

## Crump Procedure Outline

# Procedure I

Review Outlines

Part 1: use with video at the *end of coverage of subject-matter jurisdiction*.

Part 2: at *end of coverage of summary judgment*.

Part 3: at *end of course*.

These and the videos can also be used as previews.

**IMPORTANT!**

### **NOTE ABOUT COVERAGE CHANGES**

**From year to year, I change the topics covered. But it does not make sense to redo a video review for minor changes in topics.**

**The video reviews contain a few items here and there that I covered in the past but that we have not covered this year. Also, there are items this year that are new that are not covered in the videos.**

More than 95% of the video content, however, is consistent with our coverage.

## Crump Procedure Outline

### REVIEW, PART 1

BASIC OVERVIEW OF A LAWSUIT; JURISDICTION; SERVICE OF PROCESS; VENUE

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#### I. OVERVIEW

##### A. PRE-SUIT STAGE

##### B. WHERE AND HOW TO FILE SUIT

###### 1. Subject-Matter Jurisdiction

- a. State-Federal
- b. Type of Court—Small Claims, Probate, Etc.

###### 2. In Personam Jurisdiction; also, Service of Process

###### 3. Venue

##### C. THE PLEADINGS (Complaint, Answer, Etc.)

##### D. PRELIMINARY DISPUTES (Jurisdiction, Etc.; Motions to Dismiss)

##### E. DISCOVERY AND PRETRIAL

##### F. DISPOSITION WITHOUT TRIAL (Summary J., Default, Settlement, Dismissal, Etc.)

##### G. TRIAL—SCHEDULING AND TRYING

1. Judge and Jury
2. Selecting the Jury
3. The Trial: Evidence, Arguments
4. Court's Charge and Verdict; Judgment
5. Taking Case from the Jury: Judgment as a Matter of Law (also called Directed Verdict or Judgment Notwithstanding the Verdict); New Trial

##### H. ENFORCEMENT; Remedies

##### I. APPEAL

##### J. ALTERNATE DISPUTE RESOLUTION

#### II. BASIC JURISDICTIONAL CONCEPTS

##### A. JURISDICTION is What Gives a Court Power to Act

##### B. COURT MUST HAVE BOTH In Personam and Subject-Matter Jurisdiction

##### C. CONSEQUENCE OF LACK OF JURISDICTION: No Power Over the Dispute

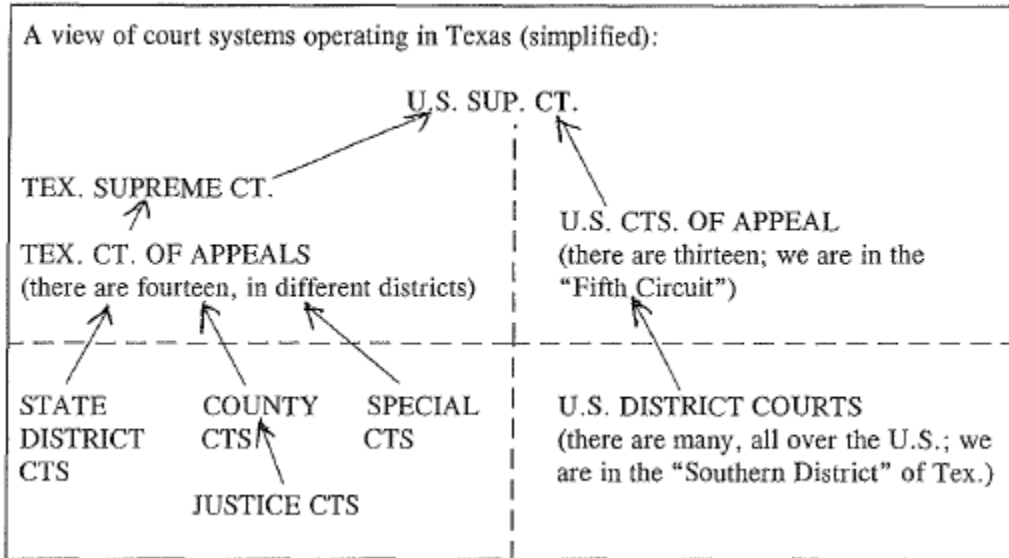
##### D. CONTRAST Venue; Other Rights

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### III. SUBJECT MATTER JURISDICTION

**A. SUBJECT MATTER JURISDICTION is Power over the Type of Dispute, as Contrasted to In Personam Jurisdiction, Which is Power Over the Specific Parties to the Dispute**

**B. ONE BASIC SUBJ. MATTER IDEA: TYPES OF COURTS & COURT SYSTEMS**



**C. SUBJECT MATTER JURISDICTION IN FEDERAL COURTS**

**1. Diversity Jurisdiction (Congress Passed § 1332, Under Authority of Constitution)**

a. Requirements:

(1) Diversity (Citizens of Different States or of State & Foreign Nation, Etc.) (permanent resident aliens treated as citizens)

(2) Over \$75,000 Amount in Controversy

b. Diversity Must Be Complete

c. Corporation: Place of Incorporation and Principal Place of Business (Nerve Center Test Determines This) (**Important Note: In class, we'll see that the video's statement is changed by recent Supreme Court case: PPB is headquarters or nerve center only ["bulk of activities" is gone; it's now nerve center only]**)

**2. "Arising Under" Jurisdiction—§ 1331 (Also Misleadingly Called "Federal Question" Jurisdiction)**

a. Requirement: a Claim "Arising Under U.S. Constitution, Statutes or Treaties"

b. Anticipation of Federal Defense Not Enough; Even Use of a Federal Law in Avoidance of Defense Not Enough. Plaintiff's Own Claim Must Arise Out of Federal Law.

