

LITIGATION/LAWSUITS IN THE U.S.A.

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1. *American Legal System*, U.S. Constitution (cf Lithuanian Consultation); state and federal law; common law (cf civil law), statutes, regulations, criminal law.
2. *American Adversarial System*. Important Role of Lawyers in dispute resolution. Role of Judges, lower and specialty courts, administrative agencies; law firms; law schools; bar associations; legal fees.
3. *Litigation Process*. Complaint, deadlines, motions to dismiss. Discovery. Court Rules of Procedure; depositions.
4. *Trials/Hearings*
 - a. Roles of Jury; Judge, Trial Lawyers
 - b. Conduct of a trial from start to finish
 - c. Rules of evidence
 - d. Appeals
5. *American Labor laws*, including union matters, collective bargaining, employment laws and anti-discrimination laws.
6. *Alternate Dispute Resolution (ADR)* by negotiation, mediation, arbitration.

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AMERICAN LEGAL SYSTEM

A. *The U.S. Constitution*

1. In 1787, 13 former colonies of England joined together at a convention in Philadelphia and promulgated the Constitution which was then ratified separately by each of the 13 states.
2. The Constitution sets forth the functions of the three branches of Government: Legislative (Congress), Executive (President) and Judicial (U.S. Supreme Court and other lower courts)
3. Congress consists of the House of Representatives - membership based on population (now 435) and the Senate: two Senators for each state (now 100 Senators)
4. Congress has the power *inter alia*, to
 - a. regulate commerce among the states
 - b. declare war
 - c. levy taxes
 - d. provide for the general welfare
 - e. make laws necessary and proper to carry out the powers of government
5. Presidential appointments, including judges, and treaties must be approved by the Senate;
6. The President is Commander in Chief of the Military; appoints federal judges for life and signs treaties (subject to Senate approval). The President can

veto Acts of Congress, which then require a 2/3 vote to override the veto.

The President is elected by the states voting in the Electoral College based on the state's selection of its electors and not by nation-wide popular vote.

7. In 1791 the Bill of Rights (Ten Amendments) was added to the Constitution:
 - a. The First Amendment provides for freedom of speech, press, and religion,
 - b. The Second Amendment sets forth the “rights of the people to keep and bear arms”.
 - c. The Fourth Amendment forbids unreasonable searches and seizures.
 - d. The Fifth Amendment protects witnesses from self incrimination.
 - e. The Sixth Amendment guarantees a speedy public trial and other rights for the accused.
 - f. The Seventh Amendment provides for the right to trial by jury in common law cases
 - g. The Eighth Amendment forbids cruel and unusual punishment
8. In 1868 after the civil war, there was enacted the Thirteenth Amendment (which forbids slavery) and the Fourteenth Amendment which says “no state shall deprive citizens of life, liberty, or property without due process or deny equal protection.”
9. The Constitution leaves the non enumerated powers “to the states or to the people.”

B. *American Legal System Miscellaneous*

1. Federal Statutes

- a. multiple subjects (e.g. federal regulations, federal crimes)
- b. The role of many many federal agencies (e.g. FDA, SEC, FAA, Post Office, NLRB, EEOC)

2. State Law

- a. state statutes cover multiple subjects e.g. domestic relations, crimes, civil rights, real estate, estates
- b. Each state has its own constitution
- c. Each state has subdivisions: counties and cities which have their own laws and judges
- d. State common law is the historic succession of judicial decisions, dating back to English law. For example, the law of torts (civil wrongs) and the law of contracts evolve case by case, based on judicial precedent – guided by the doctrine of *stare decisis*

3. Courts

Federal

- a. 94 Federal District Courts – trial courts (federal question and diversity of citizenship jurisdiction)
- b. 12 Federal Appeal Courts – circuit courts
- c. U.S. Supreme Court: No automatic appeal except in a very few cases

- d. Miscellaneous specialty courts e.g. patent, tax, bankruptcy, military
4. State
- a. Courts of general jurisdiction – county trial courts
 - b. Courts of Appeals
 - c. State Supreme Courts
 - d. Some states provide for the popular election of judges. In other states judges are appointed by the Governor
5. Miscellaneous Specialty Courts
- a. Domestic Relations – divorce, matrimonial
 - b. Probate – covers estates
 - c. Juvenile court
 - d. Municipal and Mayor's Court - minor matters and traffic offenses
 - e. Small Claims Court
 - f. Ohio Court of Claims (suits against some government agencies)
6. Criminal Law
- a. Felony – misdemeanor distinction
 - b. grand jury indictment if probable cause is shown by prosecutor
 - c. trial by jury guaranteed by Constitution
 - d. Prosecutor, probation officer, public defender
 - e. 90% of Defendants plead guilty - sentencing as a result of plea bargains
 - f. Federal crimes – Federal Court
 - g. State law crimes – State County Court

