Chapter 1: Law and the Profession of Law

Chapter Summary

Law school training and admission to the bar are the first steps in becoming a competent attorney. Although law school imparts a basic knowledge of important fields of the law, it emphasizes the development of analytical skills and does not provide either training for the daily tasks of the practice of law or the communication skills necessary for rendering valuable legal services. Law students often clerk in law offices during summer terms to gain experience in the practical side of the profession.

Lawyers are problem solvers; they help remove the legal hurdles from a client’s path. Sometimes this means fighting a legal battle in the courtroom, but more often it involves resolving a dispute without going to trial. Perhaps attorneys spend an even greater portion of their time preventing disputes and aiding in personal and business transactions by anticipating and avoiding potential conflicts.

The practice of law entails many skills that are not taught in law school and are often absent from the popular image of the lawyer. These are primarily interpersonal communication skills that cast the attorney in the role of advisor, counselor, and negotiator.

The last years of the twentieth century witnessed a boom in large law firms and a trend toward specialization even in small ones. This accompanied an increase in personnel and technology. This same period saw the establishment of paralegal employment as an essential adjunct to the law office, part of a more businesslike emphasis in the legal profession. Paralegals, or legal assistants, perform a variety of tasks in law offices that depend largely on the needs of the firm. Paralegals today do many things that only lawyers did in the past, but there are certain things only lawyers may do, and anyone else who attempts to engage in these activities risks being charged with unauthorized practice of law. Representing clients in court and giving final legal advice top the list of activities that require membership in the bar. Independent paralegals, often called “legal technicians,” must therefore walk a fine line. Licensure for paralegals has been considered for several years but has yet to come to pass.

Chapter 2: Ethics

Chapter Summary

The legal profession is governed by a code of professional ethics that is enforced by the courts and the profession. Each state has an ethical code for lawyers. The ABA has been the leader in developing ethical codes, adopting the Model Code of Professional Responsibility in 1970 and the Model Rules of Professional Conduct in 1983. Most states have adopted these codes nearly verbatim, so there is considerable uniformity in principle, at least. The interpretation of the codes by the courts shows some disparities, especially in defining the unauthorized practice of law, which is of special concern to paralegals because they risk unauthorized practice of law if they engage in activities permitted only to licensed attorneys, namely:

1. Legal representation before a court
2. Preparation of legal documents (without attorney supervision)
3. Giving legal advice

The unauthorized practice of law may be prosecuted under criminal statutes or by the
court as contempt of court.
Confidentiality of client statements is protected by the attorney-client privilege, which extends to law office personnel. Paralegals must take great pains not to disclose confidential information from or regarding clients to persons not covered by the privilege. The attorney-client privilege belongs to the client and not the attorney. Major exceptions to the privilege apply when a client proposes to commit a crime or when the client sues the attorney.
Confidentiality gives rise to problems of conflict of interest when an attorney or a paralegal changes employment from one firm to another. If the new firm represents a party adverse to a party represented by the firm from which the new employee came, the risk that confidential information may be disclosed to the disadvantage of a former client is great. The entire new firm may be disqualified. However, in this age of large law firms, lawyers and paralegals frequently have no contact with a client of the firm in which they work. As a result, the courts and the Model Rules have adopted the “substantially related” test: The adverse representation must be substantially related to matters with which the attorney dealt in prior employment. Law firms must additionally take pains to isolate the attorney from the case, the so-called Chinese wall approach.

Chapter 3: Sources of Law: Cases
Chapter Summary
The Anglo-American legal tradition has a rich history of judge-made law known as the common law. It is governed by the principle of stare decisis, which urges that the courts abide by past precedents unless there is a compelling reason to depart from them. The process of adjudication focuses on disputes, in contrast to the legislative process, which enacts general laws for future application.
In determining and interpreting the law, courts base decisions on authority, principally statutes and prior case law. When these do not provide a clear answer to the case at hand, secondary authority may be used as the source of reasoning and rules.
The statements of the law made in higher courts must be followed by the lower courts, but the force of precedent applies only to that part of the decision pertinent to the facts of the dispute before the court and not to incidental statements of the author of a judicial opinion.

