Part III legal procedure

"Facts are stubborn things; and whatever may be our wishes our inclinations, or the dictates of our passions, they cannot alter the state of facts and evidence."

– John Adams

The law of legal procedure differs from what is known as substantive law. *Substantive law* (such as criminal law and the law of torts, contracts, probate law, family law, etc.) defines our rights and obligations. *Procedural law* establishes procedures for enforcing those rights and obligations fairly and efficiently.

Rules of procedure are provided for criminal actions, which are prosecuted by a governmental entity (such the state of Ohio) or its representative (such as the county prosecutor). In criminal actions, the prosecution usually will ask the court to order the defendant to pay a fine or be imprisoned.

Different rules of procedure are provided for *civil actions*, also called civil suits or civil cases. In such actions, the *plaintiff* (the person or entity bringing the action or suit) typically asks the court to order the *defendant* (the person against whom the action is brought) to pay damages to the plaintiff, or to obey an *injunction* (an order to do or refrain from doing something), or to perform a legal obligation to which the defendant has agreed by contract.

Because the procedural rules governing civil actions and criminal cases are different, the two types of cases are discussed separately in the remainder of this chapter.

Procedure in Civil Actions

Procedure in a civil action is best understood by analyzing the following eleven stages, although the stages may overlap. It is important to note that plaintiffs and defendants agree to settle more than 90 percent of all civil actions before reaching trial (*see Stage 8*) and that only a very small percentage of civil actions continue through all 11 stages.

Stage 1: The plaintiff selects a court

The first step in filing a civil action is to select a court in which to file the action. The plaintiff-to-be (and attorney representative) must select a court that satisfies three conditions: (1) subject-matter jurisdiction; (2) personal jurisdiction; and (3) venue.

Subject-matter jurisdiction is simply the power to hear a particular type of case. As explained in Part II, "The Courts," both federal (national) and state courts sit in Ohio. The rules governing subject-matter jurisdiction are found primarily in federal and state constitutions and statutes (legislative acts).

Sometimes, a plaintiff-to-be can choose to file in federal court or in state court. For example, a citizen of Ohio who contemplates filing a major personal injury action against a citizen of another state can choose to file in state or in federal court. Sometimes, a plaintiff-to-be will be required to file in one system or the other. For example, civil actions for divorce or dissolution are properly filed only in state court, while civil actions seeking damages for patent infringement are properly filed only in federal court.

Personal jurisdiction is the power to decide the rights of the parties to the civil action. The plaintiff who chooses to file a civil action in a particular court has agreed or consented to the power of the court to decide the plaintiff's rights. A court must also have the power to decide the rights of the defendant or defendants in a civil action. Earlier in our country's history, a state court could exercise jurisdiction over a defendant only if the defendant:

- was served with process (*see Stage 2*) in the state;
- consented to have the court determine the defendant's rights; or
- was considered a legal resident of the state in which the court was located.

Now, most states have adopted "long-arm" provisions that permit a state court to exercise jurisdiction over an out-of-state defendant based merely on the defendant's having certain contacts with the state. Under Ohio's long-arm provisions, for example, an out-of-state manufacturer that markets products to Ohio residents is likely to be subject to an Ohio court's jurisdiction if one of its products proves defective and injures someone in Ohio. For statutory reasons, the personal jurisdictional reach of each federal court has, for many types of civil actions, been limited to the reach of the state courts in that state. For some civil actions, however, Congress has provided for nationwide (even worldwide) *service of process* (official notice to a defendant that an action has been started).

The rules of *venue* attempt to ensure that a court that has subject-matter and personal jurisdiction is relatively convenient for the defendant. They do so by limiting a plaintiff's choices to specified locations, such as the county or judicial district in which the defendant lives or does business, or in which events key to the civil action occurred.

Stage 2: Service of process

State and federal constitutions require that a defendant be given fair notice of the filing of a civil action. Controlling procedural rules typically require that two documents ("process") be transmitted to ("served on") the defendant. One document is a *complaint* that the plaintiff files, which provides details about the plaintiff, the relief sought by the plaintiff, and the court in which the action has been filed. The second is a *summons*, which informs the defendant that, unless the defendant files a response (a document called an *answer* [*see Stage 3*]) by a certain date, the court will enter *default judgment* in favor of the plaintiff for the relief sought in the complaint. The threat of a default judgment against a defendant helps to ensure that the defendant will not ignore the action (just as a sports team will make every effort to show up at a game if it risks a loss by forfeit for failing to appear).

Service of process is commonly made by certified or express mail addressed to the defendant as specified by the relevant rules. Service is sometimes accomplished by handing the documents to the defendant or by leaving them at the defendant's home or place of business.

Stage 3: Further pleadings and motions

As noted above, a defendant in a civil action must answer the summons and complaint by filing an official document with the court. In this document (the *answer*), the defendant either admits or denies the allegations of the complaint. The defendant also may provide certain *defenses* or reasons why the court should not decide in favor of the plaintiff. For example, the defendant may point out that the plaintiff's claim has expired in accordance with the statute of limitations (for example, a claim for an auto collision that occurred more than two years before the plaintiff filed the case). If the defendant also has a claim against the plaintiff, then the defendant may be permitted (even required) to enter a *counterclaim* against the plaintiff, either in the defendant's answer or in a separate pleading. For example, let's say Ms. Black and Mr. Simms are involved in an auto accident, causing personal injury as well as damage to both vehicles. Ms. Black (the plaintiff) files a civil action against Mr. Simms (the defendant) for these injuries and/or property damage. If Mr. Simms believes he also has a claim against Ms. Black for injuries and/or property damage resulting from the same accident, then he must file a counterclaim. The plaintiff (in this case, Ms. Black) then will be required to file a *reply* to respond to the allegations of the counterclaim and raise any applicable defenses.

If a plaintiff files a civil action against more than one defendant, one of the named defendants may be permitted to assert a cross-claim against another defendant. For example, let's say Mr. Rivera was injured while using a chain saw that he bought at a retail hardware store. He files a civil action for damages against both the manufacturer of the chain saw and the hardware store. If the store believes the responsibility for injury is ultimately the manufacturer's, the store may assert a cross-claim against the manufacturer.