- h. Evidence of guilt must be so strong as to convince jury beyond a reasonable doubt
 - i. Sentencing guidelines
 - j. State cannot appeal acquittal
 - k. Habeas Corpus
 - l. Capital punishment issues
7. How should court interpret constitutions and statutes?
- a. original intent; original meaning of words at time of enactment;
 - b. interpretations should serve general purpose of statute and legislative intent;
 - c. Should interpretations change over the years to meet needs of the time?
8. Where do you find the law?
- a. Judicial opinions in prior similar cases
 - b. Statutes, administrative regulations
 - c. text books/internet/articles/Restatement
 - d. lawyers' duty to search for precedent
9. Miscellaneous
- a. Equity: The court (judge – no jury) orders a party to do something or cease some illegal activity
 - 1. E.g. cease mass picketing or violence if a strike; stop the illegal erection or destruction of a building. Court can issue an injunction, temporary and permanent injunction

2. E.g. to enforce a non competition agreement

b. Statute of Limitations Deadlines

State law (Ohio example)

Defamation – 1 year

Tort – 4 years

Contract – 6 years

180 days is deadline for EEOC discrimination charge

c. Class Actions – cover similarly situated plaintiffs. Suits with similar

claims against same Defendant can cover a large number of persons in many states

Examples:

1. Walmart case – gender discrimination

2. FLSA cases; nationwide overtime violations

d. Federal Administrative Agencies

1. EEOC (Equal Employment Opportunity Commission)

2. Food and Drug Administration

3. Immigration and National Service

4. Internal Revenue Service

5. Occupational Safety Health Division

6. Department of Labor

7. Federal Bureau of Investigation

8. Social Security Administration - includes claims of permanent disability

ADVERSARIAL LEGALISM

The American System of Dispute Resolution

1. Justice is achieved through court proceedings – legal contests culminating in a jury trial
2. In USA there is a traditional fear of organized bureaucracy and opposition to governance by professionals and administrators
3. It is believed the clash of adversaries will bring out the truth
4. The legal system is therefore dominated by the claimants and their lawyers.
5. USA has 1,000,000 lawyers – 100,000 in New York, 100,000 in California
6. Court procedures are lawyer dominated. Other legal systems e.g. Europe feature government officials and neutral investigators who present facts to judges. These European systems are bureaucratic and feature judicial leadership in investigation and trial. Lawyers play only a supporting role.
7. Americans are fearful of politically biased judges and prefer juries.
8. The USA system is uncertain, complicated, and unpredictable and often inefficient. The European system is more predictable.
9. The search for argument and evidence is controlled by the parties and their lawyers, not by judges, and not by court investigators and usually not by administrative officials.
10. Personal injury cases involving medical matters are not treated as social insurance benefit issues but rather claimant/lawyer dominated tort law which penalizes wrongdoer and compensates victims. Twenty-one percent of auto accidents result in litigation.
11. Dispute resolution, dominated by lawyers and trials, is very costly and there is much delay. In the USA getting a civil case to trial usually takes at least 2 years, in Chicago about 5 years and in Los Angeles 3 years c.f. 6 months in Germany. Expenses of trial vary but usually amount to thousands of dollars.
12. Yet less than 5% of cases actually go to trial. The rest are dismissed by the judge or settled prior to trial.

