

## Introduction

There are many issues regarding disabled individuals. The government is concerned with making sure disabled individuals are treated with the same amount of respect and given the same advantages as other individuals. I would like to focus on what type of rights they have and which laws they have that protect them against any type of discrimination. I will research discrimination against disabled individuals in public places where they have been discriminated against exclusively because of their disabilities.

## Code

Section 54.1 Rights concerning transportation, accommodations, and facilities

(a)(1) Individuals with disabilities shall be entitled to full and equal access, as other members of the general public, to accommodations, advantages, facilities, medical facilities, including hospitals, clinics, and physicians' offices, and privileges of all common carriers, airplanes, motor vehicles, railroad trains, motorbuses, streetcars, boats, or any other public conveyances or modes of transportation (whether private, public, franchised, licensed, contracted, or otherwise provided), telephone facilities, adoption agencies, private schools, hotels, lodging places, places of public accommodation, amusement, or resort, and other places to which the general public is invited, subject only to the conditions and limitations established by law, or state or federal regulation, and applicable alike to all persons.

(2) As used in this section, "telephone facilities" means tariff items and other equipment and services that have been approved by the Public Utilities Commission to be used by

individuals with disabilities in a manner feasible and compatible with the existing telephone network provided by the telephone companies.

(3) "Full and equal access," for purposes of this section in its application to transportation, means access that meets the standards of Titles II and III of the Americans with Disabilities Act of 1990 (Public Law 101-336) and federal regulations adopted pursuant thereto, except that, if the laws of this state prescribe higher standards, it shall mean access that meets those higher standards.

(b)(1) Individuals with disabilities shall be entitled to full and equal access, as other members of the general public, to all housing accommodations offered for rent, lease, or compensation in this state, subject to the conditions and limitations established by law, or state or federal regulation, and applicable alike to all persons.

(2) "Housing accommodations" means any real property, or portion thereof, that is used or occupied, or is intended, arranged, or designed to be used or occupied, as the home, residence, or sleeping place of one or more human beings, but shall not include any accommodations included within subdivision (a) or any single family residence the occupants of which rent, lease, or furnish for compensation not more than one room therein.

(3)(A) Any person renting, leasing, or otherwise providing real property for compensation shall not refuse to permit an individual with a disability, at that person's expense, to make reasonable modifications of the existing rented premises if the modifications are necessary to afford the person full enjoyment of the premises.

(B) Any person renting, leasing, or otherwise providing real property for compensation shall not refuse to make reasonable accommodations in rules, policies, practices, or

services, when those accommodations may be necessary to afford individuals with a disability equal opportunity to use and enjoy the premises.

(4) Nothing in this subdivision shall require any person renting, leasing, or providing for compensation real property to modify his or her property in any way or provide a higher degree of care for an individual with a disability than for an individual who is not disabled.

### **Rationale**

The purpose of this section is to discourage discrimination against disabled individuals. This section gives individuals with disabilities entitlement to full and equal access, as other members of the general public, to accommodations, advantages, facilities, and other places. The primary purpose is to compel recognition of the equality of all persons in having rights to a particular service.

### **Cases**

**Marsh v. Edwards Theatres Circuit, Inc.** Court of Appeal of California, Second Appellate District, Division Two

64 Cal. App. 3d 881; 134 Cal Rptr. 844; 1976 Cal App. Lexis 2170

#### **Facts:**

The plaintiff, a quadriplegic confined to a wheelchair, and his parents arrived at the Newport Cinema Theatre in Newport Beach to see a movie. The theatre, built in 1968 in conformance with then applicable building laws, contained no special facilities for persons in wheelchairs. The theatre manager, who was acting as box office cashier, informed the plaintiff's father that the plaintiff would have to leave his wheelchair and occupy a regular seat since the fire regulations prohibited anyone from sitting in the

aisles. The plaintiff was unwilling to risk injury by being lifted from his wheelchair into a theatre seat and did not wish to be placed near the screen as an alternative suggested by the manager. The plaintiff left the theatre with feelings of frustration and humiliation. He alleged that the theatre did not accommodate his handicap and violated laws which prohibit discrimination by operators of public accommodations.

**Issue:**

Does California law which prohibits discrimination against the physically handicapped in access to public accommodations require the operator of such accommodations, absent specific legislation mandating it, to make structural modifications in order to facilitate access?

**Rule:**

California Civil Code 54.1 states that individuals with disabilities shall be entitled to full and equal access, as other members of the general public, to accommodations, advantages, facilities, and other places to which the general public is invited, subject only to the conditions and limitations established by law, or state or federal regulation, and applicable alike to all persons.

**Analysis:**

California Civil Code 54.1 states that individuals with disabilities are entitled to equal access to places the general public is invited, subject only to the conditions and limitations established by law. The plaintiff was discriminated against based on his physical handicap. However, the intent of Government Code Section 4450 and Health & Safety Code, Sections 19955, 19956, and 19959, disclosed a legislative intent for the

proprietor to render facilities suitable to use by handicapped persons only on the construction of new facilities or the repair and alteration of existing facilities.

**Conclusion:**

The judgment is reversed and the trial court is directed to enter a judgment for the defendant along with an award of costs. Defendant is to recover costs on this appeal.

**Hankins v. El Torito Restaurants, Inc.** Court of Appeal of California, First Appellate District, Division Two

63 Cal. App. 4<sup>th</sup> 510; 74 Cal. Rptr. 2d 684; 1998 Cal. App. Lexis 360

**Facts:**

After a disabled restaurant customer was unable to climb the stairs to use the restroom on the second floor, he sought damages and injunctive relief against the restaurant based on restaurant employees' refusal to permit him to use an accessible employee restroom on the first floor. Although all customers assuredly were denied access to the employee restroom, the defendant's policy and the layout of its premises allowed patrons not physically handicapped to use a restroom on the second floor, but denied that service to handicapped patrons.

**Issue:**

Did the defendant violate state and federal laws which prohibit discrimination on the basis of a disability?

**Rule:**

California Civil Code 54.1 states that individuals with disabilities shall be entitled to full and equal access, as other members of the general public, to accommodations, advantages, facilities, and other places to which the general public is invited, subject only

to the conditions and limitations established by law, or state or federal regulation, and applicable alike to all persons.

**Analysis:**

California Civil Code 54.1 states that individuals with disabilities are entitled to equal access to places the general public is invited, subject only to the conditions and limitations established by law. The restaurant employees refused to permit the plaintiff to use the restroom which discriminated against him in violation of California law.

**Conclusion:**

For the plaintiff

**Social Impact**

The social impact that this legislation causes to society is a positive one. Disabled individuals benefit from this legislation. Any type of positive law that is passed that protects disabled individuals is a big step because it is improving relations in society. Disabled people should not be discriminated against just because they are different. They seek desperately for people to see past their disabilities and realize that different does not equate to inferior. Society is beginning to realize this and is taking steps to even the playing field.

**Personal Opinion**

I believe that this is a great piece of legislation because disabled people deserve to be treated equally with the rest of society. I personally agree with this law and any other law that disabled people can benefit from. It is bad enough that disabled people have to struggle with their disabilities slowing them down or inhibiting them from functioning like other people. Their disabilities sometimes hold them back. They don't need the

additional issue of others holding them back. They have enough problems to deal with pertaining to their disabilities. I am happy that disabled people are being treated less and less as second class citizens. I feel that society is gaining a better perspective of disabled people.

## INTRODUCTION TO LAW

- ELEMENTS OF LAW
  - CULTURE
  - CODIFICATION
  - CONTROL
  - ENFORCEMENT
  - ACCEPTANCE

## INTRODUCTION TO LAW

- Functions of law
  - Control
  - Equity and Fairness
  - Social Justice
  - Business Decisions
  - Moral Standards
  - Accommodate Change
  - Peace
  - Status Quo

## INTRODUCTION TO LAW

- Legal Systems
  - Common Characteristics
    - Peaceful Solution to Disputes
    - Social Justice
    - Established Rules of Procedure to Insure Fairness
    - Equality
    - Predictability

## INTRODUCTION TO LAW

- Jurisprudence-study and evaluation of law
  - Natural Law
  - Sociological
  - Legal Positivism
  - Legal Realist
  - Socialist
  - Philosophical

## INTRODUCTION TO LAW

- Legal Systems-distinguishing characteristics is source of law
  - Islamic-Quoran
  - Civil Code
    - Confucian-hierarchy, consensus and harmony
    - European-secular and control
    - Spanish-church influence
  - Socialist-command economy-party domination

## INTRODUCTION TO LAW

- Legal Systems
  - Bifurcated
    - Subsaharan Africa-two systems in one-local v. national
    - Hindu-family v nonfamily



## INTRODUCTION TO LAW

- Common Law-source of law is case law.
- Reasons
  - Ambiguity of English Language
  - English Heritage-De Bracton-Of Customs and Laws
  - Diversity
  - Distance
  - Accommodate Local Customs and Practices

## INTRODUCTION TO LAW

- Case Law
  - Statute on Point-
    - statute
    - rationale
    - case law
    - public policy
    - opinion
  - Statute Not On Point
    - case of first impression-public policy,related cases

## INTRODUCTION TO LAW

- Sources of Law Used to Decide Cases
  - US Constitution
  - Treaties and Conventions
  - State Constitution
  - Statutes
    - codes
    - codes annotated
    - uniform codes

## INTRODUCTION TO LAW

- Sources of Law Continued
  - administrative codes
  - municipal and county codes
  - case law
    - restatement

## INTRODUCTION TO LAW

- Predictability and Case Law
  - Appellate Process-as case is appeal from local level to national level, under the law of precedent, the lower courts must follow the decision of the higher court with wider jurisdiction.
    - Department Level
    - Presiding Court
    - County Court System
    - State Appellate Court System
    - State Supreme Court
    - Federal Appellate System
    - US Supreme Court

## INTRODUCTION- CLASSIFICATION

- Civil
  - Preponderance of Evidence
  - Private Dispute
  - No Self Incrimination
  - Majority Verdict
  - Counsel Not Provided by State
  - Minimal Rules of Exclusion
- Criminal
  - Beyond Reasonable Doubt
  - Public Dispute
  - Self Incrimination
  - Unanimous Verdict
  - Right to Counsel
  - Maximum Rules of Exclusion

## INTRODUCTION TO LAW- CLASSIFICATION

- Public
  - Constitutional
  - Criminal
  - Administrative
  - Entitlement Programs
  - Regulatory
  - Criminal Procedure
  - Government Agencies
- Private
  - Tort
  - Contract
  - Business Relations
  - Family
    - trusts
    - wills
    - community property
    - dissolution

## INTRODUCTION TO LAW

- Classification-Substantive Law-laws that determine the rights of individuals, government and business.
  - Tort family relations
  - criminal
  - contracts
  - constitutional
  - business relations

## INTRODUCTION TO LAW

- Classification-Procedural-laws that address process by which law is applied.
  - Evidence
  - Criminal Procedure
  - Civil Procedure
  - Administrative Law

## INTRODUCTION TO LAW

- Classification-Remedy-compensation to injured party after court determines cause and liability of injury.
  - Remedies to society if crime committed
    - incarceration
    - fines
    - restitution
    - forfeiture
    - probation

