Rules Of Civil Procedure and what they Govern

8 General Rules Of Pleading

(A) Claim for relief. A pleading that states a claim for relief must contain

(1) A Short and plain statement of the rounds for the courts jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdiction support

(a) **Analysis of the rule Requires only to plead a claim sufficient to let the opposing party know what that plaintiff is complaining about.**

(2) A short and plain statement of the claim showing the pleader is entitled to relief; and

(a) Analysis

(i) A flaw may be a pleading oversight that can be cured by amendment rather than a (incurable) reflection of absence of fact

(3) A demand for the Relief Sought, which may include relief in the alternative or different types of Relief

12 Defenses and Objections; when and how presented; motion for judgment on the pleadings, consolidating motions, waiving defense; pretrial hearing

(a) Time to Serve a Responsive Pleading.

(1) *In General.* Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows:

(A) A defendant must serve an answer:

(i) within 21 days after being served with the summons and complaint; or

(ii) if it has timely waived service under Rule 4(d), within 60 days after the request for a waiver was sent, or within 90 days after it was sent to the defendant outside any judicial district of the United States.

(B) A party must serve an answer to a counterclaim or crossclaim within 21 days after being served with the pleading that states the counterclaim or crossclaim.

(C) A party must serve a reply to an answer within 21 days after being served with an order to reply, unless the order specifies a different time.

(2) *United States and Its Agencies, Officers, or Employees Sued in an Official Capacity.* The United States, a United States agency, or a United States officer or employee sued only in an official capacity must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the United States attorney.

(3) *United States Officers or Employees Sued in an Individual Capacity.* A United States officer or employee sued in an individual capacity for an act or omission occurring in

connection with duties performed on the United States' behalf must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the officer or employee or service on the United States attorney, whichever is later.

(4) *Effect of a Motion.* Unless the court sets a different time, serving a motion under this rule alters these periods as follows:

(A) if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 14 days after notice of the court's action; or

(B) if the court grants a motion for a more definite statement, the responsive pleading must be served within 14 days after the more definite statement is served.

(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(1) lack of subject-matter jurisdiction;

(2) lack of personal jurisdiction;

(3) improper venue;

(4) insufficient process;

(5) insufficient service of process;

(6) failure to state a claim upon which relief can be granted; and

- Analysis **12(b)(6) = confined to "four corners of complaint" -Takes well-pleaded allegations of complaint as true + only those**
  - **IF thoseFacts outside of 4 corners to support/oppose a Rule 12(b)(6) motion to dismiss for failure to state a claim**
    - **Court can then treat motion as a summary judgment motion (has to tell parties it is doing this--12(d))**
      - **Motion decided by standards of summary judgment rule (Rule 56)**

Court can grant summary judgment if it finds that the material facts are undisputed and moving party is entitled to judgment as a matter of law

(7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No

defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings.

(d) Result of Presenting Matters Outside the Pleadings. If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

(e) Motion for a More Definite Statement. A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 14 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.

Analysis of 12 E - Motion only available when the pleading "is so vague or ambiguous that the party cannot reasonably prepare a response" -Incorporating prior allegations by reference + even failing to separate counts cleanly doesn't make a complaint subject to Rule 12(e) motion

(f) Motion to Strike. The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:

(1) on its own; or

(2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.

Analysis- Rule 12(f) motions = target redundant, immaterial, impertinent, or scandalous matter

(g) Joining Motions.

(1) *Right to Join.* A motion under this rule may be joined with any other motion allowed by this rule.

(2) *Limitation on Further Motions.* Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.

- **Analysis of 12(g) - "Omnibus motion rule" = effectively requires a party to consolidate all of Rule 12 defenses + objections then available to it in a single omnibus pre-answer motion, instead of presenting them serially.**
  - **Prevents parties from raising it again by another pre-answer motion and raising Rule 12(b)(2)-(5) defenses again by any means**
  - **Doesn't require a party to file a pre-answer motion, matter of IF they do**
    - **Exception Omnibus motion rule only applies to Rule 12 defenses that are "available" to party when it filed the pre-answer motion**
      - **When P amends original complaint and the amendment adds new claims, it can raise new issues not present in original pleading**
- **Rule 12(g)(2) = forbids party from making another motion under Rule 12 based on a defense or objection that was available to it when filing pre-answer motion**

(h) Waiving and Preserving Certain Defenses.

(1) *When Some Are Waived.* A party waives any defense listed in Rule 12(b)(2)–(5) by:

(A) omitting it from a motion in the circumstances described in Rule 12(g)(2); or

(B) failing to either:

(i) make it by motion under this rule; or

(ii) include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.

Analysis Rule 12(h)(1)(A) = omitting any of Rule 12(b)(2)-(5) defenses of lack of PJ, improper V, insufficient process, or insufficient service of process from the pre-trial answer motion waives that defense

(2) *When to Raise Others.* Failure to state a claim upon which relief can be granted, to join a person required by Rule 19(b), or to state a legal defense to a claim may be raised:

(A) in any pleading allowed or ordered under Rule 7(a);

(B) by a motion under Rule 12(c); or

(C) at trial.

(3) *Lack of Subject-Matter Jurisdiction.* If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.

(i) Hearing Before Trial. If a party so moves, any defense listed in Rule 12(b)(1)–(7)—whether made in a pleading or by motion—and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial.

55 Default Judgment

a) Entering a Default. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default.

- **Analysis of Rule 55 A**
  - **Rule 55(a) = clerk shall enter default only if there has been a default AND that failure is shown by affidavit or otherwise**
  - **P must bring the fact of default to clerk's attention, usually through filing an affidavit**

(b) Entering a Default Judgment.

(1) *By the Clerk.* If the plaintiff's claim is for a sum certain or a sum that can be made certain by computation, the clerk—on the plaintiff's request, with an affidavit showing the amount due—must enter judgment for that amount and costs against a defendant who has been defaulted for not appearing and who is neither a minor nor an incompetent person.

(2) *By the Court.* In all other cases, the party must apply to the court for a default judgment. A default judgment may be entered against a minor or incompetent person only if represented by a general guardian, conservator, or other like fiduciary who has appeared. If the party against whom a default judgment is sought has appeared personally or by a representative, that party or its representative must be served with written notice of the application at least 7 days before the hearing. The court may conduct hearings or make referrals—preserving any federal statutory right to a jury trial—when, to enter or effectuate judgment, it needs to:

(A) conduct an accounting;

(B) determine the amount of damages;

(C) establish the truth of any allegation by evidence; or

(D) investigate any other matter.

- **Analysis of 55(B)**
  - **Rule 55(b) = not mandatory; courts have discretion to enter a DJ or not**
  - **D entitled to min of 7 days' written notice about entering DJ where D can argue about entering a judgment + set aside entry of default**

(c) Setting Aside a Default or a Default Judgment. The court may set aside an entry of default for good cause, and it may set aside a final default judgment under Rule 60(b)

- **Analysis of 55(C)**
  - **Default is disfavored; easy to set it aside "for good cause" (Rule 55(c))**
  - **Once DJ entered = standard tightened; final judgment on which P and others may have relied**
  - **Setting it aside may be prejudicial to such parties--especially if some time has passed since entry**

(d) Judgment Against the United States. A default judgment may be entered against the United States, its officers, or its agencies only if the claimant establishes a claim or right to relief by evidence that satisfies the court.

- Analysis of Whole Rule
- **Authorized by Rule 55: Occurs if non-defaulting party + court carefully follow prescribed procedures**
  - **Why they can happen:**
    - **D's are judgment proof and elect to it**
      - **Judgment proof = have not assets from which judgement can be collected**
    - **Ds gamble that default judgment winner will not track down their assets in order to enforce the judgment**

<u>60 Relief from a Judgment or Order</u>

(a) Corrections Based on Clerical Mistakes; Oversights and Omissions.The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding.On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

- **Analysis of 60B**
  - **Defaulting party has to move for relief under Rule 60(b)**

(c) Timing and Effect of the Motion.

(1) *Timing.* A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

(2) *Effect on Finality.* The motion does not affect the judgment's finality or suspend its operation.

- **Analysis of 60C**
  - **Excusable neglect or mistake**
  - **Courts have to consider if default was wilful, whether setting it aside would Prejudice P + Whether F has any meritorious defenses**

(d) Other Powers to Grant Relief. This rule does not limit a court's power to:

(1) entertain an independent action to relieve a party from a judgment, order, or proceeding;

(2) grant relief under 28 U.S.C. §1655 to a defendant who was not personally notified of the action; or

(3) set aside a judgment for fraud on the court.

(e) Bills and Writs Abolished. The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela.

11 Signing Pleadings, Motions, and Other Papers; Representation to the Court; Sanctions

(a) Signature. Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name—or by a party personally if the party is unrepresented. The paper must state the signer's address, e-mail address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.

(b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or

unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

- Analysis of 11(b)(2)- **Rule 11(b)(2) tolerates nonfrivolous argument for extending, modifying, or reversing existing laws or for establishing new law**
  - **Most likely to apply to a situation of civil rights**
  - ***Austin* = the "existing law" in the 4th circuit, regardless of the majority rule, and P's theory wasn't warranted by it**
  - **Arguing for change:**
  - **4th circuit not bound to follow "the majority rule," but that rule could supply a persuasive reason for client's CoA to revisit its own law**

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

- Analysis of **11(b)(3) = tolerates factual contentions that may lack evidentiary support at filing a long a they are specifically ID-ed**
  - **Reasonable: Involves balancing the costs + time available for investigation against the likelihood that more investigation will turn up relevant law + evidence]**
    - **Reasonableness factors:**
      - **Complexity of the factual and legal issues in question**
      - **Extent to which pertinent facts were under the control of opponents and 3rd parties**
      - **Extent to which the lawyer relied on the client for facts**
      - **Whether the case wa accepted from another lawyer and the extent to which the receiving lawyer relied on the referring lawyer**
      - **Resources reasonably available to the lawyer to conduct an inquiry**
      - **Extent to which the lawyer was on notice that further inquiry might be appropriate**
  - **Doesn't require steps that aren't cost-justified**
  - **It is about what you know (or should know after reasonable inquiry) at the time of presenting that controls**

- **Rule 11 taking a "snapshot" of state of idea at time of presenting that serves a basis for deciding whether paper complied w rule**
- **No obligation to withdraw paper on basis of later-acquired info**

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

- **Analysis of Rule 11 (b)**
  - **presumes pleader conducted a reasonable inquiry, including acquiring reasonably accessible info in order to admit/deny allegations in the complaint**
  - **doesn't look to standard of care in particular lawyer's community of practice; rather a national standard**
  - **depends on both time available to investigate and on the probability that more investigation will turn up important evidence**
  - **Losing Doesn't violate this rule**
    - **Unless the loss is because claims were legally frivolous then its a violation**

(c) Sanctions.

(1) *In General.* If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

(2) *Motion for Sanctions.* A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. If warranted, the court may award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the motion.

(3) *On the Court's Initiative.* On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b).

- **Analysis of Rule 11(c)(3)**

- **Rule 11(c)(3) = requires a court acting of its own initiative to order offender "to show cause why conduct specifically described in order has not violated Rule 11(b)"**

(4) *Nature of a Sanction.* A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.

- **Analysis of 11(c)(4)**
  - **sanction must be limited to what suffices to deter repetition of conduct or comparable conduct by others similarly situated**
  - **Court charged with imposing the least severe sanction that would deter repetition of the violation**
  - **Objective is deterrence, not compensation or punishment**
  - **Sanctions: Monetary or nonmonetary :Nonmonetary could be a apology or reprimand**

(5) *Limitations on Monetary Sanctions.* The court must not impose a monetary sanction:

(A) against a represented party for violating Rule 11(b)(2); or

(B) on its own, unless it issued the show-cause order under Rule 11(c)(3) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

(6) *Requirements for an Order.* An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.

(d) Inapplicability to Discovery. This rule does not apply to disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37.

- **Analysis of Whole Rule 11**
  - **Requires a reasonable pre-filling inquiry into the facts by the pleader which may settle these kinds of questions before the pleading is filed.**
  - **sets out both standard of care and candor in pleading (also for the filing of other papers before the court) + the sanctions for violating the standard**
  - **Bad faith not required to violate the rule. Good faith not a defense against a violation.**

15 Amended and Supplemental Pleadings

(a) *Amending as a Matter of Course.* A party may amend its pleading once as a matter of course within:

(A) 21 days after serving it, or

(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

(2) *Other Amendments.* In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

(3) *Time to Respond.* Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later.

- **Analysis of 15(a)**
  - **Addresses 2 types of amendments before trial:Amendments allowed as a matter of course (can be filed w/o the court's permission)**
  - **Amendments by leave of court (requires the court's permission)**
  - **Rule 15(a) authorizes amendment once as a matter of course (without leave) in 3 circumstances:**
    - **1) a party may amend the original pleading once w/o leave of court w/i 21 days of serving that pleading**
    - **2) if the original pleading is one to which a responsive pleading is required, a party may amend the original pleading w/i 21 days after the responsive pleading is served**
    - **3) if a party files a motion:Under Rule 12(b) to dismiss a complaint, counterclaim, crossclaim, or 3rd party complaint**
  - **Under Rule 12(e) for a more definite statement Under Rule 12(f) to strike Pleader may amend w/i 21 days after the motion is served Court must determine whether to grant leave to amend under Rule 15(a)**
    - **Court considers variety of factors:**
      - **Whether in bad faith**
      - **Timing: would D have enough time to prepare defense**
      - **Number of times previously amended**
      - **Futility**

(b) Amendments During and After Trial.

(1) *Based on an Objection at Trial.* If, at trial, a party objects that evidence is not within the issues raised in the pleadings, the court may permit the pleadings to be amended. The court should freely permit an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits. The court may grant a continuance to enable the objecting party to meet the evidence.

(2) *For Issues Tried by Consent.* When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move—at any time, even after judgment—to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.

- **Analysis of Rule 15(b)**
    - **sets a stricter standard than 15(a) as applied to amendments during or after trial**

(c) Relation Back of Amendments.

(1) *When an Amendment Relates Back.* An amendment to a pleading relates back to the date of the original pleading when:

(A) the law that provides the applicable statute of limitations allows relation back;

Analysis of 15(c)(1)(a)-**As long as P has sued someone before the limitations period runs, she may add other Ds later w/o regard to the limitations in 15(c)15(c)(1)(a) = such state law provisions will apply if state law governs the limitations period**

(B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading; or

- **Analysis of Rule 15(c)(1)(B)**
    - **even if applicable law doesn't expressly allow relation back, allowed if new claim or defense arose out of the conduct, transaction, or occurrence set out in the original pleading**
    - ***Bonerb* Court asked "whether D was put on notice of the claim that the P later seeks to add"**
        - **Transactional nexus: theory of relation-back rule: original pleading gave the party notice of the conduct/transaction/occurrence for which he was being sued, so he will not be unfairly surprised by the addition of a new claim based on the same events**
            - **Supported by 5th Cir. (*Barthel v. Stamm)***

(C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:

(i) received such notice of the action that it will not be prejudiced in defending on the merits; and

(ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

- **Rule 15(c)(1)(C):**
  - **authorizes relation back of an amendment "changing the party against whom a claim is asserted" if several requirements are met **************
  - **Theory behind relation back of amendments that change parties:**
    - **Notice: grounds for the relation back as long as claims/defenses arose from the same transaction as the original pleading**
    - **in *Bonerb* How amendment changing parties is different:**
      - **New party was not served with the original complaint w/i limitations period because they weren't an original party**
  - **15(c)(1)(c) recognizes that timely notice for a new party is more problematic than for a party who was actually sued and served w/i the limitations period**
    - **Requires some notice of the original action (and transaction giving rise) be received by the new party during the limitations period allowed for service of a timely filed complaint**
    - **Includes any extension of the service period permitted by the court under Rule 4(m)**
      - **90 day period for service of original complaint and summons**
    - **Rule doesn't say anything about "service" of notice to the new party; only requires that the party received such notice of the action that it will not be prejudiced in defending on the merits; and knew or should have known**

(2) *Notice to the United States.* When the United States or a United States officer or agency is added as a defendant by amendment, the notice requirements of Rule 15(c)(1)(C)(i)and (ii) are satisfied if, during the stated period, process was delivered or mailed to the United States attorney or the United States attorney's designee, to the Attorney General of the United States, or to the officer or agency.

- **Analysis of 15(c)**
  - **Rule 15(c): addresses amendments attempted after SoL has run out and whether they can relate back (backdating to the date of timely original pleading that they amend)**
    - **Matters of delay: Rule 15(c) says nothing about the timing of P's diligence in making such an amendment, if its relation-back requirements are satisfied then relation back is mandatory (delay still relevant under Rule 15(a))**

(d) Supplemental Pleadings. On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The court may permit supplementation even though the original pleading is defective in stating a claim or defense. The court may order that the opposing party plead to the supplemental pleading within a specified time.

- **Rule 15 Analysis**
  - **was created to provide the max opportunity for each claim to be decided on its merits rather than on procedural niceties**
  - **Variances disallowed under CL now allowed under**
  - **Rule 15 Mistakes of ignorance:**
    - **Most courts held that lack of knowledge of ID of correct Ds is not a mistake w/i meaning of Rule 15(c) (P must exercise diligence in discovering ID of Ds)**
    - ***Krupski*: court only held that lower courts were incorrect in inferring that Krupski had made a deliberate choice not to sue, based on her knowledge of CC's answer and the ID of CC as carrier on back of ticket**

<u>18 Joinder of Claims</u>

(a) In General. A party asserting a claim, counterclaim, crossclaim, or third-party claim may join, as independent or alternative claims, as many claims as it has against an opposing party.

- **Analysis of Rule 18(a)Allows a plaintiff to assert any claims she has against an opponent whether related or unrelated.**

- **"A party assessing a claim, counterclaim cross claim or third party claim may join as independent or alternative claims as many claims as it has against an opposing party.**
  - **Claims may all be asserted as different counts or claims for relief in a single complaint to be ligated together in a single lawsuit.**

(b) Joinder of Contingent Claims. A party may join two claims even though one of them is contingent on the disposition of the other; but the court may grant relief only in accordance with the parties' relative substantive rights. In particular, a plaintiff may state a claim for money and a claim to set aside a conveyance that is fraudulent as to that plaintiff, without first obtaining a judgment for the money.

20 Permissive Joinder of Parties

(a) Persons Who May Join or Be Joined.

(1) *Plaintiffs.* Persons may join in one action as plaintiffs if:

(A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and

(B) any question of law or fact common to all plaintiffs will arise in the action.

(2) *Defendants.* Persons—as well as a vessel, cargo, or other property subject to admiralty process in rem—may be joined in one action as defendants if:

(A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and

(B) any question of law or fact common to all defendants will arise in the action.

(3) *Extent of Relief.* Neither a plaintiff nor a defendant need be interested in obtaining or defending against all the relief demanded. The court may grant judgment to one or more plaintiffs according to their rights, and against one or more defendants according to their liabilities.

- **Analysis of 20(A) -Puts limits on the plaintiffs choices**
  - **20(a)(1)**
    - **Allows plaintiffs to sue together if they assert claims that "arise out of the same transaction, occurrence, or series of transactions or occurrences and if their claims involve any question of law or fact common to all plaintiff"**
      - **Allows but does not require**

- **Allows plaintiffs to sue together even if they want different types of relief.**
- **Case Holdbein Vs. HEritage**
- **Allows patterns. Although there may be some factual similarities if the pattern is sufficiently similar to overcome the peculiar temporal and factual similarities that might otherwise justify severance.**
    - **General Policy Ex.**
    - **As long as there is efficiency.**
    - **RailRoad Ex. Four unrelated accidents at different times, the evidence gathering would be inefficient so severed.**

- **20(a)(2)**
    - **Same Test as above but defendants**
    - **Under this rule you can sue alternative defendants as well.**

(b) Protective Measures. The court may issue orders—including an order for separate trials—to protect a party against embarrassment, delay, expense, or other prejudice that arises from including a person against whom the party asserts no claim and who asserts no claim against the party.

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Misjoinder of parties is not a ground for dismissing an action. On motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party.

13

(a) Compulsory Counterclaim.

(1) *In General.* A pleading must state as a counterclaim any claim that—at the time of its service—the pleader has against an opposing party if the claim:

(A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and

(B) does not require adding another party over whom the court cannot acquire jurisdiction.

(2) *Exceptions.* The pleader need not state the claim if:

(A) when the action was commenced, the claim was the subject of another pending action; or

(B) the opposing party sued on its claim by attachment or other process that did not establish personal jurisdiction over the pleader on that claim, and the pleader does not assert any counterclaim under this rule.

- Analysis of 13(a)(1) **Provides that a counterclaim is compulsory if it "arises out of the transaction or occurrence that is the subject matter of the opposing party's claims. (Must be asserted in the same action)**
  - **A counter claim can be compulsory from a different legal theory or different body of law**
  - **If you don't assert a counterclaim you waive your right to bring it up in a different court.**
  - **Exceptions**
    - **Provide that a counterclaim that would otherwise be compulsory need not be asserted if it is the subject of another pending action or if jurisdiction over the main claim is based on attachment rather than full personal jurisdiction over the defendant.**
    - **Counter claims that arise after the defendant files an answer need not be asserted under either rule because the defendant did not have the claim "at the time of service"**
- **Section 1367(a) provides that if a federal court has SMJ over a case it may also hear other claims in that action that arise out of the same nucleus of facts, a compulsory counterclaim will meet this test.**

(b) Permissive Counterclaim. A pleading may state as a counterclaim against an opposing party any claim that is not compulsory.

- Analysis of **13B**
  - **If a counterclaim is not compulsory it may still be brought as a permissive counterclaim.**
    - **A defendnets option to join unrelated counter claims under rule 13b mirrors a plaintiff's right under rule 18 a to assert unrelated claims together**
  - **Permissive counterclaims are allowed to achieve "global peace" but will likely be separated at trial. .**
- **King V. Blanton 4 Tests for "arises out of same transaction"**
  - **1.Issue of fact and law are same**
  - **2.Same evidence**
  - **3.Logical relationship**
    - **Broadest test**
  - **4. Would res judicata bar a subsequent suit.**

(c) Relief Sought in a Counterclaim. A counterclaim need not diminish or defeat the recovery sought by the opposing party. It may request relief that exceeds in amount or differs in kind from the relief sought by the opposing party.

(d) Counterclaim Against the United States. These rules do not expand the right to assert a counterclaim—or to claim a credit—against the United States or a United States officer or agency.

(e) Counterclaim Maturing or Acquired After Pleading. The court may permit a party to file a supplemental pleading asserting a counterclaim that matured or was acquired by the party after serving an earlier pleading.

(f) [Abrogated.]

(g) Crossclaim Against a Coparty. A pleading may state as a crossclaim any claim by one party against a coparty if the claim arises out of the transaction or occurrence that is the subject matter of the original action or of a counterclaim, or if the claim relates to any property that is the subject matter of the original action. The crossclaim may include a claim that the coparty is or may be liable to the crossclaimant for all or part of a claim asserted in the action against the crossclaimant.

- **Analysis of 13 G**
  - **Under rule 20a a suit may involve more than one plaintiff and defendant, in such cases plaintiffs or defendants may choose to assert claims against each other. Such cross claims against companies are authorized by rule 13G.**

(h) Joining Additional Parties. Rules 19 and 20 govern the addition of a person as a party to a counterclaim or crossclaim.

(i) Separate Trials; Separate Judgments. If the court orders separate trials under Rule 42(b), it may enter judgment on a counterclaim or crossclaim under Rule 54(b) when it has jurisdiction to do so, even if the opposing party's claims have been dismissed or otherwise resolved.

14

(a) When a Defending Party May Bring in a Third Party.

(1) *Timing of the Summons and Complaint.* A defending party may, as third-party plaintiff, serve a summons and complaint on a nonparty who is or may be liable to it for all or part of the claim against it. But the third-party plaintiff must, by motion, obtain the court's leave if it files the third-party complaint more than 14 days after serving its original answer.

- **Analysis of 14(a)(1)**
  - **An Impleader addresses the situation in which a plaintiff's claim against the defendant triggers a right of the defender to be reimbursed by someone else if it pays the plaintiff's claim or part of it.**

- **The defendant must allege that the new party is or may be liable to the defendant for all or party of amy judgment the plaintiff recovers from the defendant.**

(2) *Third-Party Defendant's Claims and Defenses.* The person served with the summons and third-party complaint—the "third-party defendant":

(A) must assert any defense against the third-party plaintiff's claim under Rule 12;

(B) must assert any counterclaim against the third-party plaintiff under Rule 13a, and may assert any counterclaim against the third-party plaintiff under Rule 13(b) or any crossclaim against another third-party defendant under Rule 13(g);

(C) may assert against the plaintiff any defense that the third-party plaintiff has to the plaintiff's claim; and

(D) may also assert against the plaintiff any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff.

(3) *Plaintiff's Claims Against a Third-Party Defendant.* The plaintiff may assert against the third-party defendant any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The third-party defendant must then assert any defense under Rule 12 and any counterclaim under Rule 13(a), and may assert any counterclaim under Rule 13(b) or any crossclaim under Rule 13(g).

(4) *Motion to Strike, Sever, or Try Separately.* Any party may move to strike the third-party claim, to sever it, or to try it separately.