13. In the U.S.A. there is an exception to the tort law jury system in some personal injury cases i.e. the workers compensation system involving on the job, work related injuries which handles claims and medical issues by a state administrative agency. Another exception is the Social Security Disability claim system for those who become totally disabled, cannot work, and are entitled to social security benefits, even though they are not age 65.
14. The adversarial system taps the energies of entrepreneurial lawyers. For example, plaintiff lawyers in personal injury cases who work on a contingency basis obtaining usually a fee of one-third or 40% of the recovery. If the claimant receives nothing, the lawyer receives no fee.
15. The American system gives litigants more opportunity to discover the truth through the pretrial discovery system – where the parties must reveal their cases, by turning over documents and telling side of their story under oath in depositions.
16. Class actions are an important feature of American tort law. These cases involve identical unlawful treatment by companies of many identical similarly situated individuals – (frequently hundreds). An example are persons injured by the same fire or pharmaceutical drug or many employees nationwide who do not receive required overtime compensation.
17. Concerning lawyers, most attorneys work in small offices of 2-3 lawyers. Big companies and wealthy Americans are usually represented by large law firms. These firms have anywhere from 50 to 500 lawyers. Many are international firms with many offices throughout the world. They represent companies in disputes with the government, with unions, and concerning transactions, mergers, buyouts and complicated business issues such as anti-trust and European union issues.
18. America's poor people have great difficulty in finding, retaining and paying a lawyer, except in personal injury cases where there is a good chance of recovery and the lawyer will work on a contingency basis. It is said over one half of Americans cannot afford to hire a lawyer. There are legal aid societies supported by both government and private funds and other public service organizations that will help the poor or provide "pro bono" legal services, where lawyers donate their services without requiring legal fees.
19. As previously stated many legal matters involve claims where, if successful the individual will receive a settlement or a monetary award by verdict and the successful lawyer will obtain a contingent fee. In other matters, lawyers charge by the hour and this includes individuals who are defending claims. Hourly rates can range from \$75 to \$1000 per hour. Large corporations and wealthy individuals pay their lawyers by the hour, usually \$250-\$750 per

hour. Sometimes lawyers charge a flat rate for special services. Some divorce lawyers may charge \$500 for a routine uncontested divorce of a middle class worker. Bankruptcy lawyers may charge a flat fee of \$1,000 in cases where individuals want to eliminate and discharge their debts.

20. There are several hundred law schools in the U.S.A., which are open to college graduates who are admitted after taking an examination. Law school is normally 3 years. There are some night schools. Law school graduates may practice law in a particular state immediately after passing a vigorous “bar examination” of several days and submitting to the admission rules of the particular state. No apprenticeship period is required. Each Federal Court has its own rules before admitting lawyers to practice and appear in court. Each state governs admission and the conduct of its own lawyers and may disbar lawyers who engage in misconduct.
21. Most lawyers work “solo” alone or in law firms – large or small. However, there are many lawyers who work on the staffs of businesses and corporations and for public and governmental agencies and are paid by salary. Associates in law firms are paid by salary. Partners in law firms are paid by dividing the profits of the firm by a particular percentage, with junior partners making far less money than senior partners.
22. In some countries e.g. England the “loser pays” the attorney’s fees of the winning party. Not in the U.S.A. except in certain civil rights cases. According to a few statutes, the Court may award attorney fees to the prevailing party, usually the Plaintiff.

LITIGATION - PRETRIAL PROCEDURES

1. The rules governing lawsuits are set forth in the court's rules of procedure. Each court - federal, state, local - has its own set of rules. They are similar.
2. To begin a lawsuit, the person with the claim – the plaintiff – files a complaint setting forth the claim or multiple claims and the basis of the court's jurisdiction. There is a filing fee. The complaint normally sets forth the factual and legal basis of the claim citing the particular law, the damages, and the requested relief. Complaints can now be electronically filed. The complaint is served upon the defendant by certified mail. The Defendant has a duty to respond to the complaint, usually within 20 days, by a written answer. The defendant must respond to each and every allegation, by admitting or denying the allegations one by one.
3. Frequently the Defendant will avoid answering and as a preliminary matter file a motion to dismiss, alleging some basic defenses. The Defendant, for example, may allege the court has no power or jurisdiction to hear the dispute or that Plaintiff has chosen the wrong court or that the statute of limitations or deadline for suit has expired or that even if true, Plaintiff has not stated a valid legal claim. The Court will usually decide the preliminary motion, before the case proceeds further. When the court speaks it does so by a written document called an "opinion".
4. After the answer and other "pleadings" have been filed, the court will usually have a conference with the parties in person or by phone to resolve preliminary matters and to set cut-off deadlines for discovery, dates for motions for summary judgment, and a tentative trial date.
5. There are always two sides to every dispute. At the onset of litigation usually the opponents do not understand the arguments and evidence of the other side. The rules of federal court and of most state trial courts provide for exhaustive "discovery" procedures. The purpose of discovery is to prevent surprise at trial, narrow the issues, to fill gaps of evidence, and to promote settlement by revealing strengths and weaknesses of the cases. Also the opposing party may have documents and evidence that are extremely relevant to proving plaintiff's claim or setting forth defendants' defense. Further by discovery the parties want to "lock in" the other side and prevent a switch of evidence at trial.
6. There are four major components of discovery:
 - a. Request to produce documents;
 - b. Interrogatories;

- c. Requests for admissions
- d. Depositions.

