Chapter 3

A Litigation Overview

Before you draft documents for your client, you must understand the litigation that has generated the need for your document. Lawyers submit different documents depending on whether litigation is "civil" or "criminal" litigation. Lawyers also submit different documents depending on whether litigation has just begun or is nearing its conclusion. These variables—whether a case is a civil case or a criminal case and whether the motion or brief is submitted earlier or later in the litigation—affect which facts are available, what law applies, and the arguments you may make. Thus, you must be aware of the litigation process and where your case is located within that process before you draft.

To that end, this chapter briefly describes the difference between civil and criminal litigation and then explains the different documents that are produced along each of those litigation tracks. As you read, you should note the different purposes for the different documents. Some documents present persuasive arguments and ask the court to take action or to refrain from taking an action. Those documents are usually called a "motion" or "brief." A motion is often accompanied by a "memorandum of law," which explains the arguments in detail.

Other documents merely inform. For example, "pleadings," such as a complaint or an answer, inform the court and opposing party of alle-

Oral vs. Written Motions

Not all motions are in writing. During a hearing or trial, motions are usually made orally and ruled upon by the judge. Other motions, especially those before and after a trial, are usually in writing. This book focuses on written motions.

gations, denials, or defenses in a lawsuit, but make no arguments about those allegations, denials, or defenses. Similarly, lawyers will notify opposing counsel of depositions they intend to take, documents the other side must produce, and witnesses they plan to call at trial.

In providing an overview of the civil and criminal litigation processes, this chapter describes both kinds of documents—those that seek to persuade and those that inform. In that way, you can see the different roles that different documents play. After this overview, however, this book focuses more specifically on how to develop those documents that will persuade a court to take action on your client's behalf.

I. Civil vs. Criminal Litigation

Table 3-A sets out some of the more significant differences between a civil case and a criminal case.

Table 3-A • Differences between a civil case and a criminal case

	Civil Litigation	Criminal Prosecution
Definition	Civil litigation addresses disputes between two or more parties, whether those parties are individuals, organizations, or a government.	Criminal litigation addresses crimes against society. Criminal litigation is often called criminal "prosecution" because the government prosecutes an individual or other entity for alleged crimes.
Case filed by	A private party or the government	The government
Burden of proof	The plaintiff has the burden of proof. The plaintiff must prove each claim by a preponderance of the evidence.	The burden of proof is on the government. The government must prove its case beyond a reasonable doubt.
Examples	Landlord/tenant disputes, divorce proceedings, personal injuries, and medical malpractice	Theft, assault, robbery, trafficking in controlled substances, and murder
Redress	The plaintiff seeks monetary damages or an injunction. An injunction requires a person to act or refrain from acting.	The prosecutor seeks jail time, probation, fines, or in exceptional cases and in some states, a death sentence
Appeal	The losing party appeals	Usually only the defendant appeals
Effect of judgment	Liability	Guilt

Civil and criminal cases are governed by different rules of procedure, which permit different kinds of motions and appeals.[1] The rules of civil and criminal procedure differ from jurisdiction to jurisdiction. Moreover, local custom may affect how a particular procedural step is performed. For those reasons, cases within different jurisdictions will always look a little bit different. Nevertheless, regardless of whether a case is a civil or criminal case and no matter the jurisdiction, the litigation will have four distinct stages: pre-trial, trial, post-trial, and appeals.

The two sections that follow provide a tabular overview of a civil matter and, then, a criminal matter. The tables are by no means exhaustive. The tables do, however, describe the major stages of litigation and the motions or briefs that are produced along the way. To give you a sense of the pace of litigation, the tables provide the time frames within which documents must be filed. The time frames are from the federal rules of civil, criminal, and appellate procedure. State procedural rules will govern the time frames in state court, and those rules may result in slightly different time frames.

As you read, remember that, although you may be permitted to file a motion or brief at a particular stage, whether you actually file a particular motion or brief always depends on the facts and law available to you.

II. Civil Litigation

Every civil case begins with a dispute between two or more parties. For example, one neighbor builds an addition to his house that blocks the view that another neighbor had previously enjoyed; a business owner receives a delivery of goods that do not look or perform as expected; a bicyclist runs into you while you're on your skateboard. Although the kinds of disputes are limitless, the general process of litigation is the same.