(1) "Ingredient" Test

(2) "Creation" Test

**3. Special Jurisdictional Statutes (e.g., United States as Party; Foreign Sovereign Immunities Act; Bankruptcy; Etc.; "Exclusive" Statutes)**

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### 4. Supplemental Jurisdiction (§ 1367)

- a. Purpose: To Allow a Closely Related, Nonjurisdictional Claim to be Litigated Together With a Jurisdictional Claim That is in Federal Court
- b. Test: The District Court Has Supplemental Jurisdiction Over the Claim if It is “So Related ... That They Form Part of the Same Case or Controversy [Under Art. III of the U.S. Constitution]”
- c. Discretionary in Certain Instances (i.e., Novel State Question, Nonjurisdictional Claim Predominates, Jurisdiction Claim Dismissed, Other “Exceptional” Cases)
- d. Includes Some Multiple Claims by a Plaintiff, as Well as Counterclaims, Cross-Claims, Etc., that Are Not Jurisdictional

### 5. Removal Jurisdiction: Allows Defendant to Take Case to Federal Court (§ 1441(a)-(c))

- a. Basic Concept: Defendant Can Remove From State Court to Federal if the Case is Within Original Jurisdiction of Federal Court (§ 1441(a)).
- b. BUT: If Diversity is the Sole Basis for Jurisdiction, the Case Cannot be Removed by a “Resident Defendant” even if Diversity Exists (§1441(b)). (Resident Defendant Means a Citizen of the State. I prefer the term “Local Citizen.”)
- c. Procedure (§§ 1446-1447):
  - (1) Defendant Files a “Notice of Removal” Stating Concisely the Grounds for Removal (All Defendants Must Join.),
  - (2) Within 30 Days After Receipt of Pleading “or Otherwise” Notice
  - (3) Notice to Parties & State Court “Effects” Removal; State Court Proceeds No Further.
  - (4) Court may Remand any Time Before J., on Motion of a Party or its Own Motion. The Remand is Not Reviewable by an Appellate Court.
  - (5) 1 Yr. Limit on Removal of Diversity Actions. (Note Problems Here!)
  - (6) Court May Order Filing of Copy of State Proceedings.
  - (7) Procedural Defects in Removal Waived Unless Raised by Defendant’s Motion Within 30 Days.

## **IV. IN PERSONAM JURISDICTION**

**A. BASIC PHYSICAL POWER NOTION: A Court has Power to Adjudicate as to a Person Validly Served with Process Inside Its Territorial Limits.**

**Exceptions: Persons in the Territorial Limits by Virtue of Fraudulent Enticement, or Subpoena. Cf. Burnham v. Superior Court.**

**B. CONSENT: A Court has Jurisdiction to Adjudicate as to a Person Who has Consented, Expressly or Impliedly, to Jurisdiction**

**1. Nonresident Motorist Statutes**

**2. Waiver: 12(h)(1) of FRCP; Texas’ Rules. Waiver Is Consent.**

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### 3. Motion to Dismiss

- a. Special Appearance: 1st Document
  - (1) *Not Waiver if Done Under Applicable Rules*
  - (2) *Forecloses "Collateral" Attack in D.'s Home State*
- b. Federal (12(b) Motion): Analogous to Special Appearance but Needn't Be First; Still, There's a Time Limit.

### C. LONG-ARM STATUTES & DUE PROCESS

1. Courts Ultimately Broke Away From Strict Territoriality and Allowed Service Outside the State
2. **Basic Due Process Test (Sometimes Expressed as "Doing Business," "Presence," or "Minimum Contacts," but that's the name of the test, not the test itself): Long-Arm Jurisdiction Complies with Due Process if Defendant has Sufficient Contacts with the Forum State so that Suit Is Consistent with "Traditional Notions of Fair Play and Substantial Justice."**

#### Refinements:

- a. A Single Point of Contact May be Sufficient, if Substantial Enough (McGee)
- b. Substantial Contacts with the Forum May Be Enough Even Though the Events Causing the Suit Occurred Elsewhere (Perkins v. Benguet). (But: Due Process Doesn't Mean the State Long-Arm Statute Has To Go that Far)
- c. "General" Jurisdiction (requires systematic & continuous contacts) as vs. "Specific" (requires less)

IMPORTANT: For general jurisdiction, S. Ct has held that the contacts must be strong enough so that the defendant is "essentially at home" here (whatever that means!)
- d. Unilateral Acts by Plaintiff are Not Enough (Hanson v. Denckla); Must have Some "Purposeful Act" or Acts by Which Defendant Avails Self of Facilities of Forum State. Nicastro Case Emphasizes this Principle. Maybe It Controls Even Over "Fairness" Test of International Shoe?
- e. Reasonable Anticipation: Worldwide Volkswagen
- f. Reasonable Anticipation in Commercial Case: Jurisdiction Unless D. Makes "Compelling" Showing of Convenience Issues (Burger King)(a Doubtful Principle, though)
- g. In Rem Jurisdiction: If a "Thing" is Within the Power of the Court, the Court May Adjudicate Rights in that Thing.

Shaffer v. Heitner: Nexus Among Defendant, State and Litigation—Fair Play Test
- h. The Texas Statutes
  - (1) *Nonresident Motorist—Nonresident Motorist has Motor Vehicle Accident on Tex. Roads*
  - (2) *General Long Arm—Covers Anyone "Doing Business," Including Tort or Contract; Reaches to "Limits of Due Process"*

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- D. “TAG” JURISDICTION: BURNHAM V. SUPERIOR COURT: In-State Service Apparently Suffices even Without Contacts Fairness Analysis (But Are There Limits?)**
- E. FORUM SELECTION CLAUSES: Federal Enforceability as to Jurisdiction, Venue; State Differences**
- F. NATIONWIDE SERVICE: Federal Statutes**

### **V. SERVICE OF PROCESS**

#### **A. DUE PROCESS “NOTICE” REQUIREMENT**

- 1. Notice “Reasonably Calculated” to Give Defendant Actual Notice of the Action and to Allow Defendant’s Response**
- 2. The Notice May Be Sufficient Even if Not Received (It Depends)**

#### **B. TRADITIONAL SIGNIFICANCE OF THE “CEREMONY” (“ETIQUETTE”?) of Service**

#### **C. TEXAS SERVICE**

##### **1. Within State**

- a. In-Hand by Sheriff or Constable—also: Restricted Registered Mail
- b. Substituted: A “Reasonably Calculated” Method, Upon Motion and Sworn Showing of Inability to Serve Defendant Under the Other Rules
- c. Publication
- d. Corporations: Registered Agent; Officer (e.g., Pres.; V.P.;) or—Substituted Serv. on Secretary

##### **2. Consent: Any Appearance Other Than After, and Subject to, Special Appearance**

##### **3. Outside State, with No Registered Agent: Several Ways**

- a. Most Frequent, Now—Serve on Secretary of State; Secretary Forwards by Registered Mail
- b. Other Means Also Exist

#### **D. FEDERAL—RULE 4**

##### **1. The “Summons” and “Complaint” (Rule 4(a)-(c)): Service May Be Done by any Person, 18 or Over, Not a Party (or Marshal, if Ordered by Court)**

##### **2. Waiver; Duty to Save Costs; “Notice” and “Waiver” (Rule 4(d))**

- a. See Forms 1A and 1B for Notice and Waiver
- b. Executed Request by Defendant, when Filed by Plaintiff, Is Equivalent to Service
- c. Incentives: A “Duty” Is Imposed by Rule; Rule Expressly Doesn’t Waive Venue or Personal Jurisdiction; 60 Days to Answer; Costs (Including Atty. Fees for Motion) “Shall” Be Imposed if No Waiver
- d. But: If No Waiver, Must Serve. Note Potential Problems, Including Statute of Limitations, 90 Day Limit

##### **3. Individuals (Rule 4(e))**

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- a. Can Be Served Pursuant to State Law;
- b. Or, Alternatively, One of 3 Additional Ways:
  - (1) *In-Hand (Personal) Service*;
  - (2) *“Leave with” Service (at “Dwelling” or “Usual” Abode, on Person of Suitable Age and Discretion Then Residing There)*;
  - (3) *Agent*.