7. The parties normally file exhaustive and detailed request for all documents past and present covering a large range of subject matter which may consume several pages. Discovery now includes paperless electronic documents. Deleted data can also be recovered.

Interrogatories are a list of questions e.g. “state the names and addresses of all witnesses”. The rules often limit the parties to 25 questions. Interrogatories can be very important if Plaintiff can not afford depositions. Interrogatories may be important as the sole source of accurate information e.g. regarding statistics. Answers to interrogatories can be introduced at trial and also to impeach witnesses.

Requests for admissions are rarely helpful because the party can deny and avoid the question.

8. Depositions:

All parties have the right to depose and take the testimony of persons with knowledge of the case under oath. Depositions are usually held at a lawyer’s office. Lawyers for all sides are present, as are representatives of each party. The Judge is not present. The depositions can be short – an hour or so or go on for one or two days.

Depositions are expensive. In Cincinnati, Ohio, court reporters normally charge \$60.00 per hour. In addition, it usually costs at least \$500.00 to reproduce a transcript of one day’s testimony. Tape recorders and video equipment are permissible. Telephone depositions are permitted for out of town testimony.

Plaintiff usually wants to depose hostile witnesses controlled by Defendant who will likely be witnesses at trial or possess important information needed by Plaintiff or relied on by Defendant.

Live depositions are important so the parties can see what kind of impression a witness will have on a jury and/or judge.

Leading questions by the lawyers will force the witness-deponent to give favorable answers which can be used at trial to cross examine witnesses.

Requests for admission are rarely helpful because the party can deny and avoid the question.

The parties engage in hours of preparation for depositions which may be the most important events in the litigation and frequently lead to settlement.

Court rules usually have special provisions for a mental and physical examination of the Plaintiff which may be very important e.g. concerning the extent of damages in a personal injury case.

Discovery frequently engenders hotly contested disputes by a party refusing to answer a question or produce a document. The judge assigned to the case frequently is called upon to resolve the controversy by a telephone or court hearing.

9. Summary Judgment:

After discovery is completed the Defendant will frequently file a motion for summary judgment. The Defendant will argue there are no significant factual issues for jury trial and the matter can be resolved as a “matter of law”. The Defendant will often submit portions of deposition testimony in support of its motion. Plaintiff will argue there are hotly contested issues of credibility - who is telling the truth - which can only be resolved by jurors at trial.

Courts frequently grant motions for summary judgment and dismiss the case. Then the Plaintiff will be forced to appeal to the higher Court of Appeals, based on the transcript of testimony and applicable law.

10. Miscellaneous

a. Where to sue?

Forum shopping e.g. state or federal court – the search for a friendly judge

The substantive law of the place of the tort governs. The forum state law governs procedural issues

Under state ‘long arm’ statutes Defendant can be sued in state where wrong occurred

b. Trial by jury or trial by court?

c. Who can sue?

Right of consortium of spouse

Estate of deceased

Guardian or parents of minors
Trustee in bankruptcy

d. Who can be sued?

Subsidiary of parent corporation; joint employer liability

Piercing the corporate veil by suits against individuals

Individual institutional officials e.g. corporate executives

Conflicts of law; Issues of which state law governs

Pendent jurisdiction – federal courts hear state law claims closely related to federal claims

TRIAL

A week or so before the assigned trial date there are pretrial conferences between the lawyers and judge involving pretrial statements of issues, exchange of witness and documents lists, a preview of anticipated problems and proposed jury instructions as to applicable law. Settlement is often discussed at these conferences.

Prior to trial usually one or both of the parties will file a motion “in limine” to exclude certain testimony alleged to be prejudicial or irrelevant or otherwise improper.

Trial begins with an “array” or pool of jurors – usually 20-50 potential jurors, selected from the registered voter list, who are seated in the courtroom. The first order of business is questions by the trial judge and lawyers to the jury, designed to exclude jurors who might be biased or otherwise disqualified from sitting as a juror. Each lawyer has the right to question each individual potential juror as to their opinions of the subject matter and anything which would cause them to be biased in favor of one party. Each party has the right to challenge a juror for “cause” (e.g. prior knowledge of the case or a prior relationship with a party or witness or inability to serve). Each party also has a certain number e.g. three, of “peremptory challenges” which automatically unseat jurors and which need not be based on “cause” or any particular reason. Before exercising challenges, the parties are careful to study the backgrounds of jurors as revealed in juror questionnaires and the jurors’ answer to questions of the lawyers in open court.

