Topic 7: Civil Litigation Procedure

1. What is a civil Lawsuit?

A civil lawsuit is a private legal action between two or more parties addressing a legally recognizable dispute. A civil lawsuit can be grounded in tort, contract, property, or family law. One or more of the parties have allegedly suffered a harm or loss as a result of the the actions or inactions of the other party. Those parties are seeking resolution of the legal dispute and an enforceable remedy from the court.

- *Discussion*: Compare a private civil lawsuit between individuals with criminal law trials based in public law.

- *Resource Video*:

2. Who are the Parties to a lawsuit?

A lawsuit involves (or may involve) the following parties:

- *Plaintiff* - The plaintiff is the party (individual or business) who files the action claiming that they have suffered a wrong at the hands of the defendant. Basically, the Plaintiff is the individual suing or bringing a civil action against someone else.

    - *Discussion*: Compare the plaintiff in a civil case to the prosecutor in a criminal case. Note: In criminal law, there is no plaintiff. The State (represented by the district attorney- prosecutor) brings charges against a criminal defendant.

- *Defendant* – The defendant is the party being sued in civil litigation. More specifically, a defendant is a party named by the plaintiff in the formal complaint filed with the court. Often times, the plaintiff will name multiple defendants. In some cases, each defendant's conduct may subject him or her to potential liability. In other cases, the collective actions of multiple individuals may subject them to liability collectively.

    - *Discussion*: Compare the defendant in a civil case to the defendant in a criminal case. Note, in criminal law the person being prosecuted is also called the defendant.

- *Counterclaim* – A counterclaim is a claim by a named defendant back against the plaintiff that alleges the plaintiff is responsible for some loss or harm suffered by the defendant. The counterclaim by the defendant against the plaintiff does not have to be related in any way to the claims alleged by the plaintiff against the defendant. This all happens with the same court case. In this situation, the "Counter-plaintiff" is the one bringing the

counterclaim; while the "Counter-defendant" is the original plaintiff.

- *Discussion*: What do you think is the benefit for the defendant of allowing him or her to make any claims back against the plaintiff in the action? Are there any advantages to the original plaintiff?

- *Third-party Defendants* – A third-party defendant is a party who is not initially named as a defendant in the plaintiff's complain, but is add to the case by a defendant. Basically, a defendant make a claim against a third party alleging that he or she should be brought into the litigation to be a co-defendant.

  - *Discussion*: Why do you think that the rules of court procedure allow a defendant to add co-defendants to the lawsuit?

- *Resource Video*: http://thebusinessprofessor.com/parties-litigation/

2. What is "Standing to Sue" in a civil trial?

Standing is the requirement that a person have a legally recognizable interest in dispute before the court. In summary, it means that a person must suffer a loss or harm by the defendant(s) to seek redress before the court. This rule seeks to ascertain that there is indeed an adversarial relationship between the plaintiff and defendant.

To demonstrate standing, a plaintiff must Must demonstrate two things to the court:

- *Legal Wrong* - The complaint, as written, must demonstrate a legal controversy. That is, there must be a legal wrong that took place. A legal wrong is action that is prohibited by law and, if proven, may allow for redress by the plaintiff.

- *Personal Stake* - The plaintiff must show that he or she has a personal stake in the dispute or controversy with the named defendant. This means that you have to be the one wronged. For example, you cannot sue generally someone for harming another person who is not closely related to you. Though you may be negatively affected, you are not the individual directly suffering the harm. Your harm is incidental.

Standing does not depend upon the validity or merits of the case. It only depends upon the relationship and nature of the controversy between the parties. Standing is determined at the time of filing the action. It does not matter if you suffer harm as some time well after the dispute arises. You must have suffered the harm prior to the commencement of the action.

- *Discussion*: During the economic meltdown of 2007, many people suffered financially as a result of actions of others. Should those generally affected by the poor economy be able to sue those who played a major role in the downturn? Would granting standing to such

people open the court to an unmanageable flood of cases?

