Civil Procedure

I Personal Jurisdiction

A) State Court Inquiry

1) Consent—three primary ways to give consent to PJ
   (a) By Forum Selection Clause?
      (i) Valid—legally enforceable
      (ii) Within scope—D a party to agreement, claims w/in scope
   (b) Appearing (without properly preserving objection to PJ)
   (c) By appointment of an agent to receive process—must have:
      (i) Valid appointment
      (ii) Claims must be within scope of appointment

2) No Consent—must go through tests to determine.
   (a) Statutory Authority of state’s jurisdictional statutes
      (i) Statute for resident defendants
      (ii) Statute for non-resident defendants (long arm statutes)
         (a) California kind—use 14th amendment tests
         (b) Enumerated acts—look at act to find list of acts that qualify, look
             at legislative history, judicial decision for interpretation of how to
             apply the statute.
   (b) Constitutional Authority—granted by due process clause of 14th
       amendment. Ways to get PJ over non-resident defendant:
      (i) Personal service in forum state—Burnham
      (a) Exceptions to Burnham:
         i. Defendant must knowingly and voluntarily be in the state
         ii. Corporations can’t be served based upon transient presence of
             officer (must be agent for process in state)
         iii. Partnerships can be served if knowingly/voluntarily in state
      (ii) Contacts within the state—add up and then ignore unilateral
          activities of plaintiff that cause defendant to be there (or a product)—
          Hanson
      (iii) General Jurisdiction—can be sued on any claim in that state
          (a) Clear rules—resident of state, incorporated in state—Helicol
          (b) Perkins possibility—substantial, continuous business activity in
              state (no ruling from Supreme Court on this)
          (c) Reasonableness inquiry—some courts apply this like for specific
              jurisdiction and others don’t—Helicol supposedly added up
              contacts but then threw out non-relevant ones
      (iv) Specific Jurisdiction—this is different depending on if it is in
          personam or in rem jurisdiction.
          (a) Minimum Contacts test for PJ
             i. Agents in the state—International Shoe test
             ii. Purposeful Availment—
                a. McGee—positive treatment—company solicited business
                   for insurance in a distant forum
b. **WWVW, Hanson**—negative treatment—item in stream of commerce and unilateral movement of customer to another state.

iii. Stream of Commerce—different based upon who placed object in forum state.
   a. **Gray**—defective parts that manufacturer knew would end up in forum state—direction to state before final sale (+ PJ)
   b. **WWVW**—unilateral movement by customer (-PJ)
   c. **Asahi**—small safety valve for international defendants (-PJ). Set forth a 5 factor test for reasonableness:
      i. Burden on defendant
      ii. Interests of forum state
      iii. Plaintiff’s interest in obtaining relief
      iv. Interest of ‘interstate judicial system’ in efficient resolution
      v. Shared interest of several states in promoting substantive policies

iv. Four factor test for contracts—**Burger King**
   a. Prior negotiations
   b. Contemplated future consequences
   c. Terms of the contract
   d. Parties actual course of dealings

v. Directing defamatory comments into forum state
   a. **Keeton**—plaintiff had little contact with forum state but defendant had contact so jurisdiction upheld (specific jurisdiction only)
   b. **Calder**—writer/editor were both from FL and plaintiff from CA. Neither were ever in CA but they directed the defamatory article there so PJ was upheld in CA.

vi. Directing business into the forum state
   a. **McGee**—TX company solicited business (insurance policy) from citizen of CA. Because reached into state for business, PJ upheld.

vii. Internet activity—
   a. **Zippo**—established a sliding scale between passive websites (allow postings) and active websites (allow bilateral info transfer) to establish PJ
   b. **Revell**—used a directed approach much like the one for defamation lawsuits (**Keeton & Calder**)

viii. Brennan’s argument (no longer persuasive) at end of **WWVW** that emphasized state’s interests over minimum contacts (inverse **Asahi**)

(b) Lawsuit must be related to the contacts—sliding scale from **International Shoe**

(c) Fair Play and Substantial Justice?—5 factors from **Asahi**
(v) In Rem Jurisdiction—*Shaffer v. Heitner*

(a) All types of state court jurisdiction must satisfy the reasonableness standard set forth in *International Shoe* and its progeny.