A. Pre-Trial

As an attorney, you begin by listening to the client's problem and investigating the relevant facts and law. After your preliminary investigation, you will likely contact the other party or that party's attorney. You may send a "demand letter" that asks the other party to stop certain conduct or pay damages. If a dispute cannot be settled informally, then one of the parties may decide to initiate a claim in court. The typical pre-trial path is set forth in Table 3-B.

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1. Specialized courts—such as tax courts, bankruptcy courts, or specialized business courts—have their own, somewhat different, procedural steps; however, because the majority of cases follow either the civil or criminal procedural tracks, this chapter focuses on those two paths.

Table 3-B • Typical civil pre-trial stages

Pre-trial stage	Explanation
Complaint	The first formal step in civil litigation is to file a complaint. A complaint notifies the opposing party that some individual (or entity) has initiated a legal action in court. The complaint outlines the plaintiff's legal claims and the factual basis for those claims.
Motion to dismiss	After the complaint is filed, the defendant's attorney has an initial opportunity to ask the court to take action to dismiss all or part of the complaint. A defendant can ask the court to dismiss a complaint for a variety of reasons. Some common reasons for asking the court to dismiss the complaint are because the complaint fails to state a claim upon which relief can be granted, the court lacks jurisdiction, the complaint was not properly served on the defendant, or because the plaintiff waited too long to initiate the litigation (i.e., "the statute of limitations" has run). If the judge grants the motion to dismiss, the dismissal may be granted "with prejudice" or "without prejudice." If the motion is granted with prejudice the case is dismissed, the litigation in the trial court ends, and the plaintiff's only recourse is to appeal. If the motion is granted without prejudice, the plaintiff can still amend and re-file the complaint to continue the litigation.
Answer	If the case is not dismissed, the defendant must file an answer to the plaintiff's complaint. In the answer, the defendant must admit or deny each of the allegations in the complaint. Failure to do so results in the defendant admitting to the complaint's allegations. In the answer, the defendant can set out affirmative defenses and counterclaims. An affirmative defense asserts claims that, if true, will defeat one or more plaintiff's claims. An example of an affirmative defense might be a claim that the statute of limitations has run. A counter-claim is a claim brought by the defendant that, if later proved true, would entitle defendant to some relief.
Reply	If the defendant's answer included counter-claims, the plaintiff may be able to file a "reply," similar to the defendant's answer. In a reply, the plaintiff admits or denies the allegations that support the counter-claim.
Discovery	After the lawsuit is filed, a great deal of activity occurs in the form of discovery. Discovery provides relevant information to both parties in terms of facts, expected testimony, and exhibits. Common types of discovery include: (1) interrogatories, which are a list of questions that one party is asking the other party to answer; (2) requests to produce documents; (3) requests that the opposing party admit to certain facts; and (4) depositions, during which an attorney questions a witness who is under oath. The majority of discovery is handled without judicial involvement. Sometimes, however, if the parties cannot agree, one party will file a motion asking the court to take action related to the discovery process. Typical discovery-related motions include a motion to compel discovery, a motion for a protective order to prevent discovery, or a motion to limit discovery. A court may also order parties to engage in a mediated settlement conference. Mediation is an informal settlement conference led by a trained mediator who seeks to find a resolution to the case that is acceptable to all parties.

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Table 3-B • Typical civil pre-trial stages, *continued*

Pre-trial stage	Explanation
Motion for summary judgment	A motion for summary judgment asks the court to dismiss the case based on the known facts. In a motion for summary judgment, the moving party argues that, based on the undisputed facts, that party is entitled to judgment as a matter of law. The well-known standard is that a party is entitled to summary judgment if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). If the court grants summary judgment in either party's favor, judgment is entered in the prevailing party's favor and litigation at the trial level ends. The case will continue only if the losing party appeals.
Motion in limine	Motions in limine are requests that certain materials be excluded from the trial or be deemed admissible. Usually, a party will request that material be excluded from the trial because the material was improperly obtained, would be overly prejudicial, or irrelevant to the proceedings.
Pre-trial order	Before trial begins, the parties will draft a proposed pre-trial order outlining the case as it will be presented at trial. If the proposed order is acceptable to the judge, the judge signs the pre-trial order and it governs the events at trial. The pre-trial order addresses the issues that remain in dispute, the witnesses that will appear at trial, and the need for further decisions by the court.