In criminal cases and some civil cases there is a 12 person jury. In other cases there may be a 6 or 8 person jury depending on state law. Alternate jurors are also seated. In criminal cases and in federal court the verdict must be unanimous. In some state courts

e.g. Ohio, a three-fourth verdict in all that is required to prevail.

The trial judge normally instructs the jury concerning their duties, particularly as to their duty not to discuss the case with anyone or to reach an early conclusion or communicate with or listen to the media concerning the case. Each side then will give an opening statement to the jury of at least thirty minutes, which will outline the evidence to be presented.

After opening statements, the plaintiff in a civil case and the prosecuting attorney in a criminal case will first present its case i.e. its witnesses and documents and other evidence. Then the Defendant presents its case via witnesses and documents. Thereafter, the Plaintiff may present rebuttal testimony.

Witnesses testify under oath and are subject to cross examination by the other party. A court reporter is present. The trial is open to the public. Usually there will be a “separation of witnesses”, and no potential witness (except representatives of the parties i.e. Plaintiff and Defendant) will be permitted in the courtroom.

Leading questions e.g. “when did you stop beating your wife?” “Isn’t it a fact that ?” are forbidden during direct examination. However, leading questions are routine and the norm on cross examination and when examining a hostile witness.

Witnesses may be impeached by showing bias, a prior inconsistent statement and a prior criminal conviction. Witnesses can be forced to testify if they are served with a court subpoena to appear.

Trial lawyers have differing trial strategies. Most agree the first and last witnesses are most important. Most agree each side must develop one or more central themes to their case and that total preparation and mastery of the facts and evidence are the ultimate

skill of advocacy. In the event of a hostile judge, it is important to make sufficient objections as to testimony, instructions of law and erroneous rulings so as to create a written record for appeal to the higher court.

In a civil case Plaintiff must prevail by a preponderance of evidence – the scales must tip in Plaintiff's favor. In a criminal case proof must be beyond a reasonable doubt.

The rules of evidence apply at trial. There must be exclusion of "privileged" communications e.g. between husband and wife, attorney and client, doctor and patient, church member and clergy.

There is a general rule excluding "hearsay" testimony i.e. out of court statements of a person, not the witness, who did not see or hear the event, offered to prove the truth of the out of court statement or event. However, most courts allow many exceptions to the "hearsay" rule e.g. statements under belief of impending death, statements against interest, excited utterances or statements of party-opponent.

Frequently experts e.g. doctors, statisticians, may state their opinions concerning the evidence e.g. as to a party's mental state, whether an accident caused an injury and the nature and extent of a medical disability.

Frequently there are disputes at trial concerning

1. competency of witnesses;
2. exclusion of evidence on grounds of prejudice;
3. character testimony;
4. writings used to refresh recollection;
5. relevance of testimony;

6. Parole evidence concerning the meaning of documents, used to resolve ambiguity.

At the close of Plaintiff's testimony Defendant will usually move for a directed verdict, arguing that Defendant should prevail as a matter of law and there is insufficient evidence for a jury to rule in Plaintiff's favor. Sometimes there are gross violations of court rules or other incidents which require the judge to declare a "mistrial" requiring a new trial.

After both sides have "rested" their cases, the lawyers will give "closing arguments" and review the evidence in their favor and argue as to the issues of liability and damages in a civil case or guilt or innocence in a criminal case. These arguments may range from thirty minutes to one hour, or more

The court will then give lengthy instructions to the jury as to the applicable law. The judge will explain the verdict form which jurors must fill out. If there are multiple parties and many factual issues, the form can be complicated.

The jury will then retire to seclusion and elect a foreperson. Deliberation can be several hours or in some few cases several days.

After the foreperson announces the jury verdict and hands the verdict form to the judge to read in open court, the parties can make post trial motions including a motion for a judgment contrary to and notwithstanding the verdict (called motion N.O.V.).

The average jury trial extends over several days.

Most civil cases involve issues of liability - was the law broken? - and also damages - economic, medical, emotional, punitive – i.e. how much money, if any, should be awarded?

APPEALS:

Appeals involve arguments concerning errors of the trial courts and misconduct at the trial, all as set forth in “briefs” (written statements) which recite the facts and legal arguments. Usually appellate courts permit oral argument by the lawyers.