### **4. Corporations, Associations (Rule 4(h)):**

- a. State Law (as for Individuals);
- b. Or, Alternatively, by Serving
  - (1) *An “Officer” or “Managing” or “General Agent,” or*
  - (2) *Agent Authorized by Appointment or Law (Must Also Mail to Defendant if Governing Law So Requires)*

### **5. Other Provisions for Infants; Incompetents; the United States or Its Agencies; Local, State or Foreign Governments, Etc. (Rule 4(g), (i), (j))**

### **6. Territorial Limits (Rule 4(k))**

- a. Federal Courts Generally Have No Greater Out-of-State Jurisdiction than State Courts for State Claims. (Minor Exceptions to That.)
- b. The State Long-Arm Statute Provides the Limit of Effective Service, Even in Federal Court (and It Provides One Permissible Method).
- c. If It’s a Federal Claim, 4(k) Extends Jurisdiction to Due Process Limits.

### **7. International Service (Rule 4(f))**

### **8. Time Limit: 120 Days (Rule 4(m))**

### **9. The Return, or Proof of Service, Is Made by Person Effecting Service (by Affidavit). (Rule 4(l)). Note Importance in Default Cases.**

## **VI. VENUE**

**A. PURPOSE: THERE ARE ALMOST ALWAYS MANY COURTS In Either System (State or Federal) That Could Acquire Jurisdiction Over Both Person & Subject. Many Such Forums May Be Distant or Otherwise Inappropriate. Venue is a Way of Creating a Convenient Place for Trial.**

**B. NATURE OF VENUE: Unlike Lack of Jurisdiction, Which Disempowers a Court from Acting Even Though Not Raised by the Parties, Venue is a Matter of Privilege of the Defendant.**

### **C. FEDERAL VENUE (§ 1391)—IN DISTRICT & DIVISION**

- 1. **Where Any Defendant Resides (If All in Same State); or**
- 2. **Where “a Substantial Part of” the Acts or Omissions Underlying the Claim, or Property Located; or**
- 3. **In Diversity Cases, Where Personal Jurisdiction Over Defendants, if No Other District. In Federal Question Cases, Where Any Defendant “Found,” If No Other District.**

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**4. Corporations “Reside” Wherever They’re Subject to Personal Jurisdiction**

**5. Waiver Unless Timely Motion by Defendant**

**6. Discretionary Transfer: A District Court May Transfer to Dist. or Div. Where “Might Have Been Brought” (§ 1404(a)).**

a. “Convenience of Parties or Witnesses”

b. “Interest of Justice”

c. “May” Transfer

d. Transferee Dist. Must Be One Fixed by Law, Not Merely by D.’s Consent (Hoffman).

e. Law of Transferor District Still Controls.

**D. “FORUM NON CONVENIENS”—Common Law Precursor of Transfer Provision, Involving Dismissal or Stay; Still Exists When Different Procedural Systems Involved (E.g., From Federal Courts to India, as in Bhopal Case, or, From Texas to California)**

## **VII. ANALYZING LEGAL PROBLEMS**

**A. WHERE NOT TO START: with a Conclusion (E.g., “Yes, There Is Jurisdiction, Because ... “)**

1. Reasoning First: Gives Better Conclusions

2. Reasoning First: Shows How Adversary & Neutrals Will Analyze

**B. “IRAC” METHOD (as Terminology, I Think “Principles” & “Facts” Makes You Understand It Better—so, “IPFC”: Issue, Principles, Fact analysis, Conclusion)**

**C. IDENTIFY ISSUES (All)**

**D. PRINCIPLES: SET OUT ALL POSSIBLY APPLICABLE (Neutrally, Generally, Exhaustively, Declarative Sentences, Each Refinement, Exception, Ambiguity, Etc.)**

1. Examples of Non-Principles: “Court Should Use the Minimum Contacts Test.” “Court Should Ask, Are the Contacts Sufficient?” NO. Use sentence that’s a RULE.

2. Proper Statement Uses Declarative Sentence That Identifies

a. What Is Being Considered or Evaluated;

b. How it Is to Be Considered or Evaluated; and

c. What the Meaning of the Evaluation Is.

Example: “*Long-Arm Jurisdiction Requires That...* “

(1) What Is Being Evaluated: *Defendant’s “Contacts with the Forum ...;”*

(2) How It Is Being Evaluated: *Must Be “Sufficient So That Jurisdiction Is Consistent with Fair Play & Substantial Justice;”*

(3) What It Means if It Fits: *“If So, the Jurisdiction Complies with Due Process.”*

**E. ANALYZE THE FACTS AS COMPARED TO THE PRINCIPLES.**

1. State the Relevant Facts. (Exhaustively)

2. Analyze How They Compare to the Legal Principles.



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**F. CONCLUSION. (EASIEST PART!)**

**G. GO TO NEXT ISSUE.**

**H. THIS IS SYLLOGISTIC REASONING: Principles Form First Premise; Facts Form Second Premise; Conclusion Follows.**

## Crump Procedure Outline

### REVIEW, PART 2

FEDERAL-STATE CHOICE OF LAW, PLEADINGS, PARTIES, DISCOVERY

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#### I. FEDERAL-STATE CHOICE OF LAW

##### A. ERIE V. TOMPKINS

1. Policies: Avoidance of Excess Forum Shopping, Discrimination, & Federal Interference
2. Apparent Basis: Constitutional
3. History: Rules of Decision Act; *Swift v. Tyson*—confined to State & “Local” Laws
4. Basic Rule: In Diversity or Other State-Claim Cases, the Substantive Law is to be Determined not by Reference to “General” Law but Rather by the Substantive Law of the State Where the District Court Sits (Overruling *Swift v. Tyson*).