B. Trial

Most civil cases settle before the trial begins. In fact, in most jurisdictions, and depending on the type of case, less than five percent of all complaints filed proceed to trial.[2] Those cases that proceed to trial usually unfold as shown in Table 3-C.

Table 3-C • Typical stages of a civil trial

Stage	Explanation
Jury selection	In a civil case, a plaintiff or defendant must request a jury for the case to be heard by a jury. If a party does not request a jury trial, the case will be heard and decided by a judge. See Fed. R. Civ. P. 38, 39. When a case is to be heard by a jury, the trial begins by selecting the jury from a pool of potential jurors. This process is called "voir dire." During voir dire, attorneys or the judge, depending on the court's procedures, will talk with potential jurors about any pre-existing beliefs or experiences that may affect the juror's perception of the case. A juror can be dismissed "for cause" when the voir dire establishes that the juror cannot be impartial or will be unable to attend the trial. An attorney can also use one of several "peremptory" challenges or strikes to exclude a person from the panel without providing a reason for the exclusion.

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2. *See, e.g.*, U.S. Dept. of Justice, Civil Justice Survey of State Courts, 2005, at 1 (Oct. 2008) (available at http://www.bjs.gov/content/pub/pdf/cbjtsc05.pdf).

Table 3-C • Typical stages of a civil trial, *continued*

Stage	Explanation
Opening statement	The plaintiff's lawyer opens the trial by making an "opening statement." In the opening statement, counsel describes what will be proved during the trial. The defendant's attorney then follows with an opening statement describing, from the defendant's perspective, what the trial will show.
Plaintiff's case-in-chief	Because the plaintiff has the burden of proof, the plaintiff's case is presented first. Plaintiff's counsel provides evidence witness-by-witness. Each witness's testimony is recorded. Witnesses also can identify and present documentary or other physical evidence, which is then entered into the record. After plaintiff's attorney examines each witness, defendant's attorney has the opportunity to cross-examine that witness.
Motion for judgment as a matter of law	After plaintiff's case-in-chief, the defendant will often move that the case be dismissed because the evidence presented was insufficient to prove the plaintiff's case. Such a motion is usually made orally and is often ruled upon quickly. In federal courts, such a motion is called a "motion for judgment as a matter of law." However, in state courts, the same motion is often called a "motion for directed verdict" in jury trials, or a "motion to dismiss" in bench trials.
Defendant's case-in-chief	Next, the defendant puts on his case-in-chief by producing witnesses and evidence to respond to the plaintiff's case and to establish any affirmative defenses or counterclaims. Like the process in the plaintiff's case-in-chief, each witness is questioned by the defense attorney and may be cross-examined by plaintiff's counsel.
Rebuttal and sur-rebuttal	At the end of the defendant's evidence, the plaintiff may put on rebuttal witnesses or evidence to refute the evidence presented by the defendant. The defendant then has the opportunity for a sur-rebuttal, essentially a rebuttal to the rebuttal.
Motion for judgment as a matter of law	After defendant's case has been presented, the plaintiff has the opportunity to move for judgment on the ground that plaintiff's case has been proved and the defendant has failed to undermine that case or prove a defense. This motion must be made before the case goes to the jury.
Closing arguments	During closing arguments, also called summation, each attorney recaps the evidence and organizes it for the jury, explaining why the evidence supports a verdict favorable to that attorney's client. Counsel's closing argument must be consistent with the jury instructions that the court will give (see below). Usually, the plaintiff's counsel will present closing argument first, and the defendant will follow. The plaintiff may follow with a short rebuttal.
Jury instructions	After closing arguments, and if the case is being heard by a jury, the judge will instruct the jury regarding the law that the jury will follow to reach a decision. The instructions that will be read to the jury are often the subject of argument, and counsel may have previously submitted arguments to the court about the precise language that should be read to the jury.

