
CHAPTER 2

COURTS AND ALTERNATIVE DISPUTE RESOLUTION

ANSWERS TO LEARNING OBJECTIVES AT THE BEGINNING OF THE CHAPTER

1A. *What is judicial review? How and when was the power of judicial review established?* The courts can decide whether the laws or actions of the legislative and executive branches of government are constitutional. The process for making this determination is judicial review. The doctrine of judicial review was established in 1803 when the United States Supreme Court decided *Marbury v. Madison*.

2A. *How are the courts applying traditional jurisdictional concepts to cases involving Internet transactions?* To hear a case, a court must have jurisdiction over the person against whom the suit is brought or over the property involved in the suit. Generally, courts apply a “sliding-scale” standard to determine when it is proper to exercise jurisdiction over a defendant whose only connection with the jurisdiction is the Internet.

3A. *What is the difference between the focus of a trial court and that of an appellate court?* A trial court is a court in which a lawsuit begins, a trial takes place, and evidence is presented. An appellate court reviews the rulings of trial court, on appeal from a judgment or order of the lower court. Basically, trial courts focus on questions of fact, and appellate courts focus on questions of law.

4A. *What is discovery, and how does electronic discovery differ from traditional discovery?* Discovery is the process of obtaining information and

evidence about a case from the other party or third parties. Discovery entails gaining access to witnesses, documents, records, and other types of evidence. Electronic discovery differs in its subject (e-media rather than traditional sources of information).

5A. *What is an electronic court filing system?* An electronic court filing system allows parties to file litigation-related documents with the courts via the Internet or other electronic means. Both state and the federal court systems have implemented this type of system.

6A. *What are three alternative methods of resolving disputes?* The traditional method of resolving a legal dispute is through litigation. Alternative methods include negotiation, mediation, and arbitration. In negotiation, the parties attempt to settle their dispute informally without the involvement of a third party acting as mediator. In mediation, the parties attempt to come to an agreement with the assistance of a neutral third party, a mediator, who does not, however, make a decision in the dispute. In arbitration, a neutral third party or a panel of experts hears a dispute and renders a decision.

ANSWERS TO CRITICAL THINKING QUESTIONS IN THE FEATURE

ADAPTING THE LAW TO THE ONLINE ENVIRONMENT—CRITICAL THINKING

In our connected world, is there any way a defendant could avoid service of process via social media? Yes, there is one way. That defendant could have to have no social media accounts whatsoever. Increasingly, though, fewer and fewer individuals are not connected to others via social media.

ANSWERS TO CRITICAL THINKING QUESTIONS IN THE CASES

CASE 2.1—CRITICAL THINKING QUESTION

WHAT IF THE FACTS WERE DIFFERENT?

Suppose Gucci had not presented evidence that Huoqing made one actual sale through his Web site to a resident of the court's district (the private investigator). Would the court still have found that it had personal jurisdiction over Huoqing? Why or why not? The single sale to a resident of the district, Gucci's

private investigator, helped the plaintiff establish that the defendant's Web site was interactive and that the defendant used the Web site to sell goods to residents in the court's district. It is possible that without proof of such a sale, the court would not have found that it had personal jurisdiction over the foreign defendant. The reason is that courts cannot exercise jurisdiction over foreign defendants unless they can show the defendants had minimum contacts with the forum, such as by selling goods within the forum.

CASE 2.2—CRITICAL THINKING QUESTIONS

LEGAL ENVIRONMENT

Who can decide questions of fact? Who can rule on questions of Law? Why?

Questions of fact can be decided by triers of fact. In a jury trial, the trier of fact is the jury. In a nonjury trial, it is the judge who decides questions of fact. The rulings on questions of law are made only by judges, not juries.

A question of fact deals with what really happened in regard to the dispute being tried—such as whether a certain act violated a contract. A question of law concerns the application or interpretation of the law—such as whether an act that violated a contract also violated the law.

One of the reasons for the distinction between those who can decide questions of fact and those who can decide questions of law is that judges have special training and expertise to make decisions on questions of law that the typical lay member of a jury lacks.

GLOBAL

In some cases, a court may be asked to determine and interpret the law of a foreign country. Some states consider the issue of what the law of a foreign country requires to be a question of fact. Federal rules of procedure provide that this issue is a question of law. Which position seems more appropriate? Why? Proof of what a foreign law states, and possibly its translation, may be appropriate for a jury to decide, based on a submission of such evidence as a foreign publication of statutes or case law, or the testimony of an expert witness. But the interpretation and application of the law would seem to be most appropriately within the province of a judge.