- *Resource Video*: http://thebusinessprofessor.com/standing-sue/

3. What is "Personal Jurisdiction" in a civil suit?

As discussed in a previous chapter, personal jurisdiction means that the court has authority, not only over the subject matter of the case, but also over the parties to the case. In practice, personal jurisdiction over the plaintiff is established by filing the action. That is, by filing a lawsuit in a court the plaintiff is voluntarily granting the court personal jurisdiction over him or her. The plaintiff must generally allege in the complaint the grounds by which the court may legally exercise personal jurisdiction over the defendant. Of course, the defendant is free to contest a court's personal jurisdiction. In fact, court procedure allows a defendant to appear before the court with the sole purpose of contesting person jurisdiction, without the individual being subjected to jurisdiction in the process.

- *Note*: Personal jurisdiction in this discussion applies to civil cases. In criminal cases, a court only has personal jurisdiction over a party who commits a crime in that state. Other states will often extradite individuals charged with crimes to the state in which charges are filed.

- *Resource Video*: http://thebusinessprofessor.com/personal-jurisdiction/

Service of Process

The primary method of obtaining personal jurisdiction over a defendant is through service of process. This means that the court must delivery notice of the litigation (a Summons) to the defendant. The summons is a notice to defendant to appear in court. The plaintiff must also include a copy of the complaint at the time of delivering the summons. In some circumstances, a plaintiff may serve process on a defendant without personally delivering it to them. For example, if a defendant is known to be in an area but cannot be found, court procedure may allow for the effective delivery of notice in other methods. This includes: delivery to the last known address, delivery to immediate family members, and publication in a newspaper of general circulation.

- *Discussion*: A recent state case allowed for service of process *via* Facebook message. Do you believe that service of process should be delivered personally to a defendant? Or do you support alternative methods of notification, such as electronic posting? Do you think alternative methods of providing notice of litigation affect an individual's due process rights?

The Long-Arm Statute

In order to serve the summons on the defendant, he or she must generally be within the state at

the time of delivery. There is, however, a common exception that allows a state to deliver service of process to individual located outside of the state's boundaries. Every state has a statute establishing this exception, known as the "Long-Arm Statute".

- *Due Process* - Serving process on a defendant is part of their Constitutional right to due process of the law. As such, a state's long-arm statute must meet constitutional due process requirements.

- *Minimum Contacts* - Specifically, the long-arm statute can only be used to serve process on a defendant who is located outside of the state if the defendant has "Minimum Contacts" with the state where the action is brought. Minimum contacts means that the defendant has sufficient contact with the state to not offend the notions of fair play and justice.

What is Minimum Contacts?

A court may be able to legally serve a summons on a Defendant who is out-of-state if one of the following are met:

- *Resident of State* - The defendant is a resident of the same state as the court.

    - *Note*: Venue determines which court in the state should bring the action, but this is usually the subject of a request to transfer the case to another town.

- *Instate Activity* - The defendant committed the action that is the subject of the litigation in the state. For example, the defendant may have committed a tort action, or entered into the business deal that was the subject of the litigation.

- *Owns Property* - Defendant may own property in the state that is the subject-matter of the litigation within the state. For example, a lawsuit challenging ownership rights property would be litigation where the property is the subject-matter of the litigation.

- *Voluntary Submission* - The defendant may voluntarily submit to personal jurisdiction in the court. The defendant can do this by written waiver or by just showing up to court and not contesting jurisdiction.

- *Presence in the State* - Remember, the court or a party may serve process on a defendant if they are present in the state for any reason. The primary exception is that a party can appear in court for the purpose of contesting personal jurisdiction and not subject herself to the court's authority by doing so.

- *Discussion*: Suppose a Defendant technically committed the tort in a state, but really has very little contact or ties with the state otherwise. For example, Dave builds a product in

Georgia and ships it to California. The product is defective and hurts the purchaser. Dave technically caused harm in California, but does not otherwise have any contacts with the state. Is this sufficient minimum contacts for the California court to exercise jurisdiction over Dave?

4. What is a Class Action Lawsuit?

A class action is a special type of lawsuit where one or more plaintiffs file suit on their own behalf and on behalf of all other persons who have a similar claim against the defendant. The individuals represented by the lead plaintiff(s) are known as a "class" of plaintiffs. These types of lawsuits are popular when many individuals suffered the same type of harm by the defendant's conduct. Frequently, they involve matters in which no one member of the class has suffered a sufficient loss or harm to justify bringing the lawsuit alone. Basically, the damage is not enough to justify the expense of litigation if just one person were to sue. The class allows for plaintiffs to aggregate their claims into one trial. Bringing a class action avoids a multiplicity of suits involving the same issue, especially when the issues are complex and the cost of preparation and defense are substantial.