##### B. FREQUENT PROBLEMS

1. The Substance-Procedure Problem: For Erie Purposes, Labels as to What is Usually “Substantive” or “Procedural” May have Some Limited Utility, But Don’t Really Apply
  - a. First Step: Gray Areas & the FRCP; “Controlling Rule Test” (*Hanna v. Plumer*).  
Reconciles Rules Enabling Act with Rules of Decision Act (Note: *Hanna* Suggests This Is the First of Two Steps)
  - b. Second: If no Controlling Federal Rule:
    - (1) Outcome Determinative Test (*Guaranty Trust v. York*); or
    - (2) “Absolute” or “Definitive” Outcome Determination (*Byrd v. Blue Ridge*); or
    - (3) Federal-State Balancing (*Byrd*); or
    - (4) Basic Test: Policies of Erie
2. Analogy: Federal Judge Should Be Like a “Ventriloquist’s Dummy”
3. Multi-State Choice of Law: The Federal Court Uses the Forum State’s Rules of Choice of Law to Determine What Law to Apply. Example: Erie Case Itself, Tried in N.Y., Concerning Penn. Events—N.Y. Would Use Penn. Law, so Fed. Ct. Does Too.
4. State Choice-of-Law Rules: Lex Loci Delicti, Most Significant Relationship, Etc.
5. Difficulty in Determining State Law—The “Erie Educated Guess” & Other Phenomena—Court Infers What Highest State Court Would Do

#### II. PLEADING

##### A. BASIC TYPES OF APPROACHES

1. Historical: Forms of Action; Rise of Equity; Common-Law Pleadings; Field Codes
2. Restrictive Practice—Facts, Not Conclusions. Disadvantages: Difficulty; Expense; Injustice Through Noncompliance or Variance (Restrictive State Approaches)
3. Federal Notice Pleading—“A Short & Concise Statement,” With Federal Rules & Forms as Guides

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4. Modern Liberalized State “Cause of Action” Pleading—Cal., N.Y., Tex. (“Cause of Action” just means you have to make a statement about each element of the claim)
5. Which is Better: a) “Notice” Pleading of Claim or b) Liberalized “Cause of Action” Pleading?

### B. PLAINTIFF’S COMPLAINT IN FEDERAL COURTS

1. Rule 8: Must State a Claim, Show Jurisdiction, & Claim Relief, But
2. Sufficiency as to Specificity—“Notice” Pleading; Forms Are Examples; Facts Must Show Claim Is “Plausible”; “Mere Conclusions” Insufficient.
3. Substantive Sufficiency—Basic Test in Response to Motion for Dismissal for Failure to State a Claim: “Construe Complaint in Light Most Favorable to P.; Then Only if it Cannot Be Said that P. Could Recover on Any Proof Under Complaint Will Motion Be Granted” Or: Assume All Allegations Are True; Dismiss Only if, As a Matter of Law, P Still Couldn’t Recover
4. Defensive Attacks on Pleadings: Motion to Dismiss for Failure to State Claim; Motion for More Definite Statement; Motion to Strike
5. Alternative & Inconsistent—OK
6. Particularity: Certain Things Must be Alleged w/Particularity—E.g., Fraud, Mistake, Special Damages. (Special Damages Are Those That Cannot Be Inferred from the Fact of Injury Alone—i.e., Most Damages.)

### C. ANSWER

1. Rule 12(b) Motion—Certain Defensive Theories Can Be Raised by Motion: (a) Subj. Jurisdiction, (b) In Pers. Jurisdiction, (c) Venue, (d) Process, (e) Service, (f) Fail/State Claim, (g) Necessary Person. Can Also Put in Answer (Note Waiver Problem). Also, M/Strike & M/More Definite Statement
2. Denials
  - a. General Denial (State)
  - b. Federal: Must Admit & Deny in Good Faith, Fairly Meeting the Substance of Each Allegation, or State Insufficient Information for a Given Allegation
3. Affirmative Defenses Must be Pled—Notice Pleading
4. Summarizing Defendants’ Pleadings
  - 3 Basic Types: Dilatory (Abatement) Matters; Challenges to Plaintiff’s Pleadings; Answer on Merits (Called Pleas in Bar)
  - In Federal Court, Generally These Matters can be Part of the Answer. Some Can Be Raised by 12(b) Motion. Others are Governed by 12(e) and (f) (Motion/More Definite Statement, Motion/ Strike).
  - Texas Uses More Specific Pleading Types.

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SUBJECT	FED. PLEADING	TEXAS STATE PLEADING
<u>Abatement:</u> Subj. Juris. In Pers. Juris.  Service Venue Parties Defect	(Ans.; 12(b) Mot.) Ans.; 12(b) Mot.  Ans.; 12(b) Mot. Ans.; 12(b) Mot. Ans.; 12(b) Mot.	(Plea to Juris.) Mot./Dism. (Special Appearance) Mot./Quash Serv. Mot. to Transfer Plea in Abatement
<u>Pleadings:</u> Substantive Ins.  Vagueness Inapprop. Matter	Ans.; 12(b) Mot./Dism. Fail State Claim 12(e) M. More Def. Stmt. 12(f) Mot./Strike	Special Exception
<u>Merits:</u> Denial  Aff. Defense	Rule 8(b) Denials & Admissions (Gen. Denial Only if Denying Entirety) "Notice" Pleading (Like Plf. 's Complaint)	Gen. Denial Special Denial  Pled Like Plf. 's Petition

### D. AMENDMENT

1. Of Right—Before Responsive Pleading, Once
2. Permissive (With Leave)—"Freely Given, When Justice so Requires."
3. Relation Back (Avoids Limitations)—Notice & Knowledge Re Mistake, Etc.

### E. TEXAS PLEADING DIFFERENCES

1. Plaintiff's: "Petition;" Cause of Action Pleading (But Liberal)
2. Defendant's: See Above.

### F. CURRENT RULE 11

1. Implied Certifications: Best of Knowledge, Based on a "Reasonable Investigation"—
  - a. No Improper Purpose;
  - b. Warranted by Existing Law (or Nonfrivolous Argument);
  - c.-d. Evidentiary Support (or Likely After Discovery, if Specifically Identified)
2. Sanctions: Discretionary; Deterrence Purpose; on Attorneys, Law Firms, Parties "Responsible"
3. Safe Harbor Procedure: Service on Opponent of Unfiled Motion; Filed only if Not Withdrawn Within 21 Days (Separate Procedure if Judge Initiates)
4. Recall Methods Of Avoiding Violation—Demand Letter, Cross-Examine Client, Document the Investigation, Expert Witness, Legal Expert, Legal Research, Prompt Discovery, Specifically Identify Allegations Depending On Discovery, etc.