Under the federal rules of procedure, in a particular case, once the existence and phrasing of a foreign law has been proved, the court has the duty of construing it. The court's construction of the foreign law can be guided by the reasoning underlying similar rules of U.S. common law. Expert witnesses may be consulted, but their opinions are not binding.

CASE 2.3—CRITICAL THINKING QUESTIONS**ECONOMIC**

Should the cost of corrective discovery efforts be imposed on an uncooperative party if those efforts turn up nothing of real value to the case? Explain. Yes, the cost of corrective discovery efforts should be imposed on an uncooperative party even if those efforts turn up nothing of real value to the case. A party's uncooperative behavior can make it reasonable to undertake expensive corrective discovery efforts. Those costs should be imposed on the uncooperative party to deter others from destroying, hiding, or stubbornly refusing to reveal materials that are required to be retained and disclosed. There is no way to know beforehand whether such tactics are actually concealing relevant information. But a persistent refusal to comply with a discovery request provides a sufficient ground to suspect that there is value in the hidden evidence.

LEGAL ENVIRONMENT

Should it be inferred from a business's failure to keep backup copies of its database that the business must therefore have destroyed the data? Discuss. No, a business's failure to keep backup copies of its database does not necessarily indicate that the business destroyed the data. There are other, less culpable reasons that backup copies may not be available. For example, they may have been inadvertently destroyed or lost. Or they may not have been created in the first place. Such a failure does not equate with the willful misconduct that occurred in the *Klipsch* case. There, it could be reasonably inferred from ePRO's actions that the missing documents and data were relevant and that their absence harmed Klipsch.

**ANSWERS TO QUESTIONS IN THE PRACTICE AND REVIEW FEATURE
AT THE END OF THE CHAPTER****1A. *Federal jurisdiction***

The federal district court can exercise jurisdiction in this case because the case involves diversity of citizenship. Diversity jurisdiction requires that the plaintiff and defendant be from different states and that the dollar amount of the controversy exceed \$75,000. Here, Garner resides in Illinois, and Foreman and his manager live in Texas. Because the dispute involved the promotion of a series of boxing matches with George Foreman, the amount in controversy likely exceeded the required threshold amount.

2A. Original or appellate jurisdiction

Original jurisdiction, because the case was initiated in that court and that is where the trial will take place. Courts having original jurisdiction are courts of the first instance, or trial courts—that is courts in which lawsuits begin, trials take place, and evidence is presented. In the federal court system, the district courts are the trial courts, so the federal district court has original jurisdiction.

3A. Jurisdiction in Illinois

No, because the defendants lacked minimum contacts with the state of Illinois. Because the defendants were located out of the state, the court would have to determine whether they had sufficient contacts with the state for the Illinois to exercise jurisdiction based on a long arm statute. Here, the defendants never came to Illinois, and the contract that they are alleged to have breached was not formed in Illinois. Thus, it is unlikely that an Illinois state court would find that sufficient minimum contacts existed to exercise jurisdiction.

4A. Jurisdiction in Nevada

Yes, because the defendants met with Garner and formed a contract in the state of Nevada. A state can exercise jurisdiction over out-of-state defendants under a long arm statute if the defendants had sufficient contacts with the state. Here, the parties met and negotiated their contract in Nevada, and a court would likely hold that these activities were sufficient to justify a Nevada court's exercising personal jurisdiction.

ANSWER TO DEBATE THIS QUESTION IN THE PRACTICE AND REVIEW FEATURE AT THE END OF THE CHAPTER

In this age of the Internet, when people communicate via e-mail, tweets, social media, and Skype, is the concept of jurisdiction losing its meaning? Many believe that yes, the idea of determining jurisdiction based on individuals' and companies' physical locations no longer has much meaning. Increasingly, contracts are formed via online communications. Does it matter where one of the parties has a physical presence? Does it matter where the e-mail server or Web page server is located? Probably not.

In contrast, in one sense, jurisdiction still has to be decided when conflicts arise. Slowly, but ever so surely, courts are developing rules to determine where jurisdiction lies when one or both parties used online systems to sell or buy goods or services. In the final analysis, a specific court in a specific physical location has to try each case.

ANSWERS TO ISSUE SPOTTERS AT THE END OF THE CHAPTER

1A. *At the trial, after Sue calls her witnesses, offers her evidence, and otherwise presents her side of the case, Tom has at least two choices between courses of actions. Tom can call his first witness. What else might he do?* Tom could file a motion for a directed verdict. This motion asks the judge to direct a verdict for Tom on the ground that Sue presented no evidence that would justify granting Jan relief. The judge grants the motion if there is insufficient evidence to raise an issue of fact.