- *Discussion*: Do you think that class actions are valuable or detrimental to US society? Do you think that class actions have an impact on corporate behavior with regard to consumers?

Requirements for a Class Action

There are a number of requirements for a plaintiff to bring a class action against a defendant, as follows:

- *Certify the Class* - The primary hurdle is that the plaintiff must "certify" all potential plaintiffs as a class. This means that the lead plaintiff must demonstrate that all of the potential plaintiffs suffered the same type of harm from the same or similar conduct of the defendant. Further, the lead plaintiff must demonstrate that her harm or loss suffered is representative of the type of loss or harm suffered by all other prospective members of the class.

    - *Note:* Denying the class does not give rise to immediate appeal; the case must be tried to a result first. Basically, it throws a big hurdle in the way for individuals trying to get certified as a class.

    - *Discussion*: In recent years, Wal-Mart was the subject of a class action lawsuit for gender discrimination in hiring, promotion, and salary. The court denied class status to the plaintiff on the grounds that all plaintiffs did not suffer the same type of harm. Gender discrimination in hiring is not sufficiently similar to discrimination in promotion and salary so that the plaintiffs are representative of

all class members. Do you believe that the requirement that each plaintiff be representative of all class members should be construed more strictly or losely?

- *Notice to Opt-Out* - Once certified, the lead plaintiff must give notice of the litigation to all prospective members of the class who can be found through reasonable efforts. This can be a difficult process to identify all prospective class members. Those prospective members are then given the option of opting out of the litigation. Opting out means that they will not be included in the class of plaintiffs. In most cases, this reserves the ability for any individual, potential class member to bring her own legal action against the defendant.

    - *Discussion*: You may have gotten notice in the mail or via an email that you are a potential class action member. They are common with purchases of electronics, lending practices, and communications or data usage agreements. Do you believe that failing to opt out of such actions is in your best interest? Were you satisfied with the result from the class action suit?

- *Cost of Litigation* - The lead plaintiffs bringing the class action must generally pay all of the costs associated with bringing the suit. This includes the heavy fee associated with notifying all potential class members. This makes it prohibitively expensive for one individual or a small group of plaintiffs. Aggregating the claims among a group of lead plaintiffs make the action more affordable. Further, if the class action is successful, the plaintiffs paying the cost of litigation may recoup those expenses from any judgment rendered.

    - *Discussion*: Do you believe that plaintiff's attorneys should be able to pay the costs of certifying the class?

- *State or Federal Court* - Plaintiffs may be able to bring a class action in state or federal court. In most cases, however, the class will be from diverse states. If there are multiple defendants from different states, bringing a state class action may run into personal jurisdiction issues. A class action in federal court must meet subject-matter jurisdiction requirements. If the parties are not suing the defendant based upon a federal law, then there must be diversity between the plaintiffs and defendants. Generally two federal statutes allow for class actions involving "Complete Diversity" and "Minimum Diversity". Each of these statutes allows for aggregation of the amount in controversy requirement.

    - *Note*: Complete diversity requires that all plaintiffs be from different states than all defendants. This is difficult to achieve when the plaintiff class is very large and some class members are located in the same state as the defendant. Minimum diversity allows for the diversity action in federal court when only one plaintiff is diverse from one defendant. In both complete and minimum diversity situations,

the amount in controversy must be at least $75K. In some situations all claims can be aggregated to meet the $75K amount. In other situations, a single plaintiff must have a claim of $75K in order to meet the statutory amount.

- *Resource Video*: http://thebusinessprofessor.com/class-actions/

5. What are "Pleadings" in a civil lawsuit?

Pleadings are the documents through which the parties communicate their grievances and responses to each other and the court. In summary, they are legal documents that start the litigation process. The pleadings consist of the following documents:

The Pleadings

- *Summons* - The summons is the document notifying a defendant of the pending litigation and directing them to respond or appear before the court on a given date.