Under limited circumstances, a defendant may be permitted to file and serve a *third-party complaint* upon a person who is not a party to the original civil action. Let's say Mr. Rivera (the man in the example above) decides to file a civil action against only the retail hardware store. If the store believes the chain saw manufacturer should bear this responsibility, then the store may file a third-party complaint against the manufacturer. In the third-party complaint, the store will ask the manufacturer to reimburse the store for any damages it may have to pay to Mr. Rivera.

Before, during, or after the pleading stage of a civil action, parties may file various *pre-trial motions* asking the court to take various actions. For example, a defendant may move to dismiss a civil action because the court lacks subject-matter jurisdiction or because the court lacks personal jurisdiction over the defendant. If a defendant believes that the plaintiff does not have a valid legal claim, even if every fact alleged by the plaintiff is true, then that defendant may move to dismiss a civil action. By making such a motion, the defendant logically argues to the court that the action need go no further because, even if the plaintiff can prove the alleged facts, the plaintiff will not be entitled to any legal relief (for example, a court would likely dismiss a plaintiff's claim that the defendant was rude and disrespectful).

Stage 4: Pre-trial discovery

The discovery process allows the parties to a civil action to get relevant factual information from each other and from other persons before trial. Ordinarily, parties send each other discovery requests without court participation, but the court will enforce proper discovery requests if the opposing party fails to comply. One of the ways a party can gain this information is through a scheduled *deposition* of another person. The person called upon to provide information at a deposition may be another party to the legal action, a witness, a medical expert, or any other person who has information that may be useful in the case. At the deposition, the person being "deposed" is placed under oath by the stenographer (called a *court reporter*) who is also a notary public, and parties or their attorneys ask the person questions. The party who requests the deposition must pay for the reporter's time there, but any party can pay the reporter for a transcript of the deposition testimony.

Another way a party can gain information is by requiring other parties to the legal action to respond under oath to written questions known as *interrogatories*. Court rules limit the number of interrogatories, so they usually ask for specific information without follow-up questions that oral depositions permit.

A party also may require other parties to produce documents or permit inspection of property through a *request for production*. A party may obtain similar information from other persons who are not parties in the case through use of the *subpoena*, a court order to produce documents or to permit inspection of property. A party also may require another party to respond to *requests for admission*, in which the other party is asked to admit certain facts. The judge may decide that a party who fails to respond has admitted those facts. Further, the judge may decide that a party who

declines to admit facts that were not fairly disputable must reimburse the requesting party's expense to prove them. If the physical or mental condition of a party is questionable, another party may request that he or she submit to a *physical or mental examination* by a physician or other appropriate professional.

In the federal courts, each party to a civil action must disclose certain basic information to other parties even if the other parties do not request it.

Stage 5: Pretrial conferences

In many civil actions, the court holds one or more *pretrial conferences* after filing and before trial. While the purposes vary from judge to judge and depending on when the conference is held, the parties or their attorneys and the court may meet to accomplish such tasks as: (1) simplifying the issues in the action; (2) attempting to resolve the matter by arbitration or other alternative to litigation; (3) preparing and organizing the action for trial; (4) controlling discovery (*see Stage 4 above*); (5) scheduling the trial and any pretrial proceedings; and (6) settling the action.

Stage 6: Motion(s) for summary judgment

After a reasonable time for discovery, a party (most commonly a defendant) sometimes makes a *motion for summary judgment*. In an action scheduled for trial by jury (*see Stage 7*), the defendant's motion must make two arguments to the court: (1) based on affidavits or the evidence produced through the discovery process, no reasonable person could find in favor of the plaintiff; and (2) the defendant is entitled to judgment as a matter of law. If the court is persuaded by both arguments, the court will conclude that no trial is needed and will enter final judgment for the defendant. For example, in a "product liability" civil action brought by Mr. Rivera (the plaintiff) against the chain saw manufacturer (the defendant), the court might enter summary judgment against Mr. Rivera if the court determines on motion that no reasonable person could find that the manufacturer's product was legally defective, so the manufacturer is entitled to win the case without consideration of any other issues.

Stage 7: Jury selection

State and federal constitutions and statutes provide for a right to trial by jury in many types of civil actions, particularly those seeking damages. Jury trial is not, however, automatic. Any party may demand a jury trial if such a right exists, but if a jury trial is not requested, the case will be decided at a *bench trial* in which the judge rather than a jury decides the facts.

The process of jury selection is known as *voir dire*. In many courts, the parties have access to brief questionnaires completed by prospective jurors. The judge often asks preliminary questions designed to determine whether any juror should be excused for *cause* (such as relationship to a party or admitted inability to be fair in arriving at a verdict). Each party has an unlimited number of challenges for cause, which are based on mandatory reasons not to seat a person as a juror for the particular civil action and which must be approved by the judge. Also, each side is usually entitled to make three *peremptory* challenges to excuse prospective jurors without having to provide a reason. After all challenges for cause have been made and ruled upon and after peremptory challenges have been made or waived, a jury (usually consisting of eight persons and one or more alternate or substitute jurors) is impaneled and sworn.

Stage 8: The trial

If the civil action has not been settled, a trial is held. The trial begins with *opening statements* by the attorneys representing the parties, or, in some cases, by the parties themselves (in cases where they are not represented by counsel). Each party's attorney summarizes the legal position of his or her client and how the evidence to be presented will support that position.

The parties then proceed with the presentation of witnesses and of documentary and other physical evidence. The plaintiff traditionally goes first and bears the burden of proving every element of any claim asserted by a *preponderance of the evidence*. A preponderance of the evidence is the greater weight of the evidence and must be enough to convince a juror that, in light of all the evidence, the plaintiff's position is, more likely than not, correct. Thus, in a *product liability* action, the plaintiff may be required to convince the jury (or judge in a non-jury trial) that, more likely than not, the defendant's product was defective and that the defect caused physical injury to the plaintiff's person or property.