### G. OTHER SANCTION POWERS OF COURT:

Statutes (e.g., Sanctions for "Vexatiously" Multiplying Litigation—Willfulness Requirement); Discovery Sanctions; General Equity Powers (Not Confined to Pleadings)

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### **III. PARTIES & CLAIMS: JOINDER**

#### **A. COUNTERCLAIM**

1. Permissive & Compulsory
2. Distinguished From Cross-Claim

#### **B. THIRD PARTY CLAIMS (IMPLEADER)—When May Be Liable to Defendant**

#### **C. JOINDER OF PLAINTIFFS & DEFENDANTS**

##### **1. Permissive**

- a. Joint, Several, or Alternative. Relief
- b. Same Transaction or Series
- c. Common Questions of Law or Fact

##### **2. Persons Needed for Just Adjudication**

- a. Basic Notion: Sometimes There are Persons, Not Parties, Who Will so Be Affected by the Action That They Ought to Be Joined if Feasible and Thus Made Parties.
- b. Simple Statement of Test: If an Absent Person Could Assert an Interest in the Subject of the Action, so That the Absent Person (or any Existing Party) Could Be Harmed by the Proceedings, then the Absent Person or Entity is “Needed”—E.g., Cotenants in a Suit to Cancel Deed; All Heirs in a Will Contest.

##### c. If Not Feasible to Join:

- (1) *Reasons Why Not Feasible: Destruction of Jurisdiction; Judgment Already Rendered or Case Underway*
- (2) *Test for Proceeding: (a) Harm to Absent Person, or Parties; (b) Shaping of Relief; (c) Adequacy of J. to Defendants (d) Plaintiff ‘s Adequacy of Remedy (Equity & Good Conscience)*

#### **D. COMPLEX & MULTI-PARTY ACTIONS**

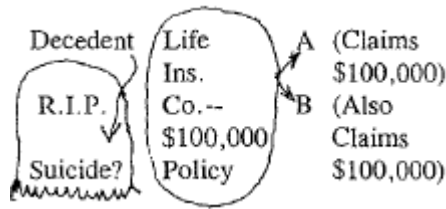
##### **1. Class Actions—R. 23**

- a. Four 23(a) Prerequisites (Numerosity, Commonality, Typicality & Adequate Representation)
- b. Three 23(b) Models ((b)(1), (b)(2) & (b)(3); (b)(3) is Most Frequent, Involving “Predominance” and “Superiority”)
- c. 23(c) Certification & Notice

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2. **Interpleader**—Faced w/Multiple Conflicting Claims, Stakeholder Requires Interpleaded Parties to Litigate Out Entitlement in a Single Action, Getting Them Enjoined From Suing Elsewhere. Essential Requirement is Existence of Conflict.

Simple Example:



3. **Intervention:** Of Right, or Permissive, Depending on Circumstances. Intervention Means Entering Into an Existing Case.

4. **Judicial Panel on Multidistrict Litigation:** Can Consolidate for Pretrial.

## IV. DISCOVERY

### A. PURPOSES & TECHNIQUES: The Practicalities

### B. SCOPE: INFORMATION IS DISCOVERABLE IF IT IS—

1. Proportional to needs of case
2. Relevant (Need Not Be Admissible Evidence)(but relevance is less important now)
3. Not Privileged (Can't Discover Even Though Relevant, if Privileged)
4. Limits—Not Cumulative/Unduly Inconvenient; Ample Opportunity; Benefit/Burden
5. Work Product
  - a. Trial Prep. Materials Usually Not Discoverable (Note Escape Valve)
  - b. Experts—(1) Testifying Experts Fully Discoverable; (2) “Retained” Consultants, Extraordinary Circumstances Only; (3) One Court Says Informally Consulted, Not at All; (4) If Not Consulted for Trial, No Restriction. Note Difference in Treatment of Reports of Phys. or Mental Exam. Expenses Usually to be Paid By Discoverer.
6. Not Under Protective Order—Court Has Powers to Specify Conditions & Limits of Discovery To Protect Against Harassment, Undue Expense, Embarrassment, Trade Secret Exposure, Etc.
7. Electronic: “reasonably accessible,” or if not, “good cause.” Note need for “litigation hold,” reasonably done; sanction possibility

### C. DISCLOSURE; MEETING

1. Initial:

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- a. Identification of Witnesses;
- b. Documents;
- c. Damage Calculations;
- d. Insurance

### **2. Experts**

### **3. Pretrial**

### **4. Discovery Meeting between Counsel (Required under Rule) (Note “Discovery Plan” Form)**

## **D. METHODS**

1. Depositions—Court Reporter.; Use under 32(a) (Impeach, Party, Unavailable, Completeness; contrast Texas, Other States); Notice; Subpoena; Presumptive Limit (10; 7 hrs.)
2. Depositions on Written Questions
3. Depositions to Preserve Testimony
4. Interrogatories (Presumptive Limit 25)
5. Requests to Admit
6. Requests to Produce or Inspect (Including Electronic Documents)
7. Motions for Phys. or Mental Exam (Good Cause; In Controversy; Relevance Not Enough)

## **E. DUTY TO SUPPLEMENT**

## **F. SANCTIONS**

1. Range: From Ordering Discovery, to Establishment, Preclusion, Striking of Claims or Defenses, Dismissal, Default, Contempt, Other “Just” Orders.
2. Payment of Fees & Expenses: Only if No Substantial Justification for Resistance.
3. Sanctions Above Ordering Discovery: Only upon Some Showing of Fault (Case Law). Merits Sanctions Usually Require Gross Negligence or Higher Standard.