- *Complaint* - The complaint lays out the plaintiff's legal grievances or causes of action against the defendant. It must state legally recognized causes of action against the defendant and be specific enough to allow the defendant to adequately respond (answer) those allegations. Generally, the complaint lays out the following:

    - Plaintiff and defendant,
    - Subject-matter jurisdiction,
    - Service of process,
    - Cause(s) of Action,
    - Request for Damages (or other legal or equitable remedy).

- *Answer* - The answer is the Defendant's response to the complaint. The defendant will generally address every point in the complaint in one of the three following ways.

    - Admit the truth of an individual point in the allegation,
    - Deny the truth of the allegation, or
    - Claim a lack sufficient knowledge to admit or deny the allegation.

        - Note: As discussed above, the defendant may present a counterclaim against the plaintiff. This generally happens within the defendant's answer to the plaintiff's complaint. f

Default & Default Judgements

Under state and federal law a defendant has a stated period of time to respond to the plaintiff's

complaint. Most jurisdictions provide for 30 days to respond. Many jurisdictions also allow an extended period of time to answer the complaint if the defendant is willing to accept service of the summons and complaint by some method other than personal delivery. That is, the statute may allow for 60 days to respond if the defendant accepts service of process through the mail. If the defendant fails to respond within the allowed period of time, the court will deem the defendant in default. This generally results in the court rendering a default judgment in favor of the plaintiff. The default judgment may award the defendant the legal or equitable remedies sought in the complaint. A defendant who defaults may be able to later petition the court to set aside the entry of default and judgment. To do so, however, the defendant will have to provide the court with a justifiable reason for setting aside the default and letting the defendant answer the complaint.

- *Discussion*: Do you believe that holding a defendant in default is a justifiable action for failure to respond to the initial pleadings? If not, what would be another manner of compelling a response from the defendant?

- *Resource Video*: http://thebusinessprofessor.com/court-pleadings/

6. What is "discovery" in a civil lawsuit and how is it used?

Discovery is the process of identifying and obtaining any information or evidence that is relevant and material to the dispute. The rules of procedure for federal and state court litigation allows a party to obtain any such evidence from the other party or third parties. The purpose behind discovery is to allow the parties to obtain the necessary information to resolve or litigate the dispute. The outcome of a case should be based on all of the facts and evidence available. Several methods exist for trading information between the parties:

- *Interrogatories* – Interrogatories are a series of written statements in questions format directed to the other party. The court will permit a limited number of that relevant questions that directly relate to or will potentially lead to relevant evidence. The questions are generally presented in a yes/no or admit/deny format. The other side must answer these questions within a statutory period of time. The other party will generally answer the questions as follows: Admit, Deny, or Lack sufficient information to admit or deny. A failure to answer the questions means that the court will deem the interrogatory statement to be true.

- *Request for production* – Each party may request that one party produce any documents and other evidence that are relevant to to the dispute or are likely to lead to relevant evidence. The party receiving the request for production must generally make the listed documents or evidence available for the other party's review.

- *Depositions* – A deposition is a formal interview of an individual taken when that person is sworn to an oath of truth (under oath). The court will permit parties to depose the other

party and any third parties who may have relevant information or evidence. Depositions serve the purpose of formally recording an individual's testimony prior to trial. It can prevent individuals from intentionally or inadvertently modifying their testimony at trial.

- *Request for Admission*- A request for admission is a statement of facts presented to the other party. It seeks to identify and establish the facts that are not in dispute. This is made to save time and money of disputing or proving a specific fact.

Through these court approved methods, parties to a civil suit have extensive authority to request any evidence relevant to the dispute. The authority to demand evidence becomes controversial when that evidence in some way discloses private or personal information of third parties.

- *Discussion*: Do you believe that this combination of discovery methods is effective in producing evidence relevant to a civil dispute? Can you think of other methods that could make the discovery process more effective?

- *Resource Video*: http://thebusinessprofessor.com/steps-discovery-process/

7. What is the "Scope of Discovery" in a civil lawsuit?

As discussed above, a party is permitted to seek evidence that is relevant to the dispute. Basically, the evidence requested through discovery must have a tendency to lead to evidence that may be relevant and admissible at trial. This standard is construed very broadly. If one party fails to product discovery, the other party generally files a motion with the court to mandate discovery. Failure to produce discovery can lead to sanctions from the court. In severe cases, it can lead to the court deeming certain allegations to be true and not subject to dispute. A very hot topic in the field of discovery is E-discovery or electronic discovery. E-discovery concerns files stored electronically on computers, servers, hard drives, or in the cloud. Today, records are very easily destroyed and hidden. Individuals who are adept at scouring computer files to identify relevant information are very valuable.