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Table 3-C • Typical stages of a civil trial, *continued*

Stage	Explanation
Verdict	After instructions are read, the jury will deliberate and return a verdict. A jury may return a "general" or "special" verdict. A general verdict simply states which side wins. A special verdict lists the jury's findings with respect to each factual issue or with respect to selected issues. In a bench trial, instead of a verdict, the judge will prepare an order with findings of fact and conclusions of law. Usually, attorneys from each side will submit proposed findings of fact and conclusions of law, and the judge will draft a final order based on those submissions.
Entry of judgment	To conclude a trial, the court must enter a judgment into the court's records. The judgment is a document that is separate from either the jury's verdict or the judge's findings of fact and conclusions of law.

C. Post-Trial

After the trial, verdict, and entry of judgment, the losing party may seek relief from the decision by filing one of the motions described in Table 3-D.

Table 3-D • Typical civil post-trial motions

Type of Motion	Explanation
Motion for judgment as a matter of law	Within 28 days after a judgment has been entered, a party can move for a judgment as a matter of law. Such a motion is permitted only if the party has also made a motion for a judgment as a matter of law at the close of all of the evidence. Fed. R. Civ. P. 50(b).
Motion for a new trial	Within 28 days after a judgment has been entered, a party may move for a new trial. Fed. R. Civ. P. 59.
Motion to alter or amend judgment	If an attorney believes that the court's judgment needs to be corrected in some way, the attorney can, within 28 days of the entry of judgment, file a motion explaining why that correction is warranted. Fed. R. Civ. P. 59(e).
Motion to set aside judgment	A motion to set aside the judgment asks the court to relieve a party from a final judgment on the ground that it would be unjust or unnecessary for the court to carry out its judgment. A party might argue that fraud, mistake, or newly discovered evidence would make it unjust for the court to exercise its authority. Fed. R. Civ. P. 60(b).
Motion for attorneys' fees	While parties typically pay their own litigation costs, sometimes the winning party may move to recoup attorneys' fees. Attorneys' fees can be awarded by statute, contract, or as a matter of public policy, depending upon the jurisdiction.

D. Appeals

After judgment is entered at the trial level, the losing party has the opportunity to appeal. The appellate process is described briefly in Table 3-E.[3] Chapter 5, *Appellate Practice*, describes the world of appeals in more detail.

Table 3-E • Appellate process

Terminology	Explanation
Appeal as of right	After a final judgment is entered, the losing party is generally entitled "as of right" to have an intermediate appellate court review the decision of the lower court. In an appeal as of right, the intermediate court cannot refuse to hear the case.
Notice of appeal	A notice of appeal must be filed within 30 days of entry of judgment. Fed. R. App. P. 4(a)(1)(A). As its name suggests, a notice of appeal notifies the parties and the courts of the party's intention to appeal.
Forwarding the record	After filing a notice of appeal, the party appealing the decision must order from the court reporter a copy of those portions of the trial transcript that will be relevant to the appeal. That record will then be forwarded to the appellate court. Fed. R. App. P. 10(b), 11(b).
Submission of briefs	The party filing the appeal must file his opening brief within 40 days after the record is filed. The party responding to the appeal has an additional 30 days to file its brief in response. The party appealing then has another 14 days to file a reply brief. Fed. R. App. P. 31.
Oral argument	In many cases, the appellate court allows the attorneys to present oral arguments related to the issues on appeal. During the arguments, the judges may interrupt and ask questions about various points of law or fact.
Opinion	A court issues an opinion to announce its decision in the case and to explain its reasoning regarding the legal issues raised on appeal. When an opinion is published, it both resolves that particular controversy and gives guidance to other potential litigants who have similar issues.

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3. Table 3-E assumes an intermediate appellate court. Although most jurisdictions in the United States have an intermediate appellate court, the following states either lack an intermediate court or have an atypical structure for their intermediate courts: Delaware, Maine, Montana, New Hampshire, Rhode Island, North Dakota, South Dakota, Vermont, West Virginia, and Wyoming.