In a jury trial, after the opponent's evidence has been presented, or after all evidence has been presented by both sides, a party is permitted to make a *motion for directed verdict* (now called *motion for judgment* as a matter of law in federal court). In such a motion, the moving party asks the court to issue an immediate decision in its favor, without allowing the jury to deliberate, on the basis that a reasonable jury would have to agree with that party's position. For example, in the case above involving Mr. Rivera and the chain saw, the chain saw manufacturer's representative may move for a directed verdict on the ground that, based on the evidence presented, no reasonable jury could find the chain saw to be defective. Or, similarly, Mr. Rivera's representative may move for a directed verdict on the ground that, based on the evidence presented, a reasonable jury must find that the manufacturer marketed a defective chain saw that, in turn, caused Mr. Rivera's injuries.

If the motion or motions for directed verdict are denied, the attorneys then present their *closing arguments*. Before then, the lawyers may ask the judge to instruct the jury about specific matters. By that time, the judge has let them know which of their requests will be part of later jury instructions to be given, so that each attorney can use the relevant law and evidence to demonstrate that his or her client deserves a favorable verdict. If an improper argument is made and is objected to, the judge may instruct the jury to disregard the argument or may even declare a mistrial.

The court then *instructs* or *charges* the jury, mainly about what laws apply to the case. The court reminds the jurors of their obligations and describes what each party must prove. Some judges give parts of those instructions at earlier times in the trial.

The jury then retires to deliberate and to reach a verdict. Once inside the jury room, the jury members select a foreperson who makes sure that discussion is orderly and who reports to the judge in the courtroom. In most civil actions, the jury returns a general verdict (for example, "For the defendant" or "For the plaintiff x in the amount of $y"). Occasionally, at a party's request, the judge will ask the jury to answer certain specific questions that are relevant to the verdict (for example, "Do you find that the product manufactured by the defendant y was defective?").

Stage 9: Post-trial motions

A party who is dissatisfied with the jury's verdict can make two post-trial motions. The first motion, traditionally known as a *motion for judgment notwithstanding the verdict* (now called *motion for judgment* as a matter of law in

federal court), is similar to the motion for directed verdict that may be made during trial. The party making the motion (the "moving" party) asks the judge to determine that a reasonable jury could not have reached the verdict that this particular jury has reached; therefore, the judge should rule in favor of the moving party "notwithstanding" or contrary to the jury verdict.

A dissatisfied party also may make a *motion for new trial*. In such a motion, the moving party alleges that, even if a judgment notwithstanding the verdict is not appropriate in this case, one or more legal errors were made during trial that entitle the moving party to a new trial.

Stage 10: Final judgment

The trial judge ultimately enters a final judgment, typically either granting (in whole or in part) or denying the relief sought by the plaintiff and by any other involved parties.

Stage 11: Appealing the court's decision

A losing or dissatisfied party is entitled to take one appeal without getting permission from either the trial judge or the appellate court. Such a party ordinarily has only 30 days from entry of the final judgment of the trial court to initiate an appeal. The appealing party must pay the court reporter for a transcript of the trial, unless some other record satisfactorily reports any claimed errors.

In deciding civil appeals, appellate courts have the power primarily to act based on errors of law and not to retry questions of fact already decided by the jury. Appellate courts make their determinations based on the written record of the trial, the briefs (written legal arguments) of the parties, and oral argument by the attorneys for the parties. A decision on a first appeal can be taken to a higher court (such as the Supreme Court of Ohio or the U.S. Supreme Court), but the higher court usually decides which appeals it will consider and which appeals it will decline even to hear.

Procedure in Criminal Actions

Like civil actions, criminal cases follow clearly established procedural rules. However, constitutional and statutory provisions have more control over criminal cases than civil cases, even though both use court-made rules. Here again, several separate stages define the progress of criminal cases.

Stage 1: The government begins the case

Unlike civil actions, a private person cannot begin or control a criminal case. A private person can and should report a crime to the proper federal, state or local government. However, the government decides whether to pursue the case, regardless of how any private person may feel about the matter. The victim of a crime is an important witness with important rights, but the government can prosecute or decline to prosecute, despite the victim's contrary wishes. A civil action usually seeks to enforce the plaintiff's rights to money or property. A criminal case seeks to punish an alleged offender for violating the government's criminal laws.

A criminal case usually begins with an arrest. If a police officer satisfies a judge or other qualified court official that an alleged offender probably violated that government's criminal law, the court can issue a warrant directing the officer to arrest that person.

A police officer has authority to arrest a person without a warrant if the officer has probable cause to believe that person committed a felony (a serious crime potentially punishable by at least six months in prison).

Police officers also can arrest a person without a warrant for any misdemeanor (a less serious offense punishable only by a fine or local jail time for less than one year) if the misdemeanor was committed in their presence, or if they have reasonable cause to believe the suspect committed a certain misdemeanor, such as theft, assault, menacing, domestic violence, or public indecency.

A person who is not a police officer can lawfully detain an alleged offender with a *citizen's arrest* only if the person has reasonable cause to believe that the alleged offender committed a felony offense. However, the person who makes a citizen's arrest should promptly deliver the alleged offender to a law enforcement officer. For example, an ordinary citizen who sees a cashier being robbed has the authority to arrest the robber. However, a citizen who attempts to make an arrest is putting himself or herself in great jeopardy. Ordinarily, the non-officer citizen should not intervene at the scene, but should inform the police as soon as possible. Only a police officer can make an arrest for a misdemeanor.

When the officer believes that the alleged offender will appear for court proceedings without an arrest, the officer can issue a summons or citation that directs the person to appear in court. In minor misdemeanor cases (offenses punishable by a fine of no more than $100), including minor traffic violations, an officer must issue a *citation* instead of arresting the accused, except where the person fails to show evidence of his or her identity or has failed before to appear in court in a previous case, or requires medical care and cannot provide for his or her own safety, or if the person refuses to sign the citation. A citation (a traffic ticket is an example) is a form of combined complaint and summons, and it informs the defendant of the violation, and when and where he or she must appear in court.

