witnesses may testify only about facts of which they have personal knowledge. A special class of witnesses—**expert witnesses**—possesses special knowledge or expertise. They are allowed to testify at trial not only about facts (as ordinary witnesses do) but also about the professional conclusions they draw from those facts. Fingerprint experts, chemists, and ballistics experts are examples of expert witnesses who often appear in criminal trials. Doctors, psychologists, and economists are examples of expert witnesses who often appear in civil trials. A heated debate over the use and misuse of expert witnesses questions whether some experts shape their testimony to fit the needs of the client who is paying them (Champagne, Shuman, and Whitaker 1992).

Evidence is also classified as direct or circumstantial. **Direct evidence** refers to the proof of a fact without the need for other facts leading up to it. **Circumstantial evidence** is evidence that indirectly proves a main fact in question. For example, testimony that the person was seen walking in the rain is direct evidence the person walked in the rain, but testimony that the person was seen indoors with wet clothing is circumstantial evidence the person walked in the rain. Contrary to popular belief, the law considers circumstantial evidence as reliable as direct evidence, and defendants can be and have been convicted on circumstantial evidence alone.

During trial, the examination of each witness called to testify is conducted according to the following three steps. The first step, **direct examination**, consists of questioning by the attorney for the party who calls the witness. The objective is to establish the facts or the claim of that party. Attorneys generally may not ask their own witnesses **leading questions**, that is, questions that suggest the answer. For instance, if the attorney asks, "You've never seen this gun before, have you?" the witness is almost told to say "no." The second step, **cross-examination**, involves questioning by the opposing counsel. Cross-examination offers the opportunity to attack the credibility of the opponent's witness and his or her testimony and is limited to matters covered on direct examination. Leading questions are permissible, however (whereas they are not in direct examination), because they promote the purpose of cross-examination. The third step, **redirect examination**, involves questioning by the attorney who conducted the direct examination. Redirect examination is generally used to "rehabilitate" the witness following cross-examination, that is, to recapture his or her lost credibility. The subject matter is usually limited to matters covered during cross-examination.

The admission of proof at trial is governed by the rules of evidence. A trial is an adversary proceeding in which the rules of evidence resemble the rules of a game and the judge acts as an impartial umpire. These rules of evidence have developed primarily out of appellate court decisions rather than from legislative enactments. Although they may seem to be fixed and rigid, they are not. Like all other legal principles, rules of evidence are general propositions that must be applied to specific instances. During such applications, judges use a balancing test, carefully weighing whether the trial would be fairer with or without the piece of evidence in question.

The purpose of the adversary process is to get at the truth; the primary purpose of rules of evidence is to help achieve that end. For instance, a judge who feels the jury would give certain evidence undue weight or would be greatly prejudiced by that evidence would not allow it to be presented. Some rules of evidence, however, have purposes other than truthfulness. Because the law seeks to protect the secrecy of communi-

cations (legally called "privileged communications") between doctor and patient, lawyer and client, and husband and wife, such communications are normally not admissible in open court. Similarly, under the exclusionary rule, illegally seized evidence is inadmissible (even if trustworthy), because the law seeks to discourage such activities. Most major rules of evidence, however, are directed at achieving the truth. The principles governing the admissibility of evidence may be briefly summarized under the headings of trustworthiness and relevance.

Trustworthiness This is the basic criterion for admissibility of evidence. The objective of the evidentiary system is to ensure that only the most reliable and credible facts, statements, or testimony are presented to the fact finder. The best evidence rule illustrates this point. Ordinarily, only the original of a document or object is admissible because a copy may have been altered. Similarly, a judge may rule that a person of unsound mind or a very young child is not a competent witness because he or she may not understand what was seen or heard. The mere fact that evidence is legally ruled to be admissible does not, of course, mean the jury must believe it. A wife's alibi for her husband may be competent evidence, but the jury may choose not to believe her.

Hearsay is secondhand evidence. It is testimony a witness provides that is not based on personal knowledge but is a repetition of what another person has said. An example is someone's testimony that "my brother Bob told me he saw Jones enter the store that evening." The general rule is that hearsay evidence is not admissible, because it is impossible to test its truthfulness: There is no way to cross-examine to find the truth of the matter. The rules for whether hearsay may be used are among the more complex in the law. Among the numerous exceptions are dying declarations.