Chapter 4: Sources of the Law: Legislation
Chapter Summary
In modern times, legislation has replaced the common law as the major source of changes in the law. Legislative bodies enact laws to be applied generally to future situations rather than to decide existing disputes, which is the task of the courts. Unless they are procedurally defective or unconstitutional, statutes must be enforced by the court without changing or distorting their language. For cases in which the application of a statute is unclear, the courts have developed a multitude of rules of construction with the purpose of ascertaining the intent of the legislature. Once a higher court has interpreted the meaning of a statute, that decision becomes precedent for it and lower courts. The legislature always has the option of rewriting the statute for clarification or revision or if it objects to the interpretation the court has given it.
Chapter 5: Trial and Appellate Courts
Chapter Summary
In the United States, the judicial system has a hierarchy that is divided into trial and appellate courts. The function of the trial court is to resolve disputes between parties in an adversarial process in which an impartial and disinterested judge presides over the presentation of evidence of fact by attorneys for the two sides. When a jury is present at trial, it determines issues of fact, whereas the judge applies the law in the conduct of the trial and renders a judgment on the verdict. In a nonjury trial, the judge serves as the trier of fact and then applies the law.

The distinction between law and fact is important on appeal. The appellate court does not try facts, although it is sometimes called upon to determine whether the trial record indicates that fact-finding at the trial was clearly erroneous, warranting reversal. This is a much higher standard than the appellate court exercises in reversing an application of law by the trial judge. On questions of law, the appellate court is free to substitute its judgment for that of the lower court and need not show any deference to the lower court. As a result, most reversals are based on legal rather than factual arguments. For an appellant to win a reversal on appeal, the appellate court must be convinced that there was reversible error at the trial level. Reversible error is a mistake in the law or the facts that was so prejudicial to the appellant that a different result might have resulted if the mistake had not occurred. Minor mistakes may be deemed to be nonprejudicial or harmless error. In some cases reversible error requires a new trial; in others the error can be corrected by the appellate court or remanded to the lower court to write a new decision and order.

The appellate process provides a means to make the actions of trial courts consistent with the law, decide new issues of law, and protect litigants from misapplication of the law.

Chapter 6: State and Federal Courts
Chapter Summary
The American legal system is complicated by the existence of separate state and federal jurisdictions. Not only do these have different spheres of authority, but the states themselves are also independent jurisdictions. The division of judicial power is expressed in the U.S. Constitution, which grants specific power to the federal government and reserves the remaining authority to the states. The Constitution is the supreme law of the land, and no official act, law, or judicial order may violate it. The federal judiciary exercises significant authority over state law under the due process and equal protection clauses of the Fourteenth Amendment. The Constitution also requires that the states honor the acts, laws, and judicial orders of other states under the full faith and credit clause.

The Constitution also dictates subject matter jurisdiction of the federal courts, which have jurisdiction over federal question cases (those arising under the Constitution, laws, and treaties of the federal government) and diversity of citizenship cases (those given federal jurisdiction because of the grant of authority over citizens of different states). In diversity cases, by virtue of the decision in *Erie Railroad v. Tompkins*, the federal courts apply state law rather than developing a general federal common law.
In cases in which there is some question as to which state’s substantive law should apply, each state has its own rules, called conflict of laws, to determine whether it should apply its own law or that of a state more closely involved with the facts giving rise to the lawsuit.

A further complication in the American legal system is the historical existence of common law courts and courts of equity. Equity court first arose several centuries ago in England to provide remedies for disputes that the common law courts would not hear. Equity developed special remedies differing from the usual common law remedy of monetary compensation (damages) and developed its own principles based on moral principles. As a result, equitable remedies are more flexible and less bound by precedent than legal remedies. One important feature that distinguishes law from equity is the traditional absence of the right to a jury in equity.

Today law and equity have merged, so that American judges provide both equitable and legal relief, and legal and equitable remedies may be requested in the same suit. Nevertheless, many of the traditional differences have been maintained.

Chapter 7: Procedure in Civil Cases

Chapter Summary

Civil procedure has both theoretical and practical importance. Theoretically, examination of our system of civil procedure reveals an adversarial system in which the fairness of the procedural rules takes on special significance. Reliance is placed on procedure to achieve justice. Practically, the legal practitioner must understand the procedure of the jurisdiction, both to enforce the rights of clients and to protect them from the maneuvers of the opposing side.

