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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**

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 State 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.

**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 it involves citizens of different states, a foreign coun­try and an American cit­izen, or a foreign citizen and an American citizen. Congress has set an additional require­ment—the amount in controversy must be more than $75,000. 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 mightotherwise 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. |
|  |
| (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, and copyrights.

• Suits against the United States.

• Some areas of admiralty law.

States have exclusive jurisdiction in—

• Divorce.

• 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.

**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. Today, because of the easy and instant access to information about crimes and civil disputes, courts rarely grant requests of change of venue.

**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 limited jurisdiction include local municipal courts (which handle mainly traffic cases), small claims courts, and domestic relations courts. Trial courts with general jurisdiction include county, district, and superior courts. At trial, the parties may dispute the facts, what law applies, and how that law should be ap­plied.

**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.

**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. Pretrial Procedures**

**1. 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.

**a. 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; and a statement ask­ing for a specific remedy.

**b. 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.

**c. 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).

**d. 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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| **Case Synopsis—** |
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| **Case 2.1: *Espresso Disposition Corp. 1 v. Santana Sales***  ***& Marketing Group, Inc.*** |
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| Espresso Disposition Corp. 1 and Santana Sales & Marketing Group, Inc., entered into an agreement that included a mandatory forum selection clause. The clause stated that “the venue with respect to any action pertaining to this Agreement shall be the State of Illinois.” When Santana filed a suit against Espresso in a Florida state court, the defendant filed a motion to dismiss based on the clause. Santana responded that the clause was a mistake made at the time the agreement was drafted—an agreement between different parties had been copied, and by mistake, the venue provision had not been changed from Illinois to Florida. The court denied Espresso’s motion to dismiss. Espresso appealed. |
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| A state intermediate appellate court reversed and remanded for the entry of an order of dismissal. Under Florida law, a forum selection clause is only considered unjust or unreasonable if a party establishes that enforcement would result in “no forum at all.” Espresso failed to establish this “since the designated forum—Illinois—does not result in \*  \*  \* ‘no forum at all.’ ” If a forum selection clause unambiguously mandates that litigation be subject to a certain forum, then it is wrong for a court to ignore the clause. |
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| **Notes and Questions** |
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| ***What impact will the court’s decision most likely have on the parties to this dispute?*** The effect of the court’s granting Espresso’s motion to dismiss was a ruling that the venue for any action relating to a controversy under the parties’ agreement “shall be the State of Illinois.” This means that the appropriate forum for resolving the parties’ dispute is a court in Illinois (not in Florida, where this suit was filed). Santana may have an opportunity to amend its complaint, but it is not likely that this suit will continue in a Florida court. |
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| ***Why did the appellants in this case file a motion to dismiss?*** The appellants in this case filed a motion to dismiss to avoid litigating the dispute in the court in which the related suit was filed. The contract provided that the sole forum for controversies arising under the agreement was Illinois, not Florida, where the suit was filed. The appellees’ vigorous objection to the motion suggests that Illinois was not a convenient location for these parties. This suggests that the appellants may have sought to resolve the dispute through means other than litigation—negotiation, mediation, or some other form of alternative dispute resolution—or to avoid resolving the dispute at all. |
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| ***How could the parties, particularly the defendant, have avoided this dispute?*** The parties could have avoided this dispute by drafting their agreement more carefully. The court points out that some of the steps in document preparation have been eliminated by computers but “what has not been eliminated is the need to actually read and analyze the text \*  \*  \* , especially where it is to have legal significance.” |
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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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**2. 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.

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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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**3. 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.

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| **Case Synopsis—** |
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| **Case 2.2: *Phillips Brothers, LP v. Winstead*** |
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| Phillips Brothers, LP, Harry Simmons, and Ray Winstead were the three members of Kilby Brake Fisheries, LLC, a Mississippi catfish farm. Winstead operated a hatchery for the firm, but with only two profitable years during his eight-year tenure, he was fired. He filed a suit in a Mississippi state court against Kilby Brake and its other members, alleging a corporate freeze-out. The defendants filed a counterclaim of theft. From an award to Winstead of more than $1.7 million, the defendants appealed. |
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| The Mississippi Supreme Court reversed, and remanded the case holding that Kilby Brake was entitled to discovery regarding Winstead’s outside income—the trial court's refusal to allow discovery precluded the jury from finding out what happened to a certain load of fish, and this issue was central to both sides' theories of the case. |
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| **Notes and Questions** |
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| ***What materials might reveal the information about Winstead’s finances that the defendants want to know?*** The defendants sought information about WInstead’s finances. Financial documents of any sort could reveal this information. These include tax documents, accounting records, bills of sale and other receipts, contracts, and bank statements. Relevant expenditures could be shown by recurring bills or acknowledgements of payment for utilities, mortgages, and other assessments. Even phone records, e-mail, and paper correspondence could provide proof. |
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| ***Does the defendants’ request for information regarding Winstead’s finances follow the guidelines for discovery activity?*** Yes, the defendants’ request for information regarding Winstead’s finances follows the guidelines for discovery activity. Generally, discovery is allowed regarding any matter that is not privileged and is relevant to the claim or defense of any party. In this case, Kilby Brake claimed that WInstead sold the firm’s fish and kept the income for himself. WInstead’s tax returns and other financial documents are relevant to this claim. |
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| Discovery rules protect privileged or confidential material from disclosure—a court can limit the scope of discovery. In the context of the defendants’ request for material that would reveal Winstead’s finances, for example, the court could require Winstead to submit the material to the judge, who could then decide if it should be disclosed to Kilby Brake. |
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**a. Depositions**