Table 3-E • Appellate process, *continued*

Terminology	Explanation
Disposition	A "disposition" is the appellate court's final determination of the matter. Typical dispositions are listed below. Sometimes an appellate court will have different dispositions for the different legal issues raised on appeal, or will combine dispositions, for example, by reversing and remanding the decision of the lower court.
Affirm	The appellate court agrees with the trial court's decision.
Reverse	The appellate court disagrees with the trial court's decision and overturns it.
Remand	The appellate court sends the case back to the trial court with instructions for further action.
Vacate	The appellate court makes the trial court's decision legally void.
Writ of certiorari	To have a decision heard by the highest appellate court, the parties must, in most cases, file a petition for a writ of certiorari to provide reasons why the court should exercise its discretion and review the case.

III. Criminal Litigation

Whereas a civil case begins with a dispute between two private parties, a criminal case begins when the government suspects an individual or organization has engaged or is about to engage in some criminal activity. A police officer may actually see a crime take place, or the police may learn about possible criminal activity. Two steps then follow: an investigation and an arrest. Depending on the circumstances, the investigation may precede the arrest; however, under some circumstances, a person is first arrested and then police investigate the alleged crime to support the prosecution of the arrestee.

During an investigation, officers may question witnesses, ask a witness to identify the suspect in a line-up, or obtain a search warrant to search a particular location for evidence. Prosecutors may also be involved in an investigation by, for example, issuing a subpoena for documents.

An officer will arrest a suspect when the officer or a prosecutor believes the evidence provides "probable cause" to believe that the suspect has committed a crime.[4]

A. Pre-Trial

After the arrest, the state begins its formal prosecution. Table 3-F describes the typical pre-trial proceedings in a criminal case.

4. The tables below draw heavily from the work of Wayne R. LaFave, Jerold H. Israel, Nancy J. King & Olin S. Kerr, *Criminal Procedure* (5th ed. 2009), and from

Table 3-F • Typical criminal pre-trial stages

Stage	Explanation
Complaint	After the defendant is arrested, the prosecutor reviews the case to decide whether to file charges and, if so, what charges to file. If the prosecutor decides to prosecute the case, he will prepare a complaint. The complaint describes the crime allegedly committed and the basic facts that, if proved, would establish the crime. The complaint must be filed with the court within 24 to 48 hours after the arrest. Once the complaint is filed, the arrestee becomes a criminal defendant.
Initial appearance	After the complaint is filed, the defendant is brought before a judge for an initial appearance. This appearance must also occur within 24 to 48 hours after the defendant is arrested. During the initial appearance, the defendant is formally notified of the charges contained in the complaint. If the suspect was arrested without an arrest warrant, the court will also determine whether the officer had probable cause to arrest the suspect. If the officer did not have probable cause to arrest the defendant, the complaint is dismissed. If probable cause did exist, the judge will determine whether the defendant will continue to be held in custody. The judge may temporarily release the defendant based on the defendant's promise to return for future proceedings — that is, released "on her own recognizance." Alternatively, the judge may set bail or other conditions of release, such as a curfew, travel restrictions, or wearing a monitoring device, or the defendant may be held in jail until the next proceeding.
Information or indictment	The next step in the criminal process takes place within two or three weeks after the initial appearance; however, this step differs depending on whether the jurisdiction is an "information jurisdiction" or an "indictment jurisdiction." The majority of jurisdictions are information jurisdictions. In an information jurisdiction, the next step in a criminal case is a "preliminary hearing." The purpose of this preliminary hearing is to review whether probable cause exists to proceed with the case. If a judge determines that probable cause supports each of the allegations in the complaint, the prosecutor files the "information" with the trial court that states the charges against the defendant and the essential facts establishing those charges. A minority of jurisdictions are indictment jurisdictions. In an indictment jurisdiction the grand jury determines whether sufficient probable cause exists for the case to continue. When the grand jury hears the evidence, the grand jury will hear only from the prosecutor. Neither the defendant nor defendant's counsel will be present. If the grand jury determines sufficient evidence exists, the grand jury (through the prosecutor) will issue an indictment, which sets forth the charges against the defendant and the related facts. Each charge and the related facts are listed as one "count." At this point, the information or the indictment replaces the complaint as the official "charging" or "accusatory" instrument in the case.