## **G. IMPLIED CERTIFICATIONS; DISCOVERY CONFERENCE**

## **V. PRETRIAL CONFERENCES**

### **A. CONCEPT AND PURPOSES; SANCTIONS**

### **B. REQUIREMENTS PLACED ON PARTIES BEFORE**

### **C. PRETRIAL ORDER—Controls Action Unless Manifest Injustice**

### **D. SERIES OF PRETRIALS; VARIES W/JURISDICTION**

### **E. THE “NEW” MANAGEMENT**

1. Various Requirements of “Plans”; Pretrial Orders
2. Tracking; Differential Case Management; Staging; Past Track; Enforcement; Adjudication by Deadline

## **VI. PRETRIAL DISPOSITION OF CASE**

### **A. SUMMARY J.**

## **Crump Procedure Outline**

### **1. Based on Pleadings, Discovery, Affidavits**

### **2. If These Show no Genuine Issue of Material Fact & Movant Entitled to J. as Matter of Law**

- a. Movant Shows There's No Reasonable Way Opponent Can Prevail
- b. Burden on Movant (But Note Celotex Case: A Defendant Can Carry Burden Without Affidavits or Proof, by Definitive Showing that P. Can't Produce Legally Sufficient Evidence)

Defendant Must Obtain Discovery of All Plaintiff's Evidence to Do This (Otherwise, D Can't Show that P Can't Prove it)

- c. Affidavits of Inability; Required Response by Opponent
- d. Court Can't Resolve Credibility or make Fact Inferences

### **3. Partial Sum. J.; Affidavit Requirements**

## **B. DISMISSAL**

### **1. Voluntary & Involuntary**

### **2. With & Without Prejudice (i.e., With or Without Adjudication of Merits)**

## **C. DEFAULT Judgment**

1. On D. 's Failure to Plead or Defend as Required by Rules, Clerk Enters "Default"
2. Judgment by Clerk—If Liquidated
3. By Court if Not Liquidated. Court May Require Proof of Damages.
4. Setting Aside—Under Certain Conditions. Basically, (a) Existence of Arguable Defense on Merits (or Damages) and (b) Excusable Neglect.



## Crump Procedure Outline

### REVIEW, PART 3

TRIAL AND APPELLATE PROCEDURE, COLLECTIONS AND RES JUDICATA

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#### **I. SETTING THE CASE FOR TRIAL**

##### **A. IMPORTANCE OF UNDERSTANDING DOCKET SYSTEM**

1. Need to Assure Reasonable Setting
2. Need to Understand Continuance Problems

##### **B. SYSTEMS:**

1. S. District (Federal): Docket Control Exercised by Courts and Magistrates. Great Delay.
2. Harris County: Former “Request” Procedure Was Replaced by “Certification” Procedure and Then Replaced Finally by Individual Judges’ Control
3. Immense Variation among Different Courts; Importance of Local Rules

##### **C. LOCAL RULES GENERALLY: Typical Provisions**

#### **II. TRIAL BY JURY**

##### **A. RIGHT TO TRIAL BY JURY—NOT EVERY CASE**

1. Preserved by Rules and 7th Amend., But Only in Suits at Common Law or as Required by Act of Congress
2. Right Does Not Exist in Equity Cases (and some other types)
  - a. Origins of Equity—Historical
  - b. Subjects—Mixed Bag
  - c. Examples: Injunctions, Equitable Accountings
  - d. Jury Trial Right Also Does Not Exist in Other Instances Where Did Not Exist at Common Law—E.g., Habeas, Admiralty
3. Where Claim or Part of It is Legal in Nature, Jury Trial Right Preserved Even if Joined With Equitable Claims or Requests for Equitable Relief
4. Statutory Actions (E.g., Civil Rights Cause of Action, Any Other): Issue is Whether Claim and Remedy Are Historically Analogous to Common Law Claim
5. Texas: Broader—Extends to Equity Cases Too. But Still Some Questions and Cases Not for Jury.

##### **B. DEMAND AND WAIVER**

1. Federal—Within 10 Days of Last Pleading. If Removed Case, 10 days after Removal; Demand Still Effective if Made in State Court Before Removal (or No Request Required). Judge Has Discretion to Grant or Deny Jury Trial After Time Limit. Demand is Simply a Written Demand; One Sentence is Enough; On Complaint or Answer is OK and Easiest Way.

## Crump Procedure Outline

2. Texas—Within Reasonable Time, Not Less Than 10 Days Before Trial, By Written Demand and Payment of Fee.

### C. SUMMONING OF JURORS

1. **Constitutional Requirements: Method of Summoning Must Avoid “Systematic Exclusion” of Identifiable Classes.**
2. **Federal System: Each Dist. Court to Evolve Plan for Summons Using Voter Reg. Lists or Actual Voters, Supplemented by Other Means if Necessary.** From this List, Names to be Drawn at Random to Compose List From Which Court Summons as Needed. Each Dist. Court to Allow Certain Exemptions and Evolve Rules for Others in Its Discretion. Method of Summons Includes Information Form. Method Provided for Challenge to Array.
3. **State: Different, But Analogous.** Use of Computer System. Juror Info. Forms and Exemption Certificate.

### E. JURY SELECTION

#### 1. Voir Dire

- a. Purposes (and Actual Uses): Discovery; Communications; Commitment; “Inoculation;” Rapport; Etc., Etc. Note Problem of Abuse.
- b. Methods
  - (1) *Federal Court—Judge May Allow Attys. or do Voir Dire Himself/Herself, or Ask Some Questions and Allow Parties to Ask Others. Must Allow Written Suggestions.*
  - (2) *State—Formula for Judge to Read Specified by Rules. Attorneys Given Reasonable Time to Ask Questions Relevant to Selection.*

#### 2. Challenges

- a. Cause: Unlimited Number. Bias and Prejudice, Pecuniary Interest, Etc. Judge Decides, Subj. to Review.
- b. Peremptory: 3 to a Side in Federal Civil Case. Done by Striking Lists.

#### 3. The Batson-Edmonson Problem

- a. Racially Motivated Peremptories Prohibited, in Civil Cases or Criminal, Both Sides
- b. Extension to (e.g.), Gender, but Other Categories (?) Usually Not.
- c. Paradox: Peremptories Always Are Done by Instinct, “Feel,” or Gross Characteristics
- d. Procedure: (1) Batson Challenge Raised by Prima Facie Showing (i.e., Statistical); (2) Opponent Rebutts Inference by (Credible) Neutral Explanation.

### F. OPENING STATEMENTS

### G. “THE RULE:” Sequestering of Witnesses

### H. EVIDENCE

#### 1. Opening and Closing by Party w/Burden

#### 2. Rules of Evidence

- a. Basic Rule: Admissibility of Logically Relevant Evidence, Making Fact More or Less Likely.

## Crump Procedure Outline

### b. Exclusionary Principles

(1) *Relevancy. Logical Relevance of Evidence Must Not Be “Substantially Outweighed” by Prejudice, Confusion, Etc.*

*Specific Rules (E.g., Compromise Offers, Subsequent Repairs, Insurance, Bad Character, Withdrawn Guilty Plea, Etc., Are Usually Excluded.)*

(2) *Hearsay.*

(a) Statement, Not Current Testimony, Offered to Prove Truth.