(b) Types of In Rem Jurisdiction

i. True In Rem—seizure of property in state that is subject of controversy (quiet title actions, probate proceedings)—will almost always satisfy reasonableness

ii. Quasi In Rem—Type I—seizure of property to satisfy a claim (foreclosure on mortgage)—will almost always satisfy reasonableness

iii. Quasi In Rem—Type II—seizure of property unrelated to claim simply to get person in state for jurisdictional purposes—probably will not satisfy reasonableness

B) Federal Court Inquiry

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(c) By appointment of an agent to receive process—must have:
   (i) Valid appointment
   (ii) Claims must be within scope of appointment

2) No Consent

(a) Statutory Authority—FRCP 4(k) and others

   (i) 4K1A—general rule is that they will be subject to jurisdiction in federal court if they were also subject to jurisdiction in state court in same district (so this is no consent state court inquiry above)

   (ii) 4K1D—nationwide service provision (when authorized by federal statute)—usually used in federal regulatory board cases

   (iii) 4K2—claims arising under federal law—when US is plaintiff or have foreign defendant

      (a) Federal law
      (b) Jurisdiction is constitutional
      (c) No state would have PJ

***All of above require proper service of process

(b) Constitutional—look to due process clause of 5th Amendment

   (i) Issue only when have exceptions to 4K1A (4K1D, 4K2)

   (ii) Two views on the standard of 5th Amendment

      (a) National Contacts—aggregate of all contacts with the US as a whole

      (b) National Contacts + Reasonableness (minority)—even if have many contacts, forum still must be reasonable
II Notice—closely related to PJ and without it, judgments don’t stand

A) Requirements—as defined in Mullane

1) Notice must be given to apprise interested parties of the pendency of action and give opportunity to present objections. Should give reasonable time to make appearance

2) When identity of parties is known, personal service of notice is required (or at least attempt at last known address)

3) If identity of parties is unknown then public posting of notice is acceptable. Also acceptable when it would be unduly burdensome to discover the identity of parties

4) Exceptions on service rule is for mentally handicapped persons or minors—their guardians must be served. Blind and illiterate persons can receive routine service.

5) Local jurisdictional requirements are those above and beyond constitution and must be checked.

III Venue

A) State Court Venue

1) Largely controlled by statute

   (a) Maryland Code—typical example

      (i) §6-201—general rule for individual defendants and multiple defendants—county where defendant resides, has business. A corporation can be sued where it maintains principal offices within state. Multiple defendants can be sued in any county where any one resides or the act/omission took place.

      (ii) §6-202—additional venue options in special circumstances—divorce, annulment, action against corporation (without PPB in state) can all be where plaintiff resides.

      (iii)§6-203—exceptions to the general rule for interests in land, property that lies in more than one county are main exceptions

   (b) Local action rule—venue is proper when the dispute involves land within that jurisdiction

B) Federal Court Venue

1) 28 USC §1391

   (a) Diversity Jurisdiction—under 28 USC §1332 or supplemented with §1367

      (i) Judicial district where any of defendants reside, IF all reside in the same state

      (ii) Judicial district where a substantial part of act/omission giving rise to claim took place OR where substantial part of property exists

      (iii)Judicial district in which defendant would be subject to personal jurisdiction IF no other suitable district exists

   (b) Federal Question—under 28 USC §1331 and supplemental under §1367

      (i) Judicial district where any defendant resides, IF all reside in the same state
(ii) Judicial district where a substantial part of act/omission giving rise to claim took place OR where substantial part of property exists
(iii) Judicial district in which any defendant may be found, IF no other suitable district exists
(c) Corporate Defendants—residence is defined by part (c) of statute—any judicial district where it is subject to PJ. If separate districts within same state, each district must be treated as separate state for residency determination in venue. If no district satisfies these criteria then the one where defendant has most significant contacts will serve as proper for venue purposes.

C) Change of Venue
1) State Courts—transfers must be to another court within the same state. If no other suitable court within the state then must dismiss under “forum non conveniens” because cannot transfer out of state.
2) Federal Courts—
   (a) 28 USC §1404(a)—venue is correct, inconvenient for one of parties
      (i) Permits transfer to another court where suit might have been brought originally
      (ii) Transfer can be by either plaintiff or defendant
      (iii) “Van Dusen” lock in rule—the law of original court goes with the case to the new court
          (a) Exception is where original court did not have PJ over defendant—“Goldlawr”—the law does not travel with case here and must be transferred to court with both PJ and proper venue
      (iv) Court must weigh Gilbert factors in transfer
          (a) Convenience of parties
          (b) Convenience of witnesses
          (c) Interest of justice
   (b) 28 USC §1406—venue is not proper (can either request dismissal or transfer)
      (i) This is a mandatory transfer to a court that would be a proper venue
      (ii) Must be a court that would have been originally proper
      (iii) Law does not transfer with the case (since venue was not proper anyway)
      (iv) Even if court did not have PJ could still transfer — “Goldlawr” transfer
      (v) Not going to get forum non conveniens dismissal from federal court unless you are a foreign defendant—domestic defendants will just get transfer to new forum—all of the Gilbert factors will cut against dismissal for a domestic defendant
IV Subject Matter Jurisdiction

A) State Courts—are ‘as a whole’ courts of general subject matter jurisdiction except where jurisdiction is reserved to the Federal Courts.

