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| Chapter 2 |
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**Courts and Alternative**

**Dispute Resolution**

**Introduction**

Despite the substantial amount of litigation that occurs in the United States, the experience of many students with the American judicial system is limited to little more that some exposure to traffic court. In fact, most persons have more experience with and know more about the executive and legislative branches of government than they do about the judicial branch. This chapter provides an excellent opportunity to make many aware of the nature and purpose of this major branch of our government.

One goal of this text is to give students an understanding of which courts have power to hear what disputes and when. Thus, the first major concept introduced in this chapter is jurisdiction. Careful attention is given to the requirements for federal jurisdiction and to which cases reach the Supreme Court of the United States. It might be emphasized at this point that the federal courts are not necessarily superior to the state courts. The federal court system is simply an independent system authorized by the Constitution to handle matters of particular federal interest. This chapter also covers the nuts and bolts of the judicial process.

Finally, the chapter reviews alternatives to litigation that can be as binding to the parties involved as a court’s decree. Thus, alternative dispute resolution, including methods for settling disputes in online forums, is the chapter’s third major topic. Among important points to remind students of during the discussion of this chapter are that most cases in the textbook are appellate cases (except for federal district court decisions, few trial court opinions are even published), and that most disputes brought to court are settled before trial. Of those that go through trial to a final verdict, less than 4 percent are reversed on appeal. Also, it might be emphasized again that in a common law system, such as the United States’, cases are the law. Most of the principles set out in the text of the chapters represent judgments in decided cases that involved real people in real controversies.

**Chapter Outline**

**I. The Judiciary’s Role in American Government**

The essential role of the judiciary is to interpret and apply the law to specific situations.

**A. Judicial Review**

The judici­ary can decide, among other things, whether the laws or actions of the other two branches are constitutional. The process for making such a determination is known as judicial review.

**B. The Origins of Judicial Review in the United States**

Judicial review was a new concept at the time of the adoption of the Constitution, but it is not mentioned in the document. Its application by the United States Supreme Court came soon after the United States began, notably, in the case of *Marbury v. Madison.*

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| Enhancing Your Lecture— |
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|  Judicial Review in Other Nations  |
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| The concept of judicial review was pioneered by the United States. Some maintain that one of the reasons the doctrine was readily accepted in this country was that it fit well with the checks and balances designed by the founders. Today, all established constitutional democracies have some form of judicial review—the power to rule on the constitutionality of laws—but its form varies from country to country. |
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| For example, Canada’s Supreme Court can exercise judicial review but is barred from doing so if a law includes a provision explicitly prohibiting such review. France has a Constitutional Council that rules on the constitutionality of laws *before* the laws take effect. Laws can be referred to the council for prior review by the president, the prime minister, and the heads of the two chambers of parliament. Prior review is also an option in Germany and Italy, if requested by the national or a regional government. In contrast, the United States Supreme Court does not give advisory opinions; be before the Supreme Court will render a decision only when there is an actual dispute concerning an issue. |
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| For Critical Analysis |
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| In any country in which a constitution sets forth the basic powers and structure of government, some governmental body has to decide whether laws enacted by the government are consistent with that constitution. ***Why might the courts be best suited to handle this task?*** ***Can you propose a better alternative?*** |
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**II. Basic Judicial Requirements**

**A. Jurisdiction**

Jurisdiction is the power to hear and decide a case. Before a court can hear a case, it must have jurisdiction over both the person against whom the suit is brought or the property involved in the suit and the subject matter of the case.

**1. Jurisdiction over Persons or Property**

Power over the person is referred to as *in personam* jurisdiction; power over property is referred to as *in rem* jurisdiction.

**a. Long Arm Statutes**

Generally, a court’s power is limited to the territorial boundaries of the state in which it is located, but in some cases, a state’s long arm statute gives a court jurisdiction over a nonresident.

**b. Corporate Contacts**

A corporation is subject to the jurisdiction of the courts in any state in which it is incorporated, in which it has its main office, or in which it does business.

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| **Additional Background—** |
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| **Long Arm Statutes** |
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| A court has personal jurisdiction over persons who consent to it—for example, persons who reside within a court’s territorial boundaries impliedly consent to the court’s personal jurisdiction. A state **long arm statute** gives a state court the authority to exercise jurisdiction over nonresident individuals under circumstances specified in the statute. Typically, these circumstances include going into or communicating with someone in the state for limited purposes, such as transacting business, to which the claim in which jurisdiction is sought must relate. |
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| The following is New York’s long arm statute, New York Civil Practice Laws and Rules Section 302 (NY CPLR § 302). |
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| MCKINNEY’S CONSOLIDATED LAWS OF NEW YORK ANNOTATED |
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| CHAPTER EIGHT OF THE CONSOLIDATED LAWS |
| **ARTICLE 3—JURISDICTION AND SERVICE, APPEARANCE AND CHOICE OF COURT** |
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| **§ 302. Personal jurisdiction by acts of non-domiciliaries** |
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| **(a) Acts which are the basis of jurisdiction.** As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent: |
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| 1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or |
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| 2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or |
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| 3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he |
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| (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or |
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| (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or |
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| 4. owns, uses or possesses any real property situated within the state. |
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| **(b) Personal jurisdiction over non-resident defendant in matrimonial actions or family court proceedings.** A court in any matrimonial action or family court proceeding involving a demand for support, alimony, maintenance, distributive awards or special relief in matrimonial actions may exercise personal jurisdiction over the respondent or defendant notwithstanding the fact that he or she no longer is a resident or domiciliary of this state, or over his or her executor or administrator, if the party seeking support is a resident of or domiciled in this state at the time such demand is made, provided that this state was the matrimonial domicile of the parties before their separation, or the defendant abandoned the plaintiff in this state, or the claim for support, alimony, maintenance, distributive awards or special relief in matrimonial actions accrued under the laws of this state or under an agreement executed in this state. |
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| **(c) Effect of appearance.** Where personal jurisdiction is based solely upon this section, an appearance does not confer such jurisdiction with respect to causes of action not arising from an act enumerated in this section. |
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**2. Jurisdiction over Subject Matter**

Subject-matter jurisdiction involves limitations on the types of cases a court can hear—a court of general jurisdiction can hear virtually any type of case, except a case that is appropriate for a court of limited jurisdiction. The limits may be by—

• The subject of the suit.