(b) But There are Many Hearsay Exceptions, Such as Business Records, Excited Utterances, Public Records, Etc.

(3) *Personal Knowledge. Most Matters of “Fact” Contain Some Opinion, So This Is a Question of Degree. (Expert Witness Qualified as Such May Give Opinion and Is Not Similarly Bound by Personal Knowledge Rule.)*

(4) *Unauthenticated Documents or Objects.*

(5) *Privilege. (Actually, Privilege is Stronger Concept Than Other Evidence Rules; It Prevents Disclosure).*

### c. Method of Examination and Enforcement of Rules

(1) *Non-Leading Questions; Attorney Can’t Testify (Direct Exam.) General Rule Only.*

(2) *Responsive Answers*

(3) *Enforcement: By Objection*

(4) *Additional Enforcement: Request Instr. to Disregard; Move for Mistrial; Contempt; Appeal (Appeal is Limited as an Enforcement Device by Concepts of Harmless Error, Cured Error, and Preservation)*

### d. Cross Examination and Impeachment.

(1) *Leading Questions*

(2) *Wider Admissibility: Certain Convictions, Bias, Psychological Condition, Prior Inconsistent Statements, Etc.*

### e. Jurisdictional Variations; Judgment Calls

## I. ARGUMENT OF COUNSEL

**1. Prohibited Subjects: Distortion of Law, Facts Outside Record, “Appeals to Passion or Prejudice,” Ad Hominem**

**2. The Organization of the Argument: As Discussed in Class**

**3. Purposes: To Put Together Law & Evidence, to Answer the Jury Questions**

## J. VERDICT AND INSTRUCTION

**1. Form of Verdict: General, Special, or General and Special. Federal Approach: Judge’s Discretion Which to Use. (Contrast Texas.)**

**2. Usual Contents of Charge: Basic Instructions; Principles of Law; Verdict**

**3. Federal Court: Jury Instructed Orally Before and/or After Argument. Judge Can Comment, But Not Without Limit. (Contrast Texas: Must Be Written; Read to Jury Before Argument)**

## Crump Procedure Outline

### 4. Objections to Charge

### 5. Jury Misconduct: Can't Impeach Verdict Thru Mental Processes of Jurors.

## **III. TRIAL BEFORE COURT: SIMILAR TO JURY TRIAL, BUT SIMPLER PROCEDURALLY**

—No Jury Selection or Instructions or Verdict. (But: To Appeal on Factual Grounds, Must Get Findings and Conclusions.)

## **IV. POST-TRIAL MOTIONS AND TAKING CASE FROM JURY**

### **A. MOTION FOR JUDGMENT AS A MATTER OF LAW (FORMERLY CALLED “DIRECTED VERDICT” OR “INSTRUCTED VERDICT” IF DONE DURING TRIAL—STILL CALLED THAT, IN SOME STATES)**

1. Standard—If on Undisputed Evidence Movant Entitled to Judgment as Matter of Law; No Reasonable Way to Find for Non-Movant.
2. Time—When Opponent Rests or Closes or All Parties Rest or Close.
3. A Motion for Directed Verdict is a Prerequisite to Moving for Judgment Notwithstanding the Verdict.

### **B. RENEWAL OF MOTION FOR J./MATT. LAW AFTER TRIAL (FORMERLY CALLED JUDGMENT NOTWITHSTANDING THE VERDICT)**

—Standard Same as During Trial, But After Loss of Verdict w/Jury.

### **C. APPEAL OF FACT SUFFICIENCY:** Must both move during trial and move again after trial.

### **C. MOTION FOR NEW TRIAL**

1. Standard: Discretionary w/Judge
2. Purpose: To Correct Miscarriage of Justice, Errors in Trial, Etc. Examples:
  - a. Factual Findings Against Great Wt. of Evidence, Even If J./Matter of Law Not Proper
  - b. Legal or Procedural Errors
  - c. Newly Discovered Evict, Mistake, Etc.
3. Review on Appeal: Abuse of Discretion

### **D. CORRECTION OF JUDGMENT PROCURED BY FRAUD, MISTAKE, ETC.**

1. New Trial;
2. Rule 60 Motion; or
3. Independent Action, Later, with Difficult Burden.
4. Rule 60(a): Clerical Mistakes, at Any Time
2. Rule 60(b): Other Causes, Ranging From Excusable Neglect or Mistake to Fraud, “Misconduct,” Newly Discovered Evidence, Lack of Jurisdiction, “Other” Causes; 1 Yr. Limit on Most Common Grounds

### **G. “JUDGMENT AS A MATTER OF LAW”: NEW NAME FOR BOTH DV AND JNOV**

## Crump Procedure Outline

### V. APPEAL

#### A. APPEALABLE ORDERS

##### 1. Basic Rule—Final Judgment

##### 2. Appealable Non-Final Judgments or Escape Valves

- a. Collateral Order Doctrine
- b. Certain Interlocutory Orders Appealable by Statute (Injunctions)
- c. Discretionary Appeals—Dist. Court says Novel Questions, Diff. of Opinion, Advance Termination; Appellate Court Must Agree
- d. Making It Into a Final J (Rule 54(b)): Court Enters Final J. on One of Multiple Claims, by Express Findings and Directions
- e. Mandamus—an Equitable Proceeding, Only if No Adequate Remedy by Appeal.

#### B. APPELLATE PROCEDURE (FEDERAL): Notice of Appeal, Cost Bond, Supersedeas, Record, Brief Requirements, Docket Fees, Etc.; Note Time Limits

#### C. JURISDICTION

##### 1. Courts of Appeal: Over Appealable Orders of District Courts Within Their Circuits, Unless Direct App. to Supreme Court. Also, Administrative Agency Appeals.

##### 2. Supreme Court

- a. Original Jurisdiction
- b. Appellate Jurisdiction From Courts of Appeal and State Courts of Last Resort
  - (1) *Certiorari—Note Purpose of This Kind of Review*
  - (2) *Other Kinds of Review (Rare)*

### VI. RES JUDICATA AND COLLATERAL ESTOPPEL

#### A. RES JUDICATA ELEMENTS

##### 1. Previous Final Judgment

##### 2. Covering Same Facts (Same Claim, Same Facts, or “Diligence” Rule)

##### 3. Between Same Parties, Their Privies, or Their Predecessors

—Example: A Sues B and Recovers \$10,000 Damages for Personal Injury. After All Appeals, Judgment Becomes Final; But A Thinks He Should Have Gotten \$20,000. So A Files Another Suit Against Bon the Very Same Claim, to Get More. What Does B Do?  
Answer: Pleads Res Judicata.