When a person is arrested, or served a summons or citation in lieu of arrest, the arresting officer must file a complaint with a court without delay. In citation cases, the citation itself is filed because it includes the complaint. Filing the complaint after the arrest (or service of the summons) is necessary because it formally begins the criminal case in court.

Usually a grand jury hears a criminal case after the police have arrested the alleged offender and a court has conducted a preliminary hearing to decide whether there is enough evidence to hold that person until the grand jury considers the case (*see Stage 3: Bindover and indictment in felony cases*). However, a grand jury can begin a criminal case by indicting an alleged offender without any previous arrest or other proceedings.

A grand jury is made up of citizens who review the information given to them and determine whether a certain individual should be formally charged with committing a certain offense or offenses. An *indictment* is a formal accusation charging a named person with a specific crime. The grand jury examines evidence about the crime and the evidence allegedly involving the suspect in the crime, and determines whether the evidence warrants formally indicting the person for the offense. The indictment is the formal charge. The grand jury itself does not decide whether the alleged offender has committed any crime. Rather, it investigates information and decides whether a person should be formally accused of an offense.

When a grand jury indicts someone without a previous arrest, the indictment begins the criminal case. As in cases begun by an arrest and the filing of a complaint, the indictment must be served to the defendant through a warrant or arrest, or summons and delivery of the summons.

In a few relatively rare cases, the prosecutor can begin a criminal case by filing in court a *bill of information*, a formal accusation made by

the county prosecutor, that may be used instead of an indictment by a grand jury. Because a person has a constitutional right to indictment by grand jury in serious cases, the suspect can be tried on a bill of information only with his or her consent. Consequently, bills of information usually are filed as part of a plea bargain agreement between the prosecutor and the defendant.

Stage 2: Arraignment and bail

Arraignment

Whether a criminal case begins with an arrest, a summons, or an indictment, the court begins the case with an arraignment. An *arraignment* is a (usually) brief proceeding at which the court confirms that the accused person understands the charge and his or her rights as a defendant. Usually a court arraigns the defendant very shortly after his or her arrest. An arraignment follows an indictment, even if another court has previously arraigned the defendant after his or her arrest and before a grand jury has considered the case. For an arraignment after an indictment, the judge should read the indictment (or state the substance of the charge) to the defendant. Copies of the indictment are provided to the accused.

At the time of the arraignment, the judge is required to ensure that the defendant understands the following:

- the nature of the charges;
- the right to retain counsel and to a reasonable continuance of the arraignment proceedings to secure counsel, regardless of how the defendant intends to plead;
- the right to have the court appoint counsel if the defendant cannot afford counsel;
- the right to bail if the offense allows it;
- the right to refuse to make a statement at any point in the proceeding; and
- that any statement made can and may be used against the defendant by the prosecution.

For any arraignment, the judge will ask the accused to enter a plea. There are several pleas an accused can make during arraignment or at any later stage of the case:

- *Not guilty* – The accused denies the charges.
- *Not guilty by reason of insanity* – While the accused may have committed the criminal act, the defendant is not subject to criminal liability because, at the time the offense was committed, the person did not know the wrongfulness of his or her act due to a severe mental disease or defect. It is also true that a defendant may not be brought to trial if he or she is incapable of understanding the nature of the criminal case proceedings or assisting in his or her own defense. In such cases, the court may order treatment, and the probate court may issue civil commitment orders.
- *No contest* – The accused does not admit guilt but admits the truth of the facts in the accusation (the no contest plea is sometimes used where the accused realizes that a guilty plea could be used against the accused in a civil suit).
- *Guilty* – The accused admits he or she committed the crime.

The court will not accept pleas of guilty or no contest unless it is satisfied that the plea is voluntary, that the accused is aware of his or her rights and fully understands the possible consequences of the plea. A defendant has the right to waive the reading of the indictment and enter a plea without a formal reading.

In some cases, the accused may offer to plead guilty to a lesser offense through a process called *plea bargaining*. A defendant may accept a plea bargain agreement when he or she has some doubts about his or her chances of winning at trial. The defendant hopes, by pleading guilty to a less serious offense, to secure a lesser sentence that might involve some form of community control rather than prison, in return for saving the state the time,

expense and uncertainty of a trial. The prosecution may accept a plea bargain if it has some doubts that it can obtain a conviction on the offense charged in the indictment, or if it believes that it is more economically feasible and in the interest of justice to accept a lesser plea. If a guilty plea is the result of a plea bargain, information supporting that agreement must be filed with the court or read into the transcript of the proceeding.

At the arraignment, the judge will also set bail to ensure the defendant's appearance at any later proceedings, including a later trial.

Bail

When a person 18 or older is arrested (or when a juvenile court transfers a person under 18 for trial in adult court), he or she is usually entitled to be free on bail pending trial, provided he or she satisfies any conditions imposed by the court. In general, bail is a deposit of money or property with the court, or a promise to pay or forfeit money or property to the court, designed to guarantee that the accused will appear at court for all proceedings. Often, bail is provided through a kind of insurance policy called a *bail bond*. An arrested person who qualifies for bail must be given the opportunity to be free on bail as soon as possible, although different bail terms or guarantees of appearance in court may be required. Bail is set by the court in one of these forms:

- *Personal recognizance* – A defendant's written promise to appear.
- *Unsecured bail bond* – A defendant's promise to appear, coupled with a personal, unsecured promise to pay a certain amount of money if he or she does not appear.
- *A 10-percent bond* – A deposit of 10 percent of the face amount of the required bond plus a written promise to forfeit the deposit and pay the remainder of the bond if the defendant fails to appear. For example, if the bond were $2,000, the defendant would deposit $200 and promise to forfeit and pay the entire $2,000 if he or she fails to appear. If the defendant appeared throughout the case, 90 percent of the $200 deposit, or $180, would be returned to him or her.
- *A surety bond* – A bond secured by real estate or securities, or cash, sometimes provided by a bail bondsman.