• The sum in controversy.

• Whether the case involves a felony or a misdemeanor.

• Whether the proceeding is a trial or an appeal.

**3. Original and Appellate Jurisdiction**

Courts of original jurisdiction are trial courts; courts of appellate jurisdiction are reviewing courts.

**4. Jurisdiction of the Federal Courts**

**a. Federal Questions**

A suit can be brought in a federal court whenever it involves a question arising under the Constitution, a treaty, or a federal law.

**b. Diversity of Citizenship**

A suit can be brought in a federal court whenever the amount in controversy is more than $75,000 and the suit involves—

• Citizens of different states,

• A foreign coun­try and an American cit­izen, or

• A foreign citizen and an American citizen.

For diversity-of-citizenship purposes, a corporation is a citizen of the state in which it is incorporated and of the state in which it has its principal place of business.

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| **Additional Background—** |
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| **Diversity of Citizenship** |
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| Under Article III, Section 2 of the United States Constitution, diversity of citizenship is one of the bases for federal jurisdiction. Congress further limits the number of suits that federal courts might otherwise hear by setting a minimum to the amount of money that must be involved before a federal district court can exercise jurisdiction. |
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| The following is the statute in which Congress sets out the requirements for diversity jurisdiction, including the amount in controversy. |
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| UNITED STATES CODE |
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| TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE |
| **PART IV—JURISDICTION AND VENUE** |
| **CHAPTER 85—DISTRICT COURTS; JURISDICTION** |
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| **§ 1332. Diversity of citizenship; amount in controversy; costs** |
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| (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between-- |
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| (1) citizens of different States; |
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| (2) citizens of a State and citizens or subjects of a foreign state; |
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| (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and |
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| (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States. |
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| For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled. |
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| (b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff. |
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| (c) For the purposes of this section and section 1441 of this title— |
| (1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and |
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| (2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent. |
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| (d) The word “States”, as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico. |
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| (June 25, 1948, c. 646, 62 Stat. 930; July 26, 1956, c. 740, 70 Stat. 658; July 25, 1958, Pub. L. 85-554, § 2, 72 Stat. 415; Aug. 14, 1964, Pub. L. 88-439, § 1, 78 Stat. 445; Oct. 21, 1976, Pub. L. 94-583, § 3, 90 Stat. 2891; Nov. 19, 1988, Pub. L. 100-702, Title II, §§ 201 to 203, 102 Stat. 4646 ; Oct. 19, 1996, Pub. L. 104-317, Title II, § 205(a), 110 Stat. 3850.) |
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**5. Exclusive versus Concurrent Jurisdiction**

When a case can be heard only in federal courts or only in state courts, exclusive jurisdiction exists. Federal courts have exclusive jurisdiction in—

• Cases involving federal crimes, bankruptcy, patents, copyrights, and trademarks.

• Suits against the United States.

• Some areas of admiralty law.

States have exclusive jurisdiction in—

• Divorces.

• Adoptions.

When both state and federal courts have the power to hear a case, concurrent jurisdiction exists. In such a case, factors for choosing one forum over another include—

• Availability of different remedies.

• Distance to the courthouse.

• Experience or reputation of the judge.

• The court’s bias for or against the law, the parties, or the facts in the case.

B. Jurisdiction in Cyberspace

The basic question is whether there are sufficient minimum contacts in a jurisdiction if the only connection to it is an ad on the Web originating from a remote location.

**1. The “Sliding-Scale” Standard**

One approach is the sliding scale, according to which—

• Doing substantial business online is a sufficient basis for jurisdiction.

• Some Internet interactivity may support jurisdiction.

• A passive ad is not enough on which to base jurisdiction.

**2. International Jurisdictional Issues**

The minimum-contact standard can apply in an international context. As in cyberspace, a firm should attempt to comply with the laws of any jurisdiction in which it targets customers.

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| **Case Synopsis—** |
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| **Case 2.1: *Gucci America, Inc. v. Wang Huoqing*** |
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| Gucci America, Inc., a New York corporation, makes footwear, belts, sunglasses, handbags, and wallets. Gucci uses twenty-one trademarks associated with its goods. Wang Huoqing, a resident of the People’s Republic of China, offered for sale through his websites counterfeit Gucci goods. Gucci hired a private investigator in California to buy goods from the sites. Gucci then filed a suit against Huoqing in a federal district court, seeking damages and an injunction preventing further trademark infringement. The court first had to determine whether it had jurisdiction. |
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| The court held that it had personal jurisdiction over Wang Huoqing. The U.S. Constitution’s due process clause allows a federal court to exercise jurisdiction over a defendant who has had sufficient minimum contacts with the court’s forum. Huoqing’s fully interactive websites met this standard. Gucci also showed that within the forum Huoqing had made at least one sale—to Gucci’s investigator. The court granted Gucci an injunction. |
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| **Notes and Questions** |
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| ***What do the circumstances and the holding in this case suggest to a business firm that actively attempts to attract customers in a variety of jurisdictions?*** This situation and the ruling in this case indicate that a business firm actively attempting to solicit business in a jurisdiction should be prepared to appear in its courts. This principle likely covers any jurisdiction and reaches any business conducted in any manner. |
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| ***Is it relevant to the analysis of jurisdiction that Gucci America’s principal place of business is in New York state rather than California?*** Explain. The fact that Gucci’s headquarters is in New York state was not relevant to the court’s analysis here because Gucci was the plaintiff. Courts look only at the defendant’s location or contacts with the forum in determining whether to exercise personal jurisdiction. The plaintiff’s location is irrelevant to this determination. |
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**C. Venue**

A court that has jurisdiction may not have venue. Venue refers to the most appropriate location for a trial. Essentially, the court that tries a case should be in the geographic area in which the incident occurred or the parties reside.