## INTRODUCTION TO LAW

- Remedies
  - Remedies at Law-monetary compensation sufficient.
    - Compensatory damages
    - Consequential
    - Nominal
    - Punitive
    - Mitigation

## INTRODUCTION TO LAW

- Remedies in Equity-monetary compensation inadequate due to multiplicity of suits, speculative damages, uniqueness, recurring acts and no calculation
  - injunction
  - specific performance
  - reformation
  - rescission and restitution
  - promissory estoppel
  - affirmative action

## LITIGATION

- Civil Procedure
  - Jurisdiction
  - Governing Law
  - Parties to Dispute
  - Pleadings
  - Pre Trial Motions
  - Settlement Conferences

## LITIGATION

- Trial
- Post Trial Motions
- Appeal
- Final Adjudication

## LITIGATION

- Criticism
  - Tarnishes Image of Accused
  - Economic Inequality
  - Emotionalism
  - Costly to Society and Time Consuming
  - Truth

## ALTERNATIVE DISPUTE RESOLUTION SYSTEM

- Advantages
  - less costly
  - expert
  - private
  - truth
  - save tax money and time
- Disadvantage-denial of right to trial

## LITIGATION PROCESS

- Adversary System-neutral fact finder hears evidence and arguments and makes objective decision based based on facts and law.
  - Criticism
    - time consuming
    - avoids truth
    - inequality
    - public

## LITIGATION PROCESS

- Dual Court System
  - Federal Court System
    - Federal District Courts
    - Federal Appellate Courts
      - Special Jurisdiction Courts
      - General Jurisdiction Courts
    - US Supreme Court
  - State Court System

## LITIGATION PROCESS

- Choice of Courts
  - Jurisdiction-power of court to hear case
    - Subjectmatter Jurisdiction-federal/state
      - Exclusive-admiralty, bankruptcy,criminal, claims against US and claims arising under federal statutes that require exclusive federal jurisdiction
      - Concurrent
        - » Federal Question
        - » Diversity of Citizenship that exceeds \$50,000.00

## LITIGATION PROCESS

- Jurisdiction-continued
  - In Personam-jurisdiction over person
    - Personal-presence, domicile
    - Business not incorporated or principle place of business
      - minimum contacts-continuous business in forum
    - In Rem-property
    - Quasi In Rem-collection
  - Venue-proper place-forum non conveniens

## LITIGATION PROCESS

- Primary Actors in Litigation Process
  - Judge
  - Attorney
    - attorney client privilege
  - Jury
    - petite juries
    - grand juries

## LITIGATION PROCESS

- Civil Procedure-steps courts must go through in order for ruling to be binding
  - Threshold Issues
    - Standing-one has standing if affected by outcome
      - citizen groups such as Sierra Club-Lujan and Morton
    - Case or Controversy
      - » adverse relationship
      - » actual or threatened events must give rise to problem
      - » final judgment
    - Ripeness-present controversy

## LITIGATION PROCESS

- Pretrial
  - Informal Negotiation
  - Pleadings
    - complaint
    - answer
  - Parties to the Action
    - Class Action
    - Representative-minor or incapacity
    - joinder
    - intervention

## LITIGATION PROCESS

- Pretrial-continued
  - Discovery-information must be exchanged by both parties except privilege information and Attorney Mental State of Mind
    - Form-interrogatories, admissions, depositions
  - Purpose
    - preparation
    - preservation
    - settlement

## LITIGATION PROCESS

- Pretrial
  - Pre Trial Motions
    - Summary Judgment
    - Motion to Dismiss
    - Demurrer
    - Judgment on the Pleadings
  - Pretrial Mandatory Conference
    - Judges Participation
    - If mandatory arbitration, after arbitration

## LITIGATION PROCESS

- Trial
  - Jury Selection
  - Opening Statements
  - Plaintiff's Case
    - Directed Verdict Motion
  - Defendant's Case
    - Directed Verdict Motion
  - Jury Instruction
  - Closing Arguments

## LITIGATION PROCESS

- Post Trial Motions
  - New Trial
  - Judgment Not Withstanding the Verdict
  - Appeal
    - records
    - prejudicial error
  - Appeal to United States Supreme Court
    - writ of certiorari

## LITIGATION PROCESS

- Alternative to Trial
  - Negotiations
  - Mediation
  - Arbitration
    - mandatory v. voluntary
    - process
    - binding v. nonbinding

## EVIDENCE

- Definition-all types of information (observations, recollections, documents, concrete objects) presented at trial or other hearings to prove a fact in matter in question

## EVIDENCE

- Types of Evidence
  - direct-proof of fact without the need for other facts leading up to it.
  - Circumstantial-facts that indirectly prove a main fact in question.
  - Inferential-a fact (proposition) that is probably true because a true fact leads you to believe that the inferred fact is true

## EVIDENCE

- Forms of Evidence
  - Testimonial Evidence
  - Physical Objects
  - Writings

## EVIDENCE

- Rules of Evidence
  - Relevance-evidence having tendency to prove or disprove any disputed fact that is of consequence
  - Reliability-evidence is trustworthy and no tampering
  - No Bias-no personal stake in outcome
  - No Prejudice-taking position without cause

## EVIDENCE

- Rules of Exclusion of Relevant Evidence
  - Discretion of Judge-undue consumption of time or create substantial danger of undue prejudice and confusion of issues and mislead jury
  - Foster Confidential Communication
    - attorney client
    - doctor patient
    - spousal communication
    - priest penitent

## EVIDENCE

- Rules of Exclusion (Relevance)
  - Statutory
    - Character Evidence-motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident
    - Similar Happenings
  - Public Policy
    - compromise and settlement
    - subsequent repairs-control, knowledge

## EVIDENCE

- Rules of Exclusion of Relevant Evidence
  - Hearsay
  - Exceptions
    - Former Testimony
    - Dying Declaration
    - Business Records
    - Admission
    - State of Mind
    - Spontaneous Declaration
    - Prior Identification
    - Past Recollection
    - Commercial and Scientific Publication

## EVIDENCE

- Exclusion
  - Constitutional
    - Self Incrimination

## EVIDENCE

- Reliability
  - Physical Objects
    - Chain of Custody (control)
  - Testimonial
    - competency
      - communication
      - obligation to tell the truth
      - personal knowledge
      - opinion
        - lay
        - expert

## EVIDENCE

- Reliability-Testimonial (cont)
  - Impeachment
    - Demeanor
    - Character
    - Inconsistent Statement
    - Admission
    - Prior Statement
    - Bias
    - Character for Honesty and Veracity
    - Perceived Recollection

## EVIDENCE

- Writings
  - Authentication
    - Lay Opinion
    - Expert Opinion
    - Personal Knowledge
    - Judicial Notice
    - Ancient Document

## EVIDENCE

- Disparate Treatment
  - Plaintiff=Preponderance of Evidence
  - Defendant=Burden of Production
    - clear and specific
    - full and fair opportunity to respond
    - factual basis
    - incentive to persuade
    - discovery
  - Plaintiff's Rebuttal=Preponderance of Evidence

## EVIDENCE

- Disparate Treatment
  - Defendant
    - Subjective Evaluation—does not meet burden unless specific and clear guidelines. The more subjective the more discrimination
    - Bureaucratic Inefficiency
    - Statistics

## EVIDENCE

- Disparate Treatment
  - Plaintiff's Rebuttal-Pretext
    - Statistic-inferential evidence only
    - Subjective-state of mind-not sufficient
    - Prior statements-state of mind-probative if person making statement affects decision
    - Prior Inconsistent Statement-Tye, Benzies and Foster
    - Mixed Motives-Civil Rights Act 1991

## EVIDENCE

- Plaintiff's Case (Prima Facie)
- Preponderance of Evidence
  - Proof
    - Statistics-judges intuition, 95% confidence level, standard deviation (2), four-fifth rule
    - Specific Practice that causes statistical discrepancy

## EVIDENCE

- Defendant's Case (defenses)
  - Statistical Challenge-small data set, inadequate statistical techniques, qualification of expert, no causal connection
  - Defenses-business necessity, job relatedness, seniority

## EVIDENCE

- Plaintiff Rebuttal
  - Alternative
  - Pretext
  - Prior Inconsistent Statement
  - Improper Challenge to Statistics
  - No Job Relatedness
  - No Business Necessity



## ALTERNATIVE DISPUTE RESOLUTION

- Types-least costly to most costly
  - Negotiations
  - Mediations
  - Minitrial
  - Mock Trial
  - Arbitration
  - Litigation

## ALTERNATIVE DISPUTE RESOLUTION SYSTEMS

- Advantages
  - Rules of Exclusion-statements made for compromise and settlement inadmissible for trial. Frank discussions and Truth
  - Experts and no emotion
  - Less Costly
  - Equality
  - Confidential and non public

## ALTERNATIVE DISPUTE RESOLUTION SYSTEM

- Arbitration-third party hears information and renders a reward
- Federal Arbitration Act of 1925-Mandates that certain disputes go through arbitration
- Impacted State Laws
- Points to Remember About Arbitration
  - May arise by contractual agreement
  - May arise by statute

## ALTERNATIVE DISPUTE RESOLUTION SYSTEM

- Arbitration
  - Types
    - Voluntary Arbitration
    - Mandatory Arbitration
    - Binding Arbitration-only voluntary
    - Nonbinding
    - Contractual Arbitration Enforceable by courts.

## ALTERNATIVE DISPUTE RESOLUTION SYSTEM

- Arbitration
  - Procedure
    - submission
    - selection of arbitrator
    - discovery
    - arbitration brief
    - pre hearing conference
    - hearing
    - award-must be in writing and based on facts

## ALTERNATIVE DISPUTE RESOLUTION SYSTEM

- Review--fraudulent, arbitrary or against public policy
  - constitutional challenges-no due process, no right to jury trial, unconstitutional delegation of legislative or judicial powers-Mandatory Arbitration
  - Federal Arbitration Act-corruption, fraud, bias of arbitrator, misconduct, arbitrator exceeds powers

## ALTERNATIVE DISPUTE RESOLUTION SYSTEM

- Arbitration
  - Misconduct
    - communication with only one party
    - receipt of evidence as to material fact with notice to other party
    - holding hearings without presence of other party
    - independent investigation
    - accepting gifts

## ALTERNATIVE DISPUTE RESOLUTION SYSTEM

- Mock Trial-lawyers present evidence to jurors
- Mini Trial-lawyers present evidence to managers and let them negotiate
- Mediation-third person facilitate settlement by contract
- Negotiations-position/interest based

## ALTERNATIVE DISPUTE RESOLUTION

- Types-least costly to most costly
  - Negotiations
  - Mediations
  - Minitrial
  - Mock Trial
  - Arbitration
  - Litigation

## ALTERNATIVE DISPUTE RESOLUTION SYSTEMS

- Advantages
  - Rules of Exclusion-statements made for compromise and settlement inadmissible for trial. Frank discussions and Truth
  - Experts and no emotion
  - Less Costly
  - Equality
  - Confidential and non public

## ALTERNATIVE DISPUTE RESOLUTION SYSTEM

- Arbitration-third party hears information and renders a reward
- Federal Arbitration Act of 1925-Mandates that certain disputes go through arbitration
- Impacted State Laws
- Points to Remember About Arbitration
  - May arise by contractual agreement
  - May arise by statute

## ALTERNATIVE DISPUTE RESOLUTION SYSTEM

- Arbitration
  - Types
    - Voluntary Arbitration
    - Mandatory Arbitration
    - Binding Arbitration-only voluntary
    - Nonbinding
    - Contractual Arbitration Enforceable by courts.