- *Discussion*: Do you think the power of the court to order discovery in a civil suit is too limited or too broad? What are the justifications for allowing each party such broad discovery power? Are you convinced by these reasons?

- *Resource Video*:

8. What are "Motions" and how are they used in a civil lawsuit?

A motion is a method by which a party asks the court to do something. That is, the party moves the court to take action. Motions are most often used to ask the court for some form of procedural action. Below are some common motions made to the court:

- *Motion to Compel Production* – This is a request to the court to force the other side to produce the requested information (discovery). It is extremely common for parties to litigation to ignore or not fully comply with the other party's discovery requests. The motion to compel is the procedural remedy available to the requesting party.

- *Statute of Limitations* - This is a request to the court to bar the other party from bringing a particular cause of action against the defendant. Basically, it argues that the statutory time period allowed for bringing that specific legal action has passed. Successfully demonstrating that the statute of limitations has passed effectively wins that claim for the defendant.

- *Judgment on the Pleadings* - This is a request by the defendant to the court to rule in her favor based on the information in the pleadings. It states that, even if all pleadings are true, the defendant is entitled to judgment as a matter of law. Basically, you are saying that all of the facts, as alleged, do not establish a legal claim under the existing law. At this point no facts have been present, but you haven't even alleged that sufficient facts exist to give rise to a cause of action.

- *Summary Judgment* - This is a request to the court by a defendant to rule in her favor based upon the entire presentation of evidence. That is, the plaintiff has failed to present sufficient evidence to show that the defendant could be liable under the law. If granted, the defendant does not have to present a defense because the plaintiff did not show the minimal amount of evidence necessary to demonstrate liability.

These are the most common type of motion, but a motion can take many forms and can be for any purpose. In business cases, often the motions litigation is the most intense aspect of a trial. The result of motions litigation will often be the determining factor as to whether parties continue on with litigation, dismiss the action, or settle the lawsuit.

- *Discussion*: Why do you think motion litigation is so important in business cases?

- *Resource Video*: http://thebusinessprofessor.com/motions/

9. What is a "frivolous case" and how are such cases regulated?

A frivolous case is a civil lawsuit that lacks any factual merit. Basically, the plaintiff is suing the defendant based upon facts that do not amount to a cause of action. Generally, a frivolous case is based upon conjecture or false information. Any party can move to dismiss a frivolous suit or the judge can dismiss it unilaterally. Generally, the rules of procedure in civil trials seek to prohibit the filing of frivolous cases. Specifically, Rule 11 of the Federal Rules of Civil Procedure require an attorney to sign an attestation that the case is filed in good faith. The attorney's signature says that the facts and claims in pleading are meritorious and, to his or her knowledge, not for an improper purpose.

- *Discussion*: The idea of a frivolous case relates closely to the question of whether society in the United States is over litigious. What do you think? Is it better to allow frivolous suits or potentially block a valid dispute from resolution through the court system?

- *Resource Video*: http://thebusinessprofessor.com/frivolous-cases/

10. What is the process for selecting a jury in a civil case?

Anyone who has been called to jury duty knows that being part of a jury pool and, ultimately, serving on the jury can be a very tedious process. For each jury pool a cross-section of the population is randomly choses to report for jury duty at a given time. Jurors fill out a questionnaire and submit to a background check. This process exposes any biases or prior conduct that disqualify the potential juror from service. For example, an individual who has previously been convicted of a felony may not serve on the jury. Once the general pool is selected, the trial jury is selected through a process known as "*voire dire*". In this process, the plaintiff and defendant (through their counsel) ask questions to evaluate the jurors. The purpose of the questions is to identify any biases that may prejudice the juror's ability to be fair and impartial in the execution of his or her duties. If the questions reveal any biases that disqualify the juror from service, the juror is stricken "for cause" from the jury pool. This a procedural process to narrow the jury pool down to a group of eligible, non-biased individuals. Then, each party is given the ability to strike a limited number of jurors from the pool for any non-discriminatory reason. These are known as "preemptory challenges". This allows the party to strike potential jurors that they simply do not want on the jury. The only limitation is that the peremptory challenge cannot be used to eliminate a potential juror based upon any protected classification (race, religion, gender, etc.).