**D. Standing to Sue**

Before a person can bring a lawsuit before a court, the party must have standing. The party must have suffered a harm, or been threatened a harm, by the action about which he or she is complaining. The controversy at issue must also be justifiable (real and substantial, as opposed to hypothetical or academic).

**III. The State and Federal Court Systems**

**A. The State Court Systems**

Many state court systems have a level of trial courts and two levels of appellate courts.

**1. Trial Courts**

**•** Trial courts with gen­eral jurisdiction include county, district, and superior courts.

• Trial courts with limited jurisdiction include local municipal courts (which handle mainly traffic cases), small claims courts, and domestic relations courts.

**2. Appellate, or Reviewing, Courts**

In most states, after a case is tried, there is a right to at least one appeal. Few cases are retried on appeal. In about three-fourths of the states, there is an intermediate level of appellate courts.

**a. Focus on Questions of Law**

An appellate court examines the record of a case, looking at questions of law and procedure for errors by the court below.

**b. Defer to the Trial Court’s Findings of Fact**

A trial court is in a better to evaluate the demeanor of witnesses and their testimony and other evidence. An appellate court will challenge a finding of fact only when—

• It is clearly erroneous.

• It is contrary to the evidence.

• There is no evidence to support it.

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| **Case Synopsis—** |
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| **Case 2.2: *Johnson v. Oxy USA, Inc.*** |
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| Jennifer Johnson was working for Oxy USA, Inc., when Oxy changed the job’s requirements. To meet the new standards, Johnson took certain courses. Oxy’s “Educational Assistance Policy” was to reimburse employees for the cost. Johnson further agreed that Oxy could withhold the reimbursed amount from her final paycheck if she quit Oxy within a year. When she resigned less than a year later, Oxy withheld that amount from her last check. Johnson filed a claim for the amount with the Texas Workforce Commission (TWC). Without deciding whether Oxy violated its own Educational Assistance Policy as Johnson contended, the TWC ruled that she was not entitled to the unpaid wages. She filed a suit in a Texas state court against Oxy, alleging breach of contract. The court affirmed the TWC’s ruling, holding that Johnson’s claim for breach of contract was barred by *res judicata*. Johnson appealed. |
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| A state intermediate appellate court reversed and remanded. “The TWC did not decide the key question of fact in dispute—whether Oxy violated its own Educational Assistance Policy when it withheld Johnson’s final wages.” Because the question had not been resolved, *res judicata* did not bar the claim. |
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| **Notes and Questions** |
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| ***Forty states have intermediate appellate courts. Ten states—Delaware, Maine, Montana, Nevada, New Hampshire, Rhode Island, South Dakota, Vermont, West Virginia, and Wyoming—have only a single level of appeal, which is, of course, the state’s supreme court.*** ***Why the difference?*** The primary reason that most states have intermediate appellate courts is the size of the state’s caseload. Crowded dockets at the appellate level led to the creation of more courts to relieve the backlog of casework. The chief reason that some states do not have more than one level of appellate resort is that the workload is not seen as heavy enough to warrant the expense. |
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| When the legal systems in the states were formed, a single appellate court was generally considered sufficient. In the nineteenth and twentieth centuries, most states’ caseloads increased significantly. This was due to— |
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| • Population growth.  • Expanded appeal rights in criminal cases.  • More law—statutes, ordinances, rules, regulations, case law, and so on.  • Broadened appellate jurisdiction.  • Increased resort to the courts to resolve social and economic issues. |
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**3. Highest State Courts**

In all states, there is a higher court, usually called the state supreme court. The decisions of this highest court on all questions of state law are final. If a federal constitutional issue is involved in the state supreme court’s decision, the decision may be appealed to the United States Supreme Court.

**B. The Federal Court System**

The federal court system is also three-tiered with a level of trial courts and two levels of appellate courts, including the United States Supreme Court.

**1. U.S. District Courts**

Federal trial courts of general jurisdiction are district courts. Federal trial courts of limited jurisdiction include U.S. Tax Courts and U.S. Bankruptcy Courts. Federal district courts have original jurisdiction in federal matters. Some administrative agencies with judicial power also have original jurisdiction.

**2. U.S. Courts of Appeals**

U.S. courts of appeal, or circuit courts of appeal, hear appeals from the decisions of the district courts located within their respective circuits. The decision of a court of appeals is binding on federal courts only in that circuit.

**3. The United States Supreme Court**

The court at the top of the three federal tiers is the United States Supreme Court to which further appeal is not mandatory but may be possible.

**a. Appeals to the Supreme Court**

A party may ask the Court to issue a *writ of certiorari*, but the Court may deny the petition. A denial is not a decision on the merits of the case. Most petitions are denied.

**b. Petitions Granted by the Court**

Typically, the Court grants petitions only in cases that at least four of the justices view as involving important constitutional questions.

**IV. Following a State Court Case**

The common law system is an adversary system. Each adversary is entitled to present his or her version of the facts through an advocate. An attorney is the client’s advocate.

• A judge assumes an unbiased role, but this role is not entirely passive. A judge is responsible for the appropriate application of the law and does not have to accept the adversaries’ arguments.