B) Federal Courts—courts of limited subject matter jurisdiction. This is something that cannot be waived, consented to. Plaintiff must establish that has a basis for federal SMJ (usually in complaint).  
***All federal courts have jurisdiction to determine if they have jurisdiction—“bootstrap principle”—so cannot let default then challenge SMJ in another court***

1) Constitutional Grant—Article III, §2—is either defined by the subject matter (federal question) and by the citizenship of the parties.

2) Statutory Grant—more limited than the Constitutional grant.
   (a) §1331—Federal Question
      (i) Well-pleaded complaint rule—requires that some federal law must be a part of a well pleaded complaint (needed to establish one of prima facie elements)
      (ii) Federal law must be central to the issue being adjudicated—always satisfied when federal law creates the cause of action or when there is either an express or implied cause of action under federal law.
      (a) Also when state law creates the issue but strong federal interest—Smith & Grable
      (iii)Declaratory Judgment ‘wrinkle’—to bring action for declaratory judgment under §1331 there must have been a basis for coercive relief under federal law by one of the parties—Skelly Oil rule.
   (b) §1332—Diversity of Citizenship
      (i) Grant for
         (a) citizens from different states (diversity)—Mas—Ms. Mas
         (b) citizen of state and foreigners (alienage)—Mas—Mr. Mas
         (c) satisfies the amount in controversy requirement ($75,000)—
            i. Red Cab rule that it must be a good faith estimate of damages
            ii. If bad faith then can be forced to pay defendant’s costs and dismissed
            iii. For injunctive relief the amount is estimated by the cost to performance or harm is >$75,000
            iv. Aggregation of Claims to meet amount in controversy—
               a. if only one party on either side of controversy can aggregate claims to meet the amount in controversy requirement—even non related claims joined under R18(a).
               b. if multiple parties on either side then no aggregation allowed—even if transactionally related
                  i. derivative claims not allowed
                  ii. class action exception—if one class representative meets requirement then all others can piggyback under §1367.
         (ii) Must be complete diversity—no parties on either side of suit can be from same state—Strawbridge
(a) Exceptions:
   i. Federal interpleader rule—allows minimal diversity when one of primary adverse claimants are diverse
   ii. Large class actions (>5,000,000) has minimal diversity requirements

(iii) Citizenship determination
   (a) Individuals—
      i. If US citizens then state of domicile
         a. Each person has only ONE domicile
         b. To change domicile must take up residence in different place WITH intent to remain there
      ii. Exceptions:
         a. US citizen domiciled abroad
         b. Stateless alien—not citizens of any country
      iii. If permanent resident alien then citizen of state where domiciled

(b) Corporations—
   i. Citizens of states where incorporated AND where principal place of business is located
      a. Tests for principal place of business
         i. Nerve Center Test—Scot Typewriter—for far flung and varied activity. The PPB is the nerve center from which all things radiate out.
         ii. Center of Activity—Kelly v. US Steel—activities of most significance rather than volume
         iii. Total Activity Test—J.A. Olson—combination of nerve center and center of activity. When corporation is far flung the nerve center will be more probative whereas when place of operation is one place and execs are in another then POA more important. (Majority Rule)

(c) Others—
   i. Unincorporated associations—citizen of every state where a member resides (labor unions)
   ii. LLCs/partnerships—citizens of states where partners are members

(iv) Exceptions:
   (a) Representatives—§1332(c)(2)—if suing as representative for someone else then citizenship of relevance is the person you are representing
   (b) Assignment of claims—§1359—cannot manufacture diversity by assignment of claim (legitimate assignments for value are good)
   (c) Domestic Relations—involving issuance of divorce, alimony, child custody are not heard by federal courts even though diversity exists. Any other domestic relationship outside the above named are okay—Barber, Ankenbrandt
(d) Probate—federal courts will not probate or administer a decedent’s estate nor appoint an executor (Anna Nicole Smith case pending)

(c) §1367—Supplemental Jurisdiction

(i) Grant for claims arising out of same transaction or occurrence—is as broad as Article III of Constitution permits—this covers all §1331 claims

(ii) Limitation on §1367 for pure diversity cases (§1332)

(a) No claims by plaintiffs against defendants joined under:
   i. Rule 14—third parties
   ii. Rule 19—compulsory joinder of parties
   iii. Rule 20—permissive joiners **most important—no claims by plaintiffs against multiple defendants
   iv. Rule 24—intervention

(b) No claims by persons joined as plaintiffs under Rule 19

(c) No claims by persons brought in as plaintiffs under Rule 24

(iii) Rule 20 “gap”—allows claims by multiple plaintiffs joined under Rule 20 against a single defendant.