- *Discussion:* Do you believe that the jury selection process is fair? Why or why not?

- *Resource Video*: http://thebusinessprofessor.com/selecting-jury/

11. What is the general process or steps involved in a civil trial?

As previously discussed, a civil trial begins with pleading. Following the pleadings the parties will generally submit a number of motions to the court for various reasons. This is generally known as pretrial matters. After the pre-trial mattes conclude, the trial process begins. As previously discussed, a jury trial begins with the parties selecting a jury through the voire dire process. Once the jury is selected, the trial process commences. The judge opens the case by going on the record and announcing the case and the parties to the dispute. The pleadings become part of the official record of trial. The parties are then given the opportunity to begin the case by making an open statement to the jury. The plaintiff goes first and the defendant is given the opportunity to follow. Often, the defendant will defer delivering the opening statement until after the plaintiff has delivered her entire case.

Following the opening statement, the plaintiff will present all of the evidence and witnesses to support her case. Once the plaintiff completes her presentation of evidence, the Defendant will move the court for a directed verdict. This is a request to the court to rule in the defendant's favor based on nothing more than the evidence presented by the plaintiff. If the motion is denied, the defendant is allowed to present evidence in rebuttal of the plaintiff's case. Once the defendant complete's her presentation of evidence, the jurisdiction may allow the plaintiff a chance to rebut the defendant's case with any additional presentation of evidence. At the conclusion of the plaintiff's rebuttal, the defendant is allowed to the opportunity to rebut the plaintiff's rebuttal. This is known as the surrebuttal. At the conclusion of the surrebuttal, all parties rest. At this point, the defendant will again move the court for summary judgment based upon the presentation of all evidence. If the motion is denied, the court will then allow the parties to make a closing statement to the jury.

- *Discussion*: Which steps in the trial do you feel are most important or determinative of guilt or innocence?

- *Resource Video*: http://thebusinessprofessor.com/steps-trial-process/

12. What is the "Burden of Proof" in a civil trial?

The burden of proof in a civil trial is a finding of liability be a "Preponderance of the Evidence" or by "Clear and Convincing Evidence". In either case, the requirement is a finding that the weight of the evidence demonstrates liability. In other words, it is more likely than not that the defendant is liable under the law for the alleged harm caused to the defendant.

- *Discussion*: Compare the burden of proof in a civil trial to the burden of proof in a criminal trial? Why do you think the standard of proof is far lower in a civil trial than in a criminal trial?

- *Practice Question*:

- *Resource Video*:

13. How is a civil trial decided?

At the conclusion of all evidence and arguments, the judge instructs the jury on the applicable law to apply to the facts. This is known as "charging the Jury". The jury charge explains the state of the law to the jury. The jury will use this law when determining liability. Following the jury instruction by the judge, the jury will recess to deliberate about the facts as they apply to the applicable law. After deliberation, the jury will return with a verdict of liable or not liable on all of the plaintiff's claims. If the jury find's liability, there may be a separate presentation of evidence by the parties regarding damages. The jury will deliberate to determine damages to

award for any finding of liability. The jury will then deliver the verdict to the judge. The judge will enter a judgment on the verdict. The losing party will generally moves the court for a directed verdict in contrast to the jury's findings, which is known as a "*judgment non obstante veredicto*", also known a "judgment notwithstanding the verdict" or ("JNOV"). Judge's rarely grant JNOV motions. At the same time, the losing party will generally request permission from the court to file an appeal to the appellate court. If done in a timely manner, requests to appeal are routinely granted. The trial process is now closed. The appellate court will review the losing party's request for appeal (along with the record of trial). If the appeal is denied, the case is closed. If the appeal is granted, the appellate process begins.

- *Discussion*: Do you think this is a fair and just manner of determining a party's liability? Why do you think the judge has the authority to override the jury's verdict? Why do you think the judge rarely exercises this authority?