(5) *Third-Party Defendant's Claim Against a Nonparty.* A third-party defendant may proceed under this rule against a nonparty who is or may be liable to the third-party defendant for all or part of any claim against it.

(6) *Third-Party Complaint In Rem.* If it is within the admiralty or maritime jurisdiction, a third-party complaint may be in rem. In that event, a reference in this rule to the "summons" includes the warrant of arrest, and a reference to the defendant or third-party plaintiff includes, when appropriate, a person who asserts a right under Supplemental Rule C(6)(a)(i) in the property arrested.

(b) When a Plaintiff May Bring in a Third Party. When a claim is asserted against a plaintiff, the plaintiff may bring in a third party if this rule would allow a defendant to do so.

(c) Admiralty or Maritime Claim.

(1) *Scope of Impleader.* If a plaintiff asserts an admiralty or maritime claim under Rule 9(h), the defendant or a person who asserts a right under Supplemental Rule C(6)(a)(i) may, as a third-party plaintiff, bring in a third-party defendant who may be wholly or

partly liable—either to the plaintiff or to the third-party plaintiff— for remedy over, contribution, or otherwise on account of the same transaction, occurrence, or series of transactions or occurrences.

(2) *Defending Against a Demand for Judgment for the Plaintiff.* The third-party plaintiff may demand judgment in the plaintiff's favor against the third-party defendant. In that event, the third-party defendant must defend under Rule 12against the plaintiff's claim as well as the third-party plaintiff's claim; and the action proceeds as if the plaintiff had sued both the third-party defendant and the third-party plaintiff.

23 Class Actions

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

- **Analysis of 23a1**
  - **requires the court to certify the lawsuit as a class action provided that the party seeking class action certification shows that joinder of all members is impracticable.**

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

- **Analysis of**
  - **Rule 23(a)(2)-(3)**
    - **Requires that the representatives parties share the interest of the absent class members**
    - **They share common questions and typical claims or defenses.**
  - **Rule 23(a)(4)**
    - **Requires that the representatives fairly and adequately represent the class.**
  - **Requirements under Rule 23 (a)**
    - **Assuming the class definition had been drafted to ensure that membership is objectively ascertainable and at least one viable class representatives exists for each of the subclasses put forth by plaintiffs, plaintiffs must nevertheless satisfy all four prerequisites listed in 23 A**

- **Numerosity**
  - **Class be so numerous that joinder of all members is impracticable**
    - **A reviewing court must consider these factors**
    - **The number of person in the proposed class,**
    - **The type of action at issue,**
    - **THe monetary value of the individual claims and the inconvenience of trying each case individually.**
- **Commonality**
  - **Each class member's claims contain "questions of law and fact common to the class.**
    - **IT is not necessary to demonstrate that every question of law or fact is common t =o each member of the class, Rather the issues liking the class members must be "substantially related" to the resolution of the case.**
- **Typicality**
  - **To satisfy this requirement the proponent of certification must show that the claims or defense of the representative parties are typical of the claims or defense of the class. In general typicality is established if the claims of all members arise from a single event or saher the same legal theory. If the legal theories of the representative plaintiffs are the same or similar to those of the class, slight differences in fact will not defeat certification.**
  - **THe presence of a common legal thoru does not establish typicality when proof of a violation requires individualized inquiry.**
  - **In situations where claims turn on individual facts, no economy is achieved and the typicality requirement cannot be met.**
- **Adequacy of representation.**
  - **The fourth express requirement under rule 23a is that the representative parties will fairly and adequately protect the interest of the class.**
    - **Two factors are relevant to this inquiry.**
      - **Whether the named representatives and their counsel are willing and competent to pursue the litigation**

- **And whether the interest of the representative plaintiffs are antagonistic to the interest of others in the class.**

- **Look out for claim splitting which prevents the representative plaintiffs from adequate presenting the full interest of absent class members**

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

- **Analysis of 23(b) a party seeking class certification must also satisfy one of three subsections of rule 23b**
  - **23(b1) The prejudice class**

- **Recognizes that these kinds of prejudice can be avoided or mitigated by using a different more ambitious joinder divide: a class action treating the missing person as members of the class. Hence the shorthand phrase, prejudicial class for both the rule 23b1**

- **23(b)(2)**
  - **This subsection authorizes the maintenance of a class action where in addition to satisfying rule 23(a) "the party opposing the class has acted or refused to act on grounds generally applicable to the class thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.**
    - **Rule 23b2 is intended for class seeking primarily injunctive or declaratory relief not money damages.**
      - **Intended for those groups hoping to achieve broad based injunctive relief rather than cases in which a lawyer located a plaintiff and brought a class action in the hope of a fee.**
  - **Cohesiveness.**
    - **Because actions certified under this subsection do not allow individual members to opt out corts demand that the class be cohesive or that members be bound together through pre existing or continuing legal relationships or by some significa common trait such as race or gender.**
  - **The injunctive relief or civil rights class action.**
    - **Civil rights actions and employment discrimination actions often seek primilary injunctive relief: an injunction ordering the defendent to stop viiolating the plaintiffs civil rights, to stop discriminating in hiring or to sop discrimintin in pormotion and to promote those agaisnt whom it had discriminated.**
      - **Key to b2 class is the indivisible nature of the injunctive relief or declaratory remedy warranted the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them**

- **23b3**
  - **Certification under this subsection requires that " the questions of law or fact common to the members of the class predominate over any question affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.**

- **Predominance**
  - **When making the determination as to predominance of utmost importance is whether the issue is common to the class and subject to generalized proof or whether it is instead an issue unique to each class member.**
    - **To evaluate predominance, the district court must examine the type of evidence needed to establish a plaintiff's case.**
      - **If to make a prima facie showing on a given question the members of a proposed class must present evidence that varies from member to member, then it is an individual question for purposes of rule 23B3 if the same evidence will suffice for each member to make a prima facie showing then it becomes a common question.**
- **Superiority**
  - **The second test under rule 23b is whether the class action is superior to other reliable methods for the fair and efficient adjudication of the controversy. IN evaluating property the court must consider four non-exclusive factors.**
    - **THe interest of the members of the class in individually controlling the prosecution or defense in separate actions**
    - **The extent and nature of any litigation concentrating the controversy already commenced by or against members of the class**
    - **The desirability of undesirability of concentrating the litigation of the claims in the particular form**
    - **THe difficulties likely to be encountered in the management of a class action.**
- **The damages class actions**
  - **Must putative class actions seeking damages are certified under rule 23b**
    - **Authorizes certification of a damages class action only if despite the variable of many questions of fact and law among class members a class action o=is more efficient than individual actions, the common questions predominate and the putative class members are given the chance to skip the class**
      - **To opt out from the class leaving them free to pursue their own action but also excluding them from the benefit of any class judgment.**

- **Efficiency Calculus**
  - **How does rule 23b3 suggest that a court should make the efficey judgement.**
    - **First it has to assure that the questions common to class members predominate over any individualized questions.**
      - **In deciding predominance courts have considered a number of factors including whether**
        - **The substantive elements of class members claims require the same proof for each class member.**
        - **The proposed class is bound together by a mutual interest in resolving common questions more than it is divided by individual interest**
        - **The resolution of an issue common to the class would significantly advance the litigation**
        - **One or more common issues constitute significant parts of each class members individual case**
        - **The common questions are central to all of the members claims**
        - **The same theory of liability is asserted by or against all class members and all defendants raise the same basic defenses.**
    - **Second Superiority**
      - **Requires a finding that the class action is superior to other available methods for fairly and efficiently adjudicating the controversy.**
        - **Here the rule does not leave the court at sea; it lists pertinent facts that balance the prospect and existence of individual actions against the desirability and manageability of class actions.**
          - **Vs single actions, joinder**

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) *Certification Order.*

(A) *Time to Issue.* At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) *Defining the Class; Appointing Class Counsel.* An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) *Altering or Amending the Order.* An order that grants or denies class certification may be altered or amended before final judgment.

(2) *Notice.*

(A) *For (b)(1) or (b)(2) Classes.* For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3)—or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3)—the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means.The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) *Judgment.* Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) *Particular Issues.* When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) *Subclasses.* When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) Conducting the Action.

(1) *In General.* In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require—to protect class members and fairly conduct the action—giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) *Combining and Amending Orders.* An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

- **Analysis of**
  - **23c2b requires that rule 23b3 class members each be afforded individual notice where practicable.**
    - **For a large class this can be expensive and as we shall see below it is usually an expense carried by the party who seeks class certification**
  - **Second the notice must afford each class member an opportunity to request exclusion from the class- to opt out.**

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) *Notice to the Class.*

(A) *Information That Parties Must Provide to the Court*. The parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class.

(B) *Grounds for a Decision to Give Notice*. The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to:

(i) approve the proposal under Rule 23(e)(2); and

(ii) certify the class for purposes of judgment on the proposal.

(2) *Approval of the Proposal*. If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:

(A) the class representatives and class counsel have adequately represented the class;

(B) the proposal was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

(3) *Identifying Agreements.* The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) *New Opportunity to Be Excluded*. If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) *Class-Member Objections.*

(A) *In General*. Any class member may object to the proposal if it requires court approval under this subdivision (e). The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection.

(B) *Court Approval Required for Payment in Connection with an Objection*. Unless approved by the court after a hearing, no payment or other consideration may be provided in connection with:

(i) forgoing or withdrawing an objection, or

(ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.

(C) *Procedure for Approval After an Appeal*. If approval under Rule 23(e)(5)(B) has not been obtained before an appeal is docketed in the court of appeals, the procedure of Rule 62.1 applies while the appeal remains pending.

- **Analysis of 23 E-**
  - **deals with the problem by requiring that notice of this proposed settlement be sent to all class members who would be bound by the settlement.**
  - **Unlike 23c2 This notice requirement applies to every type of class.**
    - **Sometimes when the class action is settled before the notice is combined into a single notice.**
  - **Second it requires that the court hold a "fairness Hearing" on the proposed settlement at which objections from class members can be heard.**
  - **Third it requires the court to approve the settlement only if it finds it to be "fair, reasonable and adequate"**
    - **Factors to determine if the settlement is fair, reasonable and accurate.**
      - **The strength of the plaintiff's case;**
      - **The risk, expense complexity and likely duration of further litigation**
      - **The risk of maintaining class action status through the trial; 4 the amount offered in settlement**
      - **The extent of discovery completed and the stage of proceedings**
      - **The experience and views of counsel**
      - **The presence of a governmental participant;**
      - **The reaction of the class members to the proposed settlement.**
  - **Fourth the rule allows a court to require a second opt out opportunity in rule 23b3 damages class actions. Finally the court also controls the award of attorneys fees under rule 23(h). THese provisions provide the court with a kit bag of tools to police class actions settlements and thereby protect the class.**

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule, but not from an order under Rule 23(e)(1). A

party must file a petition for permission to appeal with the circuit clerk within 14 days after the order is entered or within 45 days after the order is entered if any party is the United States, a United States agency, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel.

(1) *Appointing Class Counsel.* Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) *Standard for Appointing Class Counsel.* When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) *Interim Counsel.* The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) *Duty of Class Counsel.* Class counsel must fairly and adequately represent the interests of the class.

(h) Attorney's Fees and Nontaxable Costs. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

26 Duty to Disclose; General Provision Governing Discovery

(a) Required Disclosures.

(1) *Initial Disclosure.*

(A) *In General.* Except as exempted by Rule 26(a)(1)(B)or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(iii) a computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible

judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

- **Analysis of 26 a**
  - **Both parties will be required without awaiting any formal discovery requests to exchange information that they may use to support their claims or defenses including names addresses and telephone number of fact witnesses copes or descriptions of documents and materials underlying fact witnesses copies or descriptions of documents and materials underlying computations of damages.**

(B) *Proceedings Exempt from Initial Disclosure.* The following proceedings are exempt from initial disclosure:

(i) an action for review on an administrative record;

(ii) a forfeiture action in rem arising from a federal statute;

(iii) a petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence;

(iv) an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision;

(v) an action to enforce or quash an administrative summons or subpoena;

(vi) an action by the United States to recover benefit payments;

(vii) an action by the United States to collect on a student loan guaranteed by the United States;

(viii) a proceeding ancillary to a proceeding in another court; and

(ix) an action to enforce an arbitration award.

(C) *Time for Initial Disclosures—In General.* A party must make the initial disclosures at or within 14 days after the parties' Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in this action and states the objection in the proposed discovery plan. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure.

- **Analysis of 26a1c**
  - **states that a party "must make initial disclosure" within the time it provides unless one of the delays buttons is pressed below**
    - **Obtaining a stipulation from the other parties**

- **Can object**
  - **The objections must be stated in the proposed discovery plan. When it is, the court will then rule on the objections and "must set the time for disclosure.**
- **Move For a court order**

(D) *Time for Initial Disclosures—For Parties Served or Joined Later.* A party that is first served or otherwise joined after the Rule 26(f) conference must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order.

(E) *Basis for Initial Disclosure; Unacceptable Excuses.* A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) *Disclosure of Expert Testimony.*

(A) *In General.* In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

(B) *Witnesses Who Must Provide a Written Report.* Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

(C) *Witnesses Who Do Not Provide a Written Report.* Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:

(i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and

(ii) a summary of the facts and opinions to which the witness is expected to testify.

(D) Time to Disclose Expert Testimony. A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

(i) at least 90 days before the date set for trial or for the case to be ready for trial; or

(ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.

(E) *Supplementing the Disclosure.* The parties must supplement these disclosures when required under Rule 26(e).

- **26a2**
  - **Also requires timely disclosure of expert trial witness and their reports at least 90 days before trial**
- **26a3**
  - **Adds the requirement that at least thirty days before trial parties make mutual pretrial disclosures by exchanging lots of witnesses they expect to call and exhibits they intend to introduce at trial. These disclosure requirements were already widely imposed ad hoc by pretrial orders in many cases and they have been uncontroversial.**

(3) *Pretrial Disclosures.*

(A) *In General.* In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:

(i) the name and, if not previously provided, the address and telephone number of each witness—separately identifying those the party expects to present and those it may call if the need arises;

(ii) the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and

(iii) an identification of each document or other exhibit, including summaries of other evidence—separately identifying those items the party expects to offer and those it may offer if the need arises.

(B) *Time for Pretrial Disclosures; Objections.* Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(A)(ii); and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 26(a)(3)(A)(iii). An objection not so made—except for one under Federal Rule of Evidence 402 or 403—is waived unless excused by the court for good cause.

(4) *Form of Disclosures.* Unless the court orders otherwise, all disclosures under Rule 26(a) must be in writing, signed, and served.

(b) Discovery Scope and Limits.

(1) *Scope in General.* Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable..

- **Analysis of 26b1**
  - **26b1**
    - **Information that the disclosing party may use to support its claims or defenses.**

(2) *Limitations on Frequency and Extent.*

(A) *When Permitted.* By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.

(B) *Specific Limitations on Electronically Stored Information.* A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such

sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1).

(3) *Trial Preparation: Materials.*

(A) *Documents and Tangible Things.* Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

- **Analysis**
  - **Anticipation of litigation**
    - **Rule 26b3 Extends work product protection only to matter that is prepared in anticipation of litigation or for trial. This condition is the key to identifying work products.**
      - **What is ligation**
        - **Litigation has not proven hard to define; it includes any adversary court or administrative proceeding including a civil action, criminal case, grandy jury proceeding and administrative hearing.**
      - **Must litigation have commenced**
        - **No see below**
      - **What is anticipation of litigation**
        - **Several Different Approaches**
        - **Ad Hoc**
          - **Only that where, as here lawyers claim they advised clients regarding the risks of potential litigation, the absence of a specific claim. Represents just one factor that courts should**

consider in determining whether the work-product privilege applies.

- **Specific Claim approach**
  - **The documents must have been prepared with a specific claim supported by concrete fact which would likely lead to litigation in mind.**
- **Primary Purpose Approach**
  - **The primary motivation for preparing the putative work product must assist in preparing for possible litigation. THis motive is shown circumstantially by how the document is labeled, whether a lawyer participated in the preparation, whether the document comments on litigation and whether it has an ordinary business purpose. Documents prepared for an ordinary business purpose or to fulfill regulatory requirements therefore do not usually qualify as work products.**

- **Overcoming work product protection**
  - **Rule 26b3**
    - **Normally the discovere would need to make that showing by filing an affidavit in support of a motion to compel discovery.**
      - **The discovere must show "substantial need for the materials to prepare its case" 26b3aii**
      - **A motion to compel discovery that is backed by an affidavit that merely alleges a need for the materials to help prepare examine witnesses is doomed for failure.**
    - **Even when the requisite showing of substantial need and undue hardship has been made "the court shall protect against disclosure of the mental impression, conclusion, opinions, or legal theories of any attorney or other representative of a party concerning litigation.**
      - **Some courts allow a redact of such impression from the memo before disclosing the remainder upon a showing of need and hardship**

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) *Protection Against Disclosure.* If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

(C) *Previous Statement.* Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either:

(i) a written statement that the person has signed or otherwise adopted or approved; or

(ii) a contemporaneous stenographic, mechanical, electrical, or other recording—or a transcription of it—that recites substantially verbatim the person's oral statement.

(4) *Trial Preparation: Experts.*

(A) *Deposition of an Expert Who May Testify.* A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(B) *Trial-Preparation Protection for Draft Reports or Disclosures.* Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.

(C) *Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses.* Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

(i) relate to compensation for the expert's study or testimony;

(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(D) *Expert Employed Only for Trial Preparation.* Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who

has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i) as provided in Rule 35(b); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(E) *Payment.* Unless manifest injustice would result, the court must require that the party seeking discovery:

(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D); and

(ii) for discovery under (D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

(5) *Claiming Privilege or Protecting Trial-Preparation Materials.*

(A) *Information Withheld.* When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(i) expressly make the claim; and

(ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(B) *Information Produced.* If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(c) Protective Orders.

(1) *In General.* A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending—or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the

dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(A) forbidding the disclosure or discovery;

(B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery;

(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(E) designating the persons who may be present while the discovery is conducted;

(F) requiring that a deposition be sealed and opened only on court order;

(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and

(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

(2) *Ordering Discovery.* If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery.

(3) *Awarding Expenses.* Rule 37(a)(5) applies to the award of expenses.

(d) Timing and Sequence of Discovery.

(1) *Timing.* A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.

(2) Early Rule 34 Requests.

Time to Deliver. More than 21 days after the summons and complaint are served on a party, a request under Rule 34 may be delivered:

(i) to that party by any other party, and

(ii) by that party to any plaintiff or to any other party that has been served.

(B) When Considered Served. The request is considered to have been served at the first Rule 26(f) conference.

(3) *Sequence.* Unlessthe parties stipulate or the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

(A) methods of discovery may be used in any sequence; and

(B) discovery by one party does not require any other party to delay its discovery.

(e) Supplementing Disclosures and Responses.

(1) *In General.* A party who has made a disclosure under Rule 26(a)—or who has responded to an interrogatory, request for production, or request for admission—must supplement or correct its disclosure or response:

(A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or

(B) as ordered by the court.

(2) *Expert Witness.* For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.

(f) Conference of the Parties; Planning for Discovery.

(1) *Conference Timing.* Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable—and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b).

(2) *Conference Content; Parties' Responsibilities.* In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.

(3) *Discovery Plan.* A discovery plan must state the parties' views and proposals on:

(A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made;

(B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

(C) any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced;

(D) any issues about claims of privilege or of protection as trial-preparation materials, including—if the parties agree on a procedure to assert these claims after production—whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502;

(E) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(F) any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

(4) *Expedited Schedule.* If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule:

(A) require the parties' conference to occur less than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b); and

(B) require the written report outlining the discovery plan to be filed less than 14 days after the parties' conference, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.

- **Analysis of 26F Nice little table on page 827**

(g) Signing Disclosures and Discovery Requests, Responses, and Objections.

(1) *Signature Required; Effect of Signature.* Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name—or by the party personally, if unrepresented—and must state the signer's address, e-mail address, and telephone number. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

(A) with respect to a disclosure, it is complete and correct as of the time it is made; and

(B) with respect to a discovery request, response, or objection, it is:

(i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

(ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

(iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

(2) *Failure to Sign.* Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.

(3) *Sanction for Improper Certification.* If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.

30 Depositions by Oral Examination

(a) When a Deposition May Be Taken.

(1) *Without Leave.* A party may, by oral questions, depose any person, including a party, without leave of court except as provided in Rule 30(a)(2). The deponent's attendance may be compelled by subpoena under Rule 45.

(2) *With Leave.* A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(1) and (2):

(A) if the parties have not stipulated to the deposition and:

(i) the deposition would result in more than 10 depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by the third-party defendants;

(ii) the deponent has already been deposed in the case; or

(iii) the party seeks to take the deposition before the time specified in Rule 26(d), unless the party certifies in the notice, with supporting facts, that the deponent is expected to leave the United States and be unavailable for examination in this country after that time; or

(B) if the deponent is confined in prison.

(b) Notice of the Deposition; Other Formal Requirements.

(1) *Notice in General.* A party who wants to depose a person by oral questions must give reasonable written notice to every other party. The notice must state the time and place of the deposition and, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs.

(2) *Producing Documents.* If a subpoena duces tecum is to be served on the deponent, the materials designated for production, as set out in the subpoena, must be listed in the notice or in an attachment. The notice to a party deponent may be accompanied by a request under Rule 34 to produce documents and tangible things at the deposition.

(3) *Method of Recording.*

(A) *Method Stated in the Notice.* The party who notices the deposition must state in the notice the method for recording the testimony. Unless the court orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means. The noticing party bears the recording costs. Any party may arrange to transcribe a deposition.

(B) *Additional Method.* With prior notice to the deponent and other parties, any party may designate another method for recording the testimony in addition to that specified in the original notice. That party bears the expense of the additional record or transcript unless the court orders otherwise.

- **Analysis of 30b3**
    - **The notice must specify the method of recording, audio and video taping are expressly permitted under the rules that are gaining in popularity.**

(4) *By Remote Means.* The parties may stipulate—or the court may on motion order—that a deposition be taken by telephone or other remote means. For the purpose of this rule and Rules 28(a), 37(a)(2), and 37(b)(1), the deposition takes place where the deponent answers the questions.

(5) *Officer's Duties.*

(A) *Before the Deposition.* Unless the parties stipulate otherwise, a deposition must be conducted before an officer appointed or designated under Rule 28. The officer must begin the deposition with an on-the-record statement that includes:

(i) the officer's name and business address;

(ii) the date, time, and place of the deposition;

(iii) the deponent's name;

(iv) the officer's administration of the oath or affirmation to the deponent; and

(v) the identity of all persons present.

(B) *Conducting the Deposition; Avoiding Distortion.* If the deposition is recorded nonstenographically, the officer must repeat the items in Rule 30(b)(5)(A)(i)–(iii) at the beginning of each unit of the recording medium. The deponent's and attorneys' appearance or demeanor must not be distorted through recording techniques.

(C) *After the Deposition.* At the end of a deposition, the officer must state on the record that the deposition is complete and must set out any stipulations made by the attorneys about custody of the transcript or recording and of the exhibits, or about any other pertinent matters.

(6) *Notice or Subpoena Directed to an Organization.* In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

- **Analysis of 30b6**
  - **Deposing the corporate or institutional witness.**
  - **Institutional parties may be deposed.**
    - **Send a letter to corporate HQ describing the matters on which examination is requested. The corporation must then designate a deponent knowledgeable about those matters to testify on its behalf**

(c) Examination and Cross-Examination; Record of the Examination; Objections; Written Questions.

(1) *Examination and Cross-Examination.* The examination and cross-examination of a deponent proceed as they would at trial under the Federal Rules of Evidence, except Rules 103and 615. After putting the deponent under oath or affirmation, the officer must record the testimony by the method designated under Rule 30(b)(3)(A). The testimony must be recorded by the officer personally or by a person acting in the presence and under the direction of the officer.

(2) *Objections.* An objection at the time of the examination—whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or

to any other aspect of the deposition—must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection. An objection must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3).

- **Analysis of 30(c)2**
  - **Objections of questions may be made by opposing counsel but " the examination still proceeds; the testimony is taken subject to any objection.**
  - **All objections made at the time of the examination are noted on the record and the testimony is still taken subject to the objection.**
  - **Even if he does object, the objection objection is simply noted by reporter and the witness answers anyway subject to the objection**

(3) *Participating Through Written Questions.* Instead of participating in the oral examination, a party may serve written questions in a sealed envelope on the party noticing the deposition, who must deliver them to the officer. The officer must ask the deponent those questions and record the answers verbatim.

(d) Duration; Sanction; Motion to Terminate or Limit.

(1) *Duration.* Unless otherwise stipulated or ordered by the court, a deposition is limited to 1 day of 7 hours. The court must allow additional time consistent with Rule 26(b)(1) and (2) if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination.

- **Analysis of 30(d)1**
  - **Cautions that objections must be stated concisely in an argumentative and non suggestive manner. And limits the circumstances in which a party may instruct a deponent not to answer**
    - **The model rules of professional conduct prescribe "unlawfully obstructing another party's access to evidence" or "failing to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party.**

(2) *Sanction.* The court may impose an appropriate sanction—including the reasonable expenses and attorney's fees incurred by any party—on a person who impedes, delays, or frustrates the fair examination of the deponent.