Chart continues on the next page

Harry I. Subin, Chester L Mirsky & Ian S. Weinstein, *Federal Criminal Practice: Prosecution and Defense* (1992).

Table 3-F • Typical criminal pre-trial stages, *continued*

Stage	Explanation
Arraignment	After an information or indictment is filed, the defendant is arraigned. At an arraignment, the defendant is informed of the charges against her. The defendant can plead "guilty," "not guilty," or if permitted in the jurisdiction, "*nolo contendere*," which means "no contest." The judge then sets a date for trial or for sentencing, depending on the plea.
Motions to dismiss	Like the defendant in a civil case, the criminal defendant may move to dismiss the case. A criminal defendant may move to dismiss a case because the information or indictment fails to allege an essential element; because critical evidence should be suppressed, Fed. R. Crim. P. 8, 14; because the prosecution is constitutionally barred, for example, because of double jeopardy or violation of speedy trial requirements, *id*.; or because of some other affirmative defenses such as self-defense, insanity, or a statute of limitations.
Discovery	The discovery rules in most jurisdictions require more disclosure by the government than by the defense. In those jurisdictions that require the government to disclose certain information, the government usually must disclose defendant's oral statements; defendant's written or recorded statements; defendant's prior record; documents and objects that the government plans to rely on at trial or that would be material to a defense; reports of examinations or tests that would be material to the defense; and any summary of expert testimony the government intends to introduce. Fed. R. Crim. P. 16(a). The defendant, however, need only disclose documents, objects, reports, and expert testimony that the defendant intends to use at trial. Fed. R. Crim. P. 16(b). In some states, however, the government is not required to disclose any documents. Rather, the defense must show why requested materials should be made available.
Motions to suppress	Motions to suppress are requests that certain materials be excluded from the trial. If a motion to suppress is granted, counsel and witnesses are prohibited from referring to that material during the trial.

B. Trial

The time span from arrest to the start of a felony trial usually falls within five to eight months.[5] However, just as most civil cases settle before making it to court, most criminal cases end in settlement—that is, a plea agreement. "Most defendants—more than 90%—plead guilty

5. LaFave, *supra* note 4, at 15.

rather than go to trial."[6] If a criminal case does go to trial, that case will most likely conclude in two to three days[7] and result in a conviction.[8] The stages of that trial are described in Table 3-G.

Table 3-G • Typical stages of a criminal trial

Stage	Explanation
Jury selection	A defendant facing more than six months of incarceration always has a right to a jury trial; however, a criminal defendant may waive that right and have the case tried by a judge instead of a jury. Fed. R. Crim. P. 23(a). When a criminal case is to be heard by a jury, the trial begins (as it does in a civil case) by selecting the jury from a pool of potential jurors. This process is called "voir dire." During voir dire, the judge or the attorneys talk with potential jurors about any pre-existing beliefs or experiences that may affect the juror's perception of the case. A juror can be dismissed "for cause" when the voir dire establishes the juror cannot be impartial or will be unable to attend the trial. There is no limit to the number of jurors who can be dismissed for cause. An attorney can also use one of a limited number of "peremptory" challenges or strikes to exclude a person from the panel without providing a reason for the exclusion.
Opening statement	The prosecutor opens the trial by making an opening statement. In the opening statement, the prosecutor will identify the charges being brought against the defendant and describe the evidence the government will introduce to prove the charges. The defendant's attorney may present an opening statement or not. In addition, the defense is often given the choice as to whether to follow the prosecutor's opening statement with its own or whether to wait until the beginning of its case.
Government's case-in-chief	Like the plaintiff in a civil action, the government has the burden of proof so the government's case is presented first. The prosecutor presents evidence witness-by-witness. Each witness's testimony is recorded. Witnesses also can identify and present documentary or other physical evidence, which is then entered into the record. Each witness is examined by the prosecutor and, usually, cross-examined by the defendant's attorney. The government may then conduct a redirect examination of the same witness. The government may never call the defendant to the witness stand in its case-in-chief.

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6. *How the Federal Courts Work: Criminal Cases*, U.S. Courts, http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/HowCourtsWork/CriminalCases.aspx; *see also* LaFave, *supra* note 4, at 15 ("The ratio of guilty pleas to trials quite often will be 12 to 1 or higher.").