## ALTERNATIVE DISPUTE RESOLUTION SYSTEM

- Arbitration
  - Procedure
    - submission
    - selection of arbitrator
    - discovery
    - arbitration brief
    - pre hearing conference
    - hearing
    - award-must be in writing and based on facts

## ALTERNATIVE DISPUTE RESOLUTION SYSTEM

- Review--fraudulent, arbitrary or against public policy
  - constitutional challenges-no due process, no right to jury trial, unconstitutional delegation of legislative or judicial powers-Mandatory Arbitration
  - Federal Arbitration Act-corruption, fraud, bias of arbitrator, misconduct, arbitrator exceeds powers

## ALTERNATIVE DISPUTE RESOLUTION SYSTEM

- Arbitration
  - Misconduct
    - communication with only one party
    - receipt of evidence as to material fact with notice to other party
    - holding hearings without presence of other party
    - independent investigation
    - accepting gifts

## ALTERNATIVE DISPUTE RESOLUTION SYSTEM

- Mock Trial-lawyers present evidence to jurors
- Mini Trial-lawyers present evidence to managers and let them negotiate
- Mediation-third person facilitate settlement by contract
- Negotiations-position/interest based

## CONSTITUTIONAL LAW

- Constitutional Law-fundamental law of the land which provides provisions on how government should govern.
  - Key Concerns of US Constitution
    - Structure of Government
    - Federalism
    - Protection of Individual Liberties

## CONSTITUTIONAL LAW

- Provisions
  - Original Constitution (1989)
    - Article I Legislative Article
    - Article II Executive Article
    - Article III Judicial Article
    - Article IV Interstate Relations Article
      - » Privileges and Immunities/Full Faith and Credit
    - Article V Amending Article
    - Article VI Supremacy Clause
    - Article VII Ratification

## CONSTITUTIONAL LAW

- Amendments
  - Bill of Rights
    - First Speech, Press, Assembly, Religion
    - Second Bear Arms
    - Third Quartering of Soldiers
    - Fourth Search and Seizure
    - Fifth Self Incrimination
    - Sixth Counsel
    - Seventh Jury Trial (Civil)
    - Eighth Cruel and Unusual Punishment
    - Ninth Reserve Rights of People
    - Tenth Reserve Rights of State

## CONSTITUTIONAL LAW

- Amendments
  - Pre Civil War
    - » 11th Suits Against States
    - » 12th Electoral College
  - Civil War
    - » 13th Abolition of Slavery
    - » 14th Regulation of State and Personal Liberties
    - » 15th Right to Vote (Race)

## CONSTITUTIONAL LAW

- Amendments
  - Post Civil War
    - 16th Income Tax
    - 17th Direct Election of Senators
    - 18th Prohibition
    - 19th Right to Vote (Women)
    - 20th Presidential Terms
    - 21th Repeal of Prohibition
    - 22nd Limitation of Terms of President
    - 23rd District of Columbia

## CONSTITUTIONAL LAW

- Amendments
  - Post Civil War
    - 24th Elimination of Poll Tax
    - 25th Presidential Disability
    - 26th Right to Vote (Age)
    - 27th Compensation of Senators and Representatives

## CONSTITUTIONAL LAW

- Constitutional Development
  - Jean Jacque Rousseau
  - Montesquieu
  - Thomas Hobbe
  - John Locke
  - Thomas Jefferson
  - Iriqouis Confederation

## CONSTITUTIONAL LAW

- Provisions Affecting Business
  - Supremacy Clause
    - Preemption
  - Commerce Clause-regulation of local activity
    - Congress shall have power to regulate commerce
      - » products, instrumentality, people, transactions affecting commerce-grant of power (not local)
      - » States (restricted)
      - » No unreasonable burden of interstate commerce
      - » No discrimination

## CONSTITUTIONAL LAW

- Bill of Rights
  - Original Intent to apply to national government only (Barron v. Baltimore)
  - Due Process Clause of 14th (State Regulation)
  - Selective Incorporation (Gitlow v. New York), (Near v. Minnesota)
- Speech
  - Content of Speech (what a person says)
    - » Totally Protected Speech (political)
    - » Semi Protected Speech (commercial)
    - » Non Protected Speech (defamation, criminal)

## CONSTITUTIONAL LAW

- Provisions Impacting Business
  - Speech Continued
    - Time, Place and Manner (where) compelling interest
  - Due Process-5th and 14th-government actions cannot be arbitrary, capricious or unreasonable
    - Substantive Due Process-content or substance of legislation
      - » Fundamental Interest (compelling interest)
      - » Economic and Property (rational basis)

## CONSTITUTIONAL LAW

- Provisions Impacting Business
  - Due Process
    - Procedural Due Process-process government must provide when impacting liberty, life and property. The more important the deprivation, the more process due.
  - Equal Protection
    - Prohibits Unreasonable Classification Schemes by Government (State and Federal (5th))
    - To Determine Reasonable and Unreasonable Classification Schemes, courts will apply tests

## CONSTITUTIONAL LAW

- Provisions Impacting Business
  - Equal Protection Continued
    - Tests
      - Strict Scrutiny-compelling interest and no other alternative-fundamental interest and suspect classification (immutable characteristic, history, minority, psychological damage and economic damage)
      - Rational Basis-property and economic-legitimate interest and means rationally related
      - Quasi Suspect-important interest and substantially related
        - » women, disability and not sexual preference

## CRIMINAL LAW

- Classifications
  - Felony
  - Misdemeanor
  - Petty
  - Traditional
  - White Collar
  - Moral
  - Regulatory

## CRIMINAL LAW

- Rationale and Purpose of Criminal Law
  - Deterrence
  - Retribution
  - Isolation
  - Rehabilitation

## CRIMINAL LAW

- Essentiality of Criminal Liability
  - Corpus Delicti
  - Actus Reus
  - Mens Rea
    - Specific Intent-purposeful and intentional
    - General Intent-gross negligence and recklessness
    - Strict Liability-liable for act
  - Absence of Defenses
    - Self Defense, Defense of Others, Legal Justification
  - Standard of Proof
    - Beyond a Reasonable of Doubt

## CRIMINAL LAW

- Defenses
  - Infancy
  - Intoxication
  - Insanity
  - Mistake
  - Consent
  - Duress
  - Justifiable Force
  - Entrapment
  - Statute of Limitations
  - Immunity

## CRIMINAL LAW

- Criminal Procedure
  - Constitutional Safeguards-4th, 5th, 6th and 8th
    - Exclusionary Rule
    - Exceptions
  - Arrest
  - Indictment/Preliminary Hearing
  - Pre Trial Setting
  - Trial
  - Sentencing
    - Statutory Guidelines

## CRIMINAL LAW

- Crimes Against Business
  - Forgery
  - Robbery
  - Burglary
  - Larceny
  - False Pretenses
  - Receiving Stolen Goods
  - Embezzlement
  - Arson
  - Mail and Wire Fraud

## CRIMINAL LAW

- Crimes Against Business

- Bribery
- Bankruptcy
  - » Insider Transactions
- Money Laundering
- Insider Trading
  - » Information
- Trade Secrets
- Computer-theft, unauthorized access, piracy
- RICO-criminal enterprise

## CRIMINAL LAW

- Social Remedies

- Incarceration
- Fines
- Probation
  - » corporate probation-plan, removal, oversight, communication and review
  - » individual
- Restitution
- Forfeiture
- Administrative Costs



## TORT LAW

- Tort Law-when one person injures another.
- Theories Under Tort Law
  - Strict Liability
  - Intentional Tort
  - Negligence
  - Nuisance

## TORT LAW

- Strict Liability-Liability for acts that injures another
  - Abnormally Dangerous Animal
  - Abnormally Dangerous Activity
    - Activity-substantial likelihood of injury-community use
  - Product Liability
    - Defect-unusually dangerous-precision
  - Worker's Compensation
    - Social Insurance

## TORT LAW

- Intentional Tort
  - Person
  - Property
  - Personality
    - Trade Disparagement
    - Unfair Competition
    - Infringement Actions
  - Business

## TORT LAW

- Person-Assault, Battery, Intentional Infliction of Emotional Distress and False Imprisonment
  - Emotional Distress-outrageous conduct that intends and does cause emotional distress-not socially acceptable conduct (Sexual Harassment)
  - False Imprisonment-confine with knowledge of confinement
    - Shopkeepers Privilege-reasonable suspicion
    - Drug Free Workplace Laws

## TORT LAW

- Personality-statements and writings about a living person
  - Defamation-false written or spoken statements which causes economic loss
  - Invasion of Privacy-misappropriation, public disclosure of private facts, false light and intrusion upon seclusion

## TORT LAW

- Personality
  - Defenses
    - Truth always a defense
    - Absolute Privilege-court, politics
    - Constitutional-Must show Malice and total disregard for the truth-NY Times
    - Qualified-Must show malice and reckless disregard for the truth and no social value

## TORT LAW

- Business
  - Trade Disparagement-untrue statements about a business that causes business loss
  - Unfair Trade Practices
    - Interference with Contractual Relationship-intentionally causes breach of Contract
    - Interference with Prospective Economic Advantage-business opportunity and intentional
    - Anti Competitive Behavior-predatory behavior

## TORT LAW

- Infringement Actions
  - Forms of Intellectual Property Protected-usually granted by federal government-Article 1 section 8-promote arts and sciences
    - copyright-tangible means of expression
    - patent-novelty, productive use and economic value
    - trademark- distinctive symbol or name that has economic value-secondary meaning and when view conjures up positive images of trademark owner
    - Tradesecret-list or practices that give owner economic market advantage

## TORT LAW

- Business
  - Infringement
    - Rights Protected
      - » Distribution
      - » proprietary rights
      - » economic rights
      - » production rights
  - Defenses
    - Fair Use
    - No confusion

## TORT LAW

- Negligence-Definition
  - Standard of Care
    - Reasonable Person-act, alternative act, safer
    - Statutory Standard of Care-Negligence Per Se-liable if one violates statute
      - » Property-Trespasser, Child Trespasser, Invitee, Licensee
      - » Res Ipsa, Fireman, Automobile Guest
  - Breach
    - Failure to follow statute or reasonable person standard

## TORT LAW

- Negligence
  - Causation
    - Direct Causation (no intervening force)
    - Indirect (proximate causation) intervening force.
      - Foreseeable/unforeseeable
  - Defenses
    - Contributory Negligence
    - Comparative Negligence
    - Assumption of Risk

## TORT LAW

- Nuisance-interference with use and enjoyment of property
  - Theories-strict liability, negligence and intentional trespass
  - Private/Public
    - special damages
  - Relief
    - injunctive relief

## INTELLECTUAL PROPERTY AND INTERNET LAW

- Intellectual Property-grant of monopoly use of through human creativity by government
  - Congress authorize to grant exclusive rights through Article I, Section 8 of US Constitution
  - Rights Conferred by Congress
    - » Proprietary Rights
    - » Reproduction Rights
    - » Distribution Rights
    - » Performance Rights
  - Global Value of Intellectual Property Exceeds Global Value of Physical Property

## TYPES OF INTELLECTUAL PROPERTY

- Trademark-a distinctive mark, motto, device, or implement that a manufacturer stamps, prints or otherwise affixes to goods it produces so that it may be identified on the market and the origin vouched for.
- Patent-a machine, manufacture, composition of matter, formula, equipment, business process and computer software which is novel, non-obvious and has commercial value and improvements there of.
- Copyright-is an intangible property right granted by federal statute to the author or originator of a literary or artistic production of a specified type.
- Trade Secret-consist of customer list, plans, research and development, marketing information, production techniques or anything that makes company unique.

