

What Civil Law Attorneys Should Know about the Common Law

■ by *Larry D. White**

As we all have been taught, there are two major legal systems in the world – the common law system and the civil law system, right? But what is the common law? If you look up the term in a legal dictionary, such as Black’s Law Dictionary, you could find the following for common law: “The body of law derived from judicial decisions, rather than statutes or constitutions.”¹

However, that explanation is a bit simplistic; the difference between civil law and common law is not just the source of the law – statutes or judicial decisions – but is more about a different approach to law. Let’s discuss these differences.

Judges – the judge in a common law trial is there for fairness, not outcome. I think it is safe to say that the judge in a civil law system is responsible for ensuring the legal result is proper. The judge in a common law trial is responsible to ensure that the proceedings were fair according to the law. However, if a legal point was not raised at trial, the judge is not at fault—the attorney is.

Attorneys – the attorneys in a common law trial bear the brunt of the burden to ensure that their clients “have their day in court.” In the common law, I like to think of two guiding concepts:

1. There are not right and wrong arguments, but better and worse
2. Everything can be challenged

The second statement is a very broad one and possibly counterintuitive. What do I mean by “everything can be challenged”? Well, I mean everything. Under the American Federal Rules of Civil Procedure,² Rule 11b states:

“By presenting to the court a pleading, written motion, or other paper — whether by signing, filing, submitting, or later advocating it — an attorney or unrepresented party certifies that to the best of

* Lecturer at Ankara University, Faculty of Law. He can be contacted at “white@law.ankara.edu.tr”.

¹ Second Pocket Edition, 114.

² State courts have their own, but similar rules.

the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.”

Subparagraph (2) leaves a great deal of room for attorneys – you can even argue for a complete reversal of existing law! Ludicrous? Perhaps not.

If we look at the common law as a constantly evolving creature, it is easy to see how various parts of the law can change at different rates. For example, contract law could evolve quickly whereas perhaps family law could develop much more slowly. Therefore, as a result of changes in contract law, some family law concepts would then be “out of synch” or incongruous with contract law. Therefore, it would be quite appropriate for a case to be filed that would seek to align these concepts across the “boundaries” of different areas of the law. As such, cases to challenge the existing structure are designed to harmonize the various areas of the law.

I think inherent in the common law tradition is a belief that this harmony of the law is something we constantly seek – not only harmony within the law itself but harmony with the evolving values of society. One burden we have to bear is the fact that lawmakers want to constantly put forth new legislation to reflect these new ideas. One of the great philosophers of the common law, Oliver Wendell Holmes, did not trust the legislature to mesh the new concepts with the old but considered that to be the job of the judiciary, assisted by the bar.³

Therefore, the next time you see a case that appears to contradict the law, it may be a lawyer trying to challenge the existing regime, based on evolution of other areas of the law, to foster greater harmony between the law and the society it represents. This is a core concept of the common law.

³ See Oliver Wendell Holmes, *The Common Law*, 1881.