The amount of a bond or bail for misdemeanors is usually set by the court and published in a bail schedule. In such cases, bail can be paid at the police station without a hearing before a judge. In felony cases, the accused is usually held until the initial appearance in court, at which time the judge sets bail and the conditions of release pending trial. These conditions may include house arrest, restrictions on travel, orders not to contact a victim plus any other conditions the judge believes are required to ensure the public safety and the defendant's appearance in court.

It is important to remember that bail is not a substitute for trial. If a person does not appear as required by the court, he or she forfeits any deposit, is liable on any promise to pay bail and is subject to re-arrest and detention until trial. Additionally, failure to appear on a personal recognizance not only subjects the accused to re-arrest and detention, but is also a separate offense in itself.

Stage 3: Bindover and indictment in felony cases

A person arrested for a felony is entitled to a preliminary hearing within a short time period. This hearing is held before a municipal court or county court judge or magistrate, unless the person waives the right to a hearing in writing. The preliminary hearing is not a trial. Its purpose is to allow the court to examine the evidence against the accused and determine if it is sufficient to warrant further pro-

ceedings. (*Editor's note: Generally, under Ohio law, a magistrate has the authority to act as a judge under limited circumstances. The term "judge" will be used hereafter to denote both judge and magistrate.*)

If there is no probable cause to believe any offense was committed, or no probable cause to believe the accused committed the offense (even though an offense was committed by someone), then the case against the accused will be dismissed. A finding of probable cause must be based on credible evidence.

If the judge finds probable cause to believe both that a felony was committed and that the accused committed it, the judge must *bind over the accused* (transfer the case) to the grand jury for further action. If the judge finds the evidence supports only a misdemeanor charge, the case will stay in that court.

The accused can waive the preliminary hearing, in which case he or she is automatically bound over to the grand jury. The judge will set bail to ensure the defendant's appearance in the event that the grand jury hands down an indictment.

When a person accused of a felony is *bound over* to the grand jury, the evidence against the accused is presented by the county prosecutor and examined by the grand jury. If the grand jury finds insufficient evidence to believe a crime was committed or, if one was committed, that the accused committed it, then it will return a *no bill*, meaning the case is dismissed.

A grand jury is composed of nine jurors and up to five alternates who have the power to inquire into any criminal offense committed in their county. The regularity with which grand juries are convened varies from county to county. In some larger counties, one or more grand juries may be in continuous session.

If at least seven members of the grand jury find enough evidence to believe that a crime was committed and that the accused committed it, then the grand jury will return a *true bill*, meaning it will return an indictment against the accused. The grand jury may indict for any offense the evidence warrants, regardless of the charge for which the case was bound over. Even though the accused was bound over for a felony, the grand jury may indict for a misdemeanor if the evidence supports only a misdemeanor offense, and vice versa. For example, if the evidence only shows that the defendant stole property worth only $25, he or she can be indicted for the misdemeanor offense of *petty theft*. If, on the other hand, the defendant stole property worth more than $500, he or she can be indicted for the felony offense of *theft*.

In essence, the preliminary hearing and the grand jury are screening devices. The purpose of each is to ensure trials are held on well-grounded accusations. Indictment by a grand jury in serious offenses is a right guaranteed by both the U.S. and Ohio constitutions. A preliminary hearing is a right given by state statute.

Stage 4: Pleadings, motions, discovery, and pretrial in criminal cases

Unlike civil cases, the defendant in a criminal case does not file a written pleading (an *answer*) in response to the charge; the defendant's oral plea in court serves the same function. However, when the defendant intends to rely on the defense of *alibi*, the defendant must file written notice with the court of the place the defendant claims he or she was when the offense occurred. In essence, the defense of alibi states, "I was somewhere else, so I couldn't have committed the crime."

There are several requests, challenges and objections the accused can make by filing a written motion asking for relief. For example, a defendant can ask for a bill of particulars, which is a more detailed statement of the facts of the alleged offense; or the defendant may

object that the accusation does not properly charge an offense or is otherwise defective; or he or she may ask that certain evidence be suppressed on the grounds that it was obtained in violation of the defendant's constitutional rights. For example, the defendant may challenge the basis upon which a police officer searched his or her home, vehicle, or person. Many other defenses, objections, or requests can be made by motion.

Criminal discovery is more limited than the discovery in civil cases. In a criminal case, the defendant can (but is not required to) initiate discovery by asking the prosecutor to provide:

- statements made by the defendant or a co-defendant to the police;
- the defendant's prior criminal record, if any;
- documents and other tangible evidence, which may be used during the trial;
- reports of photographs, examinations and tests;
- the names and addresses of witnesses, unless the court bars such disclosures because the information may subject the witness to harm; and
- evidence that is favorable to the defendant.

When the defense makes such a request, the prosecution is then permitted to ask for corresponding disclosure from the defense. The prosecution may not initiate discovery requests unless the defense has first made similar discovery requests.

Under certain rare circumstances, the deposition of a witness may be taken.

It is important to point out that a defendant's deposition cannot be taken because defendants cannot be forced to give testimony. Defendants and witnesses have the constitutional right (under the 5th Amendment to the federal Constitution and Article 1, Section 10 of the Ohio Constitution) to refuse to say anything that might tend to incriminate them.

Pretrial conferences are used in criminal cases for discussion of potential evidence problems, for possible plea negotiations, and to confirm the trial date. In a criminal case, the pretrial conference generally involves a review of the evidence, time necessary for trial, whether the indictment charges the correct offense, defenses raised, a schedule for the trial and any proceedings before the trial, and the possibility of a plea.

Stage 5: The trial

Like civil trials, the main steps in criminal trials include:

- selection of a jury;
- opening statements by the attorneys;
- presentation of witnesses and evidence (in a criminal trial, the state always goes first, and the defense follows; the state then may offer rebuttal evidence if the prosecutor wishes to do so);
- closing arguments by the attorneys;
- instructions on the law by the judge to the jury; and
- deliberation and decision (verdict) by the jury.