(a) Exxon Mobile—2005 Supreme Court case that ruled on the gap
   i. Allowed non-independent claims by multiple plaintiffs against single defendant when the problem was the amount in controversy requirement—when anchor was §1332
   ii. Disallowed claims by multiple plaintiffs against single defendant when the problem was a lack of diversity between non-independent plaintiff and defendant—lack of diversity destroyed the anchor claim

(d) Removal Jurisdiction—governed by 28 USC §1441, 1446, 1447

(i) §1441—civil cases can be removed from state courts IF the federal courts would have had original jurisdiction over controversy

(a) This information comes from the pleadings (complaint)

   i. Can block removal by failing to assert a federal question—artful pleading doctrine—cannot be challenged by defendant
   ii. Join defendant simply to destroy diversity—defendant can challenge ‘sham’ party
   iii. If case is a pure diversity case (§1332) and was filed in defendant’s home state court then cannot remove to federal court

(b) §1446—procedure for removal

   i. Defendant must:
      a. file a notice of removal with federal court (across street from state court) containing:
         i. Short and plain statement of grounds for removal
         ii. Copy of all pleadings, process, etc.
      b. Give copy of removal to plaintiff
      c. Must also file copy with the state court (across street)
   ii. Must be done within 30 days of receiving original summons/complaint
iii. Decisions about proper removal are made by federal court
iv. Can get §1404(a) transfer once in federal court
v. If multiple parties:
   a. All must agree to remove—unanimity rule—Noble
   b. Exception for defendant’s named but not served
   c. If plaintiff adds party later that will allow removal (if not originally present) then have 30 days from addition
vi. One year limit on removal in §1332 cases (not §1331)
(c) §1447—once removed the federal court picks up right where state court left off (using FRCP rules)
(d) Defendant must file answer with removal if not already filed
(e) Plaintiff must challenge within 30 days of removal
(e) **Challenging Jurisdiction**
   (i) Direct Attack—challenge jurisdiction in the court where plaintiff files suit.
      (a) For PJ challenges must enter special appearance or Rule 12 motion
      (b) For SMJ challenges—
         i. All courts have jurisdiction to decide if they have jurisdiction—“bootstrap principle”
         ii. If ruling is against you then you are stuck with it until appeal
   (ii) Collateral Attack—allowing default then raising challenge when plaintiff comes to collect on judgment
      (a) For PJ challenges this works—good if:
         i. Case is weak on merits
         ii. Want to deprive plaintiff of chosen forum
      (b) Collateral attack does NOT work for SMJ because of bootstrap principle—must challenge in court where suit is brought
V Pleadings

A) Three types—
1) Common Law—based on writ system—very restrictive
2) Code Pleading—
   (a) less restrictive than writ
   (b) must plead the ultimate facts
      (i) too little detail—simply legal conclusions is bad
      (ii) too much detail—evidentiary facts is also bad
   (c) can be very technical
   (d) used in a few states
3) FRCP (notice) Pleading—no facts needed, simply notice to defendant

B) Complaint—
1) Purpose—Rule 8(a)
   (a) Allegation of jurisdiction (SMJ)
   (b) Statement of claim
   (c) Demand for relief
   (d) Form of Complaint—Rule 10
      (i) Name of court
      (ii) Party names
      (iii) Identification of document
      (iv) Docket number
      (v) Jury trial request
      (vi) Body of complaint
         (a) Each claim presented in separate numbered paragraph
         (b) Can incorporate by reference prior allegations so don’t have to repeat
2) Challenging Complaint
   (a) Factual sufficiency—
      (i) FRCP districts—
         (a) Rule 12(b)(6)—failure to state a claim—either legal or factual sufficiency
         (b) Rule 12(e)—motion for more definite statement (pre-answer)
         (c) Rule 12(f)—motion to strike
      (ii) Code districts—
         (a) Special demurrer—like R12(b)(6)—used most frequently
         (b) Motion for bill of particulars
         (c) Motion to strike
3) Heightened Pleading—Rule 9 for disfavored claims
   (a) Fraud—details of fraudulent act must be alleged specifically but general state of mind may be general
      (i) Exception in 2nd circuit—Cosmas v. Hassett where required increased information about state of mind (Securities Fraud is now codified for heightened standard)
   (b) Special Damages—for damages that are extraordinary considering what happened—“eggshell plaintiff”
(c) Claims against Municipalities (Judge made exception)—5th circuit had increased pleading standards for these claims, Supreme Court struck down because not in Rule 9