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.

**b. 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.

**c. 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.

**d. 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.

**e. E-Discovery Procedures**

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

**f. 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.

**4. Pretrial Conference**

After discovery, a pretrial hearing is held.

**5. 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).

**B. The Trial**

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.

**1. Directed Verdicts**

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.

**C. Posttrial Motions**

After the ver­dict, the losing party can move for a new trial or for a judgment notwithstanding the ver­dict (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 nonpersuasion, and usu­ally, rea­sonable jurors may differ on what evidence to believe. Thus, even if a party with the burden of per­sua­sion pro­duces 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 issues--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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**D. 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 below. 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 affirms the lower court’s judg­ment or re­verses it and remands the case for a new trial.

**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.

**E. Enforcing the Judgment**

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

**V. The Courts Adapt to the Online World**

**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. Courts Online**

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

**C. 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 andrenders 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.

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| **Case Synopsis—** |
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| **Case 2.3: *Cleveland Construction, Inc. v. Levco Construction, Inc.*** |
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| Cleveland Construction, Inc. (CCI), was the general contractor on a project to build a grocery store in Houston, Texas. CCI hired Levco Construction, Inc., as a subcontractor to perform excavation and grading. The contract provided that any dispute would be resolved by arbitration in Ohio. When a dispute arose, Levco filed a suit against CCI in a Texas state court. CCI sought to compel arbitration in Ohio under the Federal Arbitration Act (FAA). Because a Texas statute allows a party to void a contract provision that requires arbitration outside Texas, the court denied CCI’s request. CCI appealed. |
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| A state intermediate appellate court reversed. The parties had a valid arbitration agreement. If the court applied the Texas statute, it would void the agreement. This, the court decided, “would undermine the declared federal policy of rigorous enforcement of arbitration agreements.” And the FAA, as a federal law, preempted the Texas statute under the supremacy clause. |
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| **Notes and Questions** |
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| ***Considering the relative bargaining power of the parties, was it fair to enforce the arbitration clause in this contract?*** Yes, because either party could have refused to agree to the contract when it contained the arbitration clause. Of course, such clauses are likely to be ruled fair and enforceable when the parties are of equal bargaining strength. |
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| ***Why do you think that Levco did not want its claim decided by arbitration?*** A party is typically reluctant to enter into a proceeding that he or she (or it) believes will have an unfavorable result. Levco might have had a less complex claim that could have been resolved more favorably in a court, or its claim might have lent itself to a legal, adversarial argument, which would have held less weight in arbitration Arbitration’s disadvantages include the unpredictability of results, the lack of required written opinions, the difficulty of appeal, and the possible unfairness of the procedural rules. Levco might have wanted to avoid arbitration for any or all of these reasons. Also, arbi­tration can be nearly as expensive as litigation, particularly when, as here, its venue is a distant location. Levco may have been simply trying to reduce the duration of the dispute and its cost. |
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| **Additional Cases Addressing this Issue —** |
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| Recent 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). |
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| • *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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| • *Cash in a Flash Check Advance of Arkansas, L.L.C. v. Spencer,*348 Ark. 459, 74 S.W.3d 600 (2002) (in a customer’s suit against a check-cashing company, alleging that its fees were usurious, an agreement containing an arbitration clause was not legally enforceable due to a lack of mutuality). |
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**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.

**5. Mandatory Arbitration in the Employment Context**

Generally, mandatory arbitration clauses in employment contracts are enforceable.

**6. Private Arbitration Proceedings**

In at least one state (Delaware), parties can arbitrate their disputes in private, without disclosing the details of the proceedings or the result.

**D. 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.

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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— | |
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| **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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**VII. Online** **Dispute** **Resolution**

When outside help is needed to resolve a dispute, there are a number of Web sites 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 Web site 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 advan***­***tages 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 Web site, for example).

**Explanation of a Selected Footnote 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.