The goal of any trial is to find the truth. The theory is that, when each party in a dispute presents evidence and argument about his or her side of an issue before a judge and jury, the truth will be discovered. To this end, parties act as "adversaries" or opponents during the trial. The role of an attorney in a trial is to represent his or her own client's interests as fully as possible. When "opposing" attorneys on both sides do this, it is assumed that the truth of the matter will become clear to the judge and jury. The role of the judge is to control the trial as a neutral referee and to rule on questions of law. The role of the jury is to decide who to believe and what happened. Each party present has the right to present evidence and argument.

Burden and standard of proof

In a criminal case, the state must prove the defendant's guilt *beyond a reasonable doubt*. This is a much more stringent burden of proof than in a civil case. *Reasonable doubt* is present when the jurors, after they have carefully considered and compared all the evidence, cannot say they are firmly convinced of the truth of the charge. It is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. "Proof beyond a reasonable doubt" is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his or her own affairs. If the jurors believe that the defendant is probably guilty, but they have a reasonable doubt, they must find the defendant not guilty. Every defendant is presumed to be innocent until the state proves, beyond a reasonable doubt, that the defendant committed the offense.

Jury and non-jury cases

While the right to trial by jury applies in many situations, it does not apply in all cases.

Persons accused of minor misdemeanor offenses, where the maximum penalty is a fine not exceeding $100, are not entitled to a jury trial.

In criminal cases involving "serious offenses" where a jail sentence may be imposed, a trial by jury is automatically provided unless the accused waives the right to a jury in writing. Serious offenses include all felonies and those misdemeanors punishable by more than six months' imprisonment. If the offense is a *petty offense* that could be punished by no more than six months' confinement, the defendant must demand a jury trial within certain time limits.

When a civil or criminal case is tried without a jury, it is tried to the judge alone. In capital cases (criminal cases in which death is a potential penalty) a three-judge panel tries the case if a jury is waived.

Juries in criminal cases consist of 12 jurors in felony cases and eight jurors in misdemeanor cases.

At the beginning of the trial, a bailiff, a court official who acts as an aid to the judge, opens court. The bailiff will ask everyone to stand when the judge enters the court and to be seated when the judge sits.

The judge then calls the case by name (*State v. Blue*, etc.) and asks the attorneys for each side if they are ready to proceed. In jury trials, the first step is the selection of the jurors.

Jury selection

The process of choosing jurors is called *voir dire*. During voir dire, attorneys for both the plaintiff and the defendant interview potential jurors. In many courts the judge begins a preliminary interviewing process before permitting the attorneys to question prospective jurors. The purpose of voir dire is to select individuals for the jury who can be fair and impartial. Each side in a case can reject potential jurors through a *challenge for cause* or a *peremptory challenge*.

Prospective jurors may be challenged for cause for any of a number of specific reasons. For example, a prospective juror may be challenged for cause if he or she:

- has been convicted of a crime, usually a felony, which is an automatic disqualification;
- has served as a member of a petit jury in the same case (usually a situation where a new trial has been granted);
- has been subpoenaed as a witness in the case;
- has a relationship by blood or affinity to either party, or to the attorney for either party;
- has a legal proceeding pending with one of the parties to the case;
- does not speak or understand English well enough to follow the proceedings;
- discloses information showing that he or she is unable to be a fair and impartial juror.

There is no limit to the number of prospective jurors who may be challenged for cause. Each time a prospective juror is excused, another will be interviewed.

When each side has no more challenges for cause, each side may exercise its peremptory challenges. No reason is needed for peremptorily excusing a juror, but each party has a limited number of peremptory challenges. If the prosecutor proposes to excuse a juror from the same racial minority as the defendant, the judge may require the prosecutor to provide a reason unrelated to race that explains why the prosecutor wishes to exclude that juror.

In criminal cases the number of peremptory challenges allowed each party is six in capital cases, four in all other felony cases and three in misdemeanor cases.

If the prosecutor or defendant does not use a particular peremptory challenge, he or she loses or waives that peremptory challenge, thus reducing the number of peremptory challenges at his or her disposal.

When all challenges are used or waived, the jury is complete and takes an oath to perform its duty to render a true and just verdict.

Opening statements

After the jury is selected and sworn in, the attorneys for each party make their opening statements, beginning with the prosecutor and followed by the defendant's attorney. The opening statement is an outline of the facts of the case, what the party expects to prove, and the evidence by which the party expects to prove it.

Witnesses and evidence

The prosecution then presents its evidence, after which the defendant may present any additional evidence. If the defendant presents any evidence, the prosecutor may present rebuttal evidence.

A defendant in a criminal case has no duty to present any evidence. Rather, the state is obligated to prove that the defendant is guilty, whether or not the defendant presents any evidence.

Evidence is almost always presented through witnesses. In fact, witnesses are so important that they can be compelled to attend the trial by means of a *subpoena*. A subpoena is a court order commanding a witness to appear in court and provide testimony. Anyone who disobeys a subpoena is in contempt of court, and may be fined or jailed, or both.

Witnesses testify about events they saw or heard, report on the tests or investigations they conducted, or testify about other relevant matters. *Expert witnesses* sometimes are used to give professional opinions about elements of a case. For example, a coroner may testify that a gunshot at close range caused the victim's death in a murder case. Even tangible evidence, such as a murder weapon or a document, must be introduced through the testimony of a witness.

Evidence may be direct or circumstantial. *Direct* evidence is evidence that was seen, touched or heard by a witness directly. For example, if a witness sees rain coming down, he or she has direct evidence that it is raining. *Circumstantial* evidence comes from a reasonable conclusion of fact that a witness infers from direct evidence. An example of circumstantial evidence is the testimony of a witness who noted that, upon exiting a building, everything was wet and water was running down the street into the gutters. The testimony offers circumstantial evidence that it recently rained, even though the witness did not see or feel the actual rain. The other side in the case could introduce evidence to rebut this circumstantial evidence. They could call a city street maintenance supervisor to testify that the operator of a city water tanker sprayed the entire area while preparing the street for a street-cleaning machine. The jury will draw its own conclu-

sions based on testimony of the witnesses and can choose to ignore all or part of the testimony of any witness. Contrary to popular opinion, circumstantial evidence is often reliable evidence and can be more persuasive than direct evidence. Even criminal convictions can be based on circumstantial evidence.