The government cannot appeal a not guilty verdict in a criminal case

Appeals are based on the written record – the transcript of testimony transcribed by the court reporter and legal arguments and involve purely legal issues such as

1. the granting of summary judgment or directed verdict by the trial judge;
2. misconduct at trial, misconduct of jurors, parties or judges;
3. improper rulings on evidence matters;
4. improper instructions of law;
5. verdict against the weight of evidence

Civil judgments based on verdicts at trial or dismissals by the court become “res judicata” and such claims cannot be relitigated. In addition, there is “issue preclusion”. If the judge or jury decides a particular fact, that issue may not be relitigated under the doctrine of collateral estoppel.

SETTLEMENT NEGOTIATIONS, MEDIATION AND ARBITRATION

A. Over 95 percent of lawsuits are settled by the parties at some point in time.

Initially settlement is very difficult because of:

1. unrealistic expectations of the parties;
2. anger and hostility between the parties and intense emotional motivation;
3. lack of understanding of the legal system;
4. Differing evaluation of the merits of the case and differing predictions of the outcome;
5. lack of knowledge of the merits and evidence of the other party
6. undue influence of advisers – family members, business associates, lawyers;

B. Once a lawsuit is filed, the positions of the parties may harden, making settlement almost impossible at first. However, during the expensive, burdensome, revealing discovery process, the positions of the parties change and become closer, particularly as they learn the strength and weakness of their case and their opponent's case. There are various "windows of opportunity" when the door is most open for settlement – i.e. before the lawsuit is filed, after discovery and depositions, and before summary judgment motions are filed, and right before trial.

C. There is no magic formula for determining the value of a case. However, there are several important factors:

- a. The probable outcome – which will depend on whether the plaintiff can survive summary judgment and motions to dismiss, and “get to the jury”.
 - b. The real facts and how difficult is it for the parties to present their version of the truth;
 - c. The equities and how a judge and jury will react emotionally to the parties and the facts;
 - d. The personalities and likeability of the plaintiff and the major defense witnesses.
7. Potential damages are critical to negotiating a settlement. The parties will focus on hard damages e.g. medical expenses, loss of pay and benefits. However, “soft” damages are also evaluated i.e. the possibility a jury will award damages for emotional distress or punitive damages. Frequently cases settle for 2-5 times “hard” damages (e.g. medical expenses) or one year’s loss of pay plus attorney fees.
 8. Settlements in similar recent cases are to be considered where lawyers are knowledgeable specialists, and familiar with similar cases in the local area.
 9. Economic strength and the parties’ perception of the other parties’ negotiating attitude.
 10. Cost of defense including expense of discovery, trial, and most of all lawyer fees. The high cost of defense and lawyer fees (could be between \$250-\$500 per hour), fear of publicity, desire to avoid distracting, aggravating and litigation, may cause a defendant to settle.

11. Many defendants are represented by insurance company attorneys, depending on the coverage of the insurance policy. Insurance policies often have 'reservation of rights' clauses whereby the insurance company asserts its duty to defend some, but not all claims in a law suit. Insurance companies are influenced solely by financial factors and not the emotional and political factors so important to the Plaintiff and Defendant.
12. At some point one or both of the parties are particularly anxious to end the dispute. Uncertainties as to the outcome and emotional factors make settlement difficult. Yet there comes a time when good negotiators are ready to consummate an end to the litigation. The parties, after often years of struggle, are tired of combat they can ill afford emotionally and financially and want to put the dispute behind them. The plaintiff will be influenced by "a bird in the hand is worth two in the bush" philosophy. The defendant will be faced with its prospect of substantial legal fees for an upcoming trial. In the past the parties often waited to settle until "the courthouse steps" - until the Friday before a Monday trial or even after a jury has been selected and is "in the jury box".
13. Good negotiators – lawyers know the importance of compromise and frequently have more difficulty with their clients than with the opponent.

MEDIATION

14. Many times the parties and their lawyers need outside assistance to settle disputes. In the past 25 years mediation has become very popular in the USA as a way to resolve disputes. Frequently the parties hire a private

mediator, dividing his fee – usually a high hourly rate (\$200-\$350.00 per hour). Often the trial judge will act as an informal mediator. Sometimes the Court hires individuals to be full-time mediators, spending all their time mediating pending cases.