Lawsuits are initiated by the filing of a complaint and service of process on the defendant. If it is to determine the rights of the parties, the court must have personal jurisdiction over them. In restricted cases, a suit may be filed against a thing (in rem jurisdiction). When there is a choice of courts having jurisdiction over a case, proper venue is determined by the rules and the circumstances of the parties.

Most American jurisdictions follow code pleading, which is a statutory refinement of common law, and equity pleading, which requires that a complaint state a cause of action, to which the defendant files a responsive pleading called an answer. In some cases the plaintiff then files a pleading responding to the answer.

An important feature of pretrial procedure is the discovery process, in which the parties enjoy great latitude in learning about the other side’s case through depositions, interrogatories, requests for documents, and so on.

Key features of the jury trial are jury selection and presentation of evidence. Each side has ample opportunity to present evidence and challenge the evidence from the other side. The plaintiff carries the burden of proving the elements of the cause of action. Each side has at its disposal several motions at the pretrial, trial, and posttrial stages. The most important of these are motions that test the validity of the other side’s case, such as a motion for summary judgment. When granted, these motions terminate the litigation at that point.
Chapter 8: The Law of Criminal Procedure
Chapter Summary
Criminal procedure is similar to civil procedure in the steps it follows from pretrial to trial, in the presentation of evidence, and in the adversarial nature of the proceedings. There are important differences, however, many of which are based on constitutional rights of the accused. The Bill of Rights forms a skeletal code of criminal procedure that has been elaborated through appellate decisions. Among the more important rights guaranteed an accused are the privilege against self-incrimination, the right to an attorney even for those who cannot afford one, the right to a speedy and public trial, the right to be free of cruel and unusual punishment, and the right against imposition of excessive bail. Criminal procedure involves initial steps to assure that the accusation of crime is well grounded in the requirements of probable cause for arrest and for warrants (arrest or search warrants), of initial appearance before a magistrate after arrest, of preliminary hearing, and of grand jury indictment and arraignment.
The major differences between criminal and civil trials are the right of the accused in a criminal trial not to be compelled to testify, the exclusion of improperly obtained evidence, and the burden of proof on the prosecution to prove guilt beyond a reasonable doubt.

Chapter 9: Criminal Law
Chapter Summary
Although the practice of criminal law tends to focus on problems of proof and other procedural issues, the substantive law of crimes is largely the concern of legislative enactments. There is considerable variability in the definitions of specific crimes from state to state. A general definition of crime is difficult to state, but crime may be identified procedurally by recourse to statutes that define crimes and delegate authority to police and prosecutors for the resolution of misconduct so labeled.
The criminal law penalizes conduct that offends the moral sentiments of the people. However, in our diverse society, moral commands are not always a matter of consensus. In addition, lawmakers provide criminal and civil penalties to encourage people to conform to an increasingly regulated state.
Traditionally, a crime requires both a criminal act and criminal intent on the part of the actor. The criminal act is defined by the elements of specific crimes, and it is up to the courts to determine whether a particular act falls within these prohibitions. Criminal intent, or mens rea, requires that the defendant in a criminal case be shown to have had a specific state of mind at the time of commission of the criminal act.
Because subjective states of mind are difficult to ascertain, the intent of the defendant is frequently at issue in trials. Specific crimes often require or infer a specific state of mind. Questions of motivation, willfulness, premeditation, accident, knowledge, and intent are fact questions for the jury that may be quite confusing and difficult to resolve. The insanity defense is particularly problematic because of the inconsistency of legal and psychiatric definitions of insanity.
Chapter 10: Torts, Personal Injury and Compensation

Chapter Summary
Tort has traditionally been defined as “a private wrong not arising out of contract.” This definition distinguishes between public wrongs, which are classified as crimes, and private wrongs, which are wrongful conduct causing injury to a private party. The public prosecutor is responsible for bringing actions in criminal cases; private parties bring actions on their own behalf to redress private wrongs. The definition also distinguishes between torts and contract causes of action. In contract, the legal obligations are created by mutual agreement of the parties; the law of contracts simply establishes the requisites for enforcement. In tort law, obligations are imposed by law. Tort law establishes protected private interests relating to person, property, reputation, and so on that are not premised on a contractual relationship, though one may exist (e.g., doctor–patient in medical malpractice).