(3) *Motion to Terminate or Limit.*

(A) *Grounds.* At any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. The motion may be filed in the court where the action is pending or the deposition is

being taken. If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to obtain an order.

(B) *Order.* The court may order that the deposition be terminated or may limit its scope and manner as provided in Rule 26(c). If terminated, the deposition may be resumed only by order of the court where the action is pending.

(C) *Award of Expenses.* Rule 37(a)(5) applies to the award of expenses.

(e) Review by the Witness; Changes.

(1) *Review; Statement of Changes.* On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:

(A) to review the transcript or recording; and

(B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(2) *Changes Indicated in the Officer's Certificate.* The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

(f) Certification and Delivery; Exhibits; Copies of the Transcript or Recording; Filing.

(1) *Certification and Delivery.* The officer must certify in writing that the witness was duly sworn and that the deposition accurately records the witness's testimony. The certificate must accompany the record of the deposition. Unless the court orders otherwise, the officer must seal the deposition in an envelope or package bearing the title of the action and marked "Deposition of [witness's name]" and must promptly send it to the attorney who arranged for the transcript or recording. The attorney must store it under conditions that will protect it against loss, destruction, tampering, or deterioration.

(2) *Documents and Tangible Things.*

(A) *Originals and Copies.* Documents and tangible things produced for inspection during a deposition must, on a party's request, be marked for identification and attached to the deposition. Any party may inspect and copy them. But if the person who produced them wants to keep the originals, the person may:

(i) offer copies to be marked, attached to the deposition, and then used as originals—after giving all parties a fair opportunity to verify the copies by comparing them with the originals; or

(ii) give all parties a fair opportunity to inspect and copy the originals after they are marked—in which event the originals may be used as if attached to the deposition.

(B) *Order Regarding the Originals.* Any party may move for an order that the originals be attached to the deposition pending final disposition of the case.

(3) *Copies of the Transcript or Recording.* Unless otherwise stipulated or ordered by the court, the officer must retain the stenographic notes of a deposition taken stenographically or a copy of the recording of a deposition taken by another method. When paid reasonable charges, the officer must furnish a copy of the transcript or recording to any party or the deponent.

(4) *Notice of Filing.* A party who files the deposition must promptly notify all other parties of the filing.

(g) Failure to Attend a Deposition or Serve a Subpoena; Expenses. A party who, expecting a deposition to be taken, attends in person or by an attorney may recover reasonable expenses for attending, including attorney's fees, if the noticing party failed to:

(1) attend and proceed with the deposition; or

(2) serve a subpoena on a nonparty deponent, who consequently did not attend.

33 Interrogatories to Parties

(a) In General.

(1) *Number.* Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts. Leave to serve additional interrogatories may be granted to the extent consistent with Rule 26(b)(1) and (2).

(2) *Scope.* An interrogatory may relate to any matter that may be inquired into under Rule 26(b). An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the court may order that the interrogatory need not be answered until designated discovery is complete, or until a pretrial conference or some other time.

- **Analysis of 33(a)(2)**
  - **states that an interrogatory is not objectionable just because it asks for an opinion or contention that relates to factor the application of law to fact.**
    - **Such contention interrogatories are needed to ascertain how a party will contend that the law applies to the facts come trial.**

- **The rule therefore allows the court to postpone the time for answering contention interrogatories until such discovery has been completed**

- **By negative implication on the other hand an interrogatory that calls for a pure legal conclusion or opinion not applicable to the fate of the case is objectionable. The asking party can answer it as readily as the responding party, by looking in the library.**

(b) Answers and Objections.

(1) *Responding Party.* The interrogatories must be answered:

(A) by the party to whom they are directed; or

(B) if that party is a public or private corporation, a partnership, an association, or a governmental agency, by any officer or agent, who must furnish the information available to the party.

- **Analysis of 33b1b**
  - **The duty imposed on a person is the same as a corporation**
    - **Rule 33b1b is to "furnish such information as is available to the party**

(2) *Time to Respond.* The responding party must serve its answers and any objections within 30 days after being served with the interrogatories. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

(3) *Answering Each Interrogatory.* Each interrogatory must, to the extent it is not objected to, be answered separately and fully in writing under oath.

(4) *Objections.* The grounds for objecting to an interrogatory must be stated with specificity. Any ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure.

(5) *Signature.* The person who makes the answers must sign them, and the attorney who objects must sign any objections.

(c) Use. An answer to an interrogatory may be used to the extent allowed by the Federal Rules of Evidence.

(d) Option to Produce Business Records. If the answer to an interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing a party's business records (including electronically stored information), and if the burden of deriving or ascertaining the answer will be substantially the same for either party, the responding party may answer by:

(1) specifying the records that must be reviewed, in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could; and

(2) giving the interrogating party a reasonable opportunity to examine and audit the records and to make copies, compilations, abstracts, or summaries.

- **Analysis of 33d**
  - **The option to produce business records**
    - **If the answer can be found in the defendants business records and the burden of searching them is no greater for the plaintiff than for the defendant, then it makes them available to the plaintiff in lieu of answering.**

34

(a) In General. A party may serve on any other party a request within the scope of Rule 26(b):

(1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control:

- **Analysis of 34(A)(1)**
  - **Target documents and things "in the responding party's possession custody or control"**

(A) any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or

(B) any designated tangible things; or

(2) to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

(b) Procedure.

(1) *Contents of the Request.* The request:

(A) must describe with reasonable particularity each item or category of items to be inspected;

(B) must specify a reasonable time, place, and manner for the inspection and for performing the related acts; and

(C) may specify the form or forms in which electronically stored information is to be produced.

- **Analysis of 34b**
  - **Producing party to produce documents as they are kept in the usual course of business or to organize and label them to correspond to the categories in the request**

(2) *Responses and Objections.*

(A) *Time to Respond.* The party to whom the request is directed must respond in writing within 30 days after being served or — if the request was delivered under Rule 26(d)(2) — within 30 days after the parties' first Rule 26(f) conference. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

(B) *Responding to Each Item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state with specificity the grounds for objecting to the request, including the reasons. The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response.

(C) *Objections.* An objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit inspection of the rest.

(D) *Responding to a Request for Production of Electronically Stored Information.* The response may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form—or if no form was specified in the request—the party must state the form or forms it intends to use.

(E) *Producing the Documents or Electronically Stored Information.* Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:

(i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;

(ii) If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and

(iii) A party need not produce the same electronically stored information in more than one form.

(c) Nonparties. As provided in Rule 45, a nonparty may be compelled to produce documents and tangible things or to permit an inspection.

36 Requests for Admissions

(a) Scope and Procedure.

(1) *Scope.* A party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of Rule 26(b)(1) relating to:

(A) facts, the application of law to fact, or opinions about either; and

(B) the genuineness of any described documents.

(2) *Form; Copy of a Document.* Each matter must be separately stated. A request to admit the genuineness of a document must be accompanied by a copy of the document unless it is, or has been, otherwise furnished or made available for inspection and copying.

(3) *Time to Respond; Effect of Not Responding.* A matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney. A shorter or longer time for responding may be stipulated to under Rule 29 or be ordered by the court.

(4) *Answer.* If a matter is not admitted, the answer must specifically deny it or state in detail why the answering party cannot truthfully admit or deny it. A denial must fairly respond to the substance of the matter; and when good faith requires that a party qualify an answer or deny only a part of a matter, the answer must specify the part admitted and qualify or deny the rest. The answering party may assert lack of knowledge or information as a reason for failing to admit or deny only if the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny.

(5) *Objections.* The grounds for objecting to a request must be stated. A party must not object solely on the ground that the request presents a genuine issue for trial.

(6) *Motion Regarding the Sufficiency of an Answer or Objection.* The requesting party may move to determine the sufficiency of an answer or objection. Unless the court finds

an objection justified, it must order that an answer be served. On finding that an answer does not comply with this rule, the court may order either that the matter is admitted or that an amended answer be served. The court may defer its final decision until a pretrial conference or a specified time before trial. Rule 37(a)(5) applies to an award of expenses.

(b) Effect of an Admission; Withdrawing or Amending It. A matter admitted under this rule is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended. Subject to Rule 16(e), the court may permit withdrawal or amendment if it would promote the presentation of the merits of the action and if the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits. An admission under this rule is not an admission for any other purpose and cannot be used against the party in any other proceeding.

- **Analysis of 36**
  - **Purpose to narrow the issues for trial.**
    - **A party may request that an opposing party admit or deny the truth of statements in the request or the authenticity of documents attached to it. Usually the request is made after other discovery which is needed to frame the statement or locate the document. This timing suggests that the request for admission is less a discovery tool than a pretrial tool used to simplify the case on the eve of trial.**
      - **An admission conclusively establishes the matter admitted for the purposes of the particular case.**
        - **Event hough rule 26(g)s certification requirement applies to responses to request for admission no less than to other discovery responses, ambiguities in request for admission no less than to other discovery responses ambiguities in the evendeece alway enable the responding party to deny the truth of such ultimate contentions in the case without evening the rule.**

45 Subpoena

(a) In General.

(1) *Form and Contents.*

(A) *Requirements—In General.* Every subpoena must:

(i) state the court from which it issued;

(ii) state the title of the action and its civil-action number;

(iii) command each person to whom it is directed to do the following at a specified time and place: attend and testify; produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control; or permit the inspection of premises; and

(iv) set out the text of Rule 45(d) and (e).

(B) *Command to Attend a Deposition—Notice of the Recording Method.* A subpoena commanding attendance at a deposition must state the method for recording the testimony.

(C) *Combining or Separating a Command to Produce or to Permit Inspection; Specifying the Form for Electronically Stored Information.* A command to produce documents, electronically stored information, or tangible things or to permit the inspection of premises may be included in a subpoena commanding attendance at a deposition, hearing, or trial, or may be set out in a separate subpoena. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(D) *Command to Produce; Included Obligations.* A command in a subpoena to produce documents, electronically stored information, or tangible things requires the responding person to permit inspection, copying, testing, or sampling of the materials.

(2) *Issuing Court.* A subpoena must issue from the court where the action is pending.

(3) *Issued by Whom.* The clerk must issue a subpoena, signed but otherwise in blank, to a party who requests it. That party must complete it before service. An attorney also may issue and sign a subpoena if the attorney is authorized to practice in the issuing court.

(4) *Notice to Other Parties Before Service.* If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, then before it is served on the person to whom it is directed, a notice and a copy of the subpoena must be served on each party.

(b) Service.

(1) *By Whom and How; Tendering Fees.* Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the mileage allowed by law. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies.

(2) *Service in the United States.* A subpoena may be served at any place within the United States.

(3) *Service in a Foreign Country.* 28 U.S.C. §1783 governs issuing and serving a subpoena directed to a United States national or resident who is in a foreign country.

(4) *Proof of Service.* Proving service, when necessary, requires filing with the issuing court a statement showing the date and manner of service and the names of the persons served. The statement must be certified by the server.

(c) Place of Compliance.

(1) *For a Trial, Hearing, or Deposition.* A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person

(i) is a party or a party's officer; or

(ii) is commanded to attend a trial and would not incur substantial expense.

(2) *For Other Discovery.* A subpoena may command:

(A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and

(B) inspection of premises at the premises to be inspected.

- **Analysis of 45c**
  - **But the subpoena can only command compliance within 100 miles of where the despondent resides or regularly transacts business in person.**

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) *Avoiding Undue Burden or Expense; Sanctions.* A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) *Command to Produce Materials or Permit Inspection.*

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a

written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) *Quashing or Modifying a Subpoena.*

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

- **Analysis of 45 D**
  - **A person objecting to a subpoena can seek relief in the court for the district where compliance is rough**

(e) Duties in Responding to a Subpoena.

(1) *Producing Documents or Electronically Stored Information.* These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) *Claiming Privilege or Protection.*

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the

information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(f) Transferring a Subpoena-Related Motion. When the court where compliance is required did not issue the subpoena, it may transfer a motion under this rule to the issuing court if the person subject to the subpoena consents or if the court finds exceptional circumstances. Then, if the attorney for a person subject to a subpoena is authorized to practice in the court where the motion was made, the attorney may file papers and appear on the motion as an officer of the issuing court. To enforce its order, the issuing court may transfer the order to the court where the motion was made.

(g) Contempt. The court for the district where compliance is required — and also, after a motion is transferred, the issuing court — may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

37 Failure to make disclosures or to cooperate in Discovery; Sanctions

(a) Motion for an Order Compelling Disclosure or Discovery.

(1) *In General.* On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.

(2) *Appropriate Court.* A motion for an order to a party must be made in the court where the action is pending. A motion for an order to a nonparty must be made in the court where the discovery is or will be taken.

(3) *Specific Motions.*

(A) *To Compel Disclosure.* If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions.

(B) *To Compel a Discovery Response.* A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:

(i) a deponent fails to answer a question asked under Rule 30 or 31;

(ii) a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a)(4);

(iii) a party fails to answer an interrogatory submitted under Rule 33; or

(iv) a party fails to produce documents or fails to respond that inspection will be permitted—or fails to permit inspection—as requested under Rule 34.

(C) *Related to a Deposition.* When taking an oral deposition, the party asking a question may complete or adjourn the examination before moving for an order.

(4) *Evasive or Incomplete Disclosure, Answer, or Response.* For purposes of this subdivision (a), an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.

(5) *Payment of Expenses; Protective Orders.*

(A) *If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing).* If the motion is granted—or if the disclosure or requested discovery is provided after the motion was filed—the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court must not order this payment if:

(i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;

(ii) the opposing party's nondisclosure, response, or objection was substantially justified; or

(iii) other circumstances make an award of expenses unjust.

(B) *If the Motion Is Denied.* If the motion is denied, the court may issue any protective order authorized under Rule 26(c) and must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees. But the court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust.

(C) *If the Motion Is Granted in Part and Denied in Part.* If the motion is granted in part and denied in part, the court may issue any protective order authorized under Rule 26(c)and may, after giving an opportunity to be heard, apportion the reasonable expenses for the motion.

- **Analysis of 37a**
  - **When the responding party expressly makes objection to a discovery request, the requesting party may move for an order compelling discovery under rule 37a.**

- **First if the requesting party must try to resolve the dispute informally**
- **second if the informal discussion fails, the requesting party can file a motion for a court order compelling discovery pursuant to 37a.**

(b) Failure to Comply with a Court Order.

(1) *Sanctions Sought in the District Where the Deposition Is Taken.* If the court where the discovery is taken orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of court. If a deposition-related motion is transferred to the court where the action is pending, and that court orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of either the court where the discovery is taken or the court where the action is pending.

(2) *Sanctions Sought in the District Where the Action Is Pending.*

(A) *For Not Obeying a Discovery Order.* If a party or a party's officer, director, or managing agent—or a witness designated under Rule 30(b)(6) or 31(a)(4)—fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following:

(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;

(ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

(iii) striking pleadings in whole or in part;

(iv) staying further proceedings until the order is obeyed;

(v) dismissing the action or proceeding in whole or in part;

(vi) rendering a default judgment against the disobedient party; or

(vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

(B) *For Not Producing a Person for Examination.* If a party fails to comply with an order under Rule 35(a) requiring it to produce another person for examination, the court may issue any of the orders listed in Rule 37(b)(2)(A)(i)—(vi), unless the disobedient party shows that it cannot produce the other person.

(C) *Payment of Expenses.* Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the

reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

- **Analysis of 37(b)**
  - **In then ruling on the motion the court will then determine the validity of the responding party's objections. Third should the objecting party defy such an order the requesting party can go back to court with a motion for sanctions.**
  - **In addition to holding a party in contempt the sanctions can include order deeming specified facts to be established for purposes of the action., precluding the violator from introducing certain evidence, striking or dismissing claims or defense, or even entering a default judgment against the violator.**
  - **most request for sanctions are presented by motions made under rule 37 b**

(c) Failure to Disclose, to Supplement an Earlier Response, or to Admit.

(1) *Failure to Disclose or Supplement.* If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

(A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;

(B) may inform the jury of the party's failure; and

(C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)—(vi).

(2) *Failure to Admit.* If a party fails to admit what is requested under Rule 36 and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof. The court must so order unless:

(A) the request was held objectionable under Rule 36(a);

(B) the admission sought was of no substantial importance;

(C) the party failing to admit had a reasonable ground to believe that it might prevail on the matter; or

(D) there was other good reason for the failure to admit.

(d) Party's Failure to Attend Its Own Deposition, Serve Answers to Interrogatories, or Respond to a Request for Inspection.

(1) *In General.*

(A) *Motion; Grounds for Sanctions.* The court where the action is pending may, on motion, order sanctions if:

(i) a party or a party's officer, director, or managing agent—or a person designated under Rule 30(b)(6) or 31(a)(4)—fails, after being served with proper notice, to appear for that person's deposition; or

(ii) a party, after being properly served with interrogatories under Rule 33 or a request for inspection under Rule 34, fails to serve its answers, objections, or written response.

(B) *Certification.* A motion for sanctions for failing to answer or respond must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without court action.

(2) *Unacceptable Excuse for Failing to Act.* A failure described in Rule 37(d)(1)(A) is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under Rule 26(c).

(3) *Types of Sanctions.* Sanctions may include any of the orders listed in Rule 37(b)(2)(A)(i)—(vi). Instead of or in addition to these sanctions, the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

(e) Failure to Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.

(f) Failure to Participate in Framing a Discovery Plan. If a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as

required by Rule 26(f), the court may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

- **Analysis of 37D**
    - **The intermediate step of seeking a motion to compel is excused, however if the recalcitrant party has stonewalled discovery by failing to respond to discovery request or to attend its deposition, instead of making particular objections the requesting party can then go straight for sanctions**
        - **the party from which discovery is requested, the requested "stonewalls"- ((That is fails to make any response (or fails to attend its own deposition))**
            - **the requesting party may**
                - **bypass the motion to compel (first step in the usual two step process) and go straight for sanctions under rule 37D.**
                    - **The two steps become a one-step. IN such a case, it is no excuse for the lack of response that the discovery sought was objectionable. The objections come too late.**

<u>56 Summary Judgment</u>

a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

- **Analysis of rule 56(a)-**
    - **If the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law rule**
    - **authorizes summary judgment on a part of a claim or defense.**
        - **A court may grant summary judgment as to one or fewer than all claims or even to part of a claim leaving the rest for trial.**

(b) Time to File a Motion. Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

- **Analysis of rule 56(b)-**
  - **Armed with evidence you can file a motion for summary judgment any time up until 30 days after the close of discovery**

(c) Procedures.

(1) Supporting Factual Positions. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

- **Analysis of 56(c)(1)(a)**
  - **List materials that may be considered in deciding summary judgment. But all discovery materials do not automatically qualify for consideration on summary judgment.**
    - **They must be admissible under the rules of evidence before they are properly considered as part of the record for summary judgment. W**
      - **Why should support materials need to be admissible?**
        - **Applying the admissibility tests to all evidence on a summary judgment motion serves the purpose of summary judgment rule 56 is designed to avoid a trial that would be unnecessary. THe motion could ont serve that function if in deciding whether issues exist for trials, courts were to consider evidence that could not subsequently be admitted at trial.**
    - **Does not expressly exclude a movant from relying on her own pleadings to support a summary judgment.**
    - **Depositions are expressly listed as materials in the record that a party may cite on summary judgment**
      - **Remember that the particular contents must be admissible as well though**

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) *Objection That a Fact Is Not Supported by Admissible Evidence.* A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

- **Analysis of 56(c)(2)**
  - **56c2 provides that the opposing party may object that material "cannot be presented in a form that would be admissible in evidence at trial. The movants own unsworn pleadings are not in such form and could not be offered as evidence by that party at trial.**
    - **In contrast an opposing party's pleadings could be admitted at trial as admission by the pleader.**
      - **On rare occasions a party may also rely on its own pleading but only if the party swore to the truth of the pleading allegations made them from personal knowledge and those allegations would be admissible at trial.**
        - **In other words, if the pleading is the equivalent of an affidavit.**

(3) *Materials Not Cited.* The court need consider only the cited materials, but it may consider other materials in the record.

(4) *Affidavits or Declarations.* An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

- **Analysis of 56c4**
  - **Must be made on personal knowledge**

(d) When Facts Are Unavailable to the Nonmovant. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;

(2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

- **Analysis of 56(d)**
  - **Expressly let's parties file an affidavit to obtain a continuance (a delay before having to respond to the motion) in order to complete any discovery that she needs to respond to the motion.**
    - **Although IDK yet whether the facts are undisputed is not a sufficient response to defeat summary judgment it can buy an opposing party time.**

(e) Failing to Properly Support or Address a Fact. If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

(1) give an opportunity to properly support or address the fact;

(2) consider the fact undisputed for purposes of the motion;

(3) grant summary judgment if the motion and supporting materials — including the facts considered undisputed — show that the movant is entitled to it; or

(4) issue any other appropriate order.

(f) Judgment Independent of the Motion. After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;

(2) grant the motion on grounds not raised by a party;or

(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

- **Analysis of rule 56(f)**
  - **A party must resort to rule 56(f) when it is opposing summary judgment and is unable to present a sufficient affidavit because the necessary facts or evidence are possessed or controlled by the moving party.**

(g) Failing to Grant All the Requested Relief. If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact — including an item of damages or other relief — that is not genuinely in dispute and treating the fact as established in the case.

(h) Affidavit or Declaration Submitted in Bad Faith. If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court — after notice and a reasonable time to respond — may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.

<u>50 Judgments as a MAtter of Law in a Jury Trial; Related Motion for a New Trial; Conditional Ruling</u>

(1) *In General.* If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:

(A) resolve the issue against the party; and

(B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

(2) *Motion.* A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.

- **50(a) analysis**
  - **Rule 50 a does not prohibit making two rule 50a motions.**
  - **50a1**
    - **The only imitation is that the motion cannot be made until a "party has been fully heard on an issue"**
      - **Says that a court can grant a judgment as a matter of law after " a party has been fully heard on an issue. This means that a party can make a motion after the nonmoving party has had an opportunity to present all of her evidence on the issue that is the subject of the motion.**
  - **50a2**
    - **A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury.**
    - **"the motion must specify the judgment sought and the law and facts that entitle the movant to the judgment**
  - **Taken together those two subsections mean that a rule 50 a motion can typically be made either (1) after the no-moving party (usually the plaintiff has been heard on the issue" (2) after both parties have presented all of their evidence or (3) at both times**
  - **The united states supreme court has made clear that a party's rule 50a motion cannot be appealed unless the motion is renewed pursuant to rule 60(b)**

(b) Renewing the Motion After Trial; Alternative Motion for a New Trial. If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than 28 days after the entry of judgment—or if the motion addresses a jury issue not decided by a verdict, no later than 28 days after the jury was discharged—the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59. In ruling on the renewed motion, the court may:

(1) allow judgment on the verdict, if the jury returned a verdict;

(2) order a new trial; or

(3) direct the entry of judgment as a matter of law.

- **Analysis of rule 50(b)**
  - **If the case goes to a jury, but a reasonable jury could find the verdict decided, the judge can exercise gatekeeping authority.**
    - **If the movantant renews his motion for judgment as a matter of law, the judge can set aside the jury's verdict and enter judgment for the correct party instead.**
      - **Rule 50 b authorises the judge to grant this renewed motion for judgment as a matter of law which most state courts refer to a motion for judgment notwithstanding the verdict or jnov.**
  - **Remember that the rule 50(b) motion is simply a renewed rule 50(a) motion so it stands to reason that courts will employ the same analysis.**
    - **One difference between the two motions is that they implicitly distinct pragmatic concerns mentioned earlier.**
    - **THe other difference is that the motions may be made on different records if the rule 50 a motion is made at the close of the plaintiffs evidence then rule 50b made within 28 days after entry of judgment. The court ruling will have the benefit of the defendants evident which it would ont have had in the ruling on the pripor 50a motion.**
  - **If the court does not grant a motion for judgment as a matter of law made under rule 50 a the court is considered to have submitted the action to the jury subjection to the courts later deciding the legal questions raised by the motion.**
    - **Thi means that if a party fails to make a rule 50a motion, the party has waived the opportunity to make a rule 50 b motion.**
  - **Parties can now make a rule 50 b motion as long as they previously made a rule 50 a motion at some point after the nonmoving party had been fully heard on the relevant issue and before submission of the case to the jury.**
  - **Whatever issue you raised on 50a has to be the same issue you raised on 50 b**

(c) Granting the Renewed Motion; Conditional Ruling on a Motion for a New Trial.

(1) *In General.* If the court grants a renewed motion for judgment as a matter of law, it must also conditionally rule on any motion for a new trial by determining whether a new

trial should be granted if the judgment is later vacated or reversed. The court must state the grounds for conditionally granting or denying the motion for a new trial.

(2) *Effect of a Conditional Ruling.* Conditionally granting the motion for a new trial does not affect the judgment's finality; if the judgment is reversed, the new trial must proceed unless the appellate court orders otherwise. If the motion for a new trial is conditionally denied, the appellee may assert error in that denial; if the judgment is reversed, the case must proceed as the appellate court orders.

(d) Time for a Losing Party's New-Trial Motion. Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered must be filed no later than 28 days after the entry of the judgment.