C) Answer or Other Options—
1) Pre-answer motion—you can amend your pre-answer motion with leave of court in most cases—this is not codified by any rule though.
   (a) Rule 12—
      (i) Must answer within 20 days of receiving summons/complaint
      (ii) Defenses that may be made by motion rather than pleading:
         R12(h)(3)
            (a) Lack of SMJ—cannot be waived, can be raised anytime
         R12(h)(1)
            (c) Improper venue
            (d) Insufficient process—deficiency in complaint
            (e) Insufficient service of process—deficiency in service
         R12(h)(2)
            (f) Failure to state a claim
            (g) Failure to join a defendant
      (iii) These defenses must be raised in motion before responsive pleading
      (iv) Defenses must be consolidated in the pre-answer motion—
         (a) with exception of those covered by R 12(h)(2)—
            i. judgment on pleadings (summary judgment)
            ii. motion at trial (JMOL)
         (b) All federal courts require you to raise PJ with other R12 defenses, however some courts will limit PJ objections to special appearances only—so if you consolidate then you will waive PJ b/c will be general appearance

2) Answer—
   (a) Options—
      (i) Admit—issues admitted are established as fact and are not contestable at trial
      (ii) Deny—this joins the issue making it amenable for adjudication
      (iii) Without sufficient information to admit or deny—same effect as denial although softer (good to do if not sure to avoid R11 sanctions)
      (iv) No response—same as admit
   (b) Denial types—
      (i) General denial—deny everything—be careful because things like citizenship are often alleged in complaint so would have to admit this
      (ii) Specific denial—deny parts of complaint, admit others—line by line approach
      (iii) Qualified general denial—admit a few things then deny all rest
      (iv) Argumentative denial—counter with alternate facts but don’t specifically deny—so this is an admission
      (v) Negative pregnant—denial too literal and specific that it invites general admission
   (c) Affirmative Defenses—Rule 8(c)—“yes, but” defense—introduction of new matter than can defeat the claim. Plaintiff does not have to respond to
this unless directed by court. Can be raised in post-answer motion for summary judgment.

(d) Counter claims/cross claims—**Rule 7**—should also be raised in the answer

3) Non answers—Default—**Rule 55**
   
   (a) To obtain default plaintiff must first prove that defendant was served and did not participate in time required.
   
   (b) Clerk-entered default **R55(b)(1)**—must show
       
       (i) Sum certain—known amount or can be calculated
       (ii) Defendant failed to appear or participate at all
       (iii) Person is not an infant or incompetent
   
   (c) Judge entered default—if cannot meet above requirements then must go before judge and possibly have hearing
   
   (d) Setting aside default—for good cause may set aside default
   
   (e) Setting aside default judgment—**Rule 60(b)**
       
       (i) Mistake
       (ii) Inadvertence
       (iii) Surprise
       (iv) Excusable neglect

D) **Amended Pleadings—Rule 15**

1) May amend once as matter of right if filed:
   
   (a) Before any responsive pleadings
   (b) Within 20 days if no responsive pleading needed
   (c) May get permission from either other side or judge

   - **Foman v. Davis**
     
     - Reasons for denial:
       
       (a) Undue delay
       (b) Bad faith or dilatory motive
       (c) Repeated failure to cure deficiencies by amendments previously allowed
       (d) Undue prejudice to opposing party
       (e) Futility of amendment

2) Amendment to conform to evidence at trial—if issue is not pled but is tried by either express (pretrial order/conference) or implied (no objection when raised at trial) consent then freely amend to add these issues if:
   
   (a) Furthers case on merits
   (b) Not unduly prejudicial to other party

3) Relation Back of Amendments—often used to add issue for which statute of limitations has run. Can do this when:
   
   (a) Applicable statute of limitations allows relation back in this circumstance
   (b) Claim arises from same basic set of events as original claim
   (c) More difficult to change party name. Must satisfy:
       
       (i) **Rule 15(c)(2)** about same set of events
       (ii) New defendant must have received original notice that but for mistake in identity would have been served
       (iii) Must be served within original time frame set forth in **R4(m)** of 120 days
4) Amendment to add newly discovered material—always requires leave of the court and is never a right

E) **Veracity in Pleadings**—three ways to sanction bad actors:

1) **Rule 11**—is only applicable to pleadings and not to discovery
   - (a) Certifies that when paper is filed with court it:
     - (i) Is not being submitted for improper purpose (harassment, delay, etc)
     - (ii) Claims, defenses, other legal contentions are warranted under existing law or is a non-frivolous argument for extension, modification, reversal of law (support with dissents, law reviews, opinions of others)
       - (a) Parties can never receive monetary sanctions for violation of this provision—only attorneys
     - (iii) Allegations and other factual contentions have evidentiary support or could be obtained after discovery
     - (iv) Denial of factual contentions are warranted on evidence or lack of information
   - (b) Only lawyers or pro se plaintiffs can incur the above Rule 11 violations, although parties can be held vicariously liable if contributed to the problem
   - (c) Standard is Reasonably Prudent Lawyer Under the Circumstances—so solo practitioners and those on short notice are given a bit of leeway
   - (d) **Rule 11(c)(1)(a-b)**—Sanction tracts—
     - (i) Safe Harbor Provision—**Rector**—must give opposing counsel 21 days heads up to correct deficiency before filing papers with the court.
     - (ii) Can be done sua sponte by the judge
   - (e) Sanctions can be against
     - (i) Attorneys
     - (ii) Firms
     - (iii) Parties
     To get attorney’s fees under Rule 11 must:
     - (iv) be responding to motion by a party
     - (v) have gone through other non-monetary sanctions/fees
     - (vi) be a very severe offense
   - (f) Cannot impose monetary sanctions unless have special finding that a conduct needs to be deterred and this is the only way to do it.
   - (g) **Rule 11(c)(2)**—judge has discretion on whether or not to impose sanctions. If choose to do so then they decide what sanctions and on whom (verbal, fees, service, monetary, etc.)

2) **28 USC §1927**—sanctions only apply to lawyers who multiply proceedings and drive up costs.
   - (a) Standard is usually unreasonableness although some courts require a showing of bad faith—SPLIT
   - (b) Can get attorney’s fees—only the excess fees caused by the bad behavior
   - (c) Usually ask for with **Rule 11** sanctions

3) Inherent power of the courts—very broad discretion, can apply to anyone involved in proceeding who interferes with the administration of justice in the court.
(a) Must show bad faith
(b) Can get attorney’s fees—resulting from the acts of bad faith
(c) Usually like to try Rule 11/§1927 first
(d) Can ask for in addition to above sanctions

VI Discovery—courts give wide latitude in this area, can be long and expensive. Policy reasons for broad discovery include: providing a reality check for litigants; hone issues for trial; eliminate surprises at trial and “trial by ambush”.

A) Tools—

1) Depositions—questions under oath to anyone having information (including non-parties)
   (a) Rule 30—lawyers present
      (i) Rule 30(b)(6)—deposition of a corporation that requires a statement of what you are going to ask and they will appoint an agent to come and be deposed.
   (b) Rule 31—pre-scripted questions asked by court reporter
   (c) If deposing a non-party must use a subpoena to require to appear. Can also use a subpoena duces tecum to require that they bring documents as well.

2) Interrogatories—Rule 33—written responses under oath of parties in suit, usually used prior to depositions, max of 25

3) Requests for production—Rule 34—allows party to request documents, entry to premises from other party only. Used to get information ahead of depositions.

4) Medical examinations—Rule 35—always requires leave of court and must show:
   (a) Physical or mental condition is in question
   (b) Good cause for exam
   (c) Name physician giving exam
   (d) Must be a party
   (e) Paid for by requesting party
   (f) Examinee gets copy of report
   (g) Exam can only be for a party or someone in custody of a party (child but not employee)
   (h) Does not have to be a MD, can be chiropractor, physical therapist, etc.

5) Requests for admission—Rule 36—
   (a) Forces party to admit or deny any discoverable matter relating to statements of opinion/fact
   (b) Must be on parties
   (c) If not denied then deemed admitted
   (d) Must give reasons why
   (e) If no response then deemed admitted

6) Required disclosures (federal court only)—disclosures that are required even though no one asked for them (initial disclosure)—added to federal court in 1993 and are controversial because are against the adversarial system
(a) **Rule 26(a)(1)**
   (i) Information of all persons having information
   (ii) Copy of all documents used to support claims/defenses
   (iii) Statement of damages
   (iv) Insurance policies of defendant that may cover costs
(b) **Rule 26(a)(2)**—expert witness disclosure—90 days before trial
(c) **Rule 26(a)(3)**—pretrial disclosures of evidence, witness list, etc

7) Discoverable information—discovery is broader than what can be admitted at trial.
   (a) Privileged information is communications between attorneys/clients, husband/wife, priest/parishioner and cannot be forced into disclosure.
   (b) Trial preparation material—materials prepared in anticipation of litigation. You can be forced to disclose this if the other party shows an extreme hardship.—*Hickman v. Taylor*
   (c) Opinion work product—contains attorneys thoughts or opinions on the credibility of witnesses, etc. Can NEVER be forced to disclose this.
   (d) Work created in the ordinary course of business (standard reports on products) is not protected by the work product rule.
   (e) Protective orders—order that shields parties or non parties from annoyance, embarrassment, oppression, or undue burden of expense.