2A. *Lexi contracts with Theo to deliver a quantity of computers to Lexi's Computer Store. They disagree over the amount, the delivery date, the price, and the quality. Lexi files a suit against Theo in a state court. Their state requires that their dispute be submitted to mediation or nonbinding arbitration. If the dispute is not resolved, or if either party disagrees with the decision of the mediator or arbitrator, will a court hear the case? Explain.* Yes. Submission of the dispute to mediation or nonbinding arbitration is mandatory, but compliance with the decision of the mediator or arbitrator is voluntary.

ANSWERS TO BUSINESS SCENARIOS AND CASE PROBLEMS AT THE END OF THE CHAPTER

2-1A. *Standing to sue*

This problem concerns standing to sue. As you read in the chapter, to have standing to sue, a party must have a legally protected, tangible interest at stake. The party must show that he or she has been injured, or is likely to be injured, by the actions of the party that he or she seeks to sue. In this problem, the issue is whether the Turtons had been injured, or were likely to be injured, by the county's landfill operations. Clearly, one could argue that the injuries that the Turtons complained of directly resulted from the county's violations of environmental laws while operating the landfill. The Turtons lived directly across from the landfill, and they were experiencing the specific types of harms (fires, scavenger problems, groundwater contamination) that those laws were enacted to address. Thus, the Turtons would have standing to bring their suit.

2-2A. *Discovery*

Under the work-product rule, attorneys are allowed to protect information that they have gathered as a result of their own skill and diligence. For example, an attorney for a party involved in an auto accident can go out to the scene of the accident and observe the fact that there is a stop sign missing without being under any obligation to divulge such information to his opponent in the lawsuit. Similarly, an attorney who discovers a recently decided case decision supporting his or her theory is under no obligation to share this discovery with the opposing attorney. If attorneys had to share everything, they would be less inclined to expend efforts on behalf of their clients because, in essence, they would be working for both sides at once.

2–3A. Arbitration

Yes, a court can set aside this order. The parties to an arbitration proceeding can appeal an arbitrator's decision, but court's review of the decision may be more restricted in scope than an appellate court's review of a trial court's decision. In fact, the arbitrator's decision is usually the final word on a matter. A court will set aside an award if the arbitrator exceeded her or his powers—that is, arbitrated issues that the parties did not agree to submit to arbitration.

In this problem, Horton discharged its employee de la Garza, whose union appealed the discharge to arbitration. Under the parties' arbitration agreement, the arbitrator was limited to determining whether the rule was reasonable and whether the employee violated it. The arbitrator found that de la Garza had violated a reasonable safety rule, but "was not totally convinced" that the employer should have treated the violation more seriously than other rule violations and ordered de la Garza reinstated. This order exceeded the arbitrator's authority under the parties' agreement. This was a ground for setting aside the order.

In the actual case on which this problem is based, on the reasoning stated here, the U.S. Court of Appeals for the Fifth Circuit reached the same conclusion.

2–4A. Discovery

Yes, the items that were deleted from a Facebook page can be recovered. Normally, a party must hire an expert to recover material in an electronic format, and this can be time consuming and expensive.

Electronic evidence, or e-evidence, consists of all computer-generated or electronically recorded information, such as posts on Facebook and other social media sites. The effect that e-evidence can have in a case depends on its relevance and what it reveals. In the facts presented in this problem, Isaiah should be sanctioned—he should be required to cover Allied's cost to hire the recovery expert and attorney's fees to confront the misconduct. In a jury trial, the court might also instruct the jury to presume that any missing items are harmful to Isaiah's case. If all of the material is retrieved and presented at the trial, any prejudice to Allied's case might thereby be mitigated. If not, of course, the court might go so far as to order a

new trial.

In the actual case on which this problem is based, Allied hired an expert, who determined that Isaiah had in fact removed some photos and other items from his Facebook page. After the expert testified about the missing material, Isaiah provided Allied with all of it, including the photos that he had deleted. Allied sought a retrial, but the court instead reduced the amount of Isaiah's damages by the amount that it cost Allied to address his "misconduct."

2–5A. *Electronic filing*

No, Faden was not sufficiently diligent in ensuring a timely filing. Diligence in this context requires carefulness and persistence. Excusable delay might be evidenced by proof of circumstances beyond a party's control that prevents a timely filing.