(e) Denying the Motion for Judgment as a Matter of Law; Reversal on Appeal. If the court denies the motion for judgment as a matter of law, the prevailing party may, as appellee, assert grounds entitling it to a new trial should the appellate court conclude that the trial court erred in denying the motion. If the appellate court reverses the judgment, it may order a new trial, direct the trial court to determine whether a new trial should be granted, or direct the entry of judgment.

Basic Pleading

a. Pleading
    i. a paper containing factual assertions that support jurisdiction and legal claims in a civil suit
        1. Fed 8(a)
    ii. First pleading is called a complaint
        1. Grounds for SMJ
            a. 8(a)(1)
        2. Claim
            a. 8(a)(2)
                i. A short and plain statement of the claim showing that the pleader is entitled to relief.
        3. Demand for Relief
            a. 8(a)(3)
    iii. Defendants First Pleading is called an answer
        1. Response to factual allegations
        2. Asserts Defenses
        3. Counterclaims
            a. Normally Completes the pledging process.
b. Historical Purposes of Pleading
    i. Giving notice of the nature of a claim or defense
    ii. Stating facts
    iii. Narrowing issues for litigation
    iv. Helping the court throw out bogus claims and defenses without the burden of a trial
c. Rule 8(a)2
    i. Stress that you need to make a short and plain statement of a claim showing that the pleader is entitled to relief.
d. Sufficiency of a complaint
    i. A defendant often challenges the sufficiency of the complaint to state a claim
        1. An insufficient claim can be attacked in federal court by a defendant's motion to dismiss the complaint for failure to state a claim
        2. Sometimes called a demurrer in a state case
            a. 12(b)6- failure to state a claim.
                i. Reasonable doubts should be resolved in favor of the pleader.
                ii. A court should grant a motion if assuming the truth of the well pleaded factual allegations, it determines that they do not p;ausibly show an

entitlement to relief under the applicable law. It is not enough that such allegations are equally consistent with an innocent explanation as with a liability creating explanation.

e. Modern Pleading
    i. Narrow issues that had to be decided.
f. Code Pleading
    i. (1) Facts had to be pleaded
        1. Not mere conclusions of law
            a. Needs to be
                i. What
                ii. When
                iii. Where
                iv. Who
                v. Relationship
    ii. (2)What is the Cause of Action
g. Notice Pleading
    i. What we have now
    ii. Starting in 1938 Fed Rules of Civ Pro
h. Other Pleading Rules
    i. 8(d)2
        1. Pleading in the alternative
    ii. 11
        1. Requires a reasonable pre-filling inquiry into the facts by the pleader which may settle these kinds of questions before the pleading is filed.
    iii. 10(b)
        1. Forms of pleadings
            a. Requires numbered paragraphs each limited as far as possible to a single set of circumstances thought it does not require identification of claims it urges that each claim should be stated in a separate count when " doing so would promote clarity"
    iv. 8(e)
        1. Pleadings must be construed so as to do justice.
            a. Small errors of FORM are unlikely to be fatal indeed it could well be reversible error for a court to penalize the pleader for minor errors.
    v. 8(c)(1)
        1. The court can grant a motion to dismiss if the availability of this defense is apparent on the face of the complaint.

i. Case for this Chapter
    i. Doe. V. SMith
        1. Plaintiffs need not plead facts they need not plead law they plead claims for relief usually they need do no more than narrate a grievance simply and directly so that the defendant knows what he has been accused of.
        2. A complaint suffices if any facts consistent with its allegation and showing and entitlement to prevail could be established by affidavit or testimony at trial and the complaint does not contradict itself.
        3. A complaint does not have to establish or mention a prima facie case. Elements do not have to be stated but must be able to be implicated. Reasonable doubts should be resolved in favor of the pleader.
            a. Notes After Case
                i. A complaint must contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory
                    1. No rigid elements pleading requirement.
                        a. Sorema Held
                            i. That a plaintiff need not plead facts establishing a prima facie claim.
                    2. Rule 8(a)
                        a. Requires only to plead a claim sufficient to let the opposing party know what that plaintiff is complaining about.
    ii. Heightened pleading
        1. Federal rules of civil procedure 9
            a. imposes heightened pleading requirements for such allegations of fraud and mistake.
                i. 9(b)
                    1. "A party must state with particularity the circumstances constituting fraud or mistake."
                ii. Second Part of 9(b)

1. "Malice, intent, knowledge and other conditions of a person's mind may be alleged generally"
    a. This part of rule 9 excuses a pleader from pleading discriminatory intent "under an elevated pleading standard. "

iii. 9(g)

1. Requires that special damages be specifically be stated.
    a. Special damaes are those that would not noramlly be anticipated such as damages for a later miscarriage or higher blood pressure said to have resulted from an automobile accident.
    b. Special damages should be specifically stated to avoid surprise to the defendant.

2. Reasons
    a. Fair Notice
    b. Protecting Reputation
    c. Protecting the public moneys
    d. Suspect plaintiffs
3. Fun Facts
    a. Expressio unius is a frequently used tool or canon of statutory construction making it one of a small number of lantins worth committing to memory.

iii. Iqbal

1. Two Principles of Twombly
    a. Legal conclusion not true, only well pleaded allegation
        i. The allegations must be well pleaded to assume their truth.
            1. Allegations more than just a threadbare recital of the elements of the cause of actions.
    b. Must be more than a mere possibility must be plausible.
2. The Break From Conley
    a. Factual

b. In Favor of defendant

3. Critiques
    a. Need discovery to make allegations
    b. Takes away potential trials
    c. Judges get awfully close to answering jury questions.
4. Positives
    a. Unfair settlements from defendants
    b. And counterbalance broad discovery.

475 – 477, 482 – 503

Responding to Complaints

Intro:

- Allowed to just ignore a complaint
    - FRCP don't force a D to respond affirmatively in any way to a complaint
        - Spells out consequences of NOT responding: sequence of steps resulting in default judgment
- Default judgment:
    - Authorized by Rule 55:
        - Occurs if non-defaulting party + court carefully follow prescribed procedures
    - Why they can happen:
        - D's are judgment proof and elect to it
            - Judgment proof = have not assets from which judgement can be collected
        - Ds gamble that default judgment winner will not track down their assets in order to enforce the judgment
- Other options:
    - Move to dismiss complaint under Rule 12
    - Answer complaint
        - Answer = pleading that admits or denies factual allegations in complaint, sets out defenses, and (if D has some) asserts counterclaims by D against P or crossclaims against co-Ds

- Rule 8:
  - Sets out specific requirements for admissions and denials + provides an illustrative list of affirmative defenses

■ Affirmative defenses = defenses setting forth new matter outside the original complaint in the tradition of pleas of confession + avoidance at CL

Default Option:

- Strategic but risky option:
  - Courts insisting on proper proof of service in record before they entertain motion for default judgment
  - If D has defenses, should be asserted by motion or answer
  - If defaulted for doing notion = D has themselves to blame
- Getting a Default Judgment:
  - Rule 55(a) = failed to plead or otherwise defend
    - ■ Note: this is a matter of whether it occurs during the set amount of time; could be a default as a result of missing this 21 day window
  - How to enter a default:
    - ■ Entry = actual notation in the docket
      - Docket = clerk-kept list of filings, hearings, and orders
      - Rule 55(a) = clerk shall enter default only if there has been a default AND that failure is shown by affidavit or otherwise
        - P must bring the fact of default to clerk's attention, usually through filing an affidavit
          - ■ Affidavit = sworn written declaration of facts
  - Whether non-defaulting party can enforce entry to collect damages from defaulting party:
    - ■ NO. They can't. Difference between default + default judgment.
      - Default = failure to respond as rules require
        - Entry of default is a step in obtaining DJ + NOT an enforceable judgment in itself
  - Standards of entering default judgment:
    - ■ By default = admitting facts alleged in complaint; whether facts establish liability is question of law for court

- DJ can't be entered unless court finds complaint states a claim for which relief can be granted
- Rule 55(b) = not mandatory; courts have discretion to enter a DJ or not
  - D entitled to min of 7 days' written notice about entering DJ where D can argue about entering a judgment + set aside entry of default

- Service and PJ
  - Courts deciding motion for DJ will typically require that record show that proper service was made
    - Some courts will deny motion if D makes credible showing that it never received actual notice
  - Court will often look for evidence that it has PJ over defaulting party before entering DJ

- Setting Aside DJ:
  - Default is disfavored; easy to set it aside "for good cause" (Rule 55(c))
  - Once DJ entered = standard tightened; final judgment on which P and others may have relied
    - Setting it aside may be prejudicial to such parties--especially if some time has passed since entry
    - Defaulting party has to move for relief under Rule 60(b)
      - Places time limits on motion for certain causes
        - excusable neglect or mistake = Rule 60(c)
          - Courts have to consider if default was willful, whether setting it aside would prejudice P, + whether D has any meritorious defenses
      - Courts set aside judgments as "void" if they find service was never made or the court lacked PJ

Rule 12 Motions:

- 12(b) = checklist of most common defenses that can be raised by a motion to dismiss
- Understanding *Matos:*
  - Rule 8(a)(2) and Rule (12)(b)(6) contain essentially reciprocal standards
  - Leave to amend

- Routine on motions to dismiss for failure to state a claim when complaint is merely missing a factual allegation corresponding to an element of the claim
    - A flaw may be a pleading oversight that can be cured by amendment rather than a (incurable) reflection of absence of fact
- No such thing as an independent, free-standing claim for punitive damages
    - Punitive damages = element of damages for a claim

- Motion to strike:
    - Cuts up the complaint leaving stricken matter to be treated like it wasn't there (can be stricken from the record)
    - Rule 12(f) motions = target redundant, immaterial, impertinent, or scandalous matter

- Rule 12(e) motion:
    - Motion only available when the pleading "is so vague or ambiguous that the party cannot reasonably prepare a response"
        - Incorporating prior allegations by reference + even failing to separate counts cleanly doesn't make a complaint subject to Rule 12(e) motion
            - Rule 10(c) = incorporation by reference
            - Rule 10(b) = separation of claims to promote clarity

- 4 Corner of Complaint:
    - 12(b)(6) = confined to "four corners of complaint"
        - Takes well-pleaded allegations of complaint as true + only those
    - 2 exceptions:
        - Filing a Rule 12(c) motion for judgment on the pleadings
            - Court can consider well-pleaded factual allegations of all the pleadings, answer, reply (if present), and complaint
        - Parties may present matters outside of the pleadings
            - Facts outside of 4 corners to support/oppose a Rule 12(b)(6) motion to dismiss for failure to state a claim
            - Court can then treat motion as a summary judgment motion (has to tell parties it is doing this--12(d))
                - Motion decided by standards of summary judgment rule (Rule 56)

- Court can grant summary judgment if it finds that the material facts are undisputed and moving party is entitled to judgment as a matter of law

Rule 12 Waiver Trap:

- Rule 12 = permits D to assert several different defenses + objections to complaint but can't do them one at a time
  - Requires joinder of available defenses + objections in one pre-answer motion
  - Imposes waiver as a penalty for leaving certain defenses out
- Rule 12(g)(2) = forbids party from making another motion under Rule 12 based on a defense or objection that was available to it when filing pre-answer motion
- Rule 12(h)(1)(A) = omitting any of Rule 12(b)(2)-(5) defenses of lack of PJ, improper V, insufficient process, or insufficient service of process from the pre-trial answer motion waives that defense
- Rule 12(g):
  - "Omnibus motion rule" = effectively requires a party to consolidate all of Rule 12 defenses + objections then available to it in a single omnibus pre-answer motion, instead of presenting them serially
  - Prevents parties from raising it again by another pre-answer motion and raising Rule 12(b)(2)-(5) defenses again by any means
  - Doesn't require a party to file a pre-answer motion, matter of IF they do
- Putting Rule 12(g)(2) + 12(h)(1)(A) together = only the 4 defenses in 12(b)(2)-(5) are waived by omitting the from a pre-answer motion or answer (Whichever first)
- Un-waivable defenses:
  - Rule 12(h)(3) = permits motion to dismiss for lack of SMJ at any time
  - Potentially more on pg. 500?
- When a defense is unwaivable:
  - Omnibus motion rule only applies to Rule 12 defenses that are "available" to party when it filed the pre-answer motion
  - When P amends original complaint and the amendment adds new claims, it can raise new issues not present in original pleading

503 – 524

Answering the Complaint:

- If pre-answer motion fails = must file answer w/i 14 days after notice of court's action on the motion (Rule 12(a)(4)(A))
    - Courts can take months to rule on Rule 12 motions, so 14 days isn't a firm cap on the amount of time
- 4 Options for Answer:
    - Assert "leftover" Rule 12(b) defenses
        - Any defense party hasn't waived by omitting it from a pre-answer motion
    - Must admit/deny factual allegations of the complaint (Rule 8(b)(1)(B))
        - Main purpose of pleading = ID facts in dispute
            - Denying 1+ facts essential to a claim is a defense
        - Denial = defense on the merits
    - Affirmative defense (Rule 8(c))
        - Provides excuse from liability based on facts outside of the complaint
    - Asserting counterclaims or crossclaims
        - Rule 4 = if already joined as parties to a lawsuit, a D doesn't have to serve summons or separate complaint to other parties
        - Rule 5 = allows service of answers + other papers in civil action by mailing or emailing paper to a party's attorney of record
            - Applies when recipient has consented in writing
- D isn't required to choose any of those options (Rule 8(d)(2))
    - Also has option to incorporate them all into answer

Answers:

- Challenging the Legal Sufficiency of a Defense:
    - P must have same opportunity to challenge legal sufficiency of defense as D does to a claim
        - Rule 12(f) = motion to strike an insufficient defense
            - Basically, this is the P's version of a Rule 12(b)(6) motion
            - If done, courts and parties treat the existing answer as if that defense was no longer included in case
- Generally Denying:

- Rule 8(b)(3) = allows D to enter general denial to complaint in fed court
  - Note: rule is skeptical of them
  - Only applies when a party intends in good faith to deny **all** the allegations of a pleading
  - Majority of fed cases: D will have to admit at least some allegations of a complaint
- CL general denial essentially obsolete

- Admitting and Denying:
  - Rule 8(b)(2) = denial has to fairly respond to the substance of the allegation
  - Rule 8(b)(4) = requires a D to admit part of allegation and deny the rest when its info so requires

- When D Doesn't Have Enough Info to Admit/Deny:
  - Rule 8(b)(5) = party that lacks knowledge or info sufficient to form a belief about the truth of an allegation must so state. Statement has the effect of a denial.

- Pleading Affirmative Defenses:
  - When making them (listed in Rule 8(c)), D should plead some factual support for each, even if only in short and plain terms
    - Factual support = puts P on notice of the legal bases of defenses
  - Fraud has to be pled with particularity (Rule 9)

Identifying Affirmative Defenses:

- Omitting an AD
  - Rule 8(c) = party must affirmatively state any avoidance or affirmative defense
    - *Ingraham* = failure to timely plead AD waives the defense
  - If omitted, D should ordinarily be allowed to amend answer to add defense as long as amended answer still gives P sufficient notice to prepare for the defense
    - AD can be raised in TC as long as it is done in a way that doesn't result in an unfair surprise (*Ingraham)*

- Listing ADs
  - Rule 8(c) = no damage caps
  - List in Rule 8 includes all ADs since changing of rule in 2008

- Difference between ADs and Denials:

- AD = excuse from liability, even if P proves its allegations

Further Pleading:

- For every claim of any kind that is not dismissed, an answer is allowed
- Rule 8(b)(6) = if responsive pleading is not required, an allegation is considered denied or avoided

Fundamental Pleading Errors:

- Pleading Lack of Knowledge or Info:
  - Rules do not allow empty-headed pleading (like saying "i don't know")
    - Rule 11(b) = presumes pleader conducted a reasonable inquiry, including acquiring reasonably accessible info in order to admit/deny allegations in the complaint
- Moving for a Failure to State a Claim Again:
  - Redundant to make a 12(b)(6) objection by motion a second time in answer (does nothing)
- Legally Insufficient Defense:
  - Assumption of risk doesn't qualify as an AD
    - Listed in Rule 8(c), but doesn't apply to the case

525 – 543, 554 – 558

Care and Candor in Pleading

Intro:

- Nothing in 12(b)(6) or 12(f) protects against dishonest, sloppy, mistaken, or ill-motivated allegations
- Rule 11 = sets out both standard of care and candor in pleading (also for the filing of other papers before the court) + the sanctions for violating the standard
  - By presenting a paper to the court, attorney of record or party certifies that to the best of the person's knowledge, info, and belief formed after inquiry under the circumstances:
    - 1) not presented for any improper purpose
    - 2) claims/defenses/other legal contentions warranted by existing law or by nonfrivolous argument

- 3) factual contentions have evidentiary support or will have it after discovery
- 4) denials of factual contentions are warranted on the evidence; if specifically ID-ed, reasonably based on belief or lack of info

- Presenting = signing, filing, submitting, or later advocating
- Rule 11 = presenting a paper to court certifies that the presenter believes, after conducting a reasonable inquiry, that the paper has evidentiary support, a legal basis, or a proper purpose
  - Defines form of legal malpractice based on objective negligence standard
    - Bad faith not required to violate the rule. Good faith not a defense against a violation.
- Care and candor in federal court:
  - Policed by rules of professional conduct, Rule 11, statutes, inherent power of courts to control litigation conduct, and legal malpractice law

Reasonable Inquiry:

- Rule 11's certifications to court must be based on a pre-filing "inquiry reasonable under the circumstances"
  - 11(b)(3) = tolerates factual contentions that may lack evidentiary support at filing a long a they are specifically ID-ed
- Reasonable:
  - Involves balancing the costs + time available for investigation against the likelihood that more investigation will turn up relevant law + evidence
  - Doesn't require steps that aren't cost-justified

Pre-Filing Inquiry:

- Why reasonableness of pre-filing inquiry doesn't depend on expertise of lawyer
  - Question of whether any reasonable lawyer would familiarize themselves with issue
  - Rule 11 doesn't look to standard of care in particular lawyer's community of practice; rather a national standard
- Why Guyton's claim for damages was frivolous:
  - Lacked evidentiary support

- Rule 11 = depends on both time available to investigate and on the probability that more investigation will turn up important evidence

- Bad faith:
  - Rule 11 hasn't required bad faith to find a violation
  - By positing a "reasonable" inquiry, it embraces a negligence standard of care (ignorance is not a defense)

- Understanding Rule 11(b)
  - It is about what you know (or should know after reasonable inquiry) at the time of presenting that controls
  - Rule 11 taking a "snapshot" of state of idn at time of presenting that serves a basis for deciding whether paper complied w rule
    - No obligation to withdraw paper on basis of later-acquired info

- Reasonableness factors:
  - Complexity of the factual and legal issues in question
  - Extent to which pertinent facts were under the control of opponents and 3rd parties
  - Extent to which the lawyer relied on the client for facts
  - Whether the case wa accepted from another lawyer and the extent to which the receiving lawyer relied on the referring lawyer
  - Resources reasonably available to the lawyer to conduct an inquiry
  - Extent to which the lawyer was on notice that further inquiry might be appropriate

- Warranting sanctions:
  - Motions should not be made or threatened for minor, inconsequential violations
  - Court should consider whether a violation infected entire pleading or only one particular count

Good Faith Arguments for Changes in Law:

- Rule 11(b)(2) tolerates nonfrivolous argument for extending, modifying, or reversing existing laws or for establishing new law
  - Most likely to apply to a situation of civil rights

- *Austin* = the "existing law" in the 4th circuit, regardless of the majority rule, and P's theory wasn't warranted by it
- Arguing for change:

- 4th circuit not bound to follow "the majority rule," but that rue could supply a persuasive reason for client's CoA to revisit its own law

- Whether losing violates Rule 11(b):
  - Not losing that violates Rule 11
    - If loss is because claims were legally frivolous (w/o basis in existing law or support by non-frivolous argument for its change) it's a violation of Rule 11 because arguments were frivolous

Procedure for Rule 11 Sanctions:

- Rule 11 motion must be made separately from other motions
- Must also be served on offender 21 days before it is filed with the court
  - This is to give offender time to reconsider and withdraw or correct the offending paper
- Rule 11(c)(3) = requires a court acting of its own initiative to order offender "to show cause why conduct specifically described in order has not violated Rule 11(b)"
  - Sanctions:
    - Monetary or nonmonetary
      - Nonmonetary could be a apology or reprimand
  - Rule 11(c)(4) = sanction must be limited to what suffices to deter repetition of conduct or comparable conduct by others similarly situated
    - Court charged with imposing the least severe sanction that would deter repetition of the violation
    - Objective is deterrence, not compensation or punishment

559 – 572

Amending Pleadings

Intro:

- CL prohibited any departure under the pleading as well as variances between the pleading and the proof at trial

- FRCP guiding principle: procedure should be flexible enough to allow parties to litigate entire dispute between them, as long as any changes or enlargement of the lawsuit to achieve this objective doesn't prejudice parties in their prep of their case
  - Rule 15 was created to provide the max opportunity for each claim to be decided on its merits rather than on procedural niceties
    - Variances disallowed under CL now allowed under Rule 15
- Liberal amendment: a change of an original pleading to reflect additional facts, parties, claims, or defenses or to conform to evidence produced at trial
  - Typical scenario: amending party tries to file an amended pleading that supersedes the original pleading; if party needs court's permission, a motion to leave to amend
- Rule 15(a)
  - Addresses 2 types of amendments before trial:
    - Amendments allowed as a matter of course (can be filed w/o the court's permission)
    - Amendments by leave of court (requires the court's permission)
- Rule 15(b): sets a stricter standard than 15(a) as applied to amendments during or after trial
- Rule 15(c): addresses amendments attempted after SoL has run out and whether they can **relate back** (backdating to the date of timely original pleading that they amend)

Amending without Leave of Court:

- Rule 15(a) authorizes amendment once as a matter of course (without leave) in 3 circumstances:
  - 1) a party may amend the original pleading once w/o leave of court w/i 21 days of serving that pleading
  - 2) if the original pleading is one to which a responsive pleading is required, a party may amend the original pleading w/i 21 days after the responsive pleading is served
  - 3) if a party files a motion:
    - Under Rule 12(b) to dismiss a complaint, counterclaim, crossclaim, or 3rd party complaint
    - Under Rule 12(e) for a more definite statement
    - Under Rule 12(f) to strike

- Pleader may amend w/i 21 days after the motion is served

- Pleadings where responsive pleading is required:
  - Rule 7(a) = pleadings that this falls under
    - D must file answer to a complaint
    - P must also serve an answer to a counterclaim
    - 3rd party D must serve an answer to a 3rd party complaint
- Note: 21 day periods are not cumulative; no new 21 day period after lapse
- Why 21 days:
  - Short enough amount of time that it is unlikely that the opposing party or the court has spent substantial resources in responding to the original pleading; also short enough time that the party would not be prejudiced in preparing to defend against the amended pleading

Amending Before Trial with Leave of Court:

- Factors judge must consider for amendments by leave of court:
  - Stage of litigation, reason for the amendment, viability of amended claim or defense, and reason for not including the new allegations in the original pleading
- Factors in granting leave to amend:
  - In theory: "When justice so requires"
  - Practically:
    - Reason for amendment
    - Amending party's diligence
    - Any prejudices that amendment may cause opposing party
    - Whether the amendment would be futile as a matter of law
    - (If any) amending party's prior amendments
- Common reasons for amendment:
  - Ex: Aquaslide had a recent discovery that the water slide was not one it had manufactured (Court held that A's error was neither in bad faith nor unreasonable)
  - Discovery of new facts
  - Rare situations resulting in new legal theories
    - May be more appealing on a fuller view of the facts
    - Unfair to punish client for lawyer's late discovery of a new legal theory
  - Tactical reasons may change

- However, courts will still consider why the new matter was only recently discovered
    - Still, courts routinely give leave to amend to add additional claims or defenses, even when the reason is not discovery of new facts

- Undue prejudice: consists of prejudice to preparing to defend (in the collecting and presenting of evidence) that flows from the lateness of the amendment
    - Also known as preparation prejudice
    - Courts place burden on party opposing the amendment to show preparation prejudice because they know best whether allowing the amendment would prejudice them

- Futility (when an amendment would waste the time of the parties and the court)
    - Court not bound to grant leave to amend when amendment would be futile; must analyze a proposed amendment as if it were before the court on a motion to dismiss akin to 12(b)(6) motion
    - When not futile:
        - If amended pleading alleges sufficient facts to support the claim it will survive a motion to dismiss and is therefore not futile

- Amendment after dismissal
    - Common reason for amendment of complaint: D has filed Rule 12(b)(6) motion to dismiss that is likely to succeed
        - Amendment intended to cure deficiency
        - If made w/i 21 days after service of motion, no leave required (if 1st amendment)
    - If court grants motion before the amendment:
        - If dismissal comes more than 21 days after the motion to dismiss the amending party cannot amend w/o leave
        - Many courts grant a motion to dismiss the complaint "with leave to amend" by a date certain if they believe P could cure the deficiency

- Responding to an amended pleading
    - Once a pleading amended it is a new pleading
        - Opposing party has same right to respond to amended pleading as it did to the original pleading

Amending Claims or Defenses After the Limitations Period:

- SoL provides period w/i which a claim must be filed
  - Period is usually a term of years
    - Runs from the point claim accrued until the period is tolled
      - Accrued = came into existence
      - Tolled = end of period (I think)
    - Events causing the period to be tolled:
      - Filing of a complaint
      - Service of complaint during the service period
        - Service period = service occurring w/i some relatively short period of time after filing
- Purpose of SoL:
  - Protect parties against loss of evidence and give them respite after a fixed period from the emotional distress and financial uncertainty of possible litigation
- Common for complaint to be served on last day of limitations period
  - Sometimes from procrastination, client still deciding whether to sue, or lawyers waiting as a preventative measure
- Amendments
  - Backdated to the date of the pleading that it amends (date of original complaint)
  - Amended pleading said to relate back to the date of the original pleading
    - Brings it to time set out in SoL (Note: SoL = affirmative defense)

Relation Back of Claims:

- Defending the malpractice claim:
  - *Bonerb*: by trying to amend the complaint in the pending lawsuit, can defeat affirmative defense of SoL if his amendment had been treated as if it had been part of the original complaint
- Leave to amend:

- When party must leave to amend:
  - Once window for amending w/o leave has closed
  - Party has already used it once
- Court must determine whether to grant leave to amend under Rule 15(a)
  - Court considers variety of factors:
    - Whether in bad faith
    - Timing: would D have enough time to prepare defense
    - Number of times previously amended
    - Futility
- Court has discretionary power to deny leave to amend w/o regard to SoL problem
- If amendment doesn't relate back then leave denied on grounds of futility

- Relation back for transactionally related claims or defenses:

- Rule 15(c)(1)(B) = even if applicable law doesn't expressly allow relation back, allowed if new claim or defense arose out of the conduct, transaction, or occurrence set out in the original pleading
- *Bonerb* Court asked "whether D was put on notice of the claim that the P later seeks to add"
  - Transactional nexus: theory of relation-back rule: original pleading gave the party notice of the conduct/transaction/occurrence for which he was being sued, so he will not be unfairly surprised by the addition of a new claim **based on the same events**
    - Supported by 5th Cir. (*Barthel v. Stamm)*
- Reasons for motion to dismiss to be denied:
  - If on any legal theory, including ones not stated in the complaint, the complaint plausibly alleges facts that would entitle P to relief
- Rule 18 = allows joinder of unrelated claims with no transactional requirement (Rule 15(c) = has a transactional requirement)

- Why *Bonerb's* malpractice negligence claim relates back:

- Original negligence claim was whether the Foundation breached a duty of reasonable care in maintaining the basketball court
- Malpractice claim is whether Bonerb's counselors breached their duty of professional care
- What Foundation should've seen coming:
  - A claim of liability for Bonerb's injury from playing basketball

- Foundation was on notice form complaint that Bonerb could be entitled to relief on any legal theory supported by the allegations of complaint describing the "transaction or occurrence" of the basketball game
- Main factor is notice:
  - Notice of transaction ID-ed in complaint
  - Once D aware of transaction/occurrence, it must prepare to defend the transaction/occurrence, not just a particular legal theory of liability arising from it

- Relation back under the SoL:
  - As long as P has sued someone before the limitations period runs, she may add other Ds later w/o regard to the limitations in 15(c)
    - 15(c)(1)(a) = such state law provisions will apply if state law governs the limitations period

Amending Parties After the Limitations Period:

- Rule 15(c)(1)(C): authorizes relation back of an amendment "changing the party against whom a claim is asserted" if several requirements are met
- Theory behind relation back of amendments that change parties:
  - Notice: grounds for the relation back as long as claims/defenses arose from the same transaction as the original pleading in *Bonerb*
  - How amendment changing parties is different:
    - New party was not served with the original complaint w/i limitations period because they weren't an original party
    - 15(c)(1)(c) recognizes that timely notice for a new party is more problematic than for a party who was actually sued and served w/i the limitations period
    - Requires some notice of the original action (and transaction giving rise) be received by the new party during the limitations period allowed for service of a timely filed complaint
      - Includes any extension of the service period permitted by the court under Rule 4(m)
        - 90 day period for service of original complaint and summons
    - Rule doesn't say anything about "service" of notice to the new party; only requires that the party received such notice of the action that it will not be prejudiced in defending on the merits; and knew or should have known

- Misnomers:

- When a P misnames or misidentifies a party in the pleadings but correctly serves the party
  - Rule includes amendment to correct a misnomer or misdescription of a D (a proper legal claim should not be dismissed just because of what is a typo unless the typo somehow prejudiced the D)

- "Deliberate" mistakes:
  - If a party, knowing of the new party, deliberately chose not to name it, then it is not a mistake w/i the meaning of the rule
    - Relation back will not relieve a party from consequences of its own tactical decision

- Mistakes of ignorance:
  - Most courts held that lack of knowledge of ID of correct Ds is not a mistake w/i meaning of Rule 15(c) (P must exercise diligence in discovering ID of Ds)
    - *Krupski*: court only held that lower courts were incorrect in inferring that Krupski had made a deliberate choice not to sue, based on her knowledge of CC's answer and the ID of CC as carrier on back of ticket

- Matters of delay:
  - Rule 15(c) says nothing about the timing of P's diligence in making such an amendment, if its relation-back requirements are satisfied then relation back is mandatory (delay still relevant under Rule 15(a))

Summary of Amended Pleading Principles:

- Pleading can be changed by filing an amended pleading; this replaces original
- Rule 15:
  - Amending party doesn't need leave of court to amend pleading once:
    - Amendment must be filed no more than 21 days after original pleading was served
      - Could also be 21 days after a responsive pleading or a 12(b), 12(e), or 12(f) motion is served (whichever is earlier)
    - Amendment w/o leave is effective on filing
  - All other cases: amending party must file motion for leave to amend and include proposed amendment

Joinder of claims and parties

j. Rule 18(a)
    i. Allows a plaintiff to assert any claims she has against an opponent whether related or unrelated.
        1. "A party assessing a claim, counterclaim cross claim or third party claim may join as independent or alternative claims as many claims as it has against an opposing party.
            a. Claims may all be asserted as different counts or claims for relief in a single complaint to be ligated together in a single lawsuit.

k. 8(d)(3)
    i. A party may set forth as many claims as she has against an opposing party in a single suit.

l. 42(b)
    i. Hearing unrelated claims together creates a lot of confusion for the jury and fact finders, in such cases this rule authorizes the trial judge to order separate trials.

m. 21
    i. Sever the claims completely

n. 20(a)
    i. Puts limits on the plaintiffs choices
        1. 20(a)(1)
            a. Allows plaintiffs to sue together if they assert claims that "arise out of the same transaction, occurrence, or series of transactions or occurrences and if their claims involve any question of law or fact common to all plaintiff"
                i. Allows but does not require
                ii. Allows plaintiffs to sue together even if they want different types of relief.
            b. Case Holdbein Vs. HEritage
                i. Allows patterns. Although there may be some factual similarities if the pattern is sufficiently similar to overcome the peculiar temporal and factual similarities that might otherwise justify severance.
                    1. General Policy Ex.
                    2. As long as there is efficiency.

a. RailRoad Ex. Four unrelated accidents at different times, the evidence gathering would be inefficient so severed.

2. 20(a)(2)

a. Same Test as above but defendants
b. Under this rule you can sue alternative defendants as well.

CounterClaims under the federal rules

o. A counterclaim is a claim for relief by a defending party against the party who is claiming relief from her

i. F.R 13

p. 13(a)(1)

i. Provides that a counterclaim is compulsory if it "arises out of the transaction or occurrence that is the subject matter of the opposing party's claims. (Must be asserted in the same action)

1. A counter claim can be compulsory from a different legal theory or different body of law
2. If you don't assert a counterclaim you waive your right to bring it up in a different court.
3. Exceptions

a. Provide that a counterclaim that would otherwise be compulsory need not be asserted if it is the subject of another pending action or if jurisdiction over the main claim is based on attachment rather than full personal jurisdiction over the defendant.
b. Counter claims that arise after the defendant files an answer need not be asserted under either rule because the defendant did not have the claim "at the time of service"

ii. Section 1367(a) provides that if a federal court has SMJ over a case it may also hear other claims in that action that arise out of the same nucleus of facts, a compulsory counterclaim will meet this test.

q. 13B

i. If a counterclaim is not compulsory it may still be brought as a permissive counterclaim.

1. A defendnets option to join unrelated counter claims under rule 13b mirrors a plaintiff's right under rule 18 a to assert unrelated claims together

ii. Permissive counterclaims are allowed to achieve "global peace" but will likely be separated at trial. .

r. King V. Blanton 4 Tests for "arises out of same transaction"
    i. 1.Issue of fact and law are same
    ii. 2.Same evidence
        1.
    iii. 3.Logical relationship
        1. Broadest test
    iv. 4.Would red judica bar a subsequent suit.

Cross Claims Against Co-parties

s. A cross claim is a claim against a coparty
    i. Only allows cross claims that arise out of the events that give rise to the main claim.
        1. Allows does Assert
t. Under rule 20a a suit may involve more than one plaintiff and defendant, in such cases plaintiffs or defendants may choose to assert claims against each other. Such cross claims against companies are authorized by rule 13G.
u. Bringing a 13H allows a defending party to bring a stranger into the lawsuit someone whom the plaintiff didn't choose to sue. But without a cross claim it would be simpler.

Impleader

v. Rule 14 allows a defending party to assert a claim against a stranger to the lawsuit.
    i. The standard for doing so is narrower than the transaction or occurrence test.
w. 14(a)(1)
    i. An IMpleader addresses the situation in which a plaintiff's claim against the defendant triggers a right of the defender to be reimbursed by someone else if it pays the plaintiff's claim or part of it.
    ii. The defendant must allege that the new party is or may be liable to the defendant for all or party of amy judgment the plaintiff recovers from the defendant.

Segment 10 Class Actions

x. A class action judgment is binding.
    i. Has a preclusive effect not just on the class representatives, but also on the rest of the class that they represented. Thus it prevents class members from suing for the same transaction again.
y. Why not just a rule 20 joinder?

i. A class action is simply another kind of joinder for cases in which persons with similar interests are so numerous that it is more efficient for a few class representatives to litigate on behalf of the rest of the class.

    1. The rest of the class members are not made active parties and are usually not individually involved in discovery.

        a. This makes the cases easier to manage, yet assures that the interest they share with the class members will be heard and fairly litigated.

ii. Due Process concerns with Class actions.

    1. Party statues is the key to due process because a party receives notice of the lawsuit and the opportunity to participate.
    2. Can a Class action ever bind absent class members.

        a. THe united States Supreme Court expressly recognized that class or representative lawsuits were an exception to the general due process principle that one cannot be bound by a judgment in a lawsuit to which one is not a party.

            i. For the sake of efficiency, there are so many people that their joining by the usual rules is impractical either because some are outside the jurisdiction, some are unknown, or there are just too many.
            ii. THe interest of those not joined (the absent class members not before the court must be of the same class as the interests of those who are" joined.
            iii. Second the absentees interest must in fact be adequately represented by parties who are present.
            iv. Thirdly, courts must adopt and employ procedures to ensure that the common interest and adequate representation requirements are satisfied and that the litigation is so conducted as to insure the full and fair consideration of the common issue.

    3. Rule 23

        a. A(1) requires the court to certify the lawsuit as a class action provided that the party seeking class action certification shows that joinder of all members is impracticable.
        b. Rule 23(a)(2)-(3)

            i. Requires that the representatives parties share the interest of the absent class members

                1. They share common questions and typical claims or defenses.

c. Rule 23(a)(4)

    i. Requires that the representatives fairly and adequately represent the class.

d. Rule 23 B describes additional requirements for some kinds of classes which go primarily to the efficiency of the class actions.

4. In re TEflon

a. Rule 23A Prerequisites

    i. The burden is on the party seeking certification to satisfy each of the rule 23(a) factors.

    ii. THe court must accept as true the substantive facts as alleged in the complaint but must also look beyond the pleadings to evidence submitted by the parties in order to ensure specific prerequisites have been satisfied.

    iii. Assuming a party seeking certification is able to satisfy all of the factors set under 23(a) the party must also satisfy at least one of the conditions enumerated under rule 23b. In the present case plaintiffs assert that the proposed class actions in states have a liquidated statutory penalty or where only injunct relief is sought are properly certified under rule 23b 2. Plaintiffs seek certification under rule 23b3 for actions in the remaining states.

b. Rule 23 Implicit Requirements

    i. A well crafted class definition must ensure that the court can determine objectively who is in the class and therefore bound by the ultimate ruling.

        1. THe court should not be required to restart to speculation or engage in length, individualized inquiries in order to identify class members.
        2. Identification of the class serves at least two obvious purposes in the context of certification. First it alerts the court and parties to the burdens that such a process might entail.
        3. Second, identifying the class ensures that those who are actually harmed by defendants' wrongful conduct will be the recipients of the relief eventually provided.

c. Requirements under Rule 23 (a)

i. Assuming the class definition had been drafted to ensure that membership is objectively ascertainable and at least one viable class representatives exists for each of the subclasses put forth by plaintiffs, plaintiffs must nevertheless satisfy all four prerequisites listed in 23 A

1. Numerosity
    a. Class be so numerous that joinder of all members is impracticable
        i. A reviewing court must consider these factors
        ii. The number of person in the proposed class,
        iii. The type of action at issue,
        iv. THe monetary value of the individual claims and the inconvenience of trying each case individually.
2. Commonality
    a. Each class member's claims contain "questions of law and fact common to the class.
        i. IT is not necessary to demonstrate that every question of law or fact is common t =o each member of the class, Rather the issues liking the class members must be "substantially related" to the resolution of the case.
3. Typicality
    a. To satisfy this requirement the proponent of certification must show that the claims or defense of the representative parties are typical of the claims or defense of the class. In general typicality is established if the claims of all members arise from a single event or saher the same legal theory. If the legal theories of the representative plaintiffs are the same or similar to those of the class,

slight differences in fact will not defeat certification.

b. THe presence of a common legal thoru does not establish typicality when proof of a violation requires individualized inquiry.
c. In situations where claims turn on individual facts, no economy is achieved and the typicality requirement cannot be met.

4. Adequacy of representation.
    a. The fourth express requirement under rule 23a is that the representative parties will fairly and adequately protect the interest of the class.
        i. Two factors are relevant to this inquiry.
        ii. Whether the named representatives and their counsel are willing and competent to pursue the litigation
        iii. And whether the interest of the representative plaintiffs are antagonistic to the interest of others in the class.
        iv. Look out for clima splitting which prevents the representative plaintiffs from adequate presenting the full interest of absent class members.

z. Notes after the Case
    i. Initiating The class action process
        1. Must file a motion for a certification order form the court, called a putative class action until certified.
            a. Rule 23(c)(1)
                i. Rule 23(c)(5) authorizes the creation of subclasses.
        2. Must meet the general prerequisites for class actions set out in rule 23A

3. and the specific requirements for one or more of the types of classes set out in rule 23(B)

ii. Details in numerosity

1. This rule picks no bright lines as to how many class members will ratify the numerosity requirement but some cases suggest that the line falls somewhere between twenty and forty members.

    a. However geogracy can matter: it may be more impactful for twenty members to join together as co plaintiffs if they are located in fifteen different states than for two hundred class members from the same city to join together.

iii. Commonality

1. LAwyers typically seek class certification only if there are common questions of fact however rule 23 a does not require all or even most questions to be in common.

    a. In an opinion by justice claims the court said that to meet the commonality requirement of rule 23a2 it is not enough to allege that the class members all suffered a violation of the same law. Their claims must depend upon a common contention of such a nature that it is capable of classwide resolution which means the determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.

iv. Typicality

1. Addresses the class representatives claims

    a. Vastly dissimilar claims can have a common question of law in fact, by requiring class representative to asset claims that are typical of the class rule 23 assures that the class representative will feel the pain of the class members.

        i. Similar not identical.

    b. Turns significant on the narre of the claim or defense asserted by the class. Claims arising under differing state consumer protection and consumer fraud laws, applying different states law to different class representatives undercuts the typicality of the representatives claims.

v. Adequate Representation

1. First the class must be represented by adequate counsel

    a. Rule 23(c)(1)(b) requires the court in its certification order to appoint class counsel under rule 23(g) which

directs the court to consider the lawyers preparation experience knowledge of the law and resources.

b. Second rule 23(a) 4 refers to the adequacy of representation by the class representatives.

Rule 23 B Factors

aa. In addition to satisfying the rule 23a prerequisites and the implicit factors a party seeking class certification must also satisfy one of three subsections of rule 23b

i. 23(b)(2)

1. This subsection authorizes the maintenance of a class action where in addition to satisfying rule 23(a) "the party opposing the class has acted or refused to act on grounds generally applicable to the class thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

a. Rule 23b2 is intended for class seeking primarily injunctive or declaratory relief not money damages.

i. Intended for those groups hoping to achieve broad based injunctive relief rather than cases in which a lawyer located a plaintiff and brought a class action in the hope of a fee.

2. Cohesiveness.

a. Because actions certified under this subsection do not allow individual members to opt out corts demand that the class be cohesive or that members be bound together through pre existing or continuing legal relationships or by some significa common trait such as race or gender.

ii. 23b3

1. Certification under this subsection requires that " the questions of law or fact common to the members of the class predominate over any question affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.
2. Predominance

a. When making the determination as to predominance of utmost importance is whether the issue is common to the class and subject to generalized proof or whether it is instead an issue unique to each class member.

i. To evaluate predominance, the district court must examine the type of evidence needed to establish a plaintiff's case.

1. If to make a prima facie showing on a given question the members of a proposed class must present evidence that varies from member to member, then it is an individual question for purposes of rule 23B3 if the same evidence will suffice for each member to make a prima facie showing then it becomes a common question.

3. Superiority

    a. The second test under rule 23b is whether the class action is superior to other reliable methods for the fair and efficient adjudication of the controversy. IN evaluating property the court must consider four non-exclusive factors.

        i. THe interest of the members of the class in individually controlling the prosecution or defense in separate actions
        ii. The extent and nature of any litigation concentrating the controversy already commenced by or against members of the class
        iii. The desirability of undesirability of concentrating the litigation of the claims in the particular form
        iv. THe difficulties likely to be encountered in the management of a class action.

bb. Notes After

i. 23b1

1. The prejudice class

    a. Recognizes that these kinds of prejudice can be avoided or mitigated by using a different more ambitious joinder divide: a class action treating the missing person as members of the class. Hence the shorthand phrase, prejudicial class for both the rule 23b1

ii. 23b2

1. The injunctive relief or civil rights class action.

    a. Civil rights actions and employment discrimination actions often seek primilary injunctive relief: an injunction ordering the defendent to stop viiolating the plaintiffs civil rights, to stop discriminating in hiring or to sop discrimintin in pormotion and to promote those agaisnt whom it had discriminated.

        i. Key to b2 class is the indivisible nature of the injunctive relief or declaratory remedy warranted

the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.

iii. 23b3

1. THe damages class actions
    a. Must putative class actions seeking damages are certified under rule 23b
        i. Authorizes certification of a damages class action only if despite the variable of many questions of fact and law among class members a class action o=is more efficient than individual actions, the common questions predominate and the putative class members are given the chance to skip the class
            1. To opt out from the class leaving them free to pursue their own action but also excluding them from the benefit of any class judgment.
2. Efficiency Calculus
    a. How does rule 23b3 suggest that a court should make the efficey judgement.
        i. First it has to assure that the questions common to class members predominate over any individualized questions.
            1. In deciding predominance courts have considered a number of factors including whether
                a. The substantive elements of class members claims require the same proof for each class member.
                b. The proposed class is bound together by a mutual interest in resolving common questions more than it is divided by individual interest
                c. The resolution of an issue common to the class would significantly advance the litigation
                d. One or more common issues constitute significant parts of each class members individual case

e. The common questions are central to all of the members claims
f. The same theory of liability is asserted by or against all class members and all defendants raise the same basic defenses.

ii. Second Superiority

1. Requires a finding that the class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

a. Here the rule does not leave the court at sea; it lists pertinent facts that balance the prospect and existence of individual actions against the desirability and manageability of class actions.

i. Vs single actions, joinder

3. Why class type matters

a. It matters which rule 23b class is designated partly because 23b3 imposes additional procedural requirements for designation beyond rule 23 a buth there re two additional factors rha amej even a greater difference

i. First rule 23c2b requires that rule 23b3 class members each be afforded individual notice where practicable.

1. For a large class this can be expensive and as we shall see below it is usually an expense carried by the party who seeks class certification

ii. Second the notice must afford each class member an opportunity to request exclusion from the class- to opt out.

4. Class Action Jurisdiction and Conduct.

a. First as different as they are, they remain civil actions that are subject to the baseline requirements of subject matter jurisdiction, personal jurisdiction, and venue in federal courts.

i. Even if an action qualifies for certification it cannot proceed in federal court unless it satisfies these requirements.

b. Second, to protect the rights and interest of absent class members the trial court plays a more active role in conducting the class action that it typically plays in ordinary non-class litigation.

i. Rule 23 elaborates on the role by permitting the trial court to issue orders that relate attorney fees. And by requiring the court to select and appoint class counsel and to approve a settlement voluntary dismissal or compromise of claims issues or defense in a certified class action.

c. SMJ of Class action

i. Court held that only the presentatie particles citizenship need to be diverse from that of the defendant.

1. Ben hur allows easy satisfaction of the citizenship requirement for diversity based class actions in federal court.

ii. 1367

1. Gives a federal court supplemental jurisdiction over claims that arise from the same transaction esa claim over which the court has original subject matter jurisdiction. Thus as long as a class representative claims meets the amount in controversy requirement his claim can anchor supplemental jurisdiction over the other class members below amount claims.

iii. Class Action Fairness Act of 2005

1. First Cafa gives federal courts original subject matter jurisdiction over class actions in which the aggregated amount in controversy exceeds 5 million.

a. In other words the act requires only minimal diversity for qualifying class actions and apparently overrules the common law rule against aggregating individual plaintiffs claims. 1332D

2. Second permits removal from state to federal court of actions that satisfy this amended diversity requirement even by citizens of the forum state and even more than a year after the action was filed in state court. It thus eliminated class actions and mass torts.
    a. At the same time however CAFA gives a federal court the discretion to decline jurisdiction if it finds that one third to two thirds of the plaintiff class members are from the same state as the primary dependent and the action has various attributes identifying it with a particular stage.

iv. Notice

1. 23b3
    a. Damage actions are entitled to the "best notice practicable under the circumstance including individual notice to all members who can be identified through reasonable effort"
        i. 23c2b
2. THis rule mandates notice only for rule 23b3 damages class and not 23b1 and 23b2 classes, because damages actions are viable as individual actions.

v. Settlement of Class Actions

1. Rule 23e deals with the problem by requiring that notice of this proposed settlement be sent to all class members who would be bound by the settlement.
2. Unlike 23c2 This notice requirement applies to every type of class.
    a. Sometimes when the class action is settled before the notice is combined into a single notice.
3. Second it requires that the court hold a "fairness Hearing" on the proposed settlement at which objections from class members can be heard.

4. Third it requires the court to approve the settlement only if it finds it to be "fair, reasonable and adequate"
    a. Factors to determine if the settlement is fair, reasonable and accurate.
        i. The strength of the plaintiff's case;
        ii. He risk, expense complexity and likely duration of further litigation
        iii. The risk of maintaining class action status through the trial; 4 the amount offered in settlement
        iv. The extent of discovery completed and the stage of proceedings
        v. The experience and views of counsel
        vi. The presence of a governmental participant;
        vii. The reaction of the class members to the proposed settlement.
5. Fourth the rule allows a court to require a second opt out opportunity in rule 23b3 damages class actions. Finally the court also controls the award of attorneys fees under rule 23(h). THese provisions provide the court with a kit bag of tools to police class actions settlements and thereby protect the class.

iv. Class Actions SUmmary of Basic Principles

1. A class action is a civil action in which a party acts as a representative for similarly situated non parties who are bound by any resulting judgment. The chief justification for class actions is efficiency in that they facilitate the litigation of comom issues and interest in a single binding lawsuit instead of multiple individuals.
2. The binding effect of a class action judgment on absent class members is consistent with due process because the class representative litigate as a surrogate for the class members. This surrogacy based exception to the usual due process requirement of individual notice and an opportunity to be heard is premised

on the substantial identity of the interest between the class representative and the class members, the adequacy of presentation of those interest by the class representative and the application of transparent judicial procedures for the designation and conduct of the class litigation.

3. To certify an action as a class action, a court must find that the putative class meets the general rule 23a requirements of class definition, class membership, numerosity, commonality, typicality, and adequacy of representation. F
    a. The class must also qualify as one of more of the rule 23b classes because rule 23b3 damages classes are most likely to present individual issues and claims that could be viable as individual actions
        i. Rule 23b3 requires that the class representative in addition to meeting the general requirements of rule 23a show the common issues predominate and that a class action would be superior to alternative methods of adjudication. Members of a rule 23b3 class must be given individual notice, where practicable, of the class action and of their right to exclude themselves from opt out of class.
4. Federal courts that conduct class actions, like all civil actions, must have SMJ in diversity based class action; only the class representatives citizenship must be diverse from that of opposing parties and only a single class representative needs to satisfy the amount in controversy.