8) Sanctions—there are violations that warrant a two step process and other that can be obtained by a one-step process
   (a) Two-step process—used when party has participated somewhat
      (i) Motion to compel—court order to cooperate
      (ii) Other sanctions—case thrown out, contempt of court, etc.
   (b) One-step process—used when party has not participated in any way by failing to appear for a deposition, failed to respond to interrogatories, failed to serve written response to request for production.
      (i) Can go directly to severe sanctions

### VII Adjudication

#### A) Right to a Jury
—default is judge trial unless request otherwise—governed by 7th amendment

1) Law claims—those asking for monetary relief—right to jury
2) Equity claims—asking for injunctive relief—no right to jury
   (a) Exceptions:
      (i) Replevin of personal property
      (ii) Ejection from real property
3) If have mixed then jury decides law first then judge equity afterwards
4) Ask for in complaint, answer, or judge can order
5) Size of 6-12 (usually 12)
6) Types of Jury verdicts:
   (a) General verdicts—announces winner without any reason
   (b) Special verdicts—answers discrete questions drafted by lawyers and judge decides winner
B) **Summary Judgment—Rule 56**—purpose is to challenge the legal sufficiency of the evidence

1) Three main cases where summary judgment is appropriate:
   (a) Parties agree on facts and dispute is solely on law
   (b) Parties disagree on one or more facts but evidence is overwhelmingly on one side—most common
   (c) Parties disagree but it is not material to disposition of case

2) **Anderson v. Liberty Lobby**—standard is the reasonable jury (could they find for the non-moving party?) and not mere scintilla of evidence—standard is related to the burden of the moving party at trial (clear and convincing versus preponderance of evidence)

3) Can consider:
   (a) Pleadings
   (b) Depositions
   (c) Answers to interrogatories
   (d) Admissions on file
   (e) Affidavits—personal knowledge—**Rule 56(e)**
      (i) This is different from 12(b)(6) that can only consider pleadings

4) Non moving party must present something to refute motion—may not simply reiterate pleadings

5) All evidence must be considered in the light most favorable to the non-moving party and must draw all reasonable inferences

6) Moving party must show that there is no issue of material fact
   (a) **Celotex**—moving party has initial burden to show no issue of material fact but does not have to present evidence if do not have burden of proof at trial (sit back and poke holes method)
   (b) **Adickes**—some lower courts thought that moving party must submit affidavits but not required—may do this if have something to refute one of prima facie elements (refute method)

7) No assessment of credibility may be made or weighing of evidence

8) **Rule 56(f)**—Plaintiff can avoid summary judgment if can show that they do not have evidence until discovery—hail mary last chance

9) Judge has discretion to not grant summary judgment

C) **JMOL—Rule 50**

1) Timing:
   (a) By defendant at close of plaintiff’s evidence
   (b) By either party at close of all evidence—always do this to preserve right for renewed JMOL

2) Standard:
   (a) **Anderson v. Liberty Lobby**—same reasonable jury standard and burden of proof as for summary judgment
   (b) **Reeves v. Sanderson Plumbing**—must consider all evidence, not only that favorable to non-moving party—HOWEVER, still view in light most favorable to non-moving party
3) Renewed JMOL—raised after jury verdict by a party that has raised it at close of all evidence—**Rule 50(b)**
   (a) Must make the motion within 10 days after entry of judgment
   (b) Can include a motion for new trial with JMOL motion
      (i) Judge can issue conditional ruling on new trial if decide to grant
          JMOL—saves heartache later
   (c) JMOL is reviewed under *de novo* standard

4) New Trial—**Rule 59**
   (a) Must be filed within 10 days of final judgment
   (b) can be granted for:
      (i) Mistake in jury instruction
      (ii) Mistake in ruling on evidence
      (iii) Newly discovered evidence
      (iv) Misconduct by participant (juror)
      (v) Verdict against weight of evidence—most common type
   (c) IS not final order and is not appealable
   (d) Judge in this case MAY make decisions on credibility and also weigh the evidence
   (e) Standard is that judge must give deference to jury verdict, but if after this still firmly disagree then can order new trial
   (f) New trial on damages only—only when it “shocks conscience of court”
      (i) Other methods for damage correction:
          (a) Additur—damages too low—not available in federal court
          (b) Remittur—damages too high

**D) Judgments Set Aside—** **Rule 60(b)**—
1) Can do so if:
   (a) Mistake, Inadvertence, Surprise, Excusable neglect
   (b) Newly discovered evidence that could not have been obtained with due diligence
   (c) Fraud, misrepresentation by other party
   (d) Judgment is void
   (e) Judgment has been satisfied, discharged
   (f) Any other reason justifying relief
2) Must be made within a reasonable time, not to exceed one year