## TRADEMARK

- Statutory Protection
  - Lanham Act of 1946-confusion of consumer as to owner
  - Amended in 1995-Federal Trademark Dilution Act-unauthorized use regardless of likelihood of confusion of consumer
  - Barnum and Bailey v. Utah (Greatest Show on Earth)
  - Registration-US Patent and Trademark Office
  - Infringement-whenever trademark is copied to substantial degree or used in its entirety by another, intentionally or unintentionally, without authorization, infringement

## TRADEMARK

- Distinctiveness of Mark-to avoid likelihood of confusion, must be distinctive
  - Strong Mark
    - » Fanciful
    - » Arbitrary
    - » Suggestive
  - Secondary Meaning-consumer association
  - Generic Terms-no trademark
  - Trade Dress
  - Service Mark
  - Certification Mark
  - Collective Mark

## CYBER MARK

- Cyber mark-trademark used over the internet
  - Domain Names-core part of internet address
    - Anticybersquatting Consumer Protection Act of 1999-registering trademark name over internet and have bad intent
  - Meta Tags-insert trademark name in address to increase frequency of site appearance-Diminishment
  - Dilution-diminishes distinctive qualities of company
  - Blurring-likelihood of confusion

## PATENTS

- Patent Infringement-unauthorized use. Need not be exact copy, substantial equivalence or similarity
- Software Patentable
- Business Processes Patentable
- Non-Patentable-laws of nature, natural phenomena and abstract ideas

## COPYRIGHTS

- Protected Works
  - Original literary works, musical works, dramatic works, pantomimes, pictorials and compilations of works
  - Non Protected-ideas, processes, procedure, systems methods
- Fair Use-news reporting, criticism, comment, teaching research
  - Purpose and Character, Market Effect, Nature of Use and amount and substantial portion

## COPYRIGHT

- Internet
  - Computer Software Act of 1980
  - No Electronic Theft Act-Altruistic Piracy
  - Digital Millennium Copyright Act of 1998-circumventing decryption program also exempts ISP. Fair Use-education, security, parents and privacy
    - File Sharing Technology
    - Peer to Peer Sharing

## TRADE SECRET

- Restatement of Tort 757-one who uses trade secret is liable if he discovered the secret by improper means and his disclosure constitute a breach of confidence
- Licensing
- International
  - Berne
  - WTO-TRIPS

## CYBERLAW AND E-COMMERCE

- Aspects of Cyberspace, World Wide Web and the Internet
  - New technology represents mass communication
  - Mass communication does not originate from central location
  - Information on internet highly changeable

## CYBERLAW AND E-COMMERCE

- APPROACH
  - Courts and cyberspace
  - Constitution and cyberspace
  - Cyber Crimes
  - Cyber Torts
  - Virtual Property
  - E-Commerce

## The Courts and Cyberspace

- Changes in Courtroom Procedure
  - Judicial decisions published on internet
  - Virtual Courtroom-presentation through e-mail and internet
- Jurisdiction
  - Minimum Contacts-presence in forum state
  - Sliding Scale-exercise of personal jurisdiction depends on amount of business in state
    - See Zippo v. Zippo Dot. Com, Inc

## CONSTITUTION AND CYBERSPACE

- Internationalism-ability of internet to cross geographic boundaries beyond constitution
- Freedom of Speech
  - Government can regulate speech if there is a compelling interest and the law is narrowly tailored to serve that compelling interest.
  - Statutes cannot be overbroad, vague and government must show a compelling interest

## CONSTITUTION AND CYBERSPACE

- Encryption Codes-the process by which a message (plaintext) is transformed into something (ciphertext) that the sender and receiver intend third parties not to understand
  - Software for Encryption
  - In Junger v. Daley 8 F.Supp.2d 708 is not speech and not protected. Government can regulate.

## CONSTITUTION AND CYBERSPACE

- Content Regulation
  - Communication Decency Act of 1996-sought to protect minors, in Reno v. American Civil Liberties, statute too broad.
  - Child On Line Protection Act-act made criminal on those who distribute materials harmful to minors, court ruled unconstitutional-too broad
  - Cyber Hate Speech-content regulation censorship, invalid
- Access to Web Sites-meta tags, prevent access by key words in web searching
  - In Reno, court ruled that filtering process is less restrictive and somewhat permissible.

## CYBERSPACE AND CRIMES

- **Cyber Stalking**
  - Stalkers who commit their crimes in cyberspace-chat room.
    - Laws require physical action, may not apply to cyberspace
    - Credible Threat
- **Cyber Thefts**
  - Counterfeit Access Device and Computer Fraud and Abuse Act and the National Infrastructure Act-making it a crime for a person to access computer online, without authority, to obtain computer information. Felony if for commercial purpose
  - Cyber Terrorism-hackers who aim not to gain attention but to remain undetected in order to exploit computers-false codes or data

## CYBERSPACE AND TORTS

- **Defamation**
  - Internet Service Providers not liable under Communication Decency Act
  - Blumenthal v. Drudge
  - CompuServe v. Cyber Promotions
- **Spam-junk mail which is unsolicited**
  - California provides that recipient must be given opportunity to stop unsolicited e-mail.

## CYBERSPACE AND VIRTUAL PROPERTY

- **Cyber Marks-Trademarks**
  - Cybersquatting
  - Domain Names-Internet Corporation for Assigned Names and Numbers
  - Meta Tags-Key words used for search engines
    - Playboy Enterprises v. Wells-playmate of year and web site
  - Dilution-trademark used without authorization and diminishes the distinctive value-blurring, diminishment-no requirement of confusion of consumer
  - Licensing-granting a license to use name-terms must be obeyed

## VIRTUAL PROPERTY AND CYBERSPACE

- **Patents**
  - Increasing number of patents
  - Software developers use combination of previous software to create new software
  - First in creation of software has patents however many application
  - Patent Database and availability of information

## VIRTUAL PROPERTY AND CYBERSPACE

- **Copyrights in Digital Information**
  - Copyright Act of 1976
  - World Intellectual Property Organization-registration and global protection
  - Digital Millennium Copyright Act of 1998-expanded fair use and gave protection
- **Trade Secrets**
  - Employee breach
  - Some cases criminal

## E-COMMERCE AND CYBERSPACE

- **Cyberspace Agreements**
  - Uniform Electronic Transaction Act-documents presumed valid and electronic signature are valid
- **E-Money**
  - Card Based Money-debit card and smart card (encrypted)
  - Payment
- **Marketing**
  - Consumer Data-privacy
  - Web Site Content-price changes-content must be current
  - Cyber Fraud-misrepresentation, hidden identities

## LAW OF INTELLECTUAL PROPERTY RIGHTS

- Topics Discussed in Chapter
  - Intellectual Property-United States
  - Extraterritorial Application of US Law
  - Gray Market Goods
  - International Cooperation
  - Foreign Intellectual Property Laws

## INTELLECTUAL PROPERTY LAW OF UNITED STATES

- **Trademark**-any word, name, symbol or device or any combination that identifies goods and distinguishes them from those manufactured or sold by others.
- **Copyright**-is a form of protection provided to authors of "original works of authorship" fixed in a tangible form of expression.
- **Patent**-inventions that are "novel, and non-obvious".
- **Trade Secrets**-any device or information that is used in a business and gives its owner a competitive advantage.

## TRADEMARK

- Trademarks are derived from commercial use of mark.
  - Lanham or Trademark Act-federal government grants exclusive use for ten years from date of registration and renewed for successive periods of ten years so long as mark is continued to be used.
  - To prove trademark infringement party must prove another's use of mark confuses consumer

## TRADEMARK

- Factors that determine "confusion of consumer"
  - Degree of similarity between marks
  - Intent of infringer
  - Similarity of two products or services
  - Similarity of marketing of good or service
  - Strength of the registered mark
  - Evidence of Confusion

## TRADEMARK

- **Trademark Dilution**-lessening of the capacity of a famous mark to identify and distinguish goods or services, regardless of the presence or absence of competition between the owner of the famous mark and other parties, or likelihood of confusion.
  - » Lanham Act amended in 1996 to add Trademark Dilution.
- Types of Dilution
  - » Tarnishment-trademark linked to shoddy quality or is portrayed in an unsavory context.
  - » Blurring-diminishing the selling power and value by unauthorized use.

## TRADEMARK

- **Trademark Dilution**
  - Elements
    - Service mark must be famous
    - Mark must be distinctive
    - Junior use must be a commercial use
    - Junior use must occur after senior mark famous
    - Junior use must cause dilution-tarnishment or blurring
  - Mega Tags-diversions in internet research

## COPYRIGHT PROTECTION

- Copyrights include literary, dramatic, musical, choreographic, pictorial, motion pictures, sound recordings, architectural works and computer programs (under literary works)
  - Section 106 of the Copyright Act of 1976 gives the copyright owner the exclusive right to reproduce the work in copies, prepare derivative works, distribution rights, sale, rental, lease and lending and to perform or display work publicly.

## COPYRIGHT PROTECTION

- Exemptions
  - First Sale-copyright owner's right terminates once copyright work is legally sold.
  - Fair Use Doctrine-small amount of work can be used for research, educational, criticism and news reporting.
  - Public Domain-materials include government publication, generic terms and materials whose copyrights has expired.

## COPYRIGHT PROTECTION

- Authorship creates copyright protection
  - Work For Hire-employer employees a person to create copyright work.
- Copyright Procedural Protection
  - Notice Requirement
    - No notice required however recommended to defeat defense of innocent infringer.
  - Registration
    - Establishes Public record
    - Allows for damages and attorney fees
    - Registration required if one wants to bring suits
    - Allows copyright owner to register with US Customs

## PATENT AND TRADE SECRETS

- Patents
  - Patent Act defines infringement as whoever without authority makes, uses, offers to sell or sell patented invention or imports patented invention.
    - Doctrine of Equivalent-need not be exact copying of an invention to prove a case. Equivalent between the elements of the patented invention and the infringement product.
- Trade Secrets
  - Economic Espionage Act of 1996-cannot sell government or business secrets. Especially customer list.