The parties are not free to present *any* evidence, in *any way* they please, but must abide by the *Ohio Rules of Evidence* as published by the Supreme Court of Ohio. The main purpose of the Rules of Evidence is to ensure that evidence is competent, relevant and material to the case being tried to prevent a jury from considering unreliable or unfairly misleading evidence.

An example of evidence that usually cannot be presented would be a defendant's prior criminal record. Such evidence offers no proof that the defendant committed the particular crime for which he or she is standing trial and may only serve to prejudice the jury against the defendant. Similarly, a witness generally cannot testify to what another person said he or she saw. This kind of testimony is called *hearsay*. Hearsay is not reliable since there is no opportunity for the opposing party to examine the person who allegedly made the statement.

The court will not permit the jury to consider evidence that has nothing to do with the case at hand. For example, in a rape case where the defendant denies any sexual contact with the victim, the court will not permit evidence that the victim was sexually promiscuous with others. The issue is whether the defendant forcibly engaged in sexual relations with the victim, regardless of whether the victim willingly engaged in sexual activity with others. Similarly, in a trial for murder committed in the course of a robbery, the judge would not permit the jury to hear evidence that the victim had terminal cancer and probably would have died in a month even if the victim had not been shot and killed during the robbery.

One of the judge's most important functions in a trial is to rule on whether certain evidence is admissible. Generally, a judge will not keep evidence from being heard unless one of the party's attorneys objects and asks that the evidence be excluded. But the judge carefully considers matters such as this, since the improper admission or exclusion of evidence may be so prejudicial as to affect the outcome of the trial, and cause an appeal to the court of appeals. In criminal cases, the failure by defense counsel to object to improper evidence may result in the reversal of a conviction, based on counsel's incompetence.

For each witness, the side that calls that witness conducts *direct examination*. When that side concludes its questions, the other side has a right to cross-examine that witness. The side that called the witness may ask redirect examination questions after any cross-examination, and the judge may then permit either side to ask further questions. The right of cross-examination is considered so important that it is guaranteed in both the U.S. and Ohio constitutions.

The chief purposes of a cross-examination are to place a witness's testimony in perspective, to test its accuracy and to bring out information not offered during direct examination.

For example, if woman who is a credible witness in a murder case testifies that she saw the defendant shoot the victim, her testimony would, on its own, be very damaging to the defense. However, her testimony takes on a different light when, upon cross-examination, this witness testifies that she was a city block away from the shooting, it was 11 p.m., and that she regularly wears glasses for night and distance vision, but was not wearing them that night.

Closing arguments

Once all the evidence has been presented, the attorneys deliver their closing arguments to the jury. The prosecutor goes first, because the

prosecution has the burden of proving the case. When the prosecutor is finished, it is the defense attorney's turn. The prosecutor may reserve part of his or her time for rebuttal after the defense attorney is finished.

In general, each attorney uses the closing argument to summarize the evidence, commenting on it in a way that shows his or her client in the most favorable light. Each attorney may talk about the facts and all the inferences that can properly be drawn from them. An attorney may not talk about evidence that was not presented, or argue about points that do not apply to the case. If an attorney uses improper material in a final argument, the opposing attorney may object and the judge may instruct the jury to disregard what was said. If the offending material is seriously prejudicial, the judge may declare a mistrial.

Jury instructions

When the attorneys have completed their closing arguments, the judge instructs or *charges* the jury. This means the judge explains to the jury their duties as members of a jury and the law applicable to the case.

Before the closing arguments, the attorneys may ask the judge to give specific instructions on the law as it applies to the evidence. If these instructions are proper and would not have been covered by the judge in his or her charge to the jury, the judge will include them. The charge may take minutes, or, in complicated cases, it may take hours.

Verdict

After the judge charges the jury, the jurors are escorted to the jury room to make their decision or verdict. Once inside the jury room, the jury selects a *foreperson* to make sure that the discussions are orderly and that each juror gets ample time to speak, and to report to the judge in the courtroom. Once a foreperson is selected, the jury begins deliberations about the facts of the case.

The bailiff is outside the jury room and allows no one to enter or leave the room without the express permission of the judge. Sometimes the jury's deliberations go on for several days. In such cases, the jurors may be allowed to go home for the night with an order to return the following day to resume deliberations. Or, in certain high-profile cases, the jury may be *sequestered*, that is, housed at a local hotel under the supervision of the court bailiff, with security provided by deputy sheriffs. In a capital murder case, the jurors will be sequestered if they are unable to reach a verdict by the end of the day. In all cases, the jurors are told not to discuss the case with anyone until after the verdict is announced in court. Even then, the jurors have no obligation to discuss the case with anyone else.

Usually, the court will give jurors written forms for each of the possible verdicts in the case. In a criminal case, the verdict must be unanimous. In many cases, the court may give the jury detailed information about specific questions (known as *interrogatories*) pertaining to the case.

On rare occasions, the jury becomes hopelessly deadlocked when the jurors cannot agree on a decision. This is called a *hung jury*, and if the judge is convinced that they will not be able to reach a verdict, the judge declares a mistrial. The case may have to be retried with a new jury, unless the prosecutor decides to dismiss it. If the jurors agree on a decision, they will sign the appropriate verdict form and return to the courtroom where the verdict is announced either by the judge, by the jury foreperson, by the clerk of the court, or by the court bailiff.

Attorneys for the prosecution or the defendant may ask that the jurors be polled individually to determine if the announced verdict really is each one's verdict. If each juror agrees with the verdict, the verdict is accepted, the jury is dismissed and the trial is over.