• There are rules of procedure to govern the way in which disputes are handled in courts. These rules differ from court to court, but there are similarities.

**A. The Pleadings**

In a civil case, the pleadings inform each party of the other’s claims and specify the issues. The pleadings consist of a complaint and an answer.

**1. The Plaintiff’s Complaint**

The complaint (or petition or declaration) is filed with the clerk of the trial court. It contains—

• A statement alleging jurisdictional facts.

• A statement of facts entitling the complainant to relief.

• A statement asking for a specific remedy.

**2. Service of Process**

A copy of the complaint and a summons is served on the party against whom the complaint is made. The summons notifies the defendant of his or her options—file a motion to dismiss, file an answer, or default.

**3. The Defendant’s Answer**

An answer admits or denies the allegations in the complaint and sets out any defenses and counterclaims (the plaintiff can file a reply to any counterclaim).

**4. Motion to Dismiss**

A motion to dismiss may be based on any of several grounds. A motion to dismiss for failure to state a claim on which relief can be granted alleges that according to the law, even if the facts in the complaint are true, the defendant is not liable.

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| **Additional Background—** |
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| **Motions to Dismiss and Other Pre-Answer Motions** |
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| Besides a plaintiff’s failure to state a claim on which relief can be granted, a defendant’s pre-answer **motion to dismiss** may be based on the court’s lack of subject matter or personal jurisdiction, improper venue, insufficiency of process or service of process, and the plaintiff’s failure to join a party needed for a just adjudication of the controversy. Or the defendant may raise these defenses in his or her answer. In fact, some of these must be raised at this stage, or they are deemed waived. A defendant may also move for dismissal on the ground of the plaintiff’s failure to diligently prosecute his or her claim, or to comply with procedural rules or a court order. |
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| **Other pre-answer motions** include: a motion for a more definite statement (which may be made if a pleading is so vague or ambiguous that a response cannot reasonably be framed); a motion to strike such matters as, for example, an insufficient defense; and a motion for summary judgment (through which, as discussed below, the moving party asserts that there is no genuine issue of material fact, and he or she is entitled to judgment as a matter of law). |
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| **Additional Background—** |
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| **Motions for Judgment on the Pleadings and**  **Other Motions That May Be Made after the Pleadings Are Closed** |
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| A **motion for judgment on the pleadings** is more akin to a motion for summary judgment than it is to a motion to dismiss for failure to state a claim on which relief can be granted. The grounds on which motions to dismiss can be made can be divided into four categories, including challenges to the complaint itself. These challenges point to defects on the face of a complaint—that is, a plaintiff may actually have a claim, but has not properly phrased it. A motion for judgment on the pleadings “attack[s] the substantive sufficiency of the allegations.” In other words, a motion for judgment on the pleadings challenges not only the sufficiency of an opponent’s pleading, but whether a substantive right to relief even exists on the facts as pleaded. (For example, the text notes that this motion would be appropriate if the facts as shown in the pleadings reveal that the applicable statute of limitations has run.) Also, before a motion for judgment on the pleadings can be made, both a complaint and an answer must have been filed (unlike a motion to dismiss for failure to state a claim on which relief can be granted, which is a pre-answer motion). |
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| **Other motions that may be made after the pleadings are closed** include the defendant’s motion to dismiss on the basis of the court’s lack of subject matter jurisdiction, or the plaintiff’s failure to state a claim on which relief can be granted or to join an indispensable party. At this point, a defendant may also move for dismissal on the ground of the plaintiff’s failure to diligently prosecute his or her claim, or to comply with procedural rules or a court order. At this time, a party may also object to the other’s failure to state a legal defense to a claim. |
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**B. Pretrial Motions**

After the pleadings are filed, either party can file a motion for judgment on the pleadings or a motion for summary judgment. A trial might be avoided if no facts are in dispute and only questions of law are at issue. In ruling on a motion for summary judgment, a court can consider evidence outside the pleadings.

**C. Discovery**

To prepare for trial, parties obtain information from each other and from witnesses through the process of discovery. These devices save time by preserving evidence, narrowing the issues, preventing surprises at trial, and avoiding a trial altogether in some cases.

**1. Depositions and Interrogatories**

A deposition is a record of the answers of a party or witness to questions asked by the attorneys of both plaintiff and defendant. Interrogatories are written questions asked of a party, who responds in writing.

**2. Requests for Other Information**

A request for an admission is a request that a party admit the truth of a matter. A request for documents, objects, and entry on land is a request to inspect these items. A request for a physical or mental examination will be granted only if the court decides that the need for the information outweighs the examinee’s right of privacy.

**3. Electronic Discovery**

Information stored electronically, such as e-mail and other computer data, can be the object of a discovery request. This may include data that was not intentionally saved by a user, such as concealed notes and earlier versions.

**a. E-Discovery Procedures**

The Federal Rules of Civil Procedure deal specifically with the preservation, retrieval, and production of electronic data.

**b. Advantages and Disadvantages**

E-mail can provide useful, and sometimes damaging, information. But preserving, providing, and reviewing e-evidence can be time-consuming and expensive.

**D. Pretrial Conference**

After discovery, a pretrial hearing is held.