There are numerous causes of action in tort, each having elements, each of which must be present for the court to accept a lawsuit based on a specific cause of action. However, tort law is a continually evolving field. New causes of action arise with some regularity, and courts exercise flexibility in allowing cases that do not fit into textbook definitions if conduct is clearly wrongful and injury is apparent.

Many factors influence the course of tort law independent of the interest sought to be protected. New law cannot be made by the courts unless disputes are brought, yet the economics of litigation usually influence which suits may be economically rewarding for a plaintiff.

Among the factors facilitating suit is the doctrine of respondeat superior, which holds an employer liable for the wrongful acts of an employee, thus making suits feasible when the wrongdoer/employee has limited funds and the employer has substantial resources. Similarly, the widespread use of insurance presents the opportunity to collect full compensation for injuries sustained, which might not be possible if the defendant were uninsured and without assets.

In personal injury cases, customary practice includes the use of contingency-fee arrangements whereby attorneys receive as their compensation a percentage of the settlement or award at the termination of the case. A great many cases could not be brought if the injured party were required to provide compensation to a lawyer as the case progressed.

Although these factors address practical questions, they affect the development of tort law, as certain sorts of cases are frequently pursued while others remain impractical. Traditionally, the basis for requiring a defendant to compensate an injured plaintiff was fault fixed on the defendant for a wrongful act. The degree of fault required for a particular tort distinguishes between major categories of tort. The common element of intentional torts is an intentional act, whereas in negligence the standard is not what the defendant intended but the failure to act in a reasonable and prudent manner, the so-called reasonable man or reasonable person standard.

The relatively new field of product liability establishes liability without the necessity of proving fault. Manufacturers, in particular, are held liable for distributing dangerously defective products despite a lack of intent to harm or lack of care in production. Although product liability has developed primarily over the past three decades, its roots can be found in much older theories of implied warranty and absolute liability for
extrahazardous activities.
An important aspect of tort law is damages, or monetary compensation. Any
determination of the amount of compensation depends on what can be included, but the
object is to put the injured party in the position occupied before the wrongdoing occurred,
that is, compensation for the difference in the plaintiff’s life that the injury imposed. In
some cases, punitive damages may be available to punish the wrongdoer. These go
beyond actual compensation and require malicious or outrageous conduct on the part of
the defendant.

Chapter 11: Contracts and Commercial Law
Chapter Summary
The law of contracts is concerned with private agreements that the law recognizes as
enforceable. Unlike torts, the obligations to be enforced are established by the agreement
rather than the law. Under the classical model of contract formation, the requisites for
making an enforceable contract consisted of offer, acceptance, and consideration. In its
simplest form, consideration is an exchange of promises to perform agreed-upon
obligations. The contract is not complete until offeror and offeree agree upon identical
terms; an attempted acceptance of an offer that alters a term of the contract is considered
a counteroffer rather than acceptance.
Even when offer, acceptance, and consideration are present, contract formation can be
corrupted by misconduct of one of the parties, mistake, lack of contractual capacity, or
illegality. Certain kinds of contracts are required to be in writing by the Statute of Frauds
and the Uniform Commercial Code, the latter making significant changes in the model of
offer, acceptance, and consideration.
When a contract is not fulfilled, compensatory damages are available to put the
nonbreaching party in the position he or she would have been in had the contract been
performed. Punitive damages and recovery for emotional damages are not ordinarily
available in contract, but the lines between contract and tort have become increasingly
blurred, as demonstrated by medical malpractice and product liability.
Strict adherence to the classical model provides little flexibility in the nearly infinite
variety of contractual situations, so the courts have devised a number of ways around
what appear to be unjust results. The classical model based on the common law must
compete with traditional concepts of fairness emanating from equity. A number of
equitable remedies are available that depart from monetary compensation. In addition,
equitable principles have given rise to enforcement of moral obligations in the form of
quasi-contract, whereby the law imposes a contract to avoid unjust enrichment, and
promissory estoppel, whereby a party suffers a detriment in relying on inducements made
by another when a contract is not enforceable under common law principles. Although
common law contract principles and theories of moral obligation and reliance in equity
exist side by side, they are intrinsically contradictory, resulting in inconsistency in
contract law.
The field of commercial law covers a large number of subfields, such as commercial
paper, secured transactions, and business organization. Much of the law in this area is
statutory, including the Uniform Commercial Code, which has been adopted by most
states and which provides uniformity in interstate commercial transactions.
Chapter 12: The Law of Property