7. LaFave, *supra* note 4, at 16.

8. There are approximately three convictions for every one acquittal. *Id.*

Table 3-G • Typical stages of a criminal trial, *continued*

Stage	Explanation
Motion for judgment of acquittal	After the government's case-in-chief, the defendant will often move for the case to be dismissed because the evidence presented was insufficient to prove the government's case beyond a reasonable doubt. Such a motion is usually made orally and is often ruled upon quickly.
Defendant's case-in-chief	In a criminal trial, a defendant need not present any evidence on the theory that the government has failed to meet its burden of proof. If a defendant chooses to present a case-in-chief, the defendant will also produce witnesses and evidence to establish an alternative narrative or present an affirmative defense. The defense attorney will examine each witness. The government will have the opportunity to cross-examine the witness. Then, finally, the defense attorney may choose to conduct a redirect examination.
Rebuttal	If the defendant has presented evidence, the government may put on rebuttal witnesses or evidence to refute the evidence presented by the defendant.
Closing arguments	During closing arguments, the attorneys recap their version of events and organize the evidence for the jury, explaining why the evidence supports a particular verdict. The arguments must be consistent with the jury instructions that the court gives (see below). The government will present its closing argument first, and the defendant will follow. The government may follow with a short rebuttal.
Jury instructions	The judge will instruct the jury regarding the law that the jury will follow to reach a decision. Usually, instructions are given after closing arguments. The instructions that will be read to the jury are often the subject of argument, and counsel may have previously submitted to the court the precise language that should be read to the jury.
Verdict	After instructions are read, the jury will deliberate and return a verdict. A jury may return a "general" or "special" verdict. A general verdict simply states which side wins. A special verdict lists the jury's findings with respect to selected issues. In federal courts, and in every state except Louisiana and Oregon, a jury verdict in a criminal case must be unanimous.

C. Post-Trial

If a jury finds a defendant guilty, that verdict is often followed by post-trial motions. If, after those motions, the guilty verdict stands, the court will sentence the defendant and enter judgment.

1. Motions

Common post-trial motions in a criminal case include those set forth in Table 3-H.

Table 3-H • Common post-trial motions in criminal cases

Post-verdict proceeding	Explanation
Motion for judgment of acquittal	A defendant may move for a judgment of acquittal (or renew such a motion) within 14 days after a guilty verdict or after the jury has been discharged. Fed. R. Crim. P. 29.
Motion to stay sentence	A defendant may ask the court to stay a sentence while the defendant appeals the judgment. Fed. R. Crim. P. 38.
Motion for a new trial	A motion for a new trial is usually filed when new evidence is discovered that may exonerate the client, or the attorney has discovered some procedural error or misconduct that casts doubt on the verdict. Fed. R. Crim. P. 33. In some states, before filing an appeal, the party that lost must make a motion for a new trial.

2. Sentencing

After a guilty plea, a plea of no contest, or a guilty verdict has been entered, the defendant will be sentenced. Sentencing procedures vary at the state and federal levels. However, in most states and at the federal level, the judge determines the sentence for a convicted defendant.[9]

Before sentencing the defendant, judges will often consider facts that did not or were not allowed to come to light at trial, such as a defendant's prior criminal record, family relationships, health, and work record.[10]

Some states and the federal courts have sentencing guidelines that guide judges when they impose a sentence. The guidelines are intended to help judges impose proportionate sentences and to foster uniform sentencing.[11]

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9. *See* LaFave, *supra* note 4, at 16. The major exception is death penalty cases. In death penalty cases, a jury determines whether to give the death penalty sentence to a convicted defendant.

10. So that a judge can determine an appropriate sentence, a probation officer usually submits a presentencing report that includes biographical information about the defendant, major information about his or her living situation, and relevant legal information about the crimes he or she is accused of committing. After addressing any objections, the report is then submitted to the court for consideration as a part of the sentencing. *See* Fed. R. Crim. P. 32(e)-(f); Fed. R. Crim. P. 32(d); *see also* LaFave, *supra* note 15, at 16 (describing the role of a presentence report and the parties' ability to present additional information or challenge information in a report).