From the facts as stated, it appears that Faden attempted to file her appeal only at the end of the relevant period when the Board's e-filing system was down. But there is no indication that anything prevented her from e-filing at a time when the Board's system was not down, or from mailing or faxing her appeal at any time, before the deadline. Thus, Faden appears to have been neither timely nor diligent in filing her appeal before the deadline.

In the actual case on which this problem is based, the Merit Systems Protection Board dismissed Faden's appeal. The Board found that she was not reasonably diligent in ensuring timely filing. On her further appeal, the U.S. Court of Appeals for the Federal Circuit affirmed.

2–6A. BUSINESS CASE PROBLEM WITH SAMPLE ANSWER—*Corporate contacts*

No, the defendants' motion to dismiss the suit for lack of personal jurisdiction should not be granted. A corporation normally is subject to jurisdiction in a state in which it is doing business. A court applies the minimum-contacts test to determine whether it can exercise jurisdiction over an out-of-state corporation. This requirement is met if the corporation sells its products within the state or places its goods in the "stream of commerce" with the intent that the goods be sold in the state.

In this problem, the state of Washington filed a suit in a Washington state court against LG Electronics, Inc., and nineteen other foreign companies that participated in the global market for cathode ray tube (CRT) products. The state alleged a conspiracy to raise prices and set production levels in the market for CRTs in violation of a state consumer protection statute. The defendants filed a motion to dismiss the suit for lack of personal jurisdiction. These goods were sold for many years in high volume in the United States, including the state of Washington. In other words, the corporations purposefully established minimum contacts in the state of Washington. This is a sufficient basis for a Washington state court to assert personal jurisdiction over the defendants.

In the actual case on which this problem is based, the court dismissed the suit for lack of personal jurisdiction. On appeal, a state intermediate appellate court reversed on the reasoning stated above.

2–7A. Appellate, or reviewing, courts

Yes, the state intermediate appellate court is likely to uphold the agency's findings of fact. Appellate courts normally defer to lower tribunals' findings on questions of fact because those forums' decision makers are in a better position to evaluate testimony. A trial court judge or jury, for example, can directly observe witnesses' gestures, demeanor, and other nonverbal conduct during a trial. A judge or justice sitting on an appellate court cannot.

In this problem, Angelica Westbrook, an employee of Franklin Collection Service, Inc., allegedly made a statement during a call to a debtor that violated company policy. Westbrook was fired, and applied for unemployment benefits. Benefits were approved, but Franklin objected. Witnesses at an administrative hearing on the dispute included a Franklin supervisor who testified that she heard Westbrook make the false statement, although she admitted that Westbrook had not been involved in any similar incidents. Westbrook denied making the statement, but added that if she had said it, she did not remember it. The agency found that Franklin's reason for terminating Westbrook did not amount to the misconduct required to disqualify her for benefits and upheld the approval. Franklin appealed. Under the standard for appellate review of findings of fact, the appellate court will likely affirm the agency's findings.

In the actual case on which this problem is based, the state intermediate appellate court to which Franklin appealed the MDES's approval of Johnson's claim upheld the agency's decision.

2–8A. Service of process

No, on the Queriozes' appearance in Florida to provide depositions in their *corporate* capacities, they cannot be served with process in their *individual* capacities.

As stated in the problem, witnesses appearing in court outside the jurisdiction of their residence are immune from service of process while in court. The Queirozes reside in Brazil. Bentley Bay filed a suit in a Florida state court against the Queriozes' company, Soho Bay Restaurant LLC, and against the Queriozes, as its corporate officers, in their individual capacities. The charge was for breach of a personal guaranty. Bentley Bay sought to depose the Queirozes. The court ordered them to appear in Florida to be deposed in their *corporate* capacity. These circumstances would not support serving them with process in their individual capacities.

In the actual case on which this problem is based, Bentley Bay served the Queriozes in Florida with a copy of the summons and complaint. They moved to quash service, arguing that they were immune from service because they were

appearing in the jurisdiction in their corporate capacities. The court denied the motion. A state intermediate appellate court reversed, on the principle stated above.

2–9A. A QUESTION OF ETHICS—*The IDDR approach and complaints*

1. A suit begins when a plaintiff files a complaint in a court with appropriate jurisdiction. A complaint must include a statement of facts necessary to show that the plaintiff is entitled to a remedy.