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| **Case Synopsis—** |
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| **Case 2.3: *Klipsch Group, Inc. v. ePRO E-Commerce Limited*** |
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| Klipsch Group, Inc. makes sound equipment, including headphones. Klipsch filed a suit in a federal district court against ePRO E-Commerce Limited, a Chinese corporation. Klipsch alleged that ePRO had sold $5 million in counterfeit Klipsch products. In response to the plaintiff’s discovery requests, ePRO failed to timely disclose the majority of the responsive documents in its possession. ePRO also restricted a discovery expert’s access to its e-data. The court directed ePRO to impose a hold on the custodians of the data, but the defendant failed to do so. This led to the deletion of thousands of documents and significant quantities of data, some of it permanently. The court concluded that ePRO had willingly engaged in spoliation of e-evidence. For this misconduct, the court imposed sanctions, including an order to pay Klipsch $2.7 million for its discovery efforts. ePRO appealed, contending that the sanctions were “disproportionate.” |
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| The U.S. Court of Appeals for the Second Circuit affirmed. “Discovery sanctions should be commensurate with the costs unnecessarily created by the sanctionable behavior.” |
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| **Notes and Questions** |
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| ***How might a large corporation defend against allegations that it intentionally failed to preserve electronic data that a party is attempting to review as part of a discovery request?***A corporation might defend against charges of intentional destruction or loss of data by showing, for example, that the absence is due to the implementation of a policy to periodically purge electronic systems. Such charges might be avoided by storing the data instead of destroying it. |
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**E. Jury Selection**

If the right to a jury trial has been requested, the jury is selected. Prospective jurors undergo *voir dire* (questioning by the attorneys to determine impartiality).

**F. At the Trial**

**1. Opening Arguments and Examination of Witnesses**

Once a jury is chosen, the trial begins with the attorneys’ opening statements. Because the plaintiff has the burden of proving his or her case, the plaintiff’s attorney presents the plaintiff’s evidence and witnesses. The defendant’s attorney challenges the evidence and cross-examines the witnesses. After the plaintiff’s case, the defendant can move for a directed verdict (or judgment as a matter of law). If this motion is denied, the defendant’s attorney presents the defendant’s case.

**2. Closing Arguments and Awards**

After the plaintiff’s challenges to the defendant’s case, the attorneys present their closing arguments. The jury is instructed in the law that applies and retires to consider a verdict.

**G. Posttrial Motions**

After the verdict, the losing party can move for a new trial or for a judgment notwithstanding the verdict (Motion for judgment *n.o.v*.). If these motions are denied, he or she can appeal.

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| **Additional Background—** |
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| **Motions for a Directed Verdict and Motions for Summary Judgment** |
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| Under the *Federal Rules of Civil Procedure*, a party may move for a directed verdict: (a) after his or her opponent’s opening statement, (b) at the conclusion of the opponent’s case, or (c) at the close of all the evidence. Basically, a directed verdict is proper if the party with the burden of *proof* has presented no or insufficient evidence on a critical issue. A party with the burden of *persuasion* on an issue is rarely entitled to a directed verdict, since the party bears the risk of non-persuasion, and usually, reasonable jurors may differ on what evidence to believe. Thus, even if a party with the burden of persuasionproduces substantial evidence of, for example, the other party’s negligence, so that the jury could reasonably conclude that the other party was negligent, the motion will be denied, since the jury may also disbelieve the evidence. |
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| A **motion for a directed verdict** is a procedural device available in both civil and criminal proceedings in which the trial is by jury. Either side may move for a directed verdict whenever the other side rests—for example, after the plaintiff presents his or her evidence, the defendant may move for a directed verdict; after the defendant rests, the plaintiff may so move; after the plaintiff’s rebuttal; after the defendant’s rejoinder; and so on. On determining that the evidence is such that reasonable jurors could not disagree and, thus, the moving party is entitled to a favorable verdict as a matter of law, the judge grants the motion and takes the case from the jury’s consideration. |
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| A **motion for summary judgment** is a procedural device available only in civil proceedings. Either side may move for summary judgment before the trial on any or all of the issue—the defendant at any time (for example, when the pleadings do not allege a contradictory statement of material facts, and thus, there is nothing for a jury to decide); the plaintiff not until after twenty days from commencement of the action or within twenty days after an adverse party moves for summary judgment. On determining that there is no genuine issue of material fact and the moving party is entitled to prevail on the issue or issues as a matter of law, the judge grants the motion. If there is any doubt as to any of the facts necessary to determine the outcome of the issue or issues, the court will deny the motion. |
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**H. The Appeal**

**1. Filing the Appeal**

To appeal, the appellant files the record on appeal, which contains the pleadings, a trial transcript, copies of the exhibits, the judge’s rulings, arguments of counsel, jury instructions, the verdict, posttrial motions, and the judgment order from the case. The appellant files a brief, which contains statements of facts, issues, applicable law, and grounds for reversal. The appellee files an answering brief.

**2. Appellate Review**

The court reviews these records, the attorneys present oral arguments, and the court can—

• Affirm the lower court’s judgment.

• Reverse the judgment.

• Remand the case to the lower court for proceedings consistent with the appellate opinion.

• Affirm or reverse the lower court’s judgment in part.

• Modify the lower court’s decision.

**3. Appeal to a Higher Appellate Court**

If this court is an intermediate appellate court, the losing party can file a petition for leave to appeal to a higher court. If the petition is granted, the appeal process is repeated.

**I. Enforcing the Judgment**

A judgment may not be enforceable because a defendant may not have sufficient assets to pay it.

**V. Courts Online**

Most courts also have websites, though they do not generally contain vast archives of case law.

**A. Electronic Filing**

Filing court documents may involve a transfer over the Internet, a transmission via e-mail, or a delivery of a computer disk. The text mentions some of the details of specific systems and their problems. Courts are also using electronic case-management systems.

**B. Cyber Courts and Proceedings**

Next on the horizon are virtual courtrooms, or cyber courts. And courts may use online media in other ways—conference or chatting rooms, or virtual visitation for the children of divorced parents, for example.

**VI. Alternative Dispute Resolution**

The advantage of alternative dispute resolution (ADR) is its flexibility. Normally, the parties themselves can control how the dispute will be settled, what procedures will be used, and whether the decision reached (either by themselves or by a neutral third party) will be legally binding or nonbinding. Approximately 95 percent of cases are settled before trial through some form of ADR.