Stage 6: Sentencing and motions after the trial

Sentencing in criminal cases

In criminal cases, the sentence is part of the judgment. In minor criminal cases, sentencing usually takes place immediately following a jury verdict of guilty or the judge's finding that the offender is guilty. In serious criminal cases, sentencing is often deferred pending a pre-sentence investigation to gather information on the case and on the offender's background. The judge can then determine the proper sentence according to sentencing guidelines established by the Ohio legislature. A person convicted of or pleading guilty to a felony will not be considered for probation (now called *community control sanctions*) without a pre-sentence investigation completed by the Adult Probation Department of the court. (*See Part IV, "Criminal Law," for a schedule of Ohio's felony and misdemeanor sentencing guidelines.*)

Proceedings after the trial

Following a conviction, the defendant may file a motion for a new trial or for *judgment notwithstanding the verdict*, that is, a judgment that sets aside the jury's guilty verdict in favor of a judgment for the defendant. The judge should deny the motion for judgment notwithstanding the jury's verdict unless no reasonable person could find that the prosecution proved the charge beyond a reasonable doubt, when viewing the evidence in the light most favorable to the prosecution. The judge should deny the motion for a new trial unless a serious error denied the defendant a fair trial, the verdict is clearly contrary to the evidence, or the defendant provides newly discovered evidence which was unavailable at the trial and which would probably change the result.

Appeal

In criminal cases, a person who is convicted may appeal, but the state's (prosecution's) right of appeal is very limited because of the constitutional protection against *double jeopardy*. In general, double jeopardy means a person cannot be tried or punished more than once for the same offense. *(See "Double Jeopardy" in Part IV, "Criminal Law."*)

Appeals are generally made on questions of law rather than questions of fact. (The trial process, not the appeal process, is best equipped to determine facts.) Appellate courts usually accept the factual determinations of trial courts, unless they are clearly not supported by credible evidence, concentrating instead on whether the trial court incorrectly interpreted or applied the law.

For a trial court decision to be appealed, the decision must be known as a *final order*. This prevents what might be the continual interruption of the trial process if any and all court decisions before and during the trial could be appealed. In a criminal case, an appeal could be made only after the filing of the judgment journal entry that imposes sentence upon the defendant. However, in certain circumstances, a pretrial ruling by a court that excludes evidence offered by the state may be appealed, and the trial suspended pending an appellate court decision.

Generally, a party has 30 days from final judgment or order to file an appeal. Appeals filed after that time are allowed only in criminal cases with the appellate court's permission (called *leave of court*). Permission to file a late appeal is granted only when the appellant (the party filing the appeal) can show a good reason for failing to meet the regular deadline. The right to appeal is lost if the appeal is not filed within the time allowed or leave to file a late appeal is not granted.

Other post-trial proceedings

In criminal cases, there are a number of other proceedings that may be held months or years after the trial.

If an offender is placed on community control sanctions, but then violates one of the conditions of the sanctions, the court may hold a hearing to determine if the sanctions should be revoked and the offender sent back to jail or prison.

Similarly, when a person is released on parole from prison and violates the parole conditions, a hearing may be held to determine if the parole violator should be returned to prison.

Also, the trial court may hold a post-conviction relief proceeding to determine the validity of later claims that the offender's constitutional rights were violated.

Chapter Summary

- The law defines our rights and obligations as citizens, while legal procedure provides the means for enforcing those rights and obligations fairly and effectively.
- Legal procedures identify where, when and how legal action is to be started, conducted and concluded.
- Jurisdiction refers to the power and authority of a court. Different courts have different powers, and a case can be brought only in a court with authority to deal with it.
- Venue refers to the place where a case must be tried.
- Statutes of limitations provide time limits for beginning legal actions to discourage unreasonable delay in bringing civil lawsuits and criminal prosecutions.
- A civil case begins when the claimant, or plaintiff, files a written pleading, or *complaint*, with the proper court. The defendant in a lawsuit is entitled to know he or she is being sued and why, and given time to answer the lawsuit. The parties to any civil lawsuit can challenge each other's pleadings by means of *motions*, or written requests filed with the court.
- Discovery is the process whereby the parties to a civil lawsuit obtain information or evidence from each other, often in written question or oral deposition form.
- A criminal case can begin when a proper arrest is made (followed by the filing of a complaint); when a grand jury returns an indictment; when a private citizen files a complaint; or when a summons or citation is issued.
- Bail is the pretrial release of an accused, provided the court is satisfied that the accused will attend all court hearings. An arrested person who qualifies for bail must be given the opportunity to be free on bail as soon as possible, although different guarantees of appearance in court may be required.

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Chapter Summary *continued*

- A person who is arrested for a felony must be given a preliminary hearing without delay. The purpose of a preliminary hearing is to look at the evidence against the accused, and determine if it is sufficient to warrant further proceedings.
- An indictment is a formal accusation made by a grand jury, charging a named person with a specific crime.
- An *arraignment* follows an arrest or indictment. The purpose of an arraignment is to inform the defendant of the nature of the charge, advise the defendant about his or her rights, and obtain his or her plea to the charge.
- Unlike civil cases, the defendant in a criminal case does not file a written pleading (an *answer*) in response to the charge; the defendant's oral plea in court serves the same function.
- Criminal discovery is more limited than the discovery in civil cases and can be initiated by the defendant.
- Pretrial conferences are used in criminal cases for plea negotiations and for the same purposes as civil pretrial conferences.
- A trial is a contest between adversaries. The role of the judge is to control the contest as a neutral referee and to rule on questions of law. The role of the jury is to decide questions of fact.
- The main steps in civil and criminal trials include selection of a jury, opening statements by the attorneys, presentation of witnesses and evidence, closing arguments by the attorneys, instructions by the judge to the jury, and deliberation and decision (*verdict*) by the jury.
- The right to trial by jury applies in many situations, though not all, situations. The process of choosing jurors is called *voir dire*.
- A number of legal proceedings may be conducted after the trial is over. Any party may file an appeal in civil cases. However, because of double jeopardy provisions in the U.S. and Ohio constitutions, the prosecution's right to appeal in criminal cases is more limited.