—Example: A Sues B on a Contract. The Court Rules There was No Contract, and Grants J for B. A Then Sues in Quantum Meriut. B Pleads Res Judicata. Result?

#### B. COLLATERAL ESTOPPEL REQUIREMENTS

##### 1. Previous Final Judgment

##### 2. Between Same Parties, Privies, Predecessors. But: Some Cases Require Only That the Party to Be Bound Be the “Same” (The Mutuality Problem) ·

##### 3. Involving an Adjudication of an Issue in the Prior Suit Which is an Issue in the Present Suit

## Crump Procedure Outline

### 4. Which is Material to Both Judgments

—Example: A Sues B for Pmt. of One Installment on a Note. B Pleads Lack of Consideration, But That Issue is Determined Adversely to B. When the Second Installment Becomes Due, A Again Sues; B Again Pleads Lack of Consideration for Note. A's Reply?

## **VII. COLLECTION AND ENFORCEMENT OF JUDGMENTS**

### **A. SATISFYING JUDGMENTS WITH PROPERTY —NOTE: THE FEDERAL RULES SIMPLY ADOPT STATE COLLECTION PROCEDURES**

1. **Execution: Having a Final Judgment, Plaintiff Has Court Issue Writ of Execution. In Texas, Clerk Issues.**
  - a. Procedure: Sheriff Advertises, Then Seizes Property, Then Sells at Advertised Sale
  - b. Limits: Value of Property Must Bear Reasonable Relation to Judgment; If Debtor Specifies Property, Sheriff Must Honor Designation
  - c. Exemptions: Extensive in Tex. E.g., Homestead Exemption Applies to Both Home and Business Property; Automobile; Furnishings; Etc.
2. **Post-Judgment Garnishment—To Get at a Debt Owed the Debtor by a Third Party. Serve the Third Party w/Petition in an Independent Action. E.g., to Collect on Bank Deposits. Cannot Use as to Wages in Texas (Exception—Constitutional Amendment as to Child Support.)**
3. **Liens—By Abstracting the J. and Filing It of Record in the County, Can Make It a Lien on Realty in County. Increases Chances of Collection, Because:**
  - a. Effect of Lien: Places Encumbrance on D.'s Real Estate in the County. Purchasers Take Subject to Judgment Debt. (Note Effect With Title Co.'s: Pragmatic Way Around Homestead Exemption)
  - b. Problem of Priorities (Purchase Money D/t Will Have Priority; So Will Prior Judgment Creditors; Also IRS if Filed Before).
4. **Turnover: Allows Broad Use of Court's Equitable Powers**

### **B. DISCOVERING ASSETS—Records; Discovery Methods**

### **C. PROVISIONAL REMEDIES**

1. **Types of Remedies: Attachment, Garnishment, Lis Pendens, TRO and Temporary (Preliminary) Injunction (In Tex., "Sequestration"), Etc.**
2. **Fuentes v. Shevin: State-Action Seizure of Property is Unconstitutional (Even to Protect a Property Right or Creditor's Interests) Unless There is Notice and Opportunity for a Prior Adversary Hearing. (Bond and Prompt Post-Seizure Hearing Not Enough)**  
—Note: Private Repossession Not State Action.
3. **Subsequent Cases: Mitchell v. WT Grant Indicates Seizure is Constitutional if (a) Based on Sworn Testimony Before Neutral Official and (b) Prompt Hearing Opportunity Provided. North Ga. Finishing v. DiChem., as well as Conn. v. Doerr, Indicates That if These Safeguards are Absent, Fuentes Applies.**
4. **Texas Sequestration Stat.: Sworn Application; Notice w/Seizure; Must Show Probable Injury; Replevy Bond; 10-Day Hearing; Remedies.**

## **Crump Procedure Outline**

### **IX. REMEDIES GENERALLY**

Our Coverage Included Not Only Provisional Remedies But Also Damages, Injunctions, Attorney's Fees, Other Equitable Remedies, Declaratory Judgment, Etc. This Material Also Is Part of the Course Although Not Covered in This Review.

### **X. ALTERNATE DISPUTE RESOLUTION**

Our Coverage Included the Relative Advantages of ADR and Traditional Adjudication; Negotiation Techniques and Ethics; Settlement Agreements; Adjudicative Effects of Settlement; Arbitration and Related Procedures; Mediation, Mini-Trial, Summary Jury Trial, Private Judging, Etc. This Material Also Is Part of the Course Although Not Covered in This Review.

## A Possible Format for Outlining Course Material

*[Note: There is an infinite variety of ways to outline, and this model is merely one of them, one that happens to be the way one person might do it. You should use whatever format is congenial to you, bearing in mind that the key issue is whether it helps you to gain command of the relevant principles.]*

### I. The Fifth Amendment

The taking clause says that a taking of property by government requires just compensation. The due process clause says that government cannot deprive a person of life, liberty or property without due process of law.

#### A. "Taking"

##### 1. Virtually per se takings

a. Permanent physical occupation means that the courts almost automatically will find a taking. The theory is that this occupation chops through the entire bundle of rights in the property, destroys the valuable right to exclude others, and can be the subject of a clear rule. Even a small occupation counts. A regulation that does not involve intrusion by a third party is not subject to this rule even if it governs how an owner uses his or her property.

b. Government can salvage a regulation (presumably even if it looks like a permanent physical occupation) by demonstrating that it substantially serves the state interest at issue. This exception requires a close nexus between the regulation and the purpose. A lateral easement along the beach, for example, may have something to do with the public interest, but it lacks the nexus with either psychological barriers to viewing the beach or access to the beach that would qualify as substantial enough to save the requirement from being a taking.

c. Dissenters argue that a virtually per se rule is unjustified. They also would not require a close nexus and would look instead to a multifactor approach that considers economic values and reciprocity of advantage, among other factors.

d. When government attempts to salvage its regulation by showing nexus, it is not enough for there to be a nexus, not even a substantial or a close one. There must also be a rough proportionality between the extent of the taking and the regulatory benefit. This principle prevents the government from taking a mile when it could accomplish the purpose by taking an inch.

e. Another category of virtually per se takings occurs when government destroys all economically beneficial use of property.

f. Yet another occurs (obviously) when government requires conveyance of property to it, in fee.

##### 2. The general rule when there is no per se rule

[Here you would summarize the multifactor approach that is exemplified by the Penn Central case. You then would proceed to cover the remedy of just compensation, the method of valuation by market or alternatives, and each successive subject of the course, in similar outline form.]