The Scope Of Discovery Segment 12

cc. 26b1 is sweeping, virtually creating a presumption of discoverability

i. UNless otherwise limited by court order the scope of discovery, the scope of discovery is as follows; parties may obtain discovery regarding any non privileged matter that is relevant to any parties claims or defense and proportional to the needs of the case. Considering the importance of the issues at stake in the action, the amount in controversy, the parties relative access to relevant information, the pirates resources, the importance of the discovery in resolving the issues and whether the burden or expense of the proposed discovery outweighs its likely benefit information within this scope of discovery need not be admissible in evidence to be discoverable.

ii. Rule 26b1 targets only information that is non privileged,
    1. Privileged information is usually communication made in confidence during the course and in furtherance of a relationship.
        a. This protection is not self executing, when a party wishes to resist discovery by invoking a privilege rule 26b5

requires that it make the claim expressly and describe the nature of the documents, communications or tangible things not produced or disclosed, without revealing information itself privileged or protected will enable other parties to seese the claim.

iii. That is Relevant to any party's claim or defense.
iv. That is proportional to the needs of the case

1. 26b1 lists of multiple metric in the proportionally calculus necessarily makes answers to questions like this fact dependent and ad hoc if not wholly unpredictable.

dd. 26b2c

i. The court may limit or deny discovery sua sponte or upon motion when such discovery sought is unreasonably cumulative or duplicative or can be obtained from some other source that is more convent, less burdensome, or less expensive.

ee. 26b3ciii

i. THe court may limit discovery when "the burden or expense of the proposed discovery outweighs its likely benefit.

ff. Notes After

i. THE party seeking discovery has the burden of demonstrating relance but rule 26b1 does not place a burden on the party to address all proportionality considerations.

1. A key factor in the disportionality analysis is the burden or expense of production which are issues that the party resisting discovery is in the best position to determine.

ii. That need not be admissible

1. Hearsay- an out of court statement that in many cases is not admissible at trial to prove the truth of the matter states.

iii. Lawyer Client Privilege

1. May be invoked with respect to

a. 1. A communication
b. 2. MAde between privileged persons

i. Privileged persons are the client, the clients lawyer, agent of either who facilitate communications between them, and agents of the lawyer who facilitate the representation.

c. 3. In confidence
d. 4. For the purpose of obtaining or providing legal assistance for the client.

2. The privilege applies only to the communication between lawyer and client and not to the facts that are communicated.
    a. If a client runs a red light the communication is privileged but the client must still admit the fact that he ran the light if he is asked in a written interrogatory or in a question during his testimony at a deposition or trial.
3. Corporate Lawyer Client Privilege
    a. Some Courts limit the corporate lawyer client privilege to communications made by and to a "control group" of employees in a position to control or take a substantial part in deciding corporate action in response to legal advice.
        i. Federal court overruled saying that it was to narrow
        ii. Federal courts now go by a fact specific basis to determine what corporate communications are privileged.

iv. Work Product Protection

1. Reasons for work product production
    a. Adversary relationship.
    b. Protect the value that the attorney added himself not the facts.
2. 26b3
    a. (3) Trial preparation materials
        i. (a) ordinarily a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative.
            1. But subject to rule 26b4 those materials may be discovered if
                a. They are otherwise discoverable under rule 26b1 and
                b. The party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.
        ii. B Protection against disclosure. If the court orders discovery of those materials it must protect against disclosure of the mental impressions, conclusions,

opinions, or legal theories of a party's attorney or other representative concerning the litigation.

b. B5
    i. Work product is an objection that you must expressly make, describing the study in such a manner that without revealing the protected information will enable your adversaries to assess your claim
c. Prepared by whom.
    i. The rule protects work products prepared by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer or agent.
d. Anticipation of litigation
    i. Rule 26b3 Extends work product protection only to matter that is prepared in anticipation of litigation or for trial. This condition is the key to identifying work products.
        1. What is ligation
            a. Litigation has not proven hard to define; it includes any adversary court or administrative proceeding including a civil action, criminal case, grandy jury proceeding and administrative hearing.
        2. Must litigation have commenced
            a. No see below
        3. What is anticipation of litigation
            a. Several Different Approaches
            b. Ad Hoc
                i. Only that where, as here lawyers claim they advised clients regarding the risks of potential litigation, the absence of a specific claim. Represents just one factor that courts should consider in determining whether the work-product privilege applies.

c. Specific Claim approach

i. The documents must have been prepared with a specific claim supported by concrete fact which would likely lead to litigation in mind.

d. Primary Purpose Approach

i. The primary motivation for preparing the putative work product must assist in preparing for possible litigation. THis motive is shown circumstantially by how the document is labeled, whether a lawyer participated in the preparation, whether the document comments on litigation and whether it has an ordinary business purpose. Documents prepared for an ordinary business purpose or to fulfill regulatory requirements therefore do not usually qualify as work products.

ii. Overcoming work product protection

1. The court stressed that the plaintiff had not made a sufficient showing to overcome the work product protection for
2. Rule 26b3

a. Normally the discovere would need to make that showing by filing an affidavit in support of a motion to compel discovery.

i. The discovere must show "substantial need for the materials to prepare its case" 26b3aii

ii. A motion to compel discovery that is backed by an affidavit that merely alleges a need for the materials to help prepare

examine witnesses is doomed for failure.

b. Even when the requisite showing of substantial need and undue hardship has been made "the court shall protect against disclosure of the mental impression, conclusion, opinions, or legal theories of any attorney or other representative of a party concerning litigation.

i. Some courts allow a redact of such impression from the memo before disclosing the remainder upon a showing of need and hardship

Discovery Tools Segment 13

gg. 26(a)

i. Both parties will be required without awaiting any formal discovery requests to exchange information that they may use to support their claims or defenses including names addresses and telephone number of fact witnesses copes or descriptions of documents and materials underlying fact witnesses copies or descriptions of documents and materials underlying computations of damages.

1. These are required disclosures

ii. After required disclosures the parties may also take discretionary discovery using

1. Depositions

a. Oral or written examinations of live witnesses under oath before a court reporter

2. Interrogatories

a. Written questions that must be answered

3. Document productions requests, Physical and mental examinations and requests for admissions.

iii. Changes in 1993

1. "Self executing discovery rule.

a. This rule insulted a regime of required initial disclosures of the core information in a lawsuit as well as additional disclosures on the eve of trial. This regime was intended to accelerate and to some degree defang discovery.

iv. Changes in 2000

1. The required initial disclosure of some categories of information was mandated for all actions except a small set of relatively simple actions that were expressly exempted by rule 26(a)(1)(b) That is a list of the rules.

hh. 26(f)

i. Requires the parties to meet and confer to discuss a discovery plan at least 21 days before a scheduling conference is held or a scheduling order is due under rule 16b

1. That order is due within ninety days after any defendant has been served with the complaint or sixty days after any defendant has appeared. 16b

a. The disclosure are due within 14 days after the meet and confer by the parties under rule 26 f

i. Nice little table on page 827

ii. Defendants options to avoid required disclosures

i. 26a1c states that a party "must make initial disclosure" within the time it provides unless one of the delays buttons is pressed below

1. Obtaining a stipulation from the other parties
2. Can object

a. The objections must be stated in the proposed discovery plan. When it is, the court will then rule on the objections and "must set the time for disclosure.

3. Move for a court order

jj. What must be initially disclosed

i. 26b1

1. Information that the disclosing party may use to support its claims or defenses.

kk. Other required disclosures.

i. 26a2

1. Also requires timely disclosure of expert trial witness and their reports at least 90 days before trial

ii. 26a3

1. Adds the requirement that at least thirty days before trial parties make mutual pretrial disclosures by exchanging lots of witnesses they expect to call and exhibits they intend to introduce at trial. These disclosure requirements were already widely imposed ad

hoc by pretrial orders in many cases and they have been uncontroversial.

ll. Sanction for failure to give required disclosure.

i. Rule 37ca provides a self executing sanction with the need for a motion against a party who fails to make a required disclosure without substantial justification. THe party is precluded from using the undisclosed evidence or witness

ii. The court also, on motion, imposed additional sanctions.

mm. Discovery Sequencing and interrogatories

i. TO use interrogatories first to collect and identify evidence,

ii. To use request for document production to collect the identified written evidence or electronically stored information and them

iii. Armed with that evidence, to use depositions to collect spontaneous evidence from witnesses and parties, often leaving the key witnesses until last.

1. Interrogatory Definitions.

a. Document means any writing drawing graph chart, photographs electronically stored information or other data compilation from which information can be obtained, translated, if necessary by the person answering these interrogatories through detection devices into reasonably usable form.

i. A draft or non-identical copy is a separate document within the meaning of this term

b. Identify

i. When referring to a person , identity means to give, to the extent known, the person's full name, present or last known address, home telephone, present or last known place of employment. And business telephone. ONce a person has been identified in accordance with this subparagraph only the name of the person needs be listed in response to subsequent discovery requesting the identification of that person.

2. Thought of as continuing interrogatories

a. Requiring you to answer by supplemental answer, setting forth any information within the scope of your interrogatories as may be acquired by you, your agents, attorneys, or representatives following your original answer.

iv. Procedure for interrogatories.

1. The lawyer seeking discovery prepares and serves a party up to 25 written questions.
2. The responding party must then answer or object within thirty days; answers are made in writing under oath by the party who signs them; objections are made in writing by the party's lawyer. But the lawyer must also sign a discovery response pursuant to rule 26(g)
    a. Certifying that she has made a reasonable inquiry before submitting the response.

v. The scope of the answering parties obligation
    1. The duty imposed on a person is the same as a corporation
        a. Rule 33b1b is to "furnish such information as is available to the party
    2. The option to produce business records
        a. If the answer can be found in Toyota's business records and the burden of searching them is no greater for the painter than for Toyota, then it makes them available to the painter in lieu of answering. 33d

vi. Particular objections
    1. While the rules do not expressly make burden an objection, they do make undue burden or expense a basis for an order limiting such discovery.
        a. `26b2ci
        b. 26c1
    2. Rule 33a2 states that an interrogatory is not objectionable just because it asks for an opinion or contention that relates to factor the application of law to fact.
        a. Such contention interrogatories are needed to ascertain how a party will contend that the law applies to the facts come trial.
            i. The rule therefore allows the court to postpone the time for answering contention interrogatories until such discovery has been completed
                1. 33a2
        b. By negative implication on the other hand an interrogatory that calls for a pure legal conclusion or opinion not applicable to the fate of the case is objectionable. The asking party can answer it as readily as the responding party, by looking in the library.

vii. The duty to supplement

1. Rule 26e does require a person to supplement its answers but only with information that makes its answer materially incomplete or incorrect. If that information has not already otherwise been made known to the other parties. If the information comes out during a deposition of which all parties have notice, the rule does not literally require further supplementation and the discovering parties instructions cannot impose obligations inconsistent with the rules.

viii. Requests for production of documents.

1. Must describe" with reasonable particularity the document or category of documents you seek and then serve the request on a party, with copies to all other parties. That party must then comply or object in writing within thirty days unless the parties stipulate to a longer time.
2. The scope of the producings party's obligation.
    a. Target documents and things "in the responding party's possession custody or control"
        i. 34(a)(1)
    b. Producing party to produce documents as they are kept in the usual course of business or to organize and label them to correspond to the categories in the request
        i. 34b
3. 26e
    a. No party is obliged to give information to other parties if they have not asked for it.

E-discovery

nn. Who pays

i. Rule 26 b1 sets out a cost-benefit formula that the court could use for these purposes.

ii. 26c1b

1. Now expressly authorizes the court to order the allocation of expenses

iii. 26fc3

1. At the mandatory discovery conference they must generate a proposed discovery plan that must address "any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced.

oo. Handling of a e discovery

i. Once a party reasonably anticipated litigation, it must suspend its routine document retention/destruction policy and put in place a "litigation hold to ensure the preservation of relevant documents. As a general rule the litigation hold does not apply to inaccessible backup tapes. Which may continue to be recycled on the schedule set forth in the company's policy. On the other hand if backup tapers are accessible then such tapes would likely be subject to the litigation hold.

1. Counsel must oversee compliance with the litigation hold monitoring the party's efforts to retain and produce the relevant documents.

Depositions

pp. Depositions are the factual background where the vast majority of litigation actually takes place.

i. Serving a notice of the time and place of a deposition on a non-institutional party-deponent with copies to the other parties to the action is normally sufficient to secure the party;s deposition.

1. This is often called "noticing a deposition:.

a. The notice must specify the method of recording, audio and video taping are expressly permitted under the rules that are gaining in popularity.

i. 30B3

b. Can be a place agreed to by the parties

i. 29

ii. Unlike a party who was served with a summons at the outset of the case a non party is not within the personal jurisdiction of a court or subject to its discovery rules until and unless that non-party is served with process.

1. Gotta serve a subpoena for a non-party to come, if you want documents with the deposition, a subpoena duces tecum.

a. Rule 45 authorizes the court where the action is pending issue a subpoena and permits nationwide service.

i. 45a2 & 45b2

b. But the subpoena can only command compliance within 100 miles of where the despondent resides or regularly transacts business in person.

i. 45c

c. A person objecting to a subpoena can seek relief in the court for the district where compliance is rough

i. 45d

d. In state court actions depositions of non-resident non-parties must often be taken under the rules of the deponents home state and then used by rule or reciprocity agreement in the state where the action is pending.

e.

iii. Objections of questions may be made by opposing counsel but " the examination still proceeds; the testimony is taken subject to any objection. 30(c)(2)

iv. Deposing the corporate or institutional witness.

1. Institutional parties may be deposed.

a. Send a letter to corporate HQ describing the matters on which examination is requested. The corporation must then designate a deponent knowledgeable about those matters to testify on its behalf

i. 30 b 6

v. Taking the deposition

1. The answers are live and under oath

a. 31

2. All objections made at the time of the examination are noted on the record and the testimony is still taken subject to the objection. 30(c)(2)

a. Even inadmissible evidence is discoverable, as long as it is relevant and not privileged. In addition most discovery by deposition will never be offered as evidence at trial, rendering any evidentiary objections moot.

i. If and when selected deposition testimony is offered as evidence at trial the evidentiary objections can be heard then.

1. For all these reasons most evidentiary objections other than privilege are preserved until trial and need not be made at the depositions.

a. 32d3a

i. "An objection to a deponent's company or to the competney relavnace or material of testimony is no waived by a failure to make the objection before or during the

deposition unless the ground for it might have been corrected at that time.

b. Even if he does object, the objection the objection is simply noted by reporter and the witness answers anyway subject to the objection
    i. 30 c 2
c. If a deponent answers after an objection that the question calls for privileged communications he effectively loses the protection. A later court ruling that sustains the privilege may keep the communication out of evidence but cannot restore their confidentiality.
d. There are in addition, a small class of evidentiary objections that are waived unless made at the deposition. THese are objections made on grounds that can be correct then and there by simply reforming the question.
e. Rule 30D1
    i. Cautions that objections must be stated concisely in an argumentative and non suggestive manner. And limits the circumstances in which a party may instruct a deponent not to answer
        1. The model rules of professional conduct prescribe "unlawfully obstructing another party's access to evidence" or "failing to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party.

3. Using the deposition
    a. If the deposition is used at trial or a hearing however it poses a two layered evidentiary problem. A deposition is hearsay: an out of court statement offered in court for its truth.
        i. Rule 32a therefore only permits a deposition to be used under limited circumstances. Even if the rule is satisfied the party of the deposition that its proponent seeks to offer into evidence is itself subject to the rules of evidence.
            1. "Speaking metaphorically a deposition is like a box that contains certain evidence. The court must make two determinations. The first is a procedural one whether to admit the box itself into the rtial. Once the court has decided that the deposition meets

these procedural requirements 32a, the courts then must address the ancillary evidentiary issues such as whether

2. Rule 35 authorizes such an examination, but because of the invasive nature of such an examination the injury cases, however, the plaintiff conceding the inevitable, will stipulate to an examination

    a. 29

4. Requests For admission

    a. Purpose to narrow the issues for trial.
    b. 36

        i. A party may request that an opposing party admit or deny the truth of statements in the request or the authenticity of documents attached to it. Usually the request is made after other discovery which is needed to frame the statement or locate the document. This timing suggests that the request for admission is less a discovery tool than a pretrial tool used to simplify the case on the eve of trial.

            1. An admission conclusively establishes the matter admitted for the purposes of the particular case.

                a. Event hough rule 26(g)s certification requirement applies to responses to request for admission no less than to other discovery responses, ambiguities in request for admission no less than to other discovery responses ambiguities in the evendeece alway enable the responding party to deny the truth of such ultimate contentions in the case without evening the rule.

Controlling Discovery Abuse Segment 14

qq. THE initial control on discovery abuse is the rule 26G certification requirement

i. 26g1

1. Certifies that the papers are warranted by law and have a proper purpose

2. Rule 26 g certification also warrants that disclosures are complete and correct as of the time they are made and neither burdensome nor unduly burdensome or expensive.

ii. 26(g)

1. Not Unreasonable or unduly burdensome or expensive
2. Not interposed to harass, delay, or run up

rr. Motions to compel

i. First the requesting party must try to resolve the dispute informally.
ii. Second, if informal discussion final, the requesting party can file a motion for a court order compelling discovery pursuant to 37a.

1. In then ruling on the motion the court will then determine the validity of the responding party's objections. Third should the objecting party defy such an order the requesting party can go back to court with a motion for sanctions 37b

a. THe intermediate step of seeking a motion to compel is excused, however if the recalcitrant party has stonewalled discovery by failing to respond to discovery request or to attend its deposition, instead of making particular objections the requesting party can then go straight for sanctions

i. 37D

iii. Instead of waiting for the requesting party to file a motion to compel the responding party can raise its objection by amotion for a protective order by using protective orders

1. 26c

ss. Discovery sanctions

i. Rule 37 gives the court the discretion to impose a discovery sanction that is "just" in the circumstances.

1. In addition to holding a party in contempt the sanctions can include order deeming specified facts to be established for purposes of the action., precluding the violator from introducing certain evidence, striking or dismissing claims or defense, or even entering a default judgment against the violator.

a. 37B

2. The trial courts have broad discretion to decide the sanction but it also states that the trial court should reserve the most severe sanctions (entry of default judgment) for bad faith discovery misconduct, and that a court abuses its discretion if it enters a default when lesser, but equally effective sanctions are available.

ii. Rule 26g carries its own sanctions for violations of the certification requirements

1. May be imposed by the court on its own initiative

iii. 26g3

1. Authorizes an "appropriate sanction"
    a. Can be wildly excessive and therefore not appropriate
        i. A court must take into account the "needs of the case
            1. 26g1biii
    b. The only sanctions the rule identifie is making the violator pay the opposing party's reasonable expenses, including attorneys fee.
        i. In practice most courts ignore rule 26g and punish discovery abuse within the rule 37 because most request for sanctions are presented by motions made under rule 37 b

iv. Spoliation

1. Is teh "destruction or significant alteration of evidence or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation.
    a. Penalty is assessed by a case by case basis.
2. A party seeking an adverse inference instruction based on the spoliation of evidence must establish the following three elements
    a. That the party having control over the evidence had an obligation to preserve it at the time it was destroyed
    b. That the records were destroyed with a "culpable state of mind"
    c. That the destroyed evidence was "relevant" to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.
        i. Ex. A "culpable state of mind for purpose of a spoliation inference includes ordinary negligence. When evidence is destroyed in bad faith, that fact alone is sufficient to demonstrate relevance. By contrast when the destruction is negligent, relevance must be proven by the party seeking sanctions.
    d. Typical sanctions for spoliation

i. Instructing the jury that it could infer that the deleted or destroyed evidence would have been unfavorable to the defendant.
ii. Precluding the spoiler from using certain evidence,
iii. deeming facts adverse to the spoliator established,
iv. striking a claim or defense of the spolator,
v. or entering a default judgment against the spoliator,

1. From least severe to most severe.

v. Using protective orders.

1. What is the predicate for moving for a protective order

a. Movant must certify that it has made a good faith effort to resolve the dispute without court action, and then
b. Showing protective order is necessary to protect it from " annoyance, embarrassment, oppression, or undue burden and expense.

i. Rule 26c
ii. Also expressly provides for protection of trade secrets and "confidential research development or commercial information"

1. This rarely justifies their nondisclosure, but usually provides for a guarded disclosure to a limited number of persons who are required to protect against further disclosures, and sometimes, to return protected material once the case is over.

2. Deciding motions for protective orders.

a. Rule 26c motion

i. Requires the district judge to compare the hardship to the party against whom discovery is sought, if discovery is allowed is denied. He must consider the nature of the hardship as well as its magnitude and thus give more weight to interest and have a distinctly social value than to purely private interests and must consider the possibility of reconciling the competing interests through a carefully crafted protective order.

1. Balancing test

3. Special issues presented by protective orders.

a. Non sharing protective order

i. Forbids sharing information with other plaintiffs.

b. Umbrella protective order

i. Which forbids the requesting party from disclosing to other any information that the producing party designated as confidential"

Sequencing and timing controls on discovery

tt. When sensitive privacy, commercial, or first amendment interest are impacted by discovery request, an alternative control on discovery may be to delay the sensitive discovery until less sensitive discovery has been taken, or legal challenges to the complain have been heard, because the need for the sensitive discovery may thus be mooted

i. 26d

uu. Cost-benefits controls on discovery

i. 26b1

1. The proportionality standard was intended to "deal with the problem of over-discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subject of inquiry.

a. It expressly allows the court to consider the burden and expense of discovery in light of its benefits by taking into account

i. The needs of the case
ii. The amount in controversy
iii. The parties resources
iv. The importance of the issues at stake
v. And the importance of discovery in resolving the issues

1. The cost benefit analysis gives a judge enormous discretion to head off the runaway discovery

vv. Summary of basics Principles

i. When the respond party thinks a discovery request is improper it can try to

1. negotiate a narrowing or other limitation of the request with the requesting party,
2. make express objections in the time provided by the rules,
3. or seek court ordered limitation by a motion for limitations under the rule 26B2 (authorizing a cost benefit analysis)
4. or a motion for a protective order under rule 26(c)

5. If the responding party believes that the requesting party violated the certification requirement of rule 26G, it may also seek sanctions under that rule.

ii. Silent objections or self help by non-production are never proper options under the rules.

1. Rule 26b5 requires an objecting party to "expressly make the claim" with a proper foundation. If you object, do so in writing.

iii. Ordinary discovery sanctions involve a two step process.

1. When the responding party expressly makes objection to a discovery request, the requesting party may move for an order compelling discovery under rule 37a.
2. That motion places the objections before the court to resolve by issuing an appropriate order.
3. If the responding party violates such an order, then the requesting party may seek sanctions.

iv. If on the other hand, the party from which discovery is requested, the requested "stonewalls"- ((That is fails to make any response (or fails to attend its own deposition))

1. the requesting party may
2. bypass the motion to compel (first step in the usual two step process) and go straight for sanctions under rule 37D.

a. The two steps become a one-step. IN such a case, it is no excuse for the lack of response that the discovery sought was objectionable. The objections come too late.

Voluntary Dismissal

ww. 41(a)(1) provides

i. (a)

1. Without a court order

a. Subject to rules 23e, 23.1(c), 23.2 and 66 and any applicable federal statue, the plaintiff may dismiss an action without a court order filing: (i) a notice of dismissal before the opposing party serves with an answer or a motion for summary judgement; or (ii) a stipulation of dismissal signed by all parties who have appeared.

ii. (b) effect

iii. Unless the notice or stipulation states otherwise, the dismissal is without prejudice.

1. But if the plaintiff previously dismissed any federal or state court action based on or including the same claim a notice of dismissals operates as an adjudication on the merits.

xx. Three keys aspects of rule 41(a)(1)(a)(i)

i. First filing under the rule is a notice not a motion. Its effect is automatic

1. The defendant does ont file a response, and no order of the district court is needed to end the action.

ii. Second, the notice results in a dismissal without prejudice (unless it states otherwise, as long as the plaintiff has never dismissed an action based on or including the same claim in a prior case.

iii. Third, the defendant has only two options for cutting off the plaintiffs right to end the case by notice: Serving on the plaintiff an answer or a motion for summary judgment.

yy. Analyzing the rule

i. THe affixes a bright line test to limit the right of dismissal to the early stages of litigation.

1. WHich simplifies the court's task by telling it whether a suit has reached the point of no return. If the defendant has served either an answer or summary judgement motion it hasl if the defendant has served either it has not.
2. The point of no return dismissal is automatic and immediate- the right of a plaintiff is unfettered.

a. A timely notice of voluntary dismissal invites no response from the district court and permits no interference by it.

i. A Proper notice deprives the district court of jurisdiction to decide the merits of the case.

ii. Because a motion to dismiss under 12b6 is neither an answer nor a motion for summary judgment its filing generally does not cuff off a plaits right to dismiss by notice

1. Only when a motion filed under 12b6 is converted into a motion for summary judgment does it bar voluntary dismissal

zz. Procedure for voluntary dismissal without court order (notice dismissal)

i. Just file the notice, no response from the court.

aaa. Reasons for voluntary dismissal

i. To correct or redraft pleadings
ii. To facilitate consolidation with another action
iii. To defeat diversity jurisdiction
iv. To preserve subject matter jurisdiction
v. To avoid unfavorable state law
vi. To refile in a different jurisdiction with a longer statute of limitations
vii. To delay or avoid an anticipated adverse determination on the merits
viii. To delay or avoid discovery
ix. To change federal judges by refiling in a state court.

bbb. Why the points of no return

i. Service of an answer or a motion for summary judgment roughly fixes the point at which the resource of the court and the defendant are so committed that dismissal without preclusive consequences can no longer be had as a right.