Relevance To be admissible, evidence must also be **relevant** to the case; there must be a valid reason for introducing the statement, object, or testimony. Evidence not related to an issue at trial is termed **immaterial** or **irrelevant**. If, for example, a defendant is accused of murder, the issue is whether he or she killed the deceased. Evidence about the defendant's intention to commit the offense and his or her ability to commit the offense are all relevant. But evidence about the defendant's character—prior convictions or a reputation for dishonesty, for instance—is normally inadmissible, because it is not material to the issue of whether the defendant committed the crime. If, however, the defendant testifies, such evidence is admissible during rebuttal to impeach (cast doubt on) his or her credibility.

Scientific Evidence

Scientific evidence, such as blood, hairs, firearms, toolmarks, and fingerprints, is now routinely admitted into evidence if it meets the traditional yardsticks of the rules of evidence—trustworthiness and relevance. When the technologies for gathering and measuring those forms of evidence first emerged, however, their use as evidence was far from routine. Moreover, not all evidence based on "science" is necessarily admissible. Polygraph examinations and testimony gained from hypnosis are generally not admissible as evidence.

Separating science from pseudoscience is never an easy task. For seventy years, the "general acceptance" test was the dominant standard for determining the admissibility of novel scientific evidence at trial. This test was defined as follows:

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential forces of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs. (*Frye v. United States* 1923)

In the modern era, some courts rejected the "general acceptance" prong of the *Frye* test, holding that this nose-counting approach was no longer adequate in the face of rapid developments in science (Labaton 1990). Following that trend, the Supreme Court rejected the *Frye* standard, arguing that it had been replaced by the Federal Rules of Evidence. The Court assigned federal judges an active role in screening scientific evidence. "The trial judge must ensure that any and all scientific testimony or evidence is not only relevant but reliable" (*Daubert v. Merrell Dow Pharmaceuticals Co.* 1993). *Daubert* has particular applicability in civil cases, where critics argue that "junk science" (unreliable findings by persons with questionable credentials) is producing too many civil lawsuits. For example, *Daubert* has resulted in trial judges ruling that juries should not hear certain types of scientific evidence (Buchman 2004).

The use of DNA (deoxyribonucleic acid) as evidence has sparked considerable debate. Initially, judges and lawyers debated whether such evidence was admissible, but those legal battles have now been resolved. One dimension of the contemporary debates focuses on the reliability of crime labs. In a basic sense, crime labs have become a victim of their own success, with requests for scientific tests growing faster than their budgets. Increasingly, convicts and their representatives are demanding that old cases be reopened so that DNA tests (not available at the time of the original trial) can be performed. These requests are most often identified with the issue of innocents on death row (see Chapter 13). Moreover, in recent years, some crime labs have been identified as having conducted substandard tests, which has resulted in the overturning of some criminal convictions.

Objections to the Admission of Evidence

During trial, attorneys must be continuously alert, ready to make timely objections to the admission of evidence. After a question is asked but before the witness answers, attorneys may object. The court then rules on the objection and permits the evidence to be admitted or not. The judge may rule immediately or may request the lawyers to argue the legal point out of the hearing of the jury (termed a sidebar conference).

Occasionally, inadmissible evidence is heard by the jury. When that occurs and the attorney objects, the judge instructs the jury to disregard the evidence. Even with such a cautionary warning, however, jurors may still be influenced by that evidence. If the erroneous evidence is deemed so prejudicial that a warning to disregard is not sufficient, the judge may declare a **mistrial**.

The Defense Presents Its Case

Although a trial is generally expected to be a battle along the lines of "You did it," "No, I didn't," such a view greatly oversimplifies the tactical decisions involved. In deciding on trial strategy, attorneys must carefully consider their opponent's strengths and weaknesses and how the jury is likely to react. The defense must also consider whether the trial should be before a jury or before the judge only (a **bench trial**). In some situations, the defendant alone has the option of waiving the right to trial by jury, but, in others, the opposition must also agree. Most trials, however, are jury trials. Within those constraints, the defense attorney can construct a case along one of two broad lines: burden of proof or denial (see Table 12.1).