In this problem, John Verble, a financial advisor for Morgan Stanley Smith Barney, LLC for nearly seven years, was terminated. He filed a complaint in a federal district court against Morgan Stanley. Verble alleged that he learned of illegal activity by his employer and its clients. He claimed that he reported this to the Federal Bureau of Investigation and was fired in retaliation. His complaint contained no additional facts. From a legal standpoint, Verble clearly needed to provide more facts to support his conclusory allegations. His complaint should have contained facts that showed he was engaged in a protected activity, that he acted to stop a specific illegal activity by Morgan Stanley and its clients, and that he was fired in retaliation. A claim is plausible when a plaintiff pleads facts that allow a court to draw a reasonable inference that the defendant is liable for the alleged misconduct. Here, without additional facts, it is within the discretion of the court to dismiss Verble's complaint.

2. Yes, Verble has an *ethical* duty to supply additional facts to back up his claims. Not doing so fails to meet even the minimal ethical standard in this case.

The steps in the IDDR approach begin with an Inquiry that identifies the ethical issue, the stakeholders, and relevant ethical theories. Here, the issue is whether Verble has a duty to support the claims in his complaint with more facts. Besides Verble, the stakeholders include the court and other litigants. The applicable ethical concepts include the categorical imperative—that individuals should evaluate their actions in light of the consequences that would follow if everyone in society acted the same way.

The second step discusses possible actions. Factors include the strengths and weaknesses of each, considering the consequences and the impacts on stakeholders. Verble might choose to proceed without supporting his claims, or he could decide to go ahead only with added facts.

A party has a legal duty to allege sufficient facts in a complaint to state a plausible claim for relief. This is an ethical duty, at a minimum. Thus, choosing to proceed without sufficient factual support presents almost no advantage. In the face of an unsupported complaint, for example, an opponent who might otherwise be willing to settle would have little motivation to do so. A failure to meet the legal standard undercuts credibility, jeopardizes a case, wastes judicial resources, and affects the ability of other litigants to timely present their cases. If everyone chose to present their complaints in the same way, the courts would be clogged with insufficient complaints, and even legitimate claims would not be redressed.

The IDDR approach's third step is to make a decision and provide reasons for it. In all cases, it seems that the best decision would be to support a claim with sufficient facts. This would comport with the legal duty, meet the minimal ethical standard, and avoid the negative effects of doing otherwise.

The last step is to review the chosen action to determine its success or failure in terms of the issue and the stakeholders. It is a plaintiff's legal and ethical responsibility to properly plead his or her case. Litigation requires the parties to invest time and money, and a court to expend its own limited time and money. Vague, unsupported allegations can waste everyone's resources. Therefore, choosing to present sufficient facts to state a plausible claim is clearly the best ethical act.

CRITICAL THINKING AND WRITING ASSIGNMENTS

2–10A. TIME-LIMITED GROUP ASSIGNMENT—*Access to courts*

1. The statute violates litigants' rights of access to the courts and to a jury trial because the imposition of arbitration costs on those who improve their positions by less than 10 percent on an appeal is an unreasonable burden. And the statute forces parties to arbitrate before they litigate—an added step in the process of dispute resolution. The limits on the rights of the parties to appeal the results of their arbitration to a court further impede their rights of access. The arbitration procedures mandated by the statute are not reasonably related to the legitimate governmental interest of attaining less costly resolutions of disputes.

2. The statute does not violate litigants' constitutional right of access to the courts because it provides the parties with an opportunity for a court trial in the event either party is dissatisfied with an arbitrator's decision. The burdens on a person's access to the courts are reasonable. The state judicial system can avoid the expense of a trial in many cases. And parties who cannot improve their positions by more than 10 percent on appeal are arguably wasting everyone's time. The assessment of the costs of the arbitration on such parties may discourage appeals in some cases, which allows the courts to further avoid the expense of a trial. The arbitration procedures mandated by the statute are reasonably related to the legitimate governmental interest of attaining speedier and less costly resolution of disputes.

3. The determination on rights of access could be different if the statute was part of a pilot program and affected only a few judicial districts in the state because only parties who fell under the jurisdiction of those districts would be subject to the limits. Opponents might argue that the program violates the due process of the Fifth Amendment because it is not applied fairly throughout the state. Proponents might counter that parties who object to an arbitrator's decision have an opportunity to appeal it to a court. Opponents might argue that the program exceeds what the state

legislature can impose because it does not reasonably relate to a legitimate governmental objective—it arbitrarily requires only litigants who reside in a few jurisdictions to submit to arbitration. Proponents might counter that this is aimed at the reduction of court costs—that the statute rationally relates to a legitimate governmental end. An equal protection challenge would most likely be subject to a similar rational basis test. Under these and other arguments, the reduction of court costs would be a difficult objective to successfully argue against.