Chapter Summary

Property is an abstract concept, not a natural or physical object or feature. It is best explained in terms of legal rights, such as rights to possess, exclude, and transfer. Rights can also be limited in time, such as a lease or a life estate, and in the nature of use and transferability. Rights may be restricted by a deed, by zoning ordinances, and by rights of others, such as utility easements and rights-of-way.

Property is divided into real and personal property. Real property, which consists of land and its improvements, is based on common law estates, which have endured for many centuries because of the basic conservatism of real property law. Under this system a person owns rights in land (the bundle-of-rights concept) rather than owning the land itself. When a person owns the maximum bundle of rights, the estate is called a fee simple absolute and corresponds to what we casually refer to as ownership. Lesser estates may be held, of which the most common is the life estate, which allows the life tenant to exercise rights over the property while alive. Upon death, the rights automatically transfer to a person who until that time held only a future interest.

Leasehold (or nonfreehold) estates involve the temporary transfer of the right of possession and are regulated by landlord and tenant laws of each state.

Title is an important concept in property law. It is not a document like a deed but an abstraction based on the history of the ownership of property that describes the extent of rights and limitations on rights; it can be determined by examining the records of transactions dealing with a particular piece of land. Title to personal property is generally much simpler, especially when physical property is directly exchanged for cash or a cash equivalent—title passes instantaneously.

An important aspect of the practice of property law is estate planning, that is, preparing for the distribution of a person’s estate (the totality of one’s property, real and personal). The most common devices used in estate planning are wills and trusts. A will provides for the distribution of property at death. A trust may distribute property at death or during one’s lifetime; it establishes a trustee who distributes property to a beneficiary according to instructions in the trust instrument.

Today property is extensively regulated by government. Particularly affecting real property are restrictions on land use covered by local government planning and zoning, but state and federal governments have become more and more active in limiting land use, especially in the area of environmental law.

Chapter 13: Family Law

Chapter Summary

Family law has undergone continuous revision since the founding of American law, changing to keep up with American society. The principal subject of family law is divorce, although annulment remains an alternative. Divorce inevitably raises the issues of distribution of marital property, spousal and child support, and child custody.

Although these are the most litigated issues of family law, in most instances their resolution occurs outside of court during lawyers’ negotiations. This is due in part to the uncertainty created by the vast discretion judges exercise when forced to decide domestic
relations issues.
Adoption and premarital, or antenuptial, agreements pose additional areas of legal concern in family law.

Chapter 14: Administrative Law and Procedure
Chapter Summary
Administrative law covers the rules relating to legal action taken against the administrative agencies of the government. Although each agency has its own substantive rules and regulations, procedural law has evolved and is still evolving, first from the Constitution and more recently from the enactment of federal and state administrative procedure legislation.
The past hundred years have witnessed reversals in the major areas of administrative law. In the nineteenth century, sovereign immunity was doctrine throughout the United States—officers could be sued but not the government. It was presumed that Congress could not delegate its legislative authority to other government agencies. There was a presumption of nonreviewability of administrative action by the courts. All of these doctrines met their demise in the twentieth century. Rather than challenging legislative delegation, the courts have concentrated on the question of whether the agencies adhere to legislative intent. Rather than refusing to review, the courts have limited the scope of review along lines similar to appellate review. With the erosion of sovereign immunity, the courts have expanded the liability of government and narrowed the liability of public officers.
The enactment of the APA in 1946 put administrative law on a firm footing. The major innovation of the APA was its provisions for rulemaking, requiring public notice and the opportunity for public input prior to the promulgation of agency rules. Administrative law was forced to change as government changed from performing relatively few services into an immense bureaucracy regulating every aspect of our daily lives. Administrative law changed to hold government more accountable to the public.