Because the moving party bears the burden of proof, the defense does not have to call any witnesses or introduce any evidence. Thus, one defense strategy is to force the prosecutor or the plaintiff to prove the case. The key to such a strategy is the skillful use of cross-examination. In criminal cases, the defense attorney can try to undermine the state's case and create in the jurors' minds a reasonable doubt about whether the defendant committed the crime. Similarly, in civil cases, the defense attorney can try to undermine the plaintiff's case and create in the jurors' minds doubt that a preponderance of evidence shows the defendant to be liable. But many experienced attorneys believe the burden-of-proof defense is actually weak. To gain an acquittal or a finding of no liability, the defense must give the jurors something to "hang their hats on"—that is, the defense attorney must consider ways to deny the allegations.

In a criminal case, the most straightforward way of denying the state's charges is to call the defendant to the stand. The Fifth Amendment protects a defendant from being compelled "in any criminal case to be a witness against himself." If the defendant chooses not to testify, no comment or inference can be drawn from that fact. The prosecutor cannot argue before the jury that "if he is innocent, why doesn't he take the stand and say so?" (*Griffin v. California* 1965). But, that legal protection aside, jurors are curious about the defendant's version of what happened. They expect the defendant to argue his or her innocence, and in the secrecy of the jury room, jurors often ponder why the defendant refused to testify. In considering whether to call the defendant to the stand, the defense attorney must assess whether the story is believable. If it is not, the jury will probably dismiss it, doing more harm to the defendant's case than if he or she had not testified at all. Moreover, a defendant who testifies in his or her own behalf is subject to cross-examination like any other witness. Once the defendant chooses to testify, the prosecutor can bring out all the facts surrounding the event testified to. Just as important, once the defendant has taken the stand, the state can impeach the defendant's credibility by introducing into evidence any prior felony convictions. The defense attorney must make the difficult decision whether to arouse the jurors' suspicions by not letting the accused testify or let the defendant testify and be subjected to possibly damaging cross-examination. "Damned if they do, damned if they don't" is the conclusion of a research project that interviewed jurors in capital murder trials. In general, jurors wanted the defendants to testify during trial and were confused when they didn't. But when defendants chose to testify, jurors concluded that they were lying and showed no remorse (Antonio and Arone 2005).

TABLE 12.1 Steps of the Process

	Law on the Books	Law in Action
Trial	The adversarial process of deciding a case through the presentation of evidence and arguments about the evidence.	Only a handful of felonies and even fewer misdemeanors are decided by trial.
Bench trial	Trial before a judge without a jury.	Defense prefers when the issues are either highly technical or very emotional.
Jury trial	A group of average citizens selected by law and sworn in to look at certain facts and determine the truth.	Introduces public standards of justice into the decision-making process.
Jury selection	Process of selecting a fair and impartial jury.	Each side seeks to select jurors who are biased in its favor.
Master jury list	Potential jurors are selected by chance from a list of potential jurors. List should reflect a representative cross section of the community.	Selecting only from registered voters means that the poor, the young, and minorities are less likely to be called.
Venire	A group of citizens from which jury members are chosen (jury pool).	Judges vary in their willingness to excuse potential jurors because of hardship.
Voir dire	The process by which prospective jurors are questioned to determine whether there is cause to excuse them from the jury.	Lawyers use questioning to predispose jurors in their favor.
Peremptory challenge	Each side may exclude a set number of jurors without stating a reason.	Both sides use peremptory challenges to select a jury favorable to their side.
Challenge for cause	A judge may dismiss a potential juror if the person cannot be fair and objective.	Rarely granted.
Opening statements	Lawyers discuss what the evidence will show.	Lawyers use to lead the jury to a favorable verdict.
Prosecutor's case in chief	The main evidence offered to prove the defendant guilty beyond a reasonable doubt.	Defense suggests that the prosecution has not met its burden of proof.
Witness	A person who makes a statement under oath about the event(s) in question.	Through cross-examination, defense undermines the credibility of the witness.
Expert witness	A person possessing special knowledge or experience who is allowed to testify not only about facts but also about conclusions he or she has drawn.	Some expert witnesses testify only for one side or the other because their conclusions are predictable.
Defense's case in chief	Evidence that defense may present. Because the defendant is innocent until proven guilty, the defense is not required to present evidence.	Defense may rest without calling witnesses, but jurors expect to hear reasons why they shouldn't convict.
Witness	The defendant may waive his or her privilege against self-incrimination and testify.	Defense attorneys are reluctant to call the defendant to the stand, particularly if there is a prior conviction.
Rebuttal	Evidence that refutes or contradicts evidence given by the opposing party.	Prosecutor will call witnesses to undermine a defendant's alibi.