1. The second court held in Harvey aluminum that when the parties and the court had already expended substantial resources (on briefing, arguing, hearing, and deciding a motion for a preliminary injunction) it would be unfair to permit the plaintiff to dismiss as of right.

ii. A bright line that simplifies the court's task by telling it when a notice is no longer sufficient to obtain voluntary dismissal.

ccc. The summary judgment point of no return.

i. Rule 12 D provides that when "materials outside the pleadings are presented to and not excluded by the court the 12b6 motion must be treated as one for summary judgment.

1. Courts must take the well pleaded allegations of the complaint as true on rule 12b6 motion, but when the movant offers materials beyond these allegations, the court no longer takes the allegations as true.

a. Instead when such materials are excluded by the court it considers whether they show that material facts are genuinely undisputed. (the standard applied by a general summary judgment rule)

i. At this point 41 point of no return has been reached because now the motion is treated as a motion for summary judgment even though it was not styled as one.

ii. A court can consider materials outside the complaint in ruling on motions to dismiss for lack of personal jurisdiction, improper venue, insufficient service of process, or insufficient process, but none of these motions with or without materials outside of the complaint converts into a summary judgment motion that cuts off the right of a voluntary dismissal.

ddd. Voluntary dismissal by court order

i. Rule 41(a)(2)

1. Provides for voluntary dismissal at the plaintiff's request by a court order. Though he can no longer simply notice a voluntary dismissal, he can still move for a voluntary dismissal under rule 41 (a) 2

a. But voluntary dismissal is then discretionary with the judge and may be granted conditionally "on terms that the court considers proper".

i. A court can mitigate by imposing terms on the dismissal.

1. Example, even where the plaintiff moved for voluntary dismissal because an important witness was absent when the jury was about to be called to the boxx, a court granted the motion for dismissal without prejudice on the condition that plaintiff pay defendant's expenses and reasonable attorney's fee.

ii. Primary Purpose of giving he judge this discretion is to prevent a dismissal that unfairly causes prejudice to the opposing party

1. Sometimes called plain legal prejudice.

a. The courts have found plain legal prejudice where a defendant has spent significant time, effort, and expense in defending the suit.

i. FActors

1. (1) The suit is still in pretrial statue or further along
2. (2) the parties have filed numerous papers and memoranda
3. (3) the parties have attended many pretrial conferences
4. (4) there are prior court rulings adverse to plaintiffs position
5. (5) hearings have been held
6. (6) parties have undertaken substantial discovery

a. Though the plaintiffs reasoning is usually not a factor it may become more important as the litigation progresses.

eee. Effect of voluntary dismissal

i. The chief concern all parties have with a voluntary dismissal is whether it will permit or preclude the dismissing party from suing again on the same claim.

1. The first voluntary dismissal is by rule without prejudice.

a. After the first voluntary dismissal without court order, should the dismissing party sue on the same claim again and then notice another voluntary dismissal without court order, the second voluntary dismissal "operates as an adjudication on the merits" Rule 41(a)(1)(B)

i. This part of the rule is sometimes called the two dismissal rule,

1. Intends to protect the defendant from the harassment of repeated plaintiff's dismissal it applies only when the second dismissal is by notice without court order or stipulation.

2. Finally a voluntary dismissal by court order is without prejudice to commencing a new action on the same claim unless the court stated otherwise. But the party of the court's discretion in ruling on motion for voluntary dismissal is to order it 'with prejudice' ' based on the same factors that enter into the court's decision whether to allow the dismissal at all.

Involuntary Dismissal

fff. When a court grants a defendant's rule 12b motion to dismiss the dismissal is involuntary and does not require the plaintiff's consent.

ggg. In addition rule 41 bs describes two other grounds for involuntary dismissal

i. PLaintiffs failure to prosecute

1. At some point the plaintiff's inaction justifies involuntary dismissal of the action, the precise point often being set by rule or statute and the actual decision of dismissal depending on plaintiffs' excuses for inaction, prejudice to the defendant and other ad hoc factors.

ii. And a party's failure to comply with the rules.

1. Depends on the specific rules that were violated and specific litigation history of the case, with dismissal typically being reserved chiefly for serial violators who have abused the litigation process.

hhh. Rule 41 b provides that an involuntary dismissal "operates as an adjudication on the merices.

i. Which means an action based on the same claims cannot be brought again in the supreme court.

1. The rule accepts involuntary dismissal for lack of jurisdiction, improper venue , or failure to join a required party, because those are all defects that prevent adjudication on the merits.

Motion for Summary Judgment.

iii. By this motion the defendant agrees for purposes of the motion only, that the well pleaded factual allegations in the plaintiff's complaint are true and asks the judge to decide as a matter of law whether it states a claim based on those taken as true allegations.

i. The rules of summary judgment afford the option of making a more summary showing in advance of trial by mainly documentary evidence, including sworn witness statements called affidavits.

1. A motion for summary judgment effectively previews usually in documentary form, the evidence that parties would put on at trial in order to determine if it would establish any dispute that requires trial.

a. The Court must decide "whether the state of the evidence is such that, if the case were tried tomorrow the non-moving party would have a fair chance of obtaining a verdict.

2. If the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law rule - 56a

ii. Armed with evidence you can file a motion for summary judgment any time up until 30 days after the close of discovery

1. 56b

jjj. Inadmissible evidence

i. SUmmary judgment previews evidence of a trial. If evidence is heart or inadmissible on objection at trial it should not be considered in summary judgment.

1. If it could not be considered at trial, it should not be considered at summary judgment either (on timely objection) as long as summary judgment is to function as an accurate preview of trial.

kkk. The fundamental purpose of summary judgment.

i. The Basic purpose of summary judgment is to determine from the record whether there is a genuine dispute of material fact, and if not, whether the moving party is entitled to judgment as a matter of law on the undisputed face.

1. Because summary judgment is a matter of law, the starting point is alway to identify the applicable law. (doing so also helps identify which facts are material.)

a. Having performed those taska a court in ruling on a motion for summary judgment can then examine whether the evidence in the recordofferd by the moving party

shows that there is no genuine dispute of material fact and that it is entitled to judgment as a matter of law.

i. If the moving party meets this burden, the burden shifts to the nonmoving party and the court when then consider whether the non-moving party has identified specific facts in the record that create a genuine dispute, notwithstanding the movants showing.

a. Finally the court would grant or deny the motion, in whole or in part.

lll. How to run through a motion for summary judgment analysis

i. What is the rule of substantive law applicable to the motion?
ii. Which facts are material to applying the law?
iii. Whether the defendant had knowledge of his ill or knew he was in danger
iv. What is the proper record for summary judgment? (Evidence the court may consider)
v. As the moving party met its burden of showing that there is no genuine dispute of material fact in that record and that ists is entitled to judgment under the applicable rule of law?
vi. If the movant has met its burden has the nonmoving party met its burden of showing specific facts in that record that create a genuine dispute of material fact under the applicable rule of law?
vii. What is the proper disposition of the motion?

mmm. Slaven Rules

i. An adverse party may not resup upon mere allegations or denials of his pleading, but his response by affidavits or as otherwise provided, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate shall be entered against him.
ii. THe party failing to file an opposing affidavit in such a situation cannot rely on the hope that the judge may draw "contradictory inferences" in his favor from the apparently undisputed facts alleged in the affidavit of the moving party.
iii. A party must resort to rule 56(f) when it is opposing summary judgment and is unable to present a sufficient affidavit because the necessary facts or evidence are possessed or controlled by the moving party.

nnn. What is a proper record for summary judgment?

i. Rule 56ca1

1. List materials that may be considered in deciding summary judgment. But all discovery materials do not automatically qualify for consideration on summary judgment.

a. They must be admissible under the rules of evidence before they are properly considered as part of the record for summary judgment. W

i. Why should support materials need to be admissible?

1. Applying the admissibility tests to all evidence on a summary judgment motion serves the purpose of summary judgment rule 56 is designed to avoid a trial that would be unnecessary. THe motion could ont serve that function if in deciding whether issues exist for trials, courts were to consider evidence that could not subsequently be admitted at trial.

ooo. Relying on pleadings for summary judgment

i. Typical pleading is unsworn and often contains allegations that are not made on the personal knowledge of the hpleader. It is therefore not usually evidence that would be admissible at trial.

1. The whole purpose of the summary judgment motion is to pierce or go beyond the pleadings to the admissible evidence that the pleader expects to offer to prove them.

ii. Federal rule 56c1a

1. Does not expressly exclude a movant from relying on her own pleadings to support a summary judgment.

a. BUt 56c2 provides that the opposing party may object that material "cannot be presented in a form that would be admissible in evidence at trial. The movants own unsworn pleadings are not in such form and could not be offered as evidence by that party at trial.

i. In contrast an opposing party's pleadings could be admitted at trial as admission by the pleader.

1. On rare occasions a party may also rely on its own pleading but only if the party swore to the truth of the pleading allegations made them from personal knowledge and those allegations would be admissible at trial.

a. In other words, if the pleading is the equivalent of an affidavit.

ppp. Admissible Materials

i. Affidavits.

1. Must be made on personal knowledge 56c4

ii. Depositions are expressly listed as materials in the record that a party may cite on summary judgment

1. 56c1
2. Remember that the particular contents must be admissible as well though.

qqq. Summary Judgment and the Standard of proof

i. Whether the evidence presented is such that a reasonable jury could not find by a preponderance of the evidence for the non-moving party.

1. Libel plaintiffs had the burden of proving actual malice by clear and conniving evidence, a higher standard of proof than preponderance of the evidence.

a. In other words the determination whether there is a genuine dispute must be guided by the standard of proof applicable to the issue in the case.

rrr. Needing time to respond.

i. The Discovery rules allow parties to require others to testify under oaths in depositions or answer to interrogatories.

1. 56 D

a. Expressly let's patties file an affidavit to obtain a continuance (a delay before having to respond to the motion) in order to complete any discovery that she needs to respond to the motion.

i. Although IDK yet whether the facts are undisputed is not a sufficient response to defeat summary judgment it can buy an opposing party time.

sss. Disputes of Law

i. Would a genuine dispute about the applicable legal standard preclude summary judgment.

1. No

a. Rule 56 expressly looks to genuine disputes of material fact, not lof law.

2. However a judge will deny summary judgment and make the parties go to trial because she concludes that a fuller record may clarify the correct legal analysis.

a. The supreme court has approved the deferral of decision in such circumstances

i. Reasoning that " good judicial administration without decisions of the ultimate questions involved in this case until this or another record shall present a more solid basis of findings based litigation or on a comprehensive statement of agreed facts. While we might be able to reach a conclusion that would decide the case, it might well be found later to be lacking in the thourghounes that should precede judgment of this importance and which it is the purpose of the judicial process to provide.

ttt. Dispute of material fact

i. The supreme court has said that a dispute is genuine

1. If the evidence is such that a reasonable jury could return a verdict for the non-moving party.

a. Whether a dispute is genuine

i. Depends on whether any reasonable factfinder could decide an issue of material fact for the non-moving party. The summary judgment standard is not whether a reasonable jury should or would find for her, but COULD

uuu. The lying affiant and the slightest double standard.

i. Courts have generally rejected the "disbelief of denial" and slightest doubt theories of denying summary judgment.

1. The slightest doubt standard would eviscerate summary judgment because "at least a slight doubt can be developed as to practically all things human.

vvv. Judicial Fact Finding

i. The rule authorizes summary judgment only if the record "shows that there is on genuine dispute." if there is such a dispute summary judgment must be denied. It is the existence of the genuine dispute, not its resolution, that is key to summary judgment.

www. RElationships to other motions summary judgments.

i. The motion for summary judgment is not the only motion seeking judgment as a matter of law.

1. The rule 12b6 motion to dismiss for failure to state a claim shares that honor, because it, like hte summary judgment motion, asks the court to make a decision as a matter of law on undisputed facts.

a. How are they different

i. The record for decisions is different.

1. 12b6 is decided strictly on the factual allegations contained in the complaint, which are presumed to be true for purposes of the motion.
2. THe summary judgment motion is decided on the record of facts contained in all the supporting materials and any opposing materials that would be admissible at trial.
3. 12c motion for judgment on the pleadings record for decision under this motion is the complaint and answer as well as the reply if any.

b. Furthermore, either of these motions can be converted into a motion for summary judgment by the movant's presentation of material outside the complaint in support of the motion.

i. IF the court does not exclude such materials it must treat the motion as one for summary judgment.

c. Finally a motion for judgment as a matter of law is a third cousin to summary judgment.

i. THE supreme court has equated the standard for summary judgment with the standard for a directed verdict at trial. Under rule 50a

1. In essence the inquiry under each rule is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.

ii. THen what is the difference?

1. Timing and the record for decision

a. Summary judgment motions are usually made before trial and decided on a documentary evidence
b. Directed verdict motions are made and trial and decided on the evidence that has been admitted.

d. Great Chart on Page 1029

xxx. Relationship between the movant's burden and the burden of proof at trial.

i. THe party who moves for summary judgment has the burden of showing that there is no genuine dispute of material fact and that she is entitled to judgment as a matter of law.

    1. If the moving party would have the burden of proof on a claim or defense at trial then he must present undisputed facts supporting each and every element of the claim or defense in order to obtain summary judgment.

        a. Call his proof of the elements motion for summary judgment.

ii. If the moving party would not have the burden of proof at trial, then she typically a defendant has two alternatives

    1. She could present undisputed facts negating or proving the non-existence of an essential element of the non-moving party's claim.

        a. Call this a disproof of an element motion for summary judgment.

    2. Or she could demonstrate that there is no evidence whatsoever in the record by which the non-moving party could establish the existence of an essential element of his claim.

        a. Call this an absence of evidence motion for summary judgment.

iii. Partial Summary Judgment

    1. Rule 56 A authorizes summary judgment on a part of a claim or defense.

        a. A court may grant summary judgment as to one or fewer than all claims or even to part of a claim leaving the rest for trial.

iv. Negating an opponent's claims.

    1. Movants must produce real evidence to prove the nonexistence of the element to prove that it is not true, or in our terminology disprove it.

        a. Otherwise there would be no burden of evidence on the movant and be too easy for defendants.

v. Showing

    1. The Celotex majority concludes that this wording meant that the movant "has the initial responsibility of identifying those portions of "the pleadings depositions, answers to interrogatories and admissions on file together with affidavits if any' which it believes demonstrate the absence of a genuine issue of material facts.

a. If there is literally no evidence in the record, the moving party may demonstrate this by reviewing for the court the admissions interrogatories and other exchanges between the parties that are in the record

i. In plain english the party can just say that the opposing party doest have any evidence; celotex must review and identify relevant parts of the discovery record including answers to interrogatories or depositions, to SHOW that there is no evidence.

b. "Showing that the materials cited do not establish the absence of presence of a genuine dispute or that an adverse party cannot produce admissible evidence to support the fact.

i. 56c1b

c. Once you identify the absence the burden shifts then that party can provide evidence and then the burden shifts back.

What evidence is admissible on summary judgment

yyy. Random Rule of admissibility

i. Unavailability by reason of death

1. 32a4a

zzz. Majority in Celotex

i. We do not mean that the non moving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment. As long as it is clear at the time of summary judgment motion is made that the evidence will subsequently be put into admissible form at trial there would seem to be little to be gained from requiring the nonvolant to take the time and effort to restructure the evidence at the summary judgment state.

1. Instead the rule gives the party opposing such evidence the right to "object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

a. The burden is on the proponent to show that the material is admissible as presented or explain the admissible form that is anticipated, if the proponent can not the could will not consider its evidence.

i. 56

1. Plain language this test is not whether the evidence itself would be admissible at trial but whether the evidence suggests that the party would be able to offer to offer admissible evidence at trial
    a. on the other hand, had his letter itself revealed a lack of personal knowledge then he could object to evidence being used.
        i. There really isn't a standard form that would be admissible, the trial judge should just make a prediction informed by the rules of evidence.

aaaa. Disposition without trial: Summary of basic Principles

i. A plaintiff may voluntarily dismiss without court order simply by filing a notice of dismissal before the opposing party serves either an answer or a motion of summary judgment or by stipulation of the parties.
ii. The first such voluntary dismissal by notice (notice dismalls- is without prejudice to commencing a new action for the same claim. But under the two-dismissal rule, the second notice dismissal operates as an adjudication on the merits that precludes suing on the dismissed claims again in federal court.
iii. A plaintiff may also still move for voluntary dismissal by court order. The court considers whether dismissal will cause plain legal prejudice to the defendant beyond simply the tactical advantage that presumably any plaintiff is seeking by dismissal and may take into account the plaintiffs reasons for dismissal. THe court can condition dismissal on the plaintiffs payment prejudice to defendant form dismissal. A voluntary dismissal by court order is without prejudice to commencing an action for the same claims unless the court stated otherwise.
iv. Dismissal for failure of persecution, violation of the rules, and all other dismissal under the rules, (except for lack of jurisdiction, improver p=value and failure to join a required party operate as adjudication on the merits which usually preclude the dismissed party for commencing a new action in a federal court based on the same claims.
v. Dismissal for failure of prosecution, violation of the rules and all other dismissal under the rules (except for lack of jurisdiction, improper venue and failure to join a required party operate as adjudications on the merits which usually preclude the dismissed parth for commencing a new action in a federal court based on the same claims.
vi. Summary judgment is a device to dispose of a claim or defense on the merits without trial. But parties are entitled to try factual disputes whether or not they have asked for a jury. THerefore summary judgment

is only available when there is no genuine dispute of material facts and the non movant shows that on the undisputed facts, he is entitled to judgment as a matter of law. THe court must ascertain whether there is a genuine dispute of material fact but does not decide any disputes. The court does not weigh the evidence or assess credibility and must resolve doubt in favor of the non-moving party.

vii. Rule 12b6 motions to dismiss for failure to state a claim rule 12c motions for a judgment on the pleadings and rule 50a motions for judgment as a matter of law are also divided that ask a court to dispose of a claim on the merits as matter of law. Rule 12b6 motions are decided on the allegations of the complaint rule 12 c motions on the allegations of the complaint, answer and rely if any and rule 50 a motions on the trial record at the time the motion is made.

viii. The Substantive law determines which facts are material a dispute about the law does not preclude summary judgment

ix. TH emovants burden on summary judgment depends on whether it would have the burden of proof at trial on a claim of defense. If the movant would have the burden at trial, then its burden on summary judgment is to show that the facts necessary for each element of its claim or defense are not genuinely disputed. If it would not have the burden of proof at trial, then it has two choices to disprove an element of the opposing party's claim or to show that there is an absence of proof in which the opposing party could prove an element of its claim.

x. A movant for summary judgment may support its motion with evidence that is admissible or could be present in a form at trial that would be admissible form the non-moving party's pleading form the discovery materials on file as well form affidavits and declarations made on personal knowledge by competent witnesses setting out facts that would be admissible.

Judgment as a matter of law

bbbb. Motions for judgment as a matter of law under rule 50(a) (directed verdict)

i. Rule 50 a is used if no reasonable jury could find the facts necessary to for Penny to win and that judgment should therefore be entered in desmond's favor "as a matter of law"

1. A moving party asks the judge to direct a verdict in his favor because no reasonable jury could render a verdict for the nonmoving party based on the evidence that she presented at trial.

cccc. Performs two important functions

i. First they notify a non-moving party such that she has failed to offer evidence concerning a key element of her case, thus giving her an opportunity to correct the omissions.

1. 50(a)2 provides that "the motion must specify the judgment sought and the law and facts that entitle the movant to the judgment

ii. Second, Save time and the expense of presenting his side of the case and would not have to risk a jury verdict. The judge and the jury would not have to hear the rest of a case for which the outcome is clear.

dddd. Motions for judgment as a matter of law under rule 50(b)

i. If the case goes to a jury, but a reasonable jury could find the verdict decided, the judge can exercise gatekeeping authority.

1. If the movantant renews his motion for judgment as a matter of law, the judge can set aside the jury's verdict and enter judgment for the correct party instead.

a. Rule 50 b authorises the judge to grant this renewed motion for judgment as a matter of law which most state courts refer to a motion for judgment notwithstanding the verdict or jnov.

eeee. General Principle

i. As a general rule judges are supposed to decide legal issues and juries are supposed to determine the facts.

1. When a judge grants a rule 50 motion, the judge has determined that a party has offered so little evidence that the facts can be determined as a matter of law.

a. Rule 50 provides that a judge should do so only when a party has failed to offer a legally sufficient evidentiary basis to support a judgment in her favor.

ffff. When has a party offered legally sufficient evidence?

i. Bainbridge

1. A rebuttable inference of fact must necessarily yield to credible evidence of the actual occurrence.
2. Where the evidence is so overwhelmingly on one side as to leave no room to doubt what the fact is the court should give a prefatory instruction to the jury.

a. Gives scientific certainty to the law in its application to the facts and promotes the ends of justice.

3. Bainbridges testimony was "insufficient to rebut the substantial and contrary direct testimony that the railroad had offered.

ii. The Test for sufficiency

1. Whether the evidence is such that without weighing the credibility of the witness or otherwise considering the weight of

the evidence, there can be but one conclusion as to the verdict that reasonable person could have reached. Wright V. Miller

iii. In Entertaining a motion for judgment as a matter of law the court should review all of the evidence in the record.

1. The court must draw all reasonable inferences in favor of the non movant party and it may not make credibility determinations or weigh the evidence. "Credibility determinations, the weighing of the evidence and the drawing of legitimate inferences from the facts are jury functions not those of a judge.

a. Thus, although the court should review the record as a whole it must disregard all evidence favoring the nonmovant as well as that evidence supporting the moving party that is uncontradicted and impeach at least to the extent that the evidence comes from disinterested witnesses.

gggg. Judicial Reluctance to grant rule 50(a) motions

i. The answer turns on pragmatic concerns about what will happen if the judges grant the rule 50 a motion the losing party is likely to appeal =, arguing that the judge should have permitted her case to proceed to a jury verdict. If the appellate court agrees with Penny the court will remand the case for a retrial. Judges prefer to avoid this risk of a time-consuming and expensive retrial and thus grant rule 50 a motion only when the argument for doing so is so strong and the likelihood of reversal is low.

1. This reluctance is especially understandable in light of what will happen if the judge denies a rule 50 a motion, the jury will probably see the weakness and render a verdict for that prayer anyway. If not rule 50 b gives the judge an opportunity to revise the decision to deny the rule 50a motion after the verdict.

hhhh. No reluctance for 50 (b)

1. When an appellate court reverses a 50 b motion the appellate court has determined that the jury's verdict was reasonable and should ont have been set aside. Under these circumstances the appellate court can remand the case with an instrument for the trial court to enter a judgment based on the jurys original verdict.

a. No need for a retrial

iiii. The Legal Fiction of the renewed motion.

i. The Supreme Court upheld the entry of summary judgment and that it is not a violation of the right to a jury trial.

1. The court reasoned that if a party makes a motion for judgment as a matter of law under rule 50 (a) before the case goes to the

jury and the judge does ont grant the motion, the judge is considered to have conditionally submitted the case to a jury and can reassess the sufficiency of the evidence after the verdict. 50(b)

a. If the court does not grant a motion for judgment as a matter of law made under rule 50a the court is considered to have submitted the action to the jury subject to the courts later deciding the legal questions raised by the motion.

ii. Policy reasons for rule 50 b

1. Without them judges would have no opportunity to correct an unsupportable jury verdict knowing that they lack this power, judges would be more inclined to grant rule 50 a motion in order to avoid the possibility of an unsupportable jury verdict.

a. But granting more rule 50a motion also increased the likelihood of time-consuming and expensive retrials. The safety net of ulre 50(bz0 therefore gives judges a greater incentive to permit the case to proceed to a jury verdict.

jjjj. Why not summary judgment

i. First the parties might not have taken much if any discovery especially if the case involved relatively limited damages and the absence of any evidence to support penens case might only become apparent at trial.
ii. Second, even if the parties took discovery, the evidence is not necessarily presented the same way at trial.
iii. Summary judgment and judgments as a matter of law involve an examination of different information at different times in the litigation process. The standard that applies to each type of judgment however is identical.

kkkk. 1091 Chart Look it up.

llll. The Scintilla Alternative

i. In these states a court will deny a motion for judgment as a matter of law if the non-moving party has offered a mere scintilla of evidence in support of its position.

1. These courts refuse to consider the quantity or quality of the evidence that is being presented. Thus the motion only succeeds or fails based only on a consideration of the non-moving parts evidence.

a. Downside

i. Undermines a court's ability to prevent a patently unreasonable jury verdict.

mmmm. The RUle 50 B standard.

i. Remember that the rule 50(b) motion is simply a renewed rule 50(a) motion so it stands to reason that courts will employ the same analysis.

1. One difference between the two motions is that they implicitly distinct pragmatic concerns mentioned earlier.
2. THe other difference is that the motions may be made on different records if the rule 50 a motion is made at the close of the plaintiffs evidence then rule 50b made within 28 days after entry of judgment. The court ruling will have the benefit of the defendants evident which it would ont have had in the ruling on the pripor 50a motion.

nnnn. Denying A judgment as a matter of law.

i. Hardee Case

oooo. Procedural Technicalities of RUle 50

i. Rule 50 does not require the motion to be in writing.