15. Mediators generally require the parties to sign a pre-mediation confidentiality agreement. In addition, the mediators usually request a confidential written summary of the parties' case, including a review of the evidence, witnesses, legal theory, and damages and a proposal for a number to settle the case. The summary shall be sent to the mediator but not the opposing party.
16. At the mediation there will only be one or two persons from each side present, in addition to the attorneys and mediator. The mediation will take place in an office, not a court room. No court reporter will be present. At the onset of the mediation, the lawyers will usually give a very short statement of position. Then the parties will disperse to different rooms. The mediator goes back and forth between rooms, listening to and encouraging and communicating new offers and counteroffers. The mediator usually plays "the devil's advocate" and points out the defects, weaknesses and holes in the arguments to the respective parties. Frequently if no agreement is reached the parties will agree to seek a "mediator's proposal", which will reflect a reasonable compromise and is often accepted by both parties.
17. Unsuccessful mediations may last only a few hours or less, particularly if one party exercises its right to walk out if negotiations are not going well. Successful mediations may go on all day and into late in the evening.

18. If settlement is reached a detailed settlement agreement is drawn up, where the parties release each other from any and all claims. The agreement sets forth the amount and dates of payment and other details e.g. confidentiality, taxes.

ARBITRATION

19. Union employees and unions covered by a labor agreement are usually required by the agreement to utilize arbitration as the last and final step in the grievance procedure. Non-union employees and consumer customers may be required to arbitrate disputes by virtue of agreements signed upon hire or consummating a transaction e.g. use of a credit card or purchase agreement. These are typically “take it or leave it agreements”, that the employee or consumer, who has little or no bargaining power, must accept. Recently these agreements to arbitrate disputes and forgo court have been upheld as being valid.
20. Some regard arbitration as a much more efficient, speedier, and cheaper way to resolve disputes than court proceedings. Of course, for the plaintiff there may be a big disadvantage since there is no possibility of a sympathetic jury. Arbitration could be held within a few months of selection of the arbitrator. Discovery and depositions are usually limited. Arbitration may favor Defendant businesses, because absence of usually friendly jurors with biases in favor towards individuals. Arbitrators, in general, may be more friendly to Defendants who are usually employers, corporations, and businesses.

21. Arbitrators are often selected under the auspices of a private organization, for example the American Arbitration Association (AAA), which submits a list of proposed arbitrators to the parties. The arbitrator is agreed upon usually by each party striking names from a list of 6-7 arbitrators. Once selected, the arbitrator will set deadlines, discovery rules, and a hearing date.
22. Arbitrations usually take place within six months of selection of the arbitrator. The location is usually a law office or the local offices of the AAA. At the arbitration hearing, strict rules of evidence do not apply and the proceeding is relatively informal. A court reporter is usually, but not always present. The arbitrator will usually issue a written decision within a few weeks after the hearing. The losing party may appeal, but courts are very reluctant to vacate arbitration awards, except if there is corruption or gross violation of law.

LABOR AND EMPLOYMENT LAW

1. Early “laissez faire” doctrine fostered the “employment-at-will doctrine” in the U.S.A. The employee works at the pleasure of the employer. The employer is free to set whatever rules it likes in the workplace, as long as existing laws are not violated. Paramount is the “default” rule that an employer can discharge employees “at-will”. An early and famous formulation is the holding of one court that “an employer could discharge an employee at any time for good cause, for no cause, or even for cause morally wrong without being guilty of a legal wrong”. *Payne v. Western H & AR Co*, 81 Tenn 507 (1884). The at-will rule governs in all states except Montana.
2. There are many common law exceptions to the at-will doctrine. Frequently courts have enforced oral promises of employees upon which employees have relied to their detriment, for example by quitting a job based on the promise of a new job. Frequently the doctrine of an implied contract has been applied to enforce an employer handbook stating various company policy rules under the law of contracts.
3. Many torts apply to the workplace, such as assault and battery, intentional infliction of emotional distress, fraudulent misrepresentation, negligent hiring and retention of a known dangerous supervisor, interference with privacy. “Whistleblowers” who are fired in retaliation for complaining about employer violations of state or federal law may be protected by the “public policy” tort. Employers who deliberately publish falsehoods may be liable for slander.
4. In addition to protection by common law tort and contract law, employees are protected from wrongful termination as a result of various federal and state statutes.
5. The Civil Rights Act of 1964 forbids discrimination because of race, religion, gender and national origin. The Age Discrimination in Employment Act (ADEA) forbids discrimination on account of age. The Americans with Disabilities Act (ADA) prohibits discrimination on account of a disability and requires employers to reasonably accommodate employees with disabilities. The Family and Medical Leave Act (FMLA) requires employers to grant 12 weeks per year of medical leave for those with serious illnesses.
6. The federal EEOC (Equal Employment Opportunity Commission) is a federal agency that attempts to enforce the civil rights anti-discrimination statutes, principally by investigation and persuasion. The aggrieved employee first files a charge with the EEOC and then subsequently may file a lawsuit brought by a private attorney. Proof of discrimination may be established by direct evidence, such as derogatory discriminatory remarks. Indirect