TABLE 12.1 Steps of the Process (Continued)

	Law on the Books	Law in Action
Closing arguments	After all the evidence has been presented, each side sums up the evidence and attempts to convince the jury why its side should win.	Many trial attorneys believe that a good closing argument will win the case. Attempts to convince the jury why its side should win.
Prosecution	Because the prosecution bears the burden of proof, the prosecutor goes first and last.	The district attorney goes first and provides an orderly summary of the evidence.
Defense	Closing argument of the defense highlights the evidence leading to a not-guilty verdict.	Typically stresses that the prosecutor has failed to prove the defendant guilty beyond a reasonable doubt.
Prosecution	Rebuts defense allegations.	Impassioned statement, calling upon jurors to do their duty and convict the guilty.
Jury instructions	Explanations by the judge informing the jury of the law applicable to the case.	Legal language difficult for average citizens to follow.
Jury deliberations	Jurors are repeatedly instructed not to talk about the case. Jurors deliberate in private. Jurors select a foreperson and discuss the case. Jurors may request further instructions from the judge. Jurors take an oath to follow the law as instructed by the judge.	Jurors routinely talk with other jurors about the case. Higher-status individuals participate more. The first vote is usually decisive. Such requests produce great anxiety among lawyers. Some juries introduce popular law into the decision-making process.
Verdict	Decision that the defendant is either guilty or not guilty (acquittal).	Juries convict three out of four times. Jury verdicts often reflect a compromise.
Hung jury	Jury is unable to reach a verdict.	Defense attorneys consider a hung jury an important victory.
Post-verdict motions	Motions filed by the defense after conviction and before sentencing.	Judge must accept a verdict of not guilty.
Motion in arrest of judgment	Defense argues that the jury could not have reasonably convicted the defendant based on the evidence presented.	Trial judges are very reluctant to second-guess jury verdicts and almost never grant this motion.
Motion for a new trial	Defense argues that the trial judge made mistakes and that therefore a new trial should be held.	On very rare occasions, trial judges admit that an error occurred and set aside a jury verdict of guilty.

In a civil case, the defense can construct a denial defense around the evidence and witnesses available. In a tort case, for example, the defense may call eyewitnesses who saw the accident differently from those summoned by the plaintiff. In a suit for manufacturing defective merchandise, the defense may call company officials to testify about how carefully the product was designed and manufactured and suggest that the real problem is that the plaintiff did not use the product in the manner intended. In tort actions requesting large sums of money, however, the central question is often the amount of damages rather than liability. In such situations, the defense may call expert wit-

nesses to suggest that the plaintiff's injuries are much less extensive than suggested by the other side and that the amount of money requested is way out of proportion to any injuries that might have been suffered.

Rebuttal

After the defense rests its case, the moving party may call **rebuttal** witnesses. For example, the prosecutor may call a rebuttal witness to show that the defendant's alibi witness could not have observed what she said she did because she was somewhere else at the time. Or the prosecutor may present evidence to show that the previous witnesses have dishonorable reputations. The rules of evidence regarding rebuttal witnesses are complex. In general, evidence may be presented in rebuttal that could not have been used during the prosecution's case in chief. For example, if the defendant has taken the stand, the prosecution may legitimately inform the jury of the previous convictions of the defendant in an attempt to impeach his or her credibility.