## EXTRATERRITORIAL ENFORCEMENT AND GRAY MARKET GOODS

- Extraterritorial Enforcement
  - The Supreme Court in *Steele v. Bulova and Scotch Whiskey v. Barton* ruled that commerce in the Lanham Act applies to US citizens doing business abroad.
- Gray Market Goods-refers to imports bearing a genuine trademark but imported by a party other than the trademark holder.
  - Common Control-imported by subsidiary of parent corporation.
  - First Sell Doctrine-purchaser can import goods into country of trademark holder. Parallel Importation and Product Price Arbitrage.

## INTERNATIONAL PROPERTY RIGHTS PROTECTION

- World Intellectual Property Organization
  - Depository Organization that grew out of the Paris Convention on patents and trademarks and Bern Convention on copyrights
- Conventions
  - Paris Convention-industrial property which gives rights of priority and national treatment
    - Compulsory Licenses-grants trademark and patent rights to third parties if no use.



## INTERNATIONAL PROPERTY RIGHTS PROTECTION

- Conventions
  - Patent Cooperation-simplifies the filing, searching and publication of international patents.
  - Berne Convention on Copyrights-establishes rights of copyright owner.
  - Universal Copyright Convention-comparable to Berne
  - Berlin Act of 1908-photographic materials
  - Rome Act of 1928-moral rights of copyright owner
  - Brussels Act of 1948-movie films.
  - Stockholm Act and Paris Act of 1971 allowed developing nations to grant compulsory licenses.

## AGREEMENT ON TRADE RELATED ASPECTS OF INTELLECTUAL PROPERTY

- Enforced by WTO
  - Council for Trade Related Aspects of Intellectual Property
- Principles
  - Principles of national treatment, transparency and most favored nation
- Application
  - Applies to trade secrets, patents, copyrights and trademarks.
- Remedies
  - Civil and Criminal Remedies
  - Suspend importation through Customs Office of each nation
  - US Exporters should develop comprehensive strategy.

## FOREIGN INTELLECTUAL PROPERTY LAWS

- Foreign Trademark Law
  - Russia-first to register
  - Brazil-refusal of registration if mark is "well known"
  - Chinese see trademark as means to protect consumers and quality control.
- Foreign Patent Law
  - China's patent law defines patents as inventions that are novel, creative (substantial progress over existing technology) and has commercial utility. China grants compulsory licenses.
  - Russia-invention must have commercial utility.

Transitional Economies-Russia has compulsory licenses if licensee makes improvements.

## CYBERLAW AND E-COMMERCE

- Aspects of Cyberspace, World Wide Web and the Internet
  - New technology represents mass communication
  - Mass communication does not originate from central location
  - Information on internet highly changeable

## CYBERLAW AND E-COMMERCE

- APPROACH
  - Courts and cyberspace
  - Constitution and cyberspace
  - Cyber Crimes
  - Cyber Torts
  - Virtual Property
  - E-Commerce

## The Courts and Cyberspace

- Changes in Courtroom Procedure
  - Judicial decisions published on internet
  - Virtual Courtroom-presentation through e-mail and internet
- Jurisdiction
  - Minimum Contacts-presence in forum state
  - Sliding Scale-exercise of personal jurisdiction depends on amount of business in state
    - See Zippo v. Zippo Dot. Com, Inc

## CONSTITUTION AND CYBERSPACE

- Internationalism-ability of internet to cross geographic boundaries beyond constitution
- Freedom of Speech
  - Government can regulate speech if there is a compelling interest and the law is narrowly tailored to serve that compelling interest.
  - Statutes cannot be overbroad, vague and government must show a compelling interest

## CONSTITUTION AND CYBERSPACE

- Encryption Codes-the process by which a message (plaintext) is transformed into something (ciphertext) that the sender and receiver intend third parties not to understand
  - Software for Encryption
  - In Junger v. Daley 8 F.Supp.2d 708 is not speech and not protected. Government can regulate.

## CONSTITUTION AND CYBERSPACE

- Content Regulation
  - Communication Decency Act of 1996-sought to protect minors, in Reno v. American Civil Liberties, statute too broad.
  - Child On Line Protection Act-act made criminal on those who distribute materials harmful to minors, court ruled unconstitutional-too broad
  - Cyber Hate Speech-content regulation censorship, invalid
- Access to Web Sites-meta tags, prevent access by key words in web searching
  - In Reno, court ruled that filtering process is less restrictive and somewhat permissible.

## CYBERSPACE AND CRIMES

- **Cyber Stalking**
  - Stalkers who commit their crimes in cyberspace-chat room.
    - Laws require physical action, may not apply to cyberspace
    - Credible Threat
- **Cyber Thefts**
  - Counterfeit Access Device and Computer Fraud and Abuse Act and the National Infrastructure Act-making it a crime for a person to access computer online, without authority, to obtain computer information. Felony if for commercial purpose
  - Cyber Terrorism-hackers who aim not to gain attention but to remain undetected in order to exploit computers-false codes or data

## CYBERSPACE AND TORTS

- **Defamation**
  - Internet Service Providers not liable under Communication Decency Act
  - Blumenthal v. Drudge
  - Compuserve v. Cyber Promotions
- **Spam-junk mail which is unsolicited**
  - California provides that recipient must be given opportunity to stop unsolicited e-mail.

## CYBERSPACE AND VIRTUAL PROPERTY

- **Cyber Marks-Trademarks**
  - Cybersquatting
  - Domain Names-Internet Corporation for Assigned Names and Numbers
  - Meta Tags-Key words used for search engines
    - Playboy Enterprises v. Wells-playmate of year and web site
  - Dilution-trademark used without authorization and diminishes the distinctive value-blurring, diminishment-no requirement of confusion of consumer
  - Licensing-granting a license to use name-terms must be obeyed

## VIRTUAL PROPERTY AND CYBERSPACE

- **Patents**
  - Increasing number of patents
  - Software developers use combination of previous software to create new software
  - First in creation of software has patents however many application
  - Patent Database and availability of information

## VIRTUAL PROPERTY AND CYBERSPACE

- **Copyrights in Digital Information**
  - Copyright Act of 1976
  - World Intellectual Property Organization-registration and global protection
  - Digital Millennium Copyright Act of 1998-expanded fair use and gave protection
- **Trade Secrets**
  - Employee breach
  - Some cases criminal

## E-COMMERCE AND CYBERSPACE

- **Cyberspace Agreements**
  - Uniform Electronic Transaction Act-documents presumed valid and electronic signature are valid
- **E-Money**
  - Card Based Money-debit card and smart card (encrypted)
  - Payment
- **Marketing**
  - Consumer Data-privacy
  - Web Site Content-price changes-content must be current
  - Cyber Fraud-misrepresentation, hidden identities

## CONTRACTS

- Definition-an agreement between two or more parties to do or refrain from doing an act which is enforceable in a court of law

## CONTRACTS

- Elements
  - Choice of Law
  - Types of Contracts
  - Parties to Contracts
  - Formation of Contracts
  - Proof of Contracts
  - Conditions and Performance
  - Discharge and Breach
  - Remedies

## CONTRACTS

- Choice of Law
  - Restatement of Contracts (Common Law)
    - » Subject-matter-Local, non-merchant, face to face
    - » No consumer protection, formalistic
  - Article Two of Uniform Commercial Code
    - » Subject-matter-merchants who sale tangible moveable goods
    - » consumer protection, national, less formal
  - United Nations Convention for the International Sales of Goods
    - » International merchants who sale tangible moveable goods

## CONTRACTS

- Types of Contracts
  - Bilateral (promise for promise)-Unilateral-promise for performance
  - Unenforceable-defect in formation or proof
  - Void Contract-illegal contract-not recognized by court
  - Voidable-due to lack of genuiness of assent one party can cancel contract-negation
  - Promissory Estoppel-detrimental reliance on promise
  - Quasi in Law-prevent unjust enrichment
  - Quasi in Fact-contract formed by conduct

## CONTRACTS

- Parties to Contract
  - Third Party-at formation of contract, parties agree that benefits go to intended person
    - Intended Beneficiary-once has knowledge, rights vest
    - Unintended-no rights
  - Assignment-party assign rights of existing contract to another
    - Nonassignable if material alteration and restriction
  - Delegation-party to contract delegates obligation of performance to another
    - » no material alteration-such as personal services

## CONTRACTS

- Formation-meeting of the minds between offeror and offeree with regards to terms of agreement, involving consideration, parties with capacity, legal subject-matter, free from fraud, duress, undue influence, mistake, coercion and misrepresentation

## CONTRACTS

- Formation-continued
  - Elements of Formation
    - Meeting of Mind (genuiness of assent and no negation)
    - Offer
    - Acceptance
    - Consideration
    - Capacity
    - Legality

## CONTRACTS

- Formation (continued)
  - Genuiness of Assent-Meeting of Mind and no Negation-if negation, voidable contract
    - Duress
    - Undue Influence
    - Coercion
    - Mistake
    - Misrepresentation
    - Fraud

## CONTRACTS

- Formation (continued)
  - Offer
    - » Communication
    - » Intent
    - » Definite Terms-payment, performance, parties, price, subject-matter
    - » Termination-subsequent destruction, death, subsequent illegality, rejection and counter-offer and revocation (option contract)

## CONTRACTS

- Formation (continued)
  - Acceptance
    - Communication
    - Intent
    - Mirror Image-acceptance must mirror offer if any deviation, acceptance becomes rejection and counter-offer
    - Mail Box Rule-acceptance effective upon dispatch
      - » authorized v unauthorized

## CONTRACTS

- Formation (continued)
  - Consideration-parties must benefit and incur detriment from contract. Benefits and detriments must be bargained for.
    - Purpose-establish that parties really intended to contract
      - Bargained For Exchange-something must be exchanged
      - Mutuality of Obligation-both must be obligated to perform-illusory contracts-not past consideration or preexisting duty

## CONTRACTS

- Formation (continued)
  - Capacity-if party lacks capacity, may void contractual obligation within reasonable time
    - Infancy
      - » Necessities of Life
    - Insanity
    - Intoxication
  - Legality-void contracts
    - » Violation of Statute-gambling, drugs, restraint of trade, exculpatory clauses

## CONTRACTS

- **Proof of Contracts**
  - **Statute of Frauds**-certain contracts must be evidenced by sufficient memorandum for the contract to be enforceable
    - Application-land, contract in excess of year, promise to pay debt of another, marital contracts, sale of goods in excess of year, contracts involving disposition of property upon death, insurance contracts
    - Sufficient Memorandum-writing that contains price, parties, payment, performance, subject-matter and signed by party to be charged
    - Exception-promissory estoppel

## CONTRACTS

- **Proof (continued)**
  - **Parol Evidence Rule**-after a contract is reduced to a writing containing an integration clause, oral evidence cannot be introduced at court to contradict, modify or vary an existing made contemporaneous or before contract formed
    - Rule of Evidence
      - » Integration Clause
      - » Subsequent Statements Admissible
      - » Genuineness of Asset Issues may be raised-negation