evidence is permitted where the aggrieved employee shows a *prima facie* case by showing he or she was qualified and replaced by a non-protected employee and that the employer's explanation for the alleged discriminatory conduct was "phony" and pretextual, and not the real reason. Proof of similarly situated non-protected employees being treated differently is also circumstantial evidence of discrimination.

7. The Equal Pay Act (EPA) prohibits discrimination on the basis of sex in payment of wages and benefits where men and women perform work of similar skill effort and responsibility under similar working conditions.

There are other miscellaneous federal statutes protecting employees. Veterans of the armed forces are protected from discrimination by USERA. The Railway Labor Act deals with the rights of employees working for railroads and airlines. ERISA deals with protection of rights to fringe benefits, including pensions. The WARN Act requires 60 day notice in the event of mass layoffs.

Civil Service statutes protect the rights of federal employees who work for the U.S. government.

8. The Fair Labor Standards Act (FLSA) establishes minimum wages and overtime pay for employees working in interstate commerce. At present the minimum wage is \$7.40 per hour. Employers must pay 1 ½ times their employee's regular rate for hours worked over 40 hours in one week. There are numerous exceptions to the law for professional, administrative, managerial employees, outside sales personnel, and highly compensated employees. Liquidated, double damages may be awarded when the employer has acted willfully.
9. The National Labor Relations Act (NLRA) was enacted in 1935 in order to protect employees who wish to join and remain in a trade union. It was later amended by the Taft Hartley Act. The NLRA forbids discrimination on account of union activities. The NLRB (National Labor Relations Board) holds elections where employees seek to have a union recognized as bargaining agent for appropriate units. If the union wins a majority vote it is certified and the employer is required to bargain and negotiate with the union concerning a collective bargaining agreement. Employers that arbitrarily refuse to bargain with a union or discharge an employee because of union activities or otherwise unlawfully interfere with union activities can be held guilty of an unfair labor practice by the NLRB after a hearing. An order of the NLRB can be appealed to a U.S. court of appeals.

Labor agreements negotiated by the Company and union cover wages and working conditions. Frequently in union shops all employees are required to

join the union and pay union dues. A typical labor agreement (usually 2-3 years in length) sets forth wage rates, wage increases, holidays, promotions, working conditions, and seniority rights in the event of layoffs. There are normally prohibitions against unfair discipline and in particular unjust discharge. The union and employees may enforce the labor agreement through a grievance procedure. The union files grievances on behalf of employees. If the grievance is not settled the labor agreement gives the union the right to demand and obtain a decision by an outside private arbitrator selected by both parties. Many of the arbitrations involve claims of unfair discharge in violation of the contract's prohibition of discharge "without just cause". In considering what is "just cause" the arbitrator will consider the reasonableness of the disciplinary rule, the past disciplinary record and whether the investigation and the penalty were reasonable. An arbitration award may be attacked in court by a lawsuit to vacate the award where there is a gross violation of settled law or public policy.

There is a federal statute, the Landrum Griffin Act, which regulates internal union affairs and seeks to promote democracy in unions and prevent corruption. Federal law also imposes a duty of fair representation upon unions and permits suits against employers and unions where the union has arbitrarily or in bad faith failed to enforce the labor agreement.

10. Frequently employers require employees to sign agreements that they will not work for a competitor for a certain number of years e.g. three and within a certain geographic area e.g. in communities where the employer does business. Also the employee agrees not to disclose trade secrets to anyone. These agreements are usually deemed enforceable under the common law, although they may be cut back by the court exercising its equitable power e.g. from 3 to 1 years and limited to the community where the employee worked. The employer will frequently seek an injunction and a court order preventing the employee from working for a competitor, and if a salesman, from soliciting customers. Generally courts are not sympathetic to the harsh enforcement of these clauses, particularly where the employee has been wrongfully terminated and the clauses are unreasonable. The laws of various states differ. In California non competition clauses are illegal and unenforceable.