1. Must specify the law and facts that entitle the movant to the judgment

a. 50a2

ii. Multiple Rule 50a motion

1. Rule 50 a does not prohibit making two rule 50a motions.

a. A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury.

i. 50a2

b. The only imitation is that the motion cannot be made until a "party has been fully heard on an issue"

i. Rule 50a1

c. Taken together those two subsections mean that a rule 50 a motion can typically be made either (1) after the no-moving party (usually the plaintiff has been heard on the issue" (2) after both parties have presented all of their evidence or (3) at both times.

iii. Look on page 1104

iv. THe meaning of "fully Heard"

1. Rule 50a1

a. Says that a court can grant a judgment as a matter of law after " a party has been fully heard on an issue. This means that a party can make a motion after the nonmoving party has had an opportunity to present all of her evidence on the issue that is the subject of the motion.

v. A Better Outcome for a later filed motion

1. In courts that adopt the federal standard, why is a defendant rule 50a motion more likely to succeed when it is made at the close of all of the evidence than when it is made just after the plaintiff has finished presenting her case.

    a. If a defendant makes a rule 50 motion after the plaintiff has presented her evidence but before the defendant has offered his, the court only has the plaintiff's evidence to consider. The plaintiff's evidence alone may suffice to cross the all important line x but if the defendant makes a rule 50 motion at the close of all of the evidence, the federal court has the benefit of having heard the defendants side as well. If this additional evidence is uncontradicted and unimpeached it may be sufficient to push the evidence back on the other side of line x.

        i. Scintilla rule

            1. Doesn't matter always looking at the nonmovant party's evidence.

2. Prerequisite for a renewed motion under rule 50 b

    a. Rule 50 b specifies

        i. If the court does not grant a motion for judgment as a matter of law made under rule 50 a the court is considered to have submitted the action to the jury subjection to the courts later deciding the legal questions raised by the motion.

            1. Thi means that if a party fails to make a rule 50a motion, the party has waived the opportunity to make a rule 50 b motion.

        ii. Parties can now make a rule 50 b motion as long as they previously made a rule 50 a motion at some point after the nonmoving party had been fully heard on the relevant issue and before submission of the case to the jury.

        iii. Why

            1. Serves the important purpose of ensuring that cases are decided on their merits.

                a. If parties could make rule 50 b motion without first making rule 50 a motion parties would rarely make 50a motions parties would let the case go to a jury and raise the adversary's omission only if the

adversary wins at which time the adversary has no opportunity to correct the omission. To prevent this kind of sandbagging and ensure that cases do not turn on inadvertently to the problem at a time when the adversary can fix it by making a rule 50 a motions before the case is submitted to the jury.

b. Cannot change the basis for the motion

    i. Whatever issue you raised on 50a has to be the same issue you raised on 50 b

3. Prerequisites for appeals.

    a. The united states supreme court has made clear that a party's rule 50a motion cannot be appealed unless the motion is renewed pursuant to rule 60(b)

        i. Reasoning - For the judgment in the first instance of the judge who saw and heard the witnesses and has the fall of the case which no appellate printed transcript can impart.

            a. Thus if a party fails to ask the district judge to make that determination in a post verdict motion, the party waives the issue on appeal.

    b. Standard of review on appeal.

        i. De novo standard of review when reviewing the trial court's ruling on a rule 50 motion.

4. Judgements as a matter of law summary of basic principles

    a. Rule 50 authorizes a judge to grant a motion for judgment as a matter of law after the non-moving party has been fully hear on an issue at trial
    b. Rule 50 B permits a party to renew a rule 50 a motion for judgment as a matter of law after the jury has rendered its verdict. State courts and older federal opinions refer to these motions as motions for judgment notwithstanding the verdict.
    c. The standard for applying rule 50 is essentially the same as the standard that courts employ when deciding a motion for summary judgment under rule 56
    d. To determine whether the non-moving party has offered legally sufficient evidence a federal court will consider the non moving party's evidence along with any of the moving

parties uncontradicted and unimpeached evidence. The court will then determine whether in light of this evidence a reasonable jury could render a verdict for the non-moving party

e. At least one state uses the scintill standard and deines a motion if there is a sincitlle of evidence to evaluate to support the non-moving party's case under this approach courts will not consider the moving party's evidence even when it is uncontradicted or impeached
f. Rule 50 a requires the moving party to specify the basis for the motion and the motion cannot be made until the non-moving party has been fully heard on the issue that is the basis for the motion.
g. A party cannot renew a motion for judgment as a matter of law under rule 50b unless the party previously made a rule 50a motion that raises the same issue.
h. A party cannot appeal a denial of rule 50a motion unless that party renewed the motion under rule 50 b after the jury's verdict. AN appellate court will apply a de novo standard of review when determining whether the non-moving party offered legally sufficient evidence to withstand a motion for judgment as a matter of law.

State Law in Federal Courts : The Erie Doctrine. Segment 19

pppp. The subjects upon which congress has the authority to legislate are enumerated in article one section 8 of the constitution

i. These include matters of national interest.

1. However cases that involve state law are not always litigated in state court because article 3 section 2 authorizes federal courts to hear cases between citizens of different states.

qqqq. The First Congress provided in section 34 of the judiciary act of 1789 that federal courts should apply state law in cases that did not involve federal law.

i. The famous statute the Rules of decision act has been in the United States Code ever since. The RDS is codified at 28 USC 1652

rrrr. The RDA

i. THe laws of the several states, except where the constitution or treaties of the united states or acts of congress otherwise require or provide shall be regarded as the rules of decisions in civil actions in the court of the united states.

1. Basically the RDA instructs a federal court to apply federal law to the case if federal law governs the issue, but otherwise to decide the case under applicable law.

ii. Swift Vs. Tyson

1. Justice Story concludes that the RDA required federal courts to apply relevant state statutes to a case, but that they were not bound to follow the common law rulings of state judges.

a. At the time of Swift such common law rules were thought of as a single body of rules developed by the english courts and adopted by american states rather than as the law of any individual states. Proceeding form this promise justice story concluded that the rda did not require a federal court in diversity cases to apply anyone's states common law, but to look at all common law cases to divine the true common law rule on the issue before.

iii. Taxi Cabo

1. Holmes Dissent

a. The common law is enforced in the state. It may be adopted by statute in p;ace of another system previously in force. I see no reason why it should have less effect when the law speaks in another voice.

i. Swift is wrong.

iv. The Eerie Decision

1. Whether the law of the state shall be declared by its legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. .. and if that be so the voice adopted by the state as its own whether it be of its legislature or of its supreme court should utter the last word.

v. Choice of law problem

1. In diversity problems which state law should be chosen

a. Klaxon

i. Holding - The substantive choice of law that would be applied by the state courts is in the state in which the federal courts sit.

Federal Common Law

ssss. Standard OIl Case

i. In the absence of an applicable act of congress it is for the federal courts to fashion the governing rule of law according to their own standards.

1. Factors

a. Scope
b. Nature

c. Legal Incidents
d. And COnsequences of the relationship

i. Whether these are governed from federal sources and governed by federal authority.

ii. Except where the government has simply substituted itself for others as successor to rights governed by state law the question is one of federal policy affecting not merely the federal judicial establishment and the grounding of its action but also the government's legal interest and relations, a factor not controlling in the types of cases producing and governed by the erie ruling.

iii. Standard English

1. Before applying a federal common rule to the case the courts must find that a federal interest requires application of federal law.

a. Once it determines that federal law must govern the issue, it proceeds in the absence of a federal statute to create it.

2. FEderal interest

a. The federal government has a significant interest in determining the right to indemnification in this case.

3. Creating a federal common law rule

a. If the court must establish a new federal common rule to decide the case it is in the same position as a state court creating common law. It must consider the policies relevant to the field of law, basic principles of equity, rules of laws established in analogous fields, scholarly writings and other considerations.
b. It could also decide that the governing rule must be federal but choose to borrow local state laws as the rule of decision where state laws would serve the relevant purpose and would not frustrate the objective of federal law.

i. This is appropriate where a federal rule is needed but it doesn't have to be uniform in all 50 states.

c. Similarly the federal courts sometimes incorporate local state law as federal common law

i. Look this up I don't know what the difference is .

tttt. Summary Of basic Principles

i. Under swift v tyson federal courts did not alway apply state law to the substantive issues in diversity cases instead they often applied federal general common law.

ii. In Erie

1. The supreme court held that the federal court may not apply federal general common law to determine the applicable legal principles in diversity cases
2. Where the meaning of applicable state law is unclear, a federal court should apply the state supreme court predictive approach to determine what the law of the state is. Under this approach the federal court asks what rule the state's highest court would apply today, even if older cases have applied a different rule however federal judges are likely to require strong evidence before disregarding a state supreme court decision based on a prediction that it would be overruled today.
3. State courts use choice of law rules to determines which states substantive law to apply to a claim

    a. The supreme court held in klaxon that you must apply the choice of law rules of the state in which it sits to determine the states substantive law to apply to a diversity case.

4. While erie decreed that there is no federal general common law there still is federal specific common law. In some cases because of the national character of a question or the federal interests at stake the la applied must be federal in such situation if not federal statute provides a rule of decision a federal court must create a federal rule of decision
5. In some cases where national uniformity is not needed the federal court may incorporate local state laws as the federal rule of decision rather than creating a uniform federal common law rule

Substance and procedure under the Erie Doctrine.

uuuu. While Erie undeniably required federal diversity courts to apply state law on purley substantive matters it did not address whether he had to use state law in diversity cases on matters that might be classified as procedural rather than substantive.

i. Cities Oil CO V. Dunlap

1. THE court considered whether a federal diversity case required the court to apply the state rule on the issue of who bore the burden of proof on a question of title to land.

    a. THe burden of proof is a matter that relates to the court process not directly underlying the substantive rights that exist outside of litigation.

        i. BUt the supreme court held that the issue relates to a substantial right and required the federal court to apply the state burden of proof rule.

1. Oil CO suggested that the federal court in a diversity case would be required to defer to state law on at least some procedural issue in order to implement the principle of consistent results in state and federal court even though it would apply a different rule in a federal question case.

ii. Guaranty Trust Co of New York V. York.

1. Outcome Determinative Test

a. Would allowing the federal court to ignore state laws lead to a different outcome in federal court than the plaintiff would receive in the state court. Must look at this retrospectively

i. THis suggests that a federal court should sometimes choose to follow state practice to further eries policy of uniform outcome in diversity cases.

1. Even if there is constitutional authority for the federal court to go its own way

iii. Byrd V, Blue Ridge Rural Electric Cooperative

1. Recognized that erie requires federal diversity couts to apply state law on matters of substantive law. " THe definition of state-created rights and obligation" THe court further reaffirmed that even on arguably procedural matters a diversity court should often defer to state practice if the difference between state and federal procedure is likely to be outcome- determinative.

a. However the Byrd court suggested that when the issue before a federal diversity court is one of procedure the decision to defer to state law is a policy choice.

i. A choice to apply the state rule to assure the same outcome in federal court that the parties would get in federal court and not a constitutional command.

2. Did not overrule guarantee trust.

a. BUt did say where the difference between state and federal practice involves matters of procedure. They may choose to do so after balancing the state interest in the procedure against any countervailing federal interest. Byrd Recognizes that state practice should frequently be followed to assure uniform outcomes but that in some circumstances that policy must yield if applying state law

would interfere with other policies important to the administrations of federal courts

iv. Hanna V. Plumer Segment 20

1. Prospective Approach
2. Part one Test
    a. Would a plaintiff choose federal court over state court?
3. WHy should a conflict between a federal rule and state law by analyzed differently from other conflicts
    a. Hanna Holds that a conflict between one of the federal rules of civil procedure and state law requires a distinct analysis from the erie choice. In federal rules conflict the court has adopted a federal rule under a delegation of power from congress to govern in federal courts. If congress enacts federal law the resulting law is the supreme law of the land (supremacy clause of the united states constitution) as long as congress had the power to enact it because congress delegated its power to govern federal procedure to the supreme court in the REa the validity of a federal rule turns on whether Congress had the constitutional power to regulate the issue covered by the federal rule itself and if so whether the supreme court, in adopting the rule, acted in accordance with the congressional delegation. If so the rule is valid and applies in the face of a contrary state law.
4. Part Two Test
    a. The test must be whether a rule really regulates procedure - the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.
5. Thus the bottom line is that If Congress has authorized the Court to write the Rule and the Rule is "arguably procedural" it is valid federal law that applies under the SUpremacy clause even if it contradicts state prediction.
    a. However there is an additional limit on Congress delegation in the REA
        i. A rule even if it passes the test of procedurality may not "abridge, enlarge, or modify any substantive right.
6. Plain English Hanna Tests

a. Hanna Held that different analyses are required for conflict between a federal rule and state law and for conflict between a federal judicial practice and state law.
    i. If the case involves a conflict between a federal judicial practice and state law., it must be analyzed under Hanna Part one
        1. Whether ignoring the state statute would lead to forum shopping or inequitable administration of the law.
    ii. If the case involves a conflict between a federal statute and state law.
        1. When that is true the federal statute prevails under the supremacy clause if Congress had the authority to enact it.

Claim Preclusion Importance

vvvv. Claim Preclusion

i. which is also known by the latin phrase res judicata is a doctrine that prevents parties from relitigating claims that they fully litigated in a previous case.

wwww. Issue Preclusion

i. which is also called collateral estoppel prevents parties from relitigating issues that they previously litigated in another case.

xxxx. Reasons for claim preclusion

i. First it would be unfair to allow a plaintiff to get a second chance to recover
ii. Lasso the party will have to incur the time, expense and worry of defending against repetitive lawsuits.
iii. Also helps preserve the public's confidence in the judicial system.
iv. Helps promote efficiency

yyyy. Distinguishing Claim Preclusion from other doctrines

i. Claim preclusion applies when the plaintiff files a new, second case against the defendant.
    1. Double jeopardy only applies to criminal cases.
    2. Claim Preclusion is a common law doctrine.
    3. Does not apply to retrials.

zzzz. Defining a claim

i. First the claim must be he same as one that was litigated in a previous case

ii. Second the previously litigated claim must have resulted in a valid final judgment on the merits

iii. THird the parties who litigate the previous claims must typically be the same parties who are litigating the current claim.

1. There is no consensus on the proper definition of a claim

aaaaa. River Park

i. Two TEsts for determining whether cause of action are the same for purposes of res judicata

1. Same evidence test

a. A second suit is barred "If the evidence needed to sustain the second suit would have sustained the first or if the same facts were essential to maintain both actions.

i. Narrower than under the transactional test

1. THe same evidence test is tied to the theories of relief asserted by a plaintiff the result of which is that two claims may be part of the same transaction yet be considered separate causes of action because the evidence needed to support the theories on which they are based differs.

2. Transactional test provides that

a. "the assertion of different kinds of theories of relief still constitutes a single case of action if a single group of operative facts give rise to the assertion of relief.

i. The transactional test is more pragmatic. Under This approach a claim is viewed in factual terms and considered "coterminous with the transaction regardless of the number of substantive theories or variant forms of relief flowing from those theories that may be available to the plaintiff and regardless of the variation in the evidence needed to support the theories of rights.

1. Although a single group of operative facts may give rise to the assertion of more than one kind of relief or more than one theory of recovery assertions of different kinds of theories of relief arising out of a single group of operative facts constitute but a single cause of action.
2. Majority of federal courts

3. Another Possible definition Primary rights

a. Some state courts previously adopted a primary rights definition of a clim.

i. According to this definition a plaintiff has a separate claim for each right that the defendant has violated.

1. Much more narrow than either the transactional test or the evidence test.

bbbbb. WHy the transactional test

i. THe transactional test as the broadest test poses the greatest risk the claim preclusion will anr a later filed action so plaintiffs are likely to combine their cause of action in a single case in jurisdiction that they have adopted.

ii. The transactional test also reduces the likelihood of conflict in results and arguably protects the public's image of the justice system most effectively

iii. Finally the transactional test does the best job of promoting the interest of fairness to defendants because the test offers the braodest protection agisnt serial lawsuits.

ccccc. Validity of the judgment

i. Historically a judgment was considered invalid and not entitled to claim preclusive effect if the court issuing the judgment lacked personal or subject matter jurisdiction or if the defendant did not receive proper notice of the lawsuit.

1. There are some limited exceptions

a. Apply when the defendant responds to the lawsuit and both parties litigate the case without raising jurisdictional problems.

i. Unless the district court's decision was a manifest abuse of authority or would substantially infringe on the authority of another tribunal.

ddddd. Finality of the judgment

i. A judgment does ont have a preclusive effect until it is final.

1. Until the court has resolved the matter but a court will not dismiss a claim on reclusion grounds until another court has issued a final judgment. THis finality requirement makes sense because among other things there is no concern that a court will enter a judgment that is inconsistent with a prior judgment until a prior judgment actually exists.

a. THe majority of courts, including the federal courts have concluded that a judgment is final for preclusion purpose when the trial court enters a judgment. Even if the losing

party may subsequently file a post trial motion such as a motion for a new trial and even if the losing party appeals.

i. If a judgement is on appeal and the same claim is pending in another court the other court will typically await the completion of the appeal in the original case before determining whether claim preclusion applies.

1. But if the other courts grants a dismissal on claim preclusion grounds while the appeal of the original judgment is pending and the original judgment is subsequently reversed a party can usually set aside the second courts dismissal by filing a post judgment motion or timely appeal.

eeeee. A judgment on the merits

i. A judgment must also be on the merits for it to have claim preclusive effects. In general courts have interpreted the requirement expansilvy to include on only jury verdicts but summary judgments, judgments as a matter of law and even default judgments.

1. Exception

a. A claimant has not had an opportunity to litigate her claim when the court dismissed for lack of subject matter jurisdiction personal jurisdiction or venue. Such dismissal typically occurs before a court has had an opportunity to examine the merits of a claimants contentions and are thus not "on the merits for preclusion purposes.

ii. Rule 41b suggest that such dismissals are on the merits at least for purpose of refiling the same action in the same court, but does such a dismal have preclusive effects elsewhere

1. Although there is some disagreement the trend has been in favor of giving statute of limitations dismissal preclusive effects.

a. This trend, like the trend in favor of finding judgments to be final even though they are on appeal, reflects the increasingly widespread view that claimants should have fewer opportunities to relitigate claims.

iii. Courts today will give preclusive effect to judgments that are not truly final, not really on the merits and not valid.

fffff. Exceptions on Claim Preclusion

i. Even when all of the elements of the claim preclusion doctrine are satisfied courts will nevertheless refuse to apply the doctrine when

1. The parties have agreed in terms or in effect that the plaintiff may split his claim, or the defendants has acquiesced therein
2. The court in the first action has expressly reserved the plaintiff's right to maintain the second action or
3. THE plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because of the limitation on the subject matter jurisdiction of the courts or restrictions on their authority to entertain multiple theories or demands for multiple remedies or forms of relief in a single action, and the plaintiff desires in the second action to rely on that theory or to seek that remedy or form of relief or
4. The judgment in the first action was plainly inconsistent with the fair and equitable implementation of a statutory or constitutional scheme or it is the sense of the scheme that the plaintiff should be permitted to split his claim
5. For reasons of substantive policy in a case involving a continuation recurrent wrong the plaintiff is given an option to sue once for the trial harm both past and prospective or to sue for time to time for the damages incurred to the date of suit and chooses the latter course or
6. It clearly and convincingly shows that the policies favoring preclusion of a second action over for an extraordinary reason such as the apparent invalidity of a continuing restrain or condition having a vital relation to person liberty or the failure of the prior litigation to yield a coherent dispoint of the controversy.

ggggg. Claim Preclusion Summary of Basic Principles

i. Claim preclusion is an affirmative defense so if the defense is not raised in the manner specified in rule 8c most courts will consider it to be waived.

ii.

Issue Preclusion

hhhhh. Also Called collateral Estoppel

i. As long as the plaintiff had a full and fair opportunity to litigate this issue in lawsuit one there is no reason now to let him try again.

1. This is only fair if

a. A the issue in the two lawsuits is the same
b. B that issue was actually litigated in lawsuit number 1
c. C The plaintiff had a full and fair opportunity to litigate the issue in lawsuit number 1 so that we have substantiated confidence in the outcome,
d. D it was actually decided

e. E the resolution of the issue was essential to the judgment in lawsuit #1 and not a gratuitous and perhaps unappealable finding.

iiiii. This applies also to claims that could have been litigated based on the same transaction or same evidence.

jjjjj. The Doctrine of issue preclusion precludes the relitigation of issues smaller pieces of lawsuit than claims often the findings required to establish some element of a claim, like ownership of property, validity of an instrument, family relationship, or sometimes broader elements of a claim or defense like a party's negligence or contributory negligence.

i. A litigant's exposure to issue preclusion is therefore potentially much broader than its exposure to claim preclusion.

1. Issue preclusion unlike clima preclusion does not apply to issues that could have been litigated but weren't

kkkkk. Courts often need to examine both the pleadings and the evidence submitted at trial in lawsuit #1 in order to decide both whether the issue in lawsuit #2 is the same and whether it was actually litigated.

lllll. Issue preclusion was divided to promote finlay not accuracy in fact finding.

i. A check on accuracy is called an appeal

mmmmm. When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.

i. Panniel V. Diaz

1. For the doctrine to apply to foreclose the relitigation of an issue, the party asserting the bar must show that

a. The issue to be precluded is identical to the issue decided in the prior proceeding
b. The issue was actually litigated in the prior proceeding.
c. The court in the prior proceeding issued a final judgment on the merit.
d. The determination of the issue was essential to the prior judgment and
e. The party against whom the doctrine is asserted was a party to or in privity with a party to the earlier proceeding.

2. A court can decide not to apply the doctrine where there is sufficient countervailing interest or if it would not be fair to do so.
3. IS that the party bound had a "full and fair opportunity to litigate the issue in the earlier proceeding"

4. Collateral estoppel is not to be applied mechanically, even where all of the required elements for preclusion are present, countervailing factors may call for restraint.
    a. Specifically there are five recognized exceptions to collateral estoppel listed in section 28.
        i. There is a clear and convincing need for a new determination of the issue
            1. Because of the potential adverse impact of the determination on the public interest or the interest of person not themselves parties in the initial action
            2. Because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action or
            3. c because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.
    b. Does not matter whether the issue is factual in nature or a question of law.
    c. Is a trial necessary for an issue to be actually litigated.
        i. Panniel itself may suggest that the answer is no, because the first proceeding was not a trial but an evidentiary hearing.
            1. Issues can also be submitted and determined on motions to dismiss for failure to state a claim, summary judgment, judgment on the pleadings directed verdict, judgment as a matter of law, or judgment notwithstanding the verdict.
    d. 52 a
        i. Requiring the trial judge to find the facts specially and state them on the record or in memorandum of decision filed by the court in an action tried to the bench.
    e. The issue determination must be essential to the judgment
        i. A fact merely found in the case becomes adjudicated only when it is shown to have been a

basis of the relief denial of relief or other ultimate right established by the judgment.

1. General decisions by judge as well as by juries are given an issue preclusive effect if the various requirements are met.

Nonmutual issue preclusion

nnnnn. THe argument for issue preclusion may also be raised however in cases that involve new parties.

i. This is no mutual or one way preclusion because the parties to lawsuit #2 are not each able to use the judgment from lawsuit #1 to establish an issue in lawsuit #2

ooooo. As long as the foundation had a full incentive to litigate the issue in lawsuit #1 It has had its chance to prove this patent valid and failed. Why should I be able to keep relitigating the same issue as long as the supply of unrelated defendants holds out.

ppppp. Why defensive issue preclusion, can you be collaterally estopped from bringing a suit?

i. Litigants who never appeared in a prior action may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim.

qqqqq. Defensive issue preclusion in state courts>

i. Traditionally courts held that issue preclusion must be mutual.

1. The supreme court of california approved the defense, opening the intellectual door to many but not all other courts abrogating mutuality on the same reasoning.

Non mutual offensive preclusion

rrrrr. PLaintiffs have sought to invoke issue preclusion to establish facts to prove its claim.

i. Parklane

1. Not to preclude the use of offensive collateral estoppel but to grant trial court's broad discretion

a. Factors

i. First, A trial court must have confidence that the issue was fairly determined in the prior action.

1. This is might be unfair to preclude a patty if it did not have an adequate incentive to litigate the issue aggressively in the prior action

2. It could also be unfair if the result in the prior action was somehow brought into question, if it was inconsistent with findings in other actions on the same issue.
3. Finally it would be unfair if the losing party did not have a full procedural opportunity to litigate the issue in the prior action.
    a. This is the same full and fair opportunity requirement that most courts now apply generally to issue preclusion.
4. Second, Issue preclusion might also be denied if the plaintiff had waited in the wings for another litigat to litigate a common issue , hoping to ride on that other parties coattails if the outcome is favorable and to reliitgate if it is not. Permitting such strategic behavior would promote inefficiency.

sssss. Problems with offensive non mutual issue preclusion

i. Plaintiff shopping

1. The attorneys for numerous potential claimants might agree to jade the strongest case and go to judgment first so the subsequent claimants can ride the successful judgment through nonmutual offensive issue preclusion.

ttttt. Most states have not embraced nonmutual offensive issue preclusion.