**A. Negotiation**

One form of ADR is negotiation, in which the parties attempt to settle their dispute informally, with or without attorneys. They try to reach a resolution without the involvement of a third party.

**B. Mediation**

In mediation, the parties attempt to negotiate an agreement with the assistance of a neutral third party, a mediator. Mediation is essentially a form of “assisted negotiation.” The mediator takes an active role in resolving the dispute but does not make a decision on the matter being disputed.

**C. Arbitration**

A more formal method of ADR is arbitration, in which a neutral third party or a panel of experts hears a dispute and renders a decision. The decision can be legally binding. Formal arbitration resembles a trial. The parties may appeal, but a court’s review of an arbitration proceeding is more restricted than a review of a lower court’s proceeding.

**1. The Arbitrator’s Decision**

An arbitrator’s award will be set aside only if—

• The arbitrator’s conduct or “bad faith” substantially prejudiced the rights of a party.

• The award violates public policy.

• The arbitrator exceeded his or her powers.

**2. Arbitration Clauses**

Virtually any commercial matter can be submitted to arbitration. Often, parties include an arbitration clause in a contract. Parties can also agree to arbitrate a dispute after it arises.

**3. Arbitration Statutes**

Most states have statutes (often based on the Uniform Arbitration Act of 1955) under which arbitration clauses are enforced, and some state statutes compel arbitration of certain types of disputes. At the federal level, the Federal Arbitration Act (FAA), enacted in 1925, enforces arbitration clauses in contracts involving maritime activity and interstate commerce.

**4. The Issue of Arbitrability**

A court can consider whether the parties to an arbitration clause agreed to submit a particular dispute to arbitration. The court may also consider whether the rules and procedures that the parties agreed to are fair.

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| **Additional Cases Addressing this Issue —** |
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| **The Issue of Arbitrability** |
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| Cases examining **the validity of arbitration agreements** include the following: |
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| • *Circuit City Stores, Inc. v. Ahmed,* 283 F.3d 1198 (9th Cir. 2002) (an arbitration clause is not unconscionable, and thus it is enforceable, when it contains a provision that grants an employee a meaningful opportunity to opt out of binding arbitration). |
|  |
| • *McCaskill v. SCI Management Corp.,* 285 F.3d 623 (7th Cir. 2002) (an arbitration clause invoked to compel the arbitration of claims of sexual harassment and other employment discrimination is invalid, and thus unenforceable, when it requires that the employee pay all fees). |
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**5. Mandatory Arbitration in the Employment Context**

Generally, mandatory arbitration clauses in employment contracts are enforceable.

### D. Other Types of ADR

• Methods of “assisted negotiation” have emerged—

In *early neutral case evaluation*, the parties select a neutral third party (often an expert in the subject of the dispute) to evaluate their positions. This forms the basis for negotiations.

In a *mini-trial,* each party’s attorney argues the party’s case. A neutral third party (often an expert in the disputed subject) acts as an adviser. If the parties fail to reach an agreement, the adviser renders an opinion as to how a court would likely decide the issue.

• Characteristics of mediation and arbitration can be combined—

In *binding mediation*, the mediator can make a legally binding decision.

In *mediation-arbitration (med-arb),* if mediation is unsuccessful, arbitration is applied.

• Many federal courts use the *summary jury trial (SJT).* The litigants present their arguments and evidence, and a jury renders a nonbinding verdict. Mandatory negotiations follow.

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| **Additional Background—** | | | |
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| **ADR and the Courts** | | | |
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| States in which one or more  local **state** court has— | | States in which one or more  **federal** court has— | |
|  | |  | |
| **Arbitration** | **Mediation** | **Arbitration** | **Mediation** |
|  |  |  |  |
| Alabama  Alaska  Arizona  California  Delaware  Florida  Georgia  Hawaii  Illinois  Michigan  Minnesota  Missouri  Nevada  New Hampshire  New Jersey  New Mexico  New York  North Carolina  Ohio  Oregon  Pennsylvania  Rhode Island  Texas  Washington | Alabama  Alaska  Arizona  California  Connecticut  Delaware  Florida  Georgia  Hawaii  Indiana  Illinois  Iowa  Kansas  Kentucky  Louisiana  Maine  Michigan  Minnesota  Missouri  Montana  Nebraska  Nevada  New Hampshire  New Jersey  New Mexico  New York  North Carolina  Ohio  Oklahoma  Oregon  Pennsylvania  Rhode Island  South Carolina  South Dakota  Tennessee  Texas  Utah  Vermont  Virginia  Washington  West Virginia  Wisconsin | Alabama  Arizona  California  Connecticut  Florida  Georgia  Idaho  Michigan  Missouri  New Jersey  New York  Ohio  Oklahoma  Pennsylvania  Rhode Island  Texas  Utah  Washington | California  Delaware  Florida  Indiana  Kansas  Kentucky  Louisiana  Minnesota  Missouri  Nebraska  New Jersey  New York  North Carolina  Ohio  Oklahoma  Oregon  Pennsylvania  Rhode Island  South Carolina  Tennessee  Texas  Utah  Virginia  West Virginia  Washington  Wisconsin |
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| Source: Richard Reuben, “The Lawyer Turns Peacemaker,” *ABA Journal* (August 1996), p. 56. | | | |
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**E. Providers of ADR Services**

A major provider of ADR services is the American Arbitration Association (AAA). Most of the largest law firms in the nation are members of this nonprofit association. For profit firms around the country also provide dispute-resolution services.

**F. Online Dispute Resolution**

When outside help is needed to resolve a dispute, there are a number of websites that offer online dispute resolution (ODR). ODR may be best for resolving small to medium business claims, which may not be worth the expense of litigation or traditional ADR. Most online forums do no automatically apply the law of any jurisdiction. Any party may appeal a dispute to a court at any time.