- *Practice Question*:

- *Resource Video*:

14. What is the process and procedure for appealing the decision in a civil trial?

As previously discussed, the losing party in a case must file a request or notice of appeal with the trial court. This request allows the party to undertake the appeals procedure with the applicable appellate court. The request for appeal will generally include the grounds for appeal (allegations as to how the law was incorrectly applied) and the record of trial. The appellate court will review the request for appeal and either grant or deny the request. If the court grants the appeal, the parties are allowed to file a brief in support of their position regarding the legality of the trial court process. The appellate court consists of 3-5 judges sitting together ("en banc") to hear the parties arguments. At the appellate hearing, counsel for the parties are allowed to present an oral argument in support of their position. The appellate court will take the briefs and arguments under consideration and deliberate on the case. The appellate judges will then render an opinion as to the application of the law in the case and, sometimes, regarding the constitutionality of the law. The appellate court's written opinion about the matter that becomes a part of the common law and serves as "precedent" for the future application of that law by subordinate courts. If the court finds that the trial court erred in the application of law, the trial court's decision (or part of the decision) will be reversed and remanded for further action. The parties apposing the appellate court's reversal of the trial court's decision may take immediate appeal of the decision to the higher appellate court (generally the State or US Supreme Court). If the appeal is granted, the appellate procedure repeats itself. If the parties do not immediately appeal the appellate court's decision, they may then re-litigate the issues that are remanded. If the trial courts findings are upheld, the case is final. At that point, the losing party may again request appeal to the next level of appellate court and the process repeats itself.

- *Discussion*: How do you feel about the system for request appeal of a trial court decision?

Why do you think appellate procedure limits the information considered by the appellate court to the information in the the record of trial? Do you think the appellate court should review the evidence again (such as hearing testimony from witnesses).

- *Practice Question*:

- *Resource Video*: http://thebusinessprofessor.com/appeal-case/

15. How does a Party enforce a civil judgment?

Often, collecting on a judgment is as difficult as actually receiving the judgment. There are three primary methods by which a party may enforce a court's judgment.

- *Encumbrance* - A judgment holder may file a lien on property of the debtor. For example, the judgment holder may file the judgement as a lien on real property owned by the debtor. The process requires an order from the court ordering the judgment to be attached to available real property. The lien is then filed with the registrar of deeds. Holding a lien on the defendant's property clouds title to the property and makes it difficult for the debtor to sell or borrow money against. Further, the lienholder can file a foreclosure action to sell the property to collect the judgment.

- *Execution* - Execution is the method by which a court's judgment is enforced through the executive branch. Generally, a court official, such as a sheriff or marshal, seizes some property of the debtor, sells it at public auction, and applies the proceeds to the creditor's claim. The responsibility for identifying property of the debtor upon which to execute is the responsibility of the judgment holder. If the sheriff is unable to identify or locate any property of the debtor, then there can be no execution and sale of the property.

- *Garnishment* - Garnishment is similar in nature to execution, but involves a defendant's employee wages. It involves having a portion of the debtor's wages paid to the court, which in turn is released to the judgment holder. This process requires an order of garnishment from the court, which the judgment holder must provide to the employer of the debtor. The employer is obligated to withhold the funds pursuant to the court order or risk contempt of court.

These methods vary in degree of effectiveness. Encumbering property does not immediately ensure payment. Executing on property and selling it and garnishment of wages provides greater certainty of payment.

- *Discussion*: Do you believe that the above methods of enforcing payment of a debt are fair? Do you believe these methods go far enough to protect the rights of the debtor?

- *Practice Question*:

- *Resource Video*: http://thebusinessprofessor.com/enforcing-judgment/

16. What is "*Res Judicata*" in civil trials?

Res Judicata is a legal expression used to mean that the matter is decided between the parties. This leal principle prevents successive suits involving the same factual setting between the same parties. For example, a plaintiff may not sue the defendant for the same conduct but under a separate cause of action. The separate cause of action should have been raised during the initial trial. It brings the dispute to a conclusion.

- *Discussion*: Compare the principle or *res judicata* to the principle of double jeopardy in criminal cases. How are they similar? Different?

- *Practice Question*:

- *Resource Video*: http://thebusinessprofessor.com/res-judicata/