11. LaFave, *supra* note 4, at 16.

In jurisdictions where the sentencing judge's discretion is limited by sentencing guidelines, a judge is also usually required to make findings of fact regarding those factors that led to the sentence.[12]

3. Entry of judgment

Finally, the court must enter judgment. The judgment must state the plea or jury verdict and, if the defendant is found guilty, the final sentence imposed.[13] Once the judgment has been entered, the trial concludes.

D. Appeals and Other Post-Conviction Remedies

In criminal cases, usually only the defendant has a right to appeal.[14] The government's ability to appeal is limited by double-jeopardy, the constitutional prohibition against a defendant being tried twice for the same crime. When a defendant does appeal, the conviction will usually be affirmed. Convictions are affirmed 90 to 95 percent of the time.[15]

Criminal appeals generally proceed in the same way that civil appeals proceed. That is, the defendant appeals to an appellate court and asks the appellate court to review the record below for some error. Because a criminal appeal generally follows the same process as a civil appeal, you can review Table 3-E, Appellate Process, for an overview of the criminal appellate process. The one difference between a criminal appeal and a civil appeal is that, in a criminal appeal, the defendant must file a notice of appeal within 14 days of entry of judgment.[16] By contrast, the civil appellant has 30 days to file a notice of appeal.[17]

In addition to filing a traditional appeal, sometimes called a "direct appeal," defendants can challenge the legality of their conviction or sentence in ways that are unavailable to the civil litigant. Defendants convicted in state courts can seek review of their conviction or sentence under that state's post-conviction review proceedings. If that fails, the defendant may then file a petition for a writ of habeas corpus in federal court. Defendants convicted in a federal court can seek review of their conviction by filing a petition for a writ of habeas corpus in federal court.

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12. *See id.*

13. Fed. R. Crim. P. 32(k). In the case of a bench trial, the judgment will state the court's finding of facts and its adjudication. *Id.*

14. *Id.* Some states do allow the state to appeal in limited circumstances, most frequently to clarify aspects of the law. Because of double jeopardy (the federal constitutional prohibition against being tried twice for the same crime), if the state can appeal, it usually must appeal before the trial and not after the verdict.

15. LaFave, *supra* note 4, at 17.

16. Fed. R. App. P. 4(b)(1)(A).

17. Fed. R. App. P. 4(a)(1)(A).

These procedures are called "collateral remedies." "Collateral" means "[b]y the side" or "[n]ot lineal,"[18] and these attacks on the conviction are all by means other than direct appeals. These processes are briefly explained in Table 3-I.

Table 3-I • Additional post-conviction (collateral) remedies

Terminology	Explanation
State post-conviction review	A defendant convicted in state court may challenge his conviction or sentence (or both) in state court on the ground that it violates the state or federal constitutions. How a defendant seeks post-conviction review in state court varies from state to state. In some states, the defendant files a motion or application in the court in which he was convicted. In other states, the defendant files a separate petition for post-conviction review, initiating a new civil action. If a defendant loses a post-conviction review at the trial level, the defendant may then appeal the trial court's decision through the normal appeals process.
Federal writ of habeas corpus	A defendant convicted in federal court who has exhausted his appeals has a collateral remedy in federal court. The defendant can file a petition for a writ of habeas corpus in a federal district court, asserting that his conviction or sentence violates the United States Constitution. 22 U.S.C. §§ 2241-2255 (2012). Again, if a defendant loses at the district court level, the defendant may appeal the decision through the normal appeals process. In addition, a state court defendant who has exhausted all his state court remedies can then file a petition for a writ of habeas corpus in federal court. In essence, state-court defendants get two chances (in addition to direct appeal) to challenge their convictions and sentences; federal court defendants get only one.

Now that you have an overview of the litigation process, you can turn to your client's case and consider the document that needs to be drafted. The next two chapters, Chapter 4, *Motion Practice*, and Chapter 5, *Appellate Practice*, explain the documents that lawyers use to persuade a court to act—the motion and the appellate brief.

18. Black's Law Dictionary 317-18 (10th ed. 2014).