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| **Teaching Suggestions** |
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| **1.** To impress on students one of the reasons for the legal system’s observance of procedural technicalities, emphasize the finality of courts’ rulings, that people’s lives are often changed by a court’s decision. ***If it were the students’ person or their property hanging in the balance, would they prefer a series of well-defined steps or a less formal process? What if the decision reached in the less formal process was not binding?*** |
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| **2.** Divide students into small groups and assign one of the text chapter’s end-of-chapter problems to each group. Have each group determine whether or not the assigned problem is one that would lend itself to alternative dispute resolution. ***If not, why not? If so, which form of alternative dispute resolution would the group recommend?*** |
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| **3.** Obtain a standard arbitration agreement form from a national arbitration organization such as the American Arbitration Association. Ask students to discuss specific features of these agreements and the factors that might make them hesitant to submit a dispute to arbitration. |
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| **4.** Some students may find it enlightening to be reminded the law corresponds to the many ways in which people organize the world. That is, the law includes customs, traditions, rules, and objectives that people have held in different circumstances at different times. While it often seems that the law creates meaningless distinctions, it is in fact the real needs of real people that create them. |
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| **5.** Emphasize the factors—economic and non-economic—in deciding whether or not to pursue legal action. ***Are they prepared to pay for going to court?*** Engaging in legal action can be expensive. A good attorney may charge as much as $300 an hour, or more, plus expenses, and more for trial work. ***Do they have the patience to pursue a case through the judicial system****?* Court calendars are crowded. In some cases, it may be years before the matter comes to trial—and then there is the appeal. ***Is there an alternative to legal action?*** A settlement might be preferable to a suit, even if the former represents a lesser dollar amount, once their bottom lines are adjusted for future expenses, time lost, aggravation, and so on. Many controversies lend themselves to faster, less expensive methods of dispute resolution. Students should also be reminded that a decision should only be made with the advice of a competent legal professional. |
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| **6.** ***What do your students think that jurors discuss when they retire to consider a verdict? What should they discuss?*** Research indicates that discussion in the jury room focuses primarily on what procedures the jury should follow, their opinions about the case, and relevant personal reminiscences. Much less time is spent discussing testimony from the trial and the judge’s instructions. In many cases, jury verdicts are not different from the decisions that the judges would have made. Studies reveal that 80 percent of the time, the court agrees with the jury’s verdict. In civil cases, judges and juries almost always agree; in criminal cases, a jury is more likely to acquit a defendant than a judge is. |
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| **7.** All students have different requirements in regards to the amount of study time that they need to prepare for a class or an exam. Everyone faces the same temptation: putting off until tomorrow what should be done today. Your students might be reminded that the best remedy for this temptation is not to give into it but to remain disciplined. They might simply set up a schedule and make every effort to stick to it to achieve their best results. |
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| *Cyberlaw Link* |
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| Many jurisdictions have implemented online filing systems, and some have set up cyber courts in which part, or all, of a case is presented online. ***What issues are likely to occur in these circumstances?*** |
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| Ask your students to what extent those who send e-mail over the Internet should be liable for the content of their messages in states other than their own (or nations other than the United States). ***Is the existence of a website a sufficient basis to exercise jurisdiction?*** |
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**Discussion Questions**

**1. *If a corporation is incorporated in Delaware, has its main office in New York and does business in California, but its president lives in Connecticut, in which state(s) can it be sued?*** Delaware, New York, and California—a corporation is subject to the jurisdiction of the courts in any state in which it is incorporated, in which it has its main office, or in which it does business.

***2. Why might a defendant prefer to be sued in one state rather than in another?*** The law, and the circumstances in which the law is applied, vary from state to state. These factors might favor a particular defendant’s position in one state over another.

**3. *When can a court exercise jurisdiction over a party whose only connection to the jurisdiction is via the Internet?*** One way to phrase the issue is when, under a set of circumstances, there are sufficient minimum contacts to give a court jurisdiction over a remote party. If the only contact is an ad on the Web originating from a remote location, the outcome to date has generally been that a court cannot exercise jurisdiction. Doing considerable business online, however, generally supports jurisdiction. The “hard” cases are those in which the contact is more than an ad but less than a lot of activity.

**4. *Should a plaintiff be required to serve a defendant with a summons and a copy of a complaint more than once? Why or why not?*** More than one service is not more likely to receive a re­sponse. Besides, it would be unfair to the plaintiff to require more than one service. For example, a plaintiff who has provided evidence that a person authorized to receive mail on behalf of a corporation in fact received an item that was mailed to an officer of the corporation should not be held responsible for any failure on the part of the corporate defendant to effectively distribute that mail. ***If a mailed summons actually reached the individual to be served, would that be sufficient to establish valid service, even if the summons was not addressed correctly or was signed for by someone who did not have the authority to do so?*** Probably. If a plaintiff can provide evidence that a corporate officer or an agent for service of process actually received a summons, this would likely be sufficient to establish that the plaintiff substantially effected service.

**5. *What are the advantages of effecting service of process via e-mail?*** The chief advantages are lower cost and faster process. Any businessperson who is involved in litigation will benefit, through lower legal costs, by the time and cost savings resulting from service by e-mail. The legal profession, the court systems, and other plaintiffs will also realize the cost-saving advantages of effecting service of process over the Internet. Federal Rules of Civil Procedure permit service by e-mail in certain circumstances, but generally, a party will have to obtain a court’s permission.