Closing Arguments

When both sides have rested (that is, completed the introduction of evidence), each party has the opportunity to make a **closing argument** to the jury. Like opening statements, closing arguments do not constitute evidence. Closing arguments allow each side to sum up the facts and indicate why it believes the jury should return a verdict in its favor. The moving party goes first, carefully summarizing the facts of the case and tying together into a coherent pattern what appeared during the trial to be isolated or unimportant matters. Next, the defense attorney highlights favorable evidence, criticizes the witnesses for the other side, and indicates why they should not be believed. Because the moving party bears the burden of proof, it is allowed the final closing argument, which is often used to rebut assertions made by the defense during its closing statements.

Closing arguments to the jury call for lawyers to muster all the art and craft, skill and guile of their profession. Closing arguments are often the most dramatic parts of the trial. There is a fine line, however, between persuasiveness and unnecessary emotionalism. Jury verdicts in criminal cases have been reversed on appeal because the prosecutor interjected prejudicial statements into the closing argument.

Jury Instructions

Although the jury is the sole judge of the facts of the case, the judge alone determines the law. Therefore, after closing arguments, the court instructs the jury in the meaning of the law that is applicable to the facts of the case. These **jury instructions** include discussions of general legal principles (proof beyond a reasonable doubt or the preponderance of the evidence), as well as specific instructions concerning the law governing the current case. In criminal cases, the judge instructs the jury in the meaning of the specific criminal law the defendant is charged with violating (for example, burglary). In civil cases, the judge instructs the jury in the meaning of the specific legal standards

the defendant is charged with violating (for example, negligence). Finally, the judge instructs the jury about possible verdicts in the case and provides a written form for each. In a trial for homicide, for instance, the jury is instructed that, under state law, the jury either may find the defendant guilty of murder in the first degree, murder in the second degree, or manslaughter, or may acquit on all charges.

The judge and the attorneys prepare the jury instructions during the charging conference. Each side drafts suggested instructions, and the judge chooses the ones that seem most appropriate. If the judge rejects a given instruction, the lawyer may enter an objection on the record, thus preserving the issue for later appeal. Jury instructions are written out, signed by the judge, and then read to the jury.

Jury instructions represent a formal, detailed lecture on the law. Because faulty jury instructions are a principal basis for appellate court reversal, judges are careful in their wordings. As a result, these instructions contain extensive amounts of legal jargon not readily understood by nonlawyers (Steele and Thornburg 1991). Some have made efforts to increase jurors' understandings of these vital matters (Ellwork, Sales, and Alfini 1982; Severance and Loftus 1982). One experiment found that clarifying the meaning of the judge's jury instructions did increase understanding but that jurors still did not have an accurate knowledge of the law. The jury instructions stressed that a defendant is presumed innocent until proven guilty by the evidence beyond any reasonable doubt; yet, after hearing and reading the modern instructions on this matter, only 50 percent of the jurors understood that the defendant did not have to present any evidence of innocence, 10 percent were uncertain as to what the presumption of innocence was, and a small but still-important 2 percent believed that the burden of proof of innocence rested with the defendant (Strawn and Buchanan 1976).

The Jury Decides

How juries decide has long fascinated lawyers and laypeople alike. There is a great deal of curiosity about what goes on behind the guarded jury room door. During trial, jurors are passive spectators who are not allowed to ask questions and are typically prohibited from taking notes. After the judge reads the instructions to the jury, however, the lawyers, the judge, and the litigants must wait passively, often in tense anticipation, for the jury to reach a verdict. The only hint of what is occurring during jury deliberations occurs on the rare occasions when the jurors request further instructions from the judge about the applicable law or ask to have portions of the testimony that was given in open court reread to them.

What Motivates a Jury?

Because jury deliberations are secret, research on what factors motivate a decision must be conducted indirectly. Much of what is known about how juries decide is based either on observing mock juries or on asking jurors to recall what occurred in the jury room. Researchers at the University of Chicago Law School conducted the major studies on jury deliberation. They found that rates of participation varied with social status: Men talked more than women, better-educated jurors participated more frequently, and persons with high-status occupations were more likely to be chosen as foreperson