## CONTRACTS

- **Conditions and Performance**
  - **Conditions**-specification and implied obligations to perform
    - Expressed
    - Implied
      - » Time and Social Obligations
  - **Performance**
    - » Tender
    - » Full and Substantial (parties have performed)
    - » Partial, Non-performance and anticipatory repudiation-non-performance (breach)

## CONTRACTS

- **Discharge and Breach**
  - **Discharge**-parties no longer obligated to perform contractual obligations
    - » Discharge by Performance-full or substantial
    - » Discharge by Agreement-accord and satisfaction, waiver, novation, modification
    - » Discharge by Law-bankruptcy and statute of limitation
    - » Discharge by Impossibility-unforeseeable event
  - **Breach**-Party has not performed obligations, nor have the obligations been discharged, entitling the non-breaching party to remedies

## CONTRACTS

- **Remedies**
  - **Expectancy Interest**-what parties expected
    - » Compensatory, Consequential, incidental
  - **Reliance Interest**
    - » promissory estoppel
  - **Restitution**
    - » Quasi Contracts, Negation and Insolvency
  - **Equitable Remedies**
    - specific performance, injunction, Reformation

## E-COMMERCE

- E-commerce-contract entered into electronically.
  - Most Courts Apply
    - Traditional Contract Law
    - Uniform Commercial Code
    - Proposals by the National Conference of Commissioners for Uniform State Laws
      - On Line Offer
      - On Line Acceptance

## ON LINE OFFER

- Offer Should Include-Conspicuous and Readeable
  - Remedies
  - Payment
  - Statute of Limitations
  - Disclaimers
  - Refund and Return
  - Buyer's Agreement
  - Forum Selection
  - Dispute Settlement

## ON LINE ACCEPTANCE

- UCC-contracts for sale of goods may be accepted in any manner sufficient to show agreement, including conduct
  - Shrink Wrap
  - Click Wrap
  - Browse Wrap

## ELECTRONIC SIGNATURES

- Forms
  - Digital Signatures
  - Signature Dynamics
  - Smart Cards

## ELECTRONIC SIGNATURE

- State Law
  - Uniform Electronic Transaction Act-a signature cannot be legally denied effect solely because it is electronic
    - Must relate to transaction-must be agreement, attribution provisions, notarization, error procedure and timing
    - Partnership Agreement
    - Uniform Computer Information Transaction Act-only adopted by Maryland and Virginia. Licensing, warranties and disclaimers, attribution and authentication, marketing access and contracts
- Federal Law-Federal E-Commerce
  - Apply State if State has UETA-not social security, veterans, medicare

## COMMERCIAL PAPER

- Definition
  - a formal contract where contractual obligations automatically arise once document properly executed.
  - Substitute for Money (currency)
    - Article 3 Uniform Commercial Code
    - United Nations Convention on Bill of Exchanges and Promissory Notes
    - Uniform Customs and Practices for Documentary Credits

## COMMERCIAL PAPER

- Types-Negotiable Instruments
  - Bill of Exchange
  - Check
  - Draft
  - Traveler's Check
  - Trade Acceptance
  - Promissory Notes
  - Certificates of Deposits
  - Money Orders
  - Cashiers
  - Letters of Credit
    - Article 5 of the Uniform Commercial Code

## COMMERCIAL PAPER

- Historical Development
  - Originates in Merchant Transactions
    - Sale and Purchase Among Merchants
  - Banking Institution
    - Gold Standard
    - Unsafe Travel
    - Demand Deposits
    - Safe (blacksmith)

## COMMERCIAL PAPER

- Approach
  - Negotiability
  - Ambiguities
  - Negotiation
  - Holder in Due Course
  - Defenses
  - Liability
  - Banks

## COMMERCIAL PAPER

- Negotiability-creation of instrument
  - writing
  - signed by maker
  - unconditional promise
  - definite amount of money
  - payable on demand or definite date
  - payable on order or bearer

## COMMERCIAL PAPER

- Interpretation of Ambiguities
  - words over numbers
  - handwritten over printed
  - typed over printed
  - judgement rates



## COMMERCIAL PAPER

- Negotiation-transfer in negotiable instrument
  - Order/Bearer instrument
  - Possession
  - Endorsement
    - special endorsement
    - restrictive endorsement

## COMMERCIAL PAPER

- Holder in Due Course
  - Holder
  - Value
  - Good Faith Acquisition-reasonable transaction
  - Lack of Notice
    - overdue
    - dishonored
    - forgery, alteration or incomplete

## COMMERCIAL PAPER

- Defenses
  - Real Defenses-valid against holder/hdc
    - » forgery
    - » bankruptcy
    - » minority
    - » alteration
    - » duress, incapacity and fraud in execution
  - Personal Defenses
    - » breach of contract, lack of consideration, prior payment, fraud in inducement

## COMMERCIAL PAPER

- Liability
  - Imposter Rule
  - Conversion
  - Employee Endorsement Rule
  - Negligence
  - Fictitious Payee Rule
  - Signature Liability
  - Warranty Liability

## COMMERCIAL PAPER

- Banks
  - Article 4 Uniform Commercial Code
    - Checking Accounts
    - Electronic Transfer Act of 1978
    - Wire Transfers
      - Article 4a of Uniform Commercial Code

## SECURED TRANSACTIONS

- Secured Transactions-any contract between creditor and a debtor that provides creditor with backup source of payment should the debtor break his or her promise to pay.

## SECURED TRANSACTION

- Liens-by operation of law
  - Personal Property
  - Mortgage Liens
  - Mechanic Liens
  - Trust Deeds
    - Execution upon judgment

## SECURED TRANSACTION

- Surety Agreement-third party promises to pay in the event the debtor defaults
  - Creation
  - Types
    - Gratuitous
    - Compensated
  - Defenses
    - alteration of surety duty
    - surrender-release-performance

## SECURED TRANSACTIONS

- Secured Transaction-security interest in personal property
  - Types
    - secured
    - unsecured
  - Historical Development
    - Pledge System-possession
    - Public Filing System
    - Chattel Mortgage-chattel paper

## SECURED TRANSACTION

- Analysis
  - Coverage Under Article 9
  - Attachment
  - Perfection
  - Priorities
  - Default and Foreclosure

## SECURED TRANSACTION

- Coverage of Article 9
  - Trade Fixtures
  - Personal Property
  - Chattel Paper
  - Accounts Receivable
  - Personal Property

## SECURED TRANSACTION

- Attachment
  - Value
  - Debtor Must Have Rights in Property
  - Security Agreement
    - writing
    - sufficient description of goods
    - signed by debtor
    - sufficient description of creditor
- After Acquired Property

## SECURED TRANSACTION

- Perfection
  - Possession of Good
  - Filing
    - motor vehicles-notation on certificate of title or registration
    - local or state government
  - Automatic Perfection
    - Purchase Money Security Interest
    - Temporary Perfection-negotiable instrument

## SECURED TRANSACTION

- Priorities
  - Unsecured Creditors
  - Lien Creditors
  - Other Secured Creditors
    - Perfected v. Unperfected
    - Perfected v. Perfected-first in time to perfect
    - Unperfected v. Unperfected-first to attach
    - Inventory v Noninventory
      - Purchase Money Security Interest

## SECURITY INTEREST

- Priorities Continued
  - Against Buyers-
    - Buyer in Ordinary Course of Business
    - Buyers of Consumer Goods
    - Negotiable Instruments-holder in due course
    - Unperfected Documents-bona-fide purchaser for value
    - Investment Security-bona-fide purchaser for value

## SECURED TRANSACTION

- Default
  - Repossession (self-help)
    - No Breaching of the peace
    - storage and right of redemption
    - sale of collateral
    - good faith
  - Judgment
    - writ of execution
    - sale of collateral

## BANKRUPTCY

- Bankruptcy Code
  - 1878 Bankruptcy Act
  - 1938 Chandler act
  - 1978 Bankruptcy Reform Act
  - 1984 Federal Judgeship Act
- Types
  - Chapter 7 Liquidation
  - Chapter 9 Governmental Reorganization
  - Chapter 11 Business Reorganization
  - Chapter 13 Personal Reorganization

## BANKRUPTCY

- Chapter 7-Liquidation
  - Petition
  - Order for Relief
  - Meeting of Creditors
  - Appointment of Trustees
  - Proof of Claims
  - Automatic Stay

## BANKRUPTCY

- Property of Estate
  - Exempt Property
    - Life, Work, Health, Sentimental not Luxury
- Voidable Transfers-
  - Preferential Transfers-to creditors
  - Preferential Liens
  - Preferential Transfers to Insiders
  - Fraudulent Transfers
  - Loading Up

## BANKRUPTCY

- Distribution of Property
  - Secured Claims have priority over Unsecured
    - secured may accept collateral
    - foreclose on collateral and use proceeds to pay debt
    - allow trustee to retain collateral, dispose of it at sale, and remit the proceeds of the sale to him

## BANKRUPTCY

- Unsecured
  - administrative fees
  - gap creditors-goods sold to debtor in ordinary course of business
  - wages, salaries
  - employee benefit plans
  - farm producers
  - cash deposits for lease and rental
  - tax obligations

## BANKRUPTCY

- Discharge
  - Nondischargeable
    - taxes
    - claims and penalties owed to government
    - claims based on willful and malicious acts of injury
    - claims arising from fraud, embezzlement
    - alimony, child support and maintenance
    - luxury goods
    - cash advances
    - drunk driving

## BANKRUPTCY

- Discharge
  - Acts that Bar Discharge
    - Discharge of Student Loans - under hardship
    - Reaffirmation Agreements - voluntary agreement to set aside discharge of debt and repayment plan - court approval

## BANKRUPTCY

- Chapter 9 - Municipal Reorganization
  - Arrange
  - Plan
  - Trustee and Local Government
- Chapter 11 - Business Reorganization
  - Plan
  - Confirmation
    - Cram Down

## BANKRUPTCY

- Chapter 13
  - Petition
  - Automatic Stay
  - Plan
  - Confirmation
  - Discharge

BANKRUPTCY

## INTRABUSINESS RELATIONSHIPS

- Forms
  - employer/employee
  - independent contractor
  - agency

## EMPLOYER/EMPLOYEE

- Creation-California Labor Code Section 2922 does not specifically define an employer/employee relationship, however, provides criteria that can determine the relationship between employee and employer.
  - Key Determination-totality of circumstances with the establishment of “control”

## EMPLOYER/EMPLOYEE

- Elements to consider to establish relationship:
  - Control
  - Indeterminate time of Relationship
  - Germaneness
  - Manner of Payment
  - Provision of Equipment
  - Place of Employment

## EMPLOYER/EMPLOYEE

- Laws Applicable To Relationship
  - Tax Withholding Laws
  - Employee/Employer Contribution Laws
  - Health and Safety Laws
  - Union Laws
  - Compensation and Benefits Laws
  - Discrimination Laws
  - Retirement and Tax Deferral Laws

## EMPLOYER/EMPLOYEE

- Liability Laws
  - If employee within course and scope of employment, employer liable
    - Minor Departure
    - Failure to follow instructions
  - Vicarious Liability
  - Respondeat Superior
  - Employee Creations and Rights of Employer

## INDEPENDENT CONTRACTOR

- Creation
  - Defined by statute as opposite of employer/employee
- Applicable Laws
  - Contract Law
- Liability
  - No liability unless ultra hazardous activity
    - insurance

## AGENCY

- Agency-a person who acts on behalf of another person (principal) who can bind principal.
  - Agent has decision making power. Decisions by agents has same authority as if principal has made decision
  - Allows principal to be omnipresent and acquire expertise
  - Principal bound by agents decisions

## AGENCY

- Concept of Agent extended to managers of business (anyone who is not an employee or independent contractor of organization)
  - Meritor Savings and Loan v. Vinson
    - Extension of Power to Agent/Manager
    - Negligent allocation of authority
    - Liable despite no knowledge

## AGENCY

- Creation
  - Express-contract-today in writing
  - Implied
  - Estoppel
  - Ratification

## AGENCY

- Powers-key-authorized to act on behalf of principal-make decisions that binds principal
  - Express
  - Implied
  - Estoppel
  - Ratification

## AGENCY

- Duties of Agent to Principal-DOLIA-note if agent within course and scope of powers, but breaches duty to principal, principal liable to third person for acts of agent. Principal has grounds to take action against agent such as termination and suit for damages.
  - DOLIA-nuemonic for fiduciary duties of agent.