**6. *When may a federal court hear a case?*** Federal courts have jurisdiction in cases in which federal questions arise, in cases in which there is diversity of citizenship, and in some other cases. When a suit involves a question arising under the Constitution, a treaty, or a federal law, a federal question arises. When a suit involves citizens of different states, a foreign country and an American citizen, or a foreign citizen and an American citizen, diversity of citizenship exists. In diversity suits, there is an additional requirement—the amount in controversy must be more than $75,000. Federal courts have exclusive jurisdiction in cases involving federal crimes, bankruptcy, patents, and copyrights; in suits against the United States; and in some areas of admiralty law.

**7. *What are the advantages of discovery?*** Discovery saves time by preserving evidence, narrowing the issues, preventing surprises at trial, and avoiding a trial altogether in some cases. A trial might also be avoided if no facts are in dispute and only questions of law are at issue. Either party then files a motion for summary judgment.

**8. *After a trial, a court issues a judgment that includes a grant of relief for the plaintiff, but the relief is not as much as the plaintiff wanted. Neither the plaintiff nor the defendant is satisfied with this result. Who can appeal to a higher court?*** Either a plaintiff or a defendant, or both, can appeal a judgment to a higher court. An appellate court can affirm, reverse, or remand a case, or take any of these actions in combination. To appeal successfully, it is best to appeal on the basis of an error of law, because appellate courts do not usually reverse on findings of fact.

**9. *What is the principal difference between negotiation and mediation?*** The major difference between negotiation and mediation is that mediation involves the presence of a third party called a mediator. The mediator assists the parties in reaching a mutually acceptable agreement. The mediator talks face to face with the parties and allows them to discuss their disagreement in an informal environment. The mediator’s role, however, is limited to assisting the parties. The mediator does not decide a controversy; he or she only aids the process by helping the parties more quickly find common ground on which they can begin to reach an agreement for themselves.

**10. *What is arbitration?*** The process of arbitration involves the settling of a dispute by an impartial third party (other than a court) who renders a *legally binding* decision. The third party who renders the decision is called an arbitrator. Arbitration combines the advantages of third-party decision making—as provided by judges and juries in formal litigation—with the speed and flexibility of rules of procedure and evi­dence less rigid than those governing courtroom litigation.

**Activity and Research Assignments**

**1.** Ask your students to visit a court, observe the proceedings, and report their observations. Ask them to find out how long it might be before a petition filed in the court would be granted a hearing—that is, how clogged is the court’s calendar) and to what any delay might be attributed.

**2.** Have students prepare a chart showing the relationships between the various courts having jurisdiction in your state. (There is a digest of each state’ courts in Martindale-Hubbell Law Directory, which might be placed on reserve in the library.) Assign a few jurisdiction hypotheticals. ***For example—Through which of these courts could a divorce decree be appealed? Which court(s) would have original jurisdiction in a truck accident involving out-of-state residents (does the dollar amount of injuries and damage make a difference)? Which court(s) would have jurisdiction to render a judgment in a case arising from food poisoning at a local cheeseburger stand that is part of a nationwide corporate chain? In which court(s) could you file a suit alleging discrimination, and if you lost, to which court could you appeal the decision?***

**3.** Ask the class to research the reasons behind the earlier hostility of the courts towards arbitration procedures. ***Were they concerned solely with parties being divested of their rights or did they see arbitration as a challenge to their own authority?***

**4.** Have students investigate the dispute resolution services discussed in this chapter by going online and reading some the disputes submitted for resolution or the results in individual cases (on the ICANN website, for example).

**Explanations of Selected Footnotes in the Text**

**Footnote 2:** In ***International Shoe Co. v. State of Washington,*** the state of Washington sought unemployment contributions from the International Shoe Company based on commissions paid to its sales representatives who lived in the state. International Shoe claimed that its activities within the state were not sufficient to manifest its “presence.” It argued that (1) it had no office in Washington; (2) it employed sales representatives to market its product in Washington, but no sales or purchase contracts were made in the state; and (3) it maintained no inventory in Washington. The company claimed that it was a denial of due process for the state to subject it to suit. The Supreme Court of Washington ruled in favor of the state, and International Shoe appealed to the United States Supreme Court.

The United States Supreme Court affirmed the Washington Supreme Court’s decision—International Shoe had sufficient contacts with the state to allow the state to exercise jurisdiction constitutionally over it. The Court found that the activities of the Washington sales representatives were “systematic and continuous,” resulting in a large volume of business for International Shoe. By conducting its business within the state, the company received the benefits and protections of the state laws and was entitled to have its rights enforced in state courts. Thus, International Shoe’s operations established “sufficient contacts or ties with the state \*  \*  \* to make it reasonable and just according to our traditional conception of fair play and substantial justice to permit the state to enforce the obligation” that the company incurred there.

**Footnote 9:** In ***Zippo Manufacturing Co. v. Zippo Dot.Com, Inc.,*** a federal district court proposed three categories for classifying the types of Internet business contact: (1) substantial business conducted online, (2) some interactivity through a website, and (3) passive advertising. Jurisdiction is proper for the first category, improper for the third, and may or may not be appropriate for the second. Zippo Manufacturing Co. (ZMC) makes, among other things, “Zippo” lighters. ZMC is based in Pennsylvania. Zippo Dot Com, Inc. (ZDC), operates a Web page and an Internet subscription news service. ZDC has the exclusive right the domain names “zippo.com,” “zippo.net,” and “zipponews.com.” ZDC is based in California, and its contacts with Pennsylvania have occurred almost exclusively over the Internet. Two percent of its subscribers (3,000 of 140,000) are Pennsylvania residents who contracted over the Internet to receive its service. ZDC has agreements with seven ISPs in Pennsylvania to permit their subscribers to access the service. ZMC filed a suit in against ZDC, alleging trademark infringement and other claims, based on ZDC’s use of the word “Zippo.” ZDC filed a motion to dismiss for lack of personal jurisdiction. Holding that ZDC’s connections to the state fell into the first category, the court denied the motion.