## AGENT

- Fiduciary Duties of DOLIA of Agent to Principal
  - Due Diligence in Making Decisions
    - defense-good faith business judgment
  - Obedience
  - Loyalty
    - full disclosure and ratification
  - Inform
  - Account

## AGENCY

- Duty of Principal to Agent
  - Cooperation
    - good faith
  - Compensation
  - Indemnification
  - Reimbursement
  - Compliance with Agency Contract



## INTRABUSINESS RELATIONSHIPS

- Forms
  - employer/employee
  - independent contractor
  - agency

## EMPLOYER/EMPLOYEE

- Creation-California Labor Code Section 2922 does not specifically define an employer/employee relationship, however, provides criteria that can determine the relationship between employee and employer.
  - Key Determination-totality of circumstances with the establishment of “control”

## EMPLOYER/EMPLOYEE

- Elements to consider to establish relationship:
  - Control
  - Indeterminate time of Relationship
  - Germaneness
  - Manner of Payment
  - Provision of Equipment
  - Place of Employment

## EMPLOYER/EMPLOYEE

- Laws Applicable To Relationship
  - Tax Withholding Laws
  - Employee/Employer Contribution Laws
  - Health and Safety Laws
  - Union Laws
  - Compensation and Benefits Laws
  - Discrimination Laws
  - Retirement and Tax Deferment Laws

## EMPLOYER/EMPLOYEE

- Liability Laws
  - If employee within course and scope of employment, employer liable
    - Minor Departure
    - Failure to follow instructions
  - Vicarious Liability
  - Respondeat Superior
  - Employee Creations and Rights of Employer

## INDEPENDENT CONTRACTOR

- Creation
  - Defined by statute as opposite of employer/employee
- Applicable Laws
  - Contract Law and Licensing Requirement
- Liability
  - No liability unless ultra hazardous activity
    - insurance

## AGENCY

- Agency-a person who acts on behalf of another person (principal) who can bind principal.
  - Agent has decision making power. Decisions by agents has same authority as if principal has made decision
  - Allows principal to be omnipresent and acquire expertise
  - Principal bound by agents decisions

## AGENCY

- Concept of Agent extended to managers of business (anyone who is not an employee or independent contractor of organization)
  - Meritor Savings and Loan v. Vinson
    - Extension of Power to Agent/Manager
    - Negligent allocation of authority
    - Liable despite no knowledge

## AGENCY

- Creation
  - Express-contract-today in writing
  - Implied
  - Estoppel
  - Ratification

## AGENCY

- Powers-key-authorized to act on behalf of principal-make decisions that binds principal
  - Express
  - Implied
  - Estoppel
  - Ratification

## AGENCY

- Duties of Agent to Principal-DOLIA-note if agent within course and scope of powers, but breaches duty to principal, principal liable to third person for acts of agent. Principal has grounds to take action against agent such as termination and suit for damages.
  - DOLIA-nuemonic for fiduciary duties of agent.

## AGENT

- Fiduciary Duties of DOLIA of Agent to Principal
  - Due Diligence in Making Decisions
    - defense-good faith business judgment
  - Obedience
  - Loyalty
    - full disclosure and ratification
  - Inform
  - Account

## **AGENCY**

- **Duty of Principal to Agent**
  - **Cooperation**
    - **good faith**
  - **Compensation**
  - **Indemnification**
  - **Reimbursement**
  - **Compliance with Agency Contract**

## BUSINESS OWNERSHIP

- Types of Business Ownership
  - Sole proprietorship
  - Partnership
    - Joint Venture
    - Limited Partnership
  - Franchise
  - Corporation

## BUSINESS OWNERSHIP

- Each form of business ownership will be discussed in terms of the following\_
  - management and control
  - creation
  - capital contribution
  - advantages
  - disadvantages

## SOLE PROPRIETORSHIP AND PARTNERSHIP

- Sole Proprietorship-person or family unit operate and manage business for profit.
- Partnership-two or more persons operate and manage common enterprise for profit
  - joint venture-two existing business join together for a specific project
  - limited partnership-general partner manages and controls business and limited partners merely contribute capital

## FRANCHISE

- Definition-a business opportunity by which an owner (producer or distributor) of a service or trademark product grants exclusive rights to an individual for a local distribution and/ or sale of the service or product, an in return receives payment or royalty and conformance to quality standards

## FRANCHISE

- Licensing Rights
- Continuing Relationship
- Types
  - Product
  - Service
- Origin
  - Middle Ages
  - McCormick, Singer, McDonald and KFC

## FRANCHISE

- Advantages to Franchisee
  - Established Business
  - Technical and Managerial Assistance
  - Quality Control
  - Less Operational Controls
    - Costs
    - Knowledge
    - Experience

## FRANCHISE

- Disadvantages to Franchisee
  - Failed Expectations
  - Service Costs
  - Over Dependence
  - Restriction of Ownership
  - Performance Obligations
  - Termination

## FRANCHISE

- Advantages to Franchiser
  - Expansion
  - Motivation
  - Nonunion
  - Bulk Purchases
  - Use of Capital
  - Cooperative Advertising
  - No Local Hostility and Local Culture

## FRANCHISE

- Disadvantage
  - company owned stores v loss of control
  - recruitment
  - communication and loss of freedom

## CORPORATIONS

- Definition-artificial person created by state to carry out commercial enterprise for profit
- Social Dimensions
  - social efficiency-efficient use of social resources in that those who manage and control corporation have expertise, specialization and division of labor
  - social democracy-price of ownership small to allow for maximum feasible participation

## CORPORATION

- Types of Corporations
  - Public/Private Corporations
  - Charitable Corporations
  - Open/Closed Corporations
  - Subchapter S Corporations

## CORPORATION

- Elements of Corporations
  - Creation Perpetual Life
  - Constitutional Dimensions
  - Capitalization
  - Management and Control of Corporation
  - Limited Liability
  - Transfer of Ownership
  - Fiduciary Duties of Officers and Directors

## CORPORATIONS

- Creation
  - Created under state law. Full Compliance-dejure corporation
- Constitutional-person protected by constitution
  - 1st, 4th, 5th and 14th Amendments
- Perpetual Life-corporation once created takes on existence in and of itself.
  - Separate from owners and creators-

## CORPORATIONS

- Management and Control-Separation of Ownership and Control
  - Shareholders are Owners of corporation. When shareholder purchases share, acquires ownership rights-limited
    - Entitled to Dividends if funds available
    - Inspect Books if proper purpose and have number
    - vote-shareholder meetings-director and fundamental
    - Remaining assets upon dissolution

## CORPORATION

- Management and Control- (con't)
  - Directors-elected by shareholders
    - Minimal Qualifications
    - No Indemnification
    - Vote as Board (no individual powers)
    - Powers-decisions based on information provided by officers
      - appoint officers
      - dividend declaration (information supplied by officers)
      - fundamental changes
      - capital structure

## CORPORATION

- Management and Control
  - Officers-appointed by directors and run day to day affairs of corporation-contract for specified period of time not to exceed directors
    - Agents of Corporations
    - Controls information
    - Maximum Qualifications
    - Experts

## CORPORATION

- Fiduciary Duties
  - Diligence
  - Obedience
  - Loyalty
  - Inform
  - Account

## CORPORATION

- Limited Liability
  - Limited Liability applies to shareholders. Only liable up to their capital contribution. No personal liability unless:
    - Participation in Fraudulent Scheme
    - Benefit from Fraudulent Scheme
  - Officers and Directors Personal Liability
    - Directors less liable if reasonable reliance on information provided by officers.

## DISCRIMINATION

- Constitution, Case and Legislative History
  - Constitutional
    - Article 1, Section 2
    - Article 1, Section 9
  - State Laws
    - Black Codes
    - Fugitive Slave Laws

## DISCRIMINATION

- Constitution, Cases and Laws-continued
  - Statutes
    - Compromise Act of 1850
  - Case
    - Dredd Scott Decisions
  - Constitutional-13th, 14th and 15th
  - Statutes-1981, 1983, 1985
  - Cases-Reconstruction Cases-repeal
    - 1896 Plessy v. Ferguson

## DISCRIMINATION

- Repeal of Discrimination Laws
  - Brown v. Board of Education-immutable characteristics
  - Equal Pay Act of 1962
  - Civil Rights Act of 1964-Title VII
    - Disparate Treatment-discrimination against an individual-intentional discrimination
    - Disparate Impact-discrimination against a group-unintentional discrimination

## DISCRIMINATION

- Disparate Treatment
  - Prima Facie
    - Immutable Characteristics
    - Qualified
    - Application
    - Rejection
    - Continuation

## DISCRIMINATION

- Disparate Treatment
  - Employer's Defenses-articulate nondiscrimination reasons for rejections
    - clear and specific
    - burden of production
    - statistic not enough
    - persuasion
    - full and fair opportunity to respond
    - discovery

## DISCRIMINATION

- Disparate Treatment
  - Employee's Rebuttal-employee must show that employer's defenses is a sham and pretext for discrimination and the true intentions is to discriminate
    - Clear and convincing
    - Intentional Discrimination
    - Statistics Insufficient

## DISCRIMINATION

- Disparate Impact-group discrimination
  - Prima Facie
    - Protected Group
    - Statistics
      - Impacted Area
      - Statistical Breakdown
      - Statistical Comparison
      - Statistical Test
    - Policy or practice that caused discrepancy
      - sole cause v. substantial cause v. nonseparation

## DISCRIMINATION

- Disparate Defenses
  - Employer's Defenses
    - Attack Statistics
    - Bonified Occupational Qualification
    - Job Relatedness-Test
    - Bonified Seniority Program
  - Employees Rebuttal

## DISCRIMINATION

- Remedies
  - Injunctive Relief
  - Back Pay
  - Affirmative Action
    - Voluntary v Involuntary
    - Egregious, Glaring Discrimination
    - Standard-minimize harm-not sole, duration, intentional, alternatives, protection for nonminority and evaluation

## DISCRIMINATION

- Sexual Discrimination
  - Sex as a criteria for employment
  - sex plus
  - sexual stereotype
  - sexual harassment
    - quid pro quo
    - hostile environment-offensiveness, frequency, number, work performance, but for, intent
  - Sexual Preference-not immutable-1st Amendment

## DISCRIMINATION

- Other Laws
  - 1981-contract
  - 1983-government
  - 1985-conspiracy
  - Equal Pay Act
  - Executive Order 11246
  - American Disability Act
  - Civil Rights of 1991

## DISCRIMINATION LAWS

- Summary of Laws
  - 14<sup>th</sup> Amendment
  - Civil Rights Act of 1871-1981, 1983,1985, 1986
  - Equal Pay Act
  - Executive Order 11246
  - Title VII
    - » Race, Gender, National Origin, Religion, Gender Plus
    - » Color-Family, Pregnancy, Privacy
  - Americans Disability Act
  - Civil Rights Act of 1991



## SOURCE OF FUNDS

- Direct-funds for business from investor to business
  - Debt
    - Borrowing
  - Equity
    - Corporate
      - Bonds
      - Shares
  - Savings
- Indirect-funds for business from investor to intermediary (bank or other financial institution) to business-savings converted to investments through bank

## SOURCE OF FUNDS

- Direct Funding-for direct funding from investor to business requires that investor either have savings, borrowing capacity or collateral to secure the loan.

## SOURCE OF FUNDS

- Direct Investment Spending
  - Savings-requires that income high enough that excess save through various methods
    - Savings Account (Time Deposits)
    - Purchase of government or private bonds
    - Insurance Policies (life insurance)
    - Tax Deferred Plans
    - Employee Stock Options Plan

## SOURCE OF FUNDS

- Direct Investment Spending
  - Borrowing-to borrow funds to invest in business, must have collateral and meet other requirements if one wants to open a business. The cost (interest rate) to borrowing depends on whom lends the money. With high interest rates which are usually related to high risk ventures, the cost of doing business is high and affects returns on investment.

## SOURCE OF FUNDS

- Direct Investment Spending
  - Borrowing
    - Friends and Family Members-borrowing from friends and family members affected by cultural values and other social consideration. Cross National Analysis.
      - Low interest rates
      - possible family or friend interference with business
      - affect relationship between friends and family members

## SOURCE OF FUNDS

- Direct Investment Spending
  - Borrowing
    - Banks and other financial institution
      - Banks consider investment spending in minority and poor communities high risk loans
      - Banks require that borrower have sufficient collateral to guarantee repayment in the event of default. Secured transaction and may require higher percentages
      - Higher Interest Rates-illegal under federal and state law unless justified by business necessity
      - Usually requires that business already be in operation. Rarely does bank loan money to start business.

## SOURCE OF FUNDS

- Direct Investment Spending
  - Borrowing
    - Government Loans
      - Favorable Interest Rates
      - Small Business Administration
      - Master Plan
      - Existing Business
      - Provides Consultation
      - Favorable Repayment Loans

## SOURCE OF FUNDS

- Direct Investment
  - Borrowing
    - Collateral-borrowing will usually require that the loan be secured by collateral (something the debtor has an interest in). Sources of collateral: Article 9 of the Uniform Commercial Code
      - Savings
      - Personal Property
      - Real Property
      - Intellectual Property

## SOURCE OF FUNDS

- Direct Investment
  - Equity Financing-the party may fund the business through corporate financing.
    - Review Elements of Corporation
      - Corporation will authorize the issuance of shares or bonds to fund corporate enterprise.
      - Source of funds unlimited depending on how many shareholders purchase the shares or bonds.
      - Bonds
        - » secured
        - » unsecured

## SOURCE OF FUNDS

- Direct Investment Spending
  - Equity (corporate)
  - Shares-purchase of part of ownership of corporation
    - Regulated by statute in terms of issuance and management of corporate affairs
    - shareholders have limited liability
    - through corporate structure, can lose interest in corporation

## SOURCE OF FUNDS

- Direct Investment
  - Minority Perspective
    - Very Good Source of Funds (community savings)
    - Local Control
    - Diversification of Local Funds From Spiritual to secular
    - Controversial-possible collaborative effort between spiritual community and business community
    - Retain Local Human Capital

## SOURCE OF FUNDS

- Indirect Investment
  - Banks and Other Financial Institutions-converts savings into loans-primary function of banks
  - History of Banking as an illustration-Blacksmith and stock of money. Blacksmith's notes replaced gold and coins as money (facilitate exchange)-Blacksmith added to supply of money by granting loans

## SOURCE OF FUNDS

- Indirect Investment
  - Banking
    - source of funds-primarily from savings from the public.
    - Interest rates attracts savers-however, remember, the public saves for a variety of reasons-speculation, precautionary and major purchase
    - Savings dependent on income-higher income earners save more-remember marginal propensity to save and spend

## SOURCE OF FUNDS

- Indirect Investment
  - Banking
    - Loans and Investment-decisions by bank
      - Possibility of Default
      - Personal Relationship with Bank
      - Type of Business
      - Location of Business
      - Range of Interest Rates
      - Collateral Base of Borrower
      - Social Aspects

## SOURCE OF FUNDS

- Indirect Investment
  - Banks
    - General View-loans to minority business is high risk loan
    - Minority Communities-low savings-poor source of funds. Banks prefer to loan to customers who have high savings
    - Banking Community very conservative
    - Glass Ceilings
    - Banking and Corporate Culture

## SOURCE OF FUNDS

- Indirect Investment
  - Banks
    - Minority Banking
      - History-small capitalization-San Bernardino Example
    - Banks and Government Cooperation
      - Small Business Administration
      - Banks and Local Government
        - » Matching Funds
        - » Loan Guarantees

## SECURITIES LAWS

- Corporate Financing
  - Issuance of Securities
    - Equity Securities-stocks
      - common, preferred, cumulative, participating, convertible and redeemable or callable
    - Debt Securities-bonds
      - debenture, mortgage, convertible, callable

## SECURITIES LAWS

- |                                |                                       |
|--------------------------------|---------------------------------------|
| • STOCKS                       | • BONDS                               |
| – ownership                    | – debt                                |
| – no fixed dividend            | – interest must be paid               |
| – voting                       | – no vote                             |
| – no maturity date             | – maturity date                       |
| – all corporations issue stock | – all corporation do not issue bonds  |
| – claim against property       | – priority of claims against property |

## SECURITIES LAWS

- Purpose of Securities Laws
  - Information
    - Information has economic value. Information or lack of information can affect stock and bond value
      - Lack of Information-corporation can be used as an instrument to defraud public. Blue Sky Corporations. Investors invested in nonexistent corporations.
      - Market Information-information circulating in the market affect the market value of shares. Information usually about the corporations performance
        - » Example-Dividend

## SECURITIES LAWS

- What is a security
  - Investment in common enterprise
  - Expectation of Profit
  - Through Efforts of Others
- Various Securities Laws
  - Securities and Exchange Act 1933-initial
  - Securities and Exchange Act 1934-market
  - Insider Trader Sanctions Act-suit and punish
  - Investment Company Act-mutual funds

## SEC 1933

- Applies to Securities that are issued to the public for the first time. Lack of information about corporation that is issuing security. Security must be registered with SEC-
  - Registration
  - Underwriter
  - Waiting Period

## SEC 1933

- Key Terms
  - exempt security-examine who is issuing security
  - exempt security transaction-to whom is security being issued
  - shelf registration-once registered, update
  - restricted security-purchaser must hold security for one year-on legend of stock certificate

## SEC 1933

- Exempt Security
  - Banks Government
  - commercial paper (9 months) Small Corp-1.5
  - charitable organization Intrastate
  - corporate reorganization
  - Exchange Securities
  - finance railroad
  - insurance

## SEC 1933

- Exempt Security Transaction
  - Private Offerings
  - Public Information
  - Accredited Investor
    - no solicitation
    - no more than 35 unaccredited
    - sec notified
    - no resale

## SEC 1934

- Regulates Market Transaction in Securities
  - Insider Trading
    - 10 B-prohibits fraud in connection with the purchase or sale of securities-material misrepresentation or omission-one person
    - 10 B 5-material omission or misrepresentation
    - Tipper/Tippee-source of information from within corporation, nonpublic, material and knowledge
    - misappropriation theory-stealing information that belongs to another (corporation)

## SEC 1934

- Insider Trading (continued)
  - Section 16b- an officer, director or 10% shareholder cannot buy and sell or sell and buy within six months.
    - Strict Liability
    - Proxy Solicitation-14 a-no material misstatement in the solicitation of proxy votes.

## INSIDER TRADER SANCTIONS ACT

- SEC can bring suit in federal court for anyone violating its rules and regulations
  - Violation must occur on or through national securities exchange facilities, broker or dealer
  - Bounty Payments-persons who provide information leading to prosecution

## INVESTMENT COMPANY ACT

- Investment Companies-act on behalf of many smaller shareholders/owners by buying and selling a large portfolio of securities and managing the portfolio
  - Mutual Funds
  - Registration
  - Stock held by bank or trust company
  - Dividends paid from net income

# SECURITIES VIOLATIONS

- **COPORATE FINANCING**
  - Debt Financing-Bonds-debenture, mortgage, convertible, callable
  - Equity Financing-stocks-preferred and Common, cumulative, participating, convertible, callable
- **Securities and Exchange Commission-Functions-disclosure, investigation, regulating trade, brokers, sanctions**
- **Security**
  - investment in common enterprise
  - effort of others
  - expectation of profit
- **Securities and Exchange Act of 1933**
  - **Registration Statement**
    - Description of securities
    - Registrants Properties
    - Management
    - financial statement
    - lawsuits
  - **Exempt Securities-banks, commercial paper, charitable organizations, corporate reorganization, exchange, railroad, insurance contract, government, small amount (5 million within 12 months**

- Exempt Security Transaction
  - Restricted Security
  - Shelf Registration
    - Regulation D-small offerings
      - » Rule 504 Noninvestment Company
      - » Business opportunities
      - » accredited investor-experience, private, knowledge, wealthy, n
      - » Private Offerings
- Intrastate
- Resale
- Current Information

- **Security and Exchange Act of 1934-Insider Trading**
  - 10B-to employ any device, scheme or artifice to defraud; untrue statements, defraud
    - only officers, directors and majority shareholders
  - 10-b-5-any person who has access to or receiving nonpublic information
    - Tipper-Tippee
    - True Insiders
    - misappropriation theory
    - elements-interstate commerce, defraud, reliance, justifiable, loss
  - 16b-Insider cannot buy and sell or sell and buy within six months
  - 14b-proxy solicitation-material misrepresentation
- **Investment Companies-1940-mutual funds-registration**
- **State Securities**
  - Article 8 of the Uniform Commercial Code-transfer
  - Blue Sky Laws
  - Common Law -corporation has been injured and can sue