**VIII Choice of Law**

**A) Background**—
1) Choice of law options
   (a) Vertical—federal law or state law (focus of Erie)
   (b) Horizontal—one state or another state’s laws
2) Rules of Decision Act—**28 USC §1652**—In civil cases the laws of the several states will apply unless there is a federal law or provision on point
   (a) *Swift v. Tyson*—interpreted this to mean that it was only the codified laws of a state and not the common laws. This allowed federal courts to develop a body of federal common law
(b) **Erie**—allowed state common law to apply as well and forbade the federal courts from making general federal common law

3) Rules Enabling Act—all state laws in conflict with the FRCP are invalid. This would violate the supremacy clause.

**B) Erie Analysis**—has two prongs—**Hanna** prong and **Erie** prong

1) Is there a federal constitutional/statutory provision or FRCP “on point”?
   (a) If yes – Hanna Analysis:

2) Is it valid?
   (a) If yes, apply it (Supremacy Clause).
   (b) If no – Erie Analysis:
      (i) What rule would state court apply?
         (a) Is state rule “clearly substantive”?
         i. If yes, apply state rule.
         ii. If no, would FC’s failure to apply state rule undermine “Erie Policy”?
            a. If yes, apply state rule, unless strong federal reason not to do so, despite offense to Erie Policy.
            b. If no, apply federal common law rule instead of state rule

**IX Joinder**—allows all claims between parties or from single transaction or occurrence to be raised in single lawsuit. Rules DO NOT expand the jurisdiction of federal courts—simply procedural—must still have basis for federal SMJ

**A) Complexity of Case Issues**

1) **Rule 42(b)**—claims, issues, parties can be tried separately when confusing or for convenience. Separate hearings but will retain same docket number, one judgment issued, one appeal
   (a) Can be raised sua sponte and is protected by abuse of discretion standard

2) **Rule 20(b)**—separate trials to protect a third party from embarrassment—very narrow

**B) Joinder of Claims**

1) **Rule 18(a)**—allows joinder of claims by parties with claim for relief (original, counter, cross, third party claims) against another party for anything that they have
   (a) Pendent Jurisdiction—
      (i) If §1331 claim then constitutional because related claim is part of same case/controversy—**Gibbs**
      (ii) If §1332 claim then simply aggregate all claims against defendant to meet amount in controversy requirement
      (iii) If had pendent SMJ on claims that did not have PJ or Venue for then sometimes courts would recognize pendent PJ or pendent venue or defendant may waive these defenses.
   (b) Ancillary Jurisdiction—allowed defendant’s counter claim to come in because it was related to plaintiff’s original claim. Also applied to transactionally related cross claims, third party claims (under Rule 14)

2) **Rule 42(a)**—common questions can be consolidated into joint hearing or trial
3) **Rule 13**—
   (a) **Rule 13(a)**—compulsory counterclaims—must be asserted by defendants in the answer or lost forever—will ALWAYS have supplemental jurisdiction
      (i) Exceptions:
         (a) if at time action is commenced the claim was already asserted in another lawsuit
         (b) if original claim is an in rem claim and the counterclaim is related to that then they don't have to assert it because it would open it up to in personam jurisdiction.
         (c) if claim requires other parties be joined who the court would not have PJ over
         (d) a claim that you do not have at time you are required to serve your pleading (answer) (can file with supplemental pleading under 13(e)).
   (b) **Rule 13(b)**—permissive counterclaims—once you have a compulsory counterclaim you can add all others under this rule (like 18(a))—may or may not have supplemental jurisdiction—if related under Gibbs may be allowed in some courts
   (c) **Rule 13(g)**—cross claims against co-parties—claims against co-parties to original suit—for either plaintiffs or defendants—once have one claim can add all others under R18(a)

C) **Joinder of Parties**
   1) **Rule 20(a)**—may join all parties as either plaintiffs or defendants that can assert rights/claims arising out of transactionally related event/occurrence
   2) **Rule 42(a)**—common questions can be consolidated into joint hearing or trial bringing all defendants to same federal court (through §1404(a) transfers)
   3) Pendent Party Jurisdiction—for §1331 claims against defendant allowed related claims against another defendant (Supreme Court rejected in Finley)
   4) **Rule 13(b)**—allows joinder of additional parties against whom can assert a counterclaim or cross claim—joined under requirements of Rules 19 and 20
   5) **Rule 14**—joinder of third parties by defendant or plaintiff when a claim can be asserted against them arising from same occurrence.
      (a) Third party defendants:
         (i) must be liable to third party plaintiff for either indemnification or contribution if they should be found to be liable to plaintiff
         (ii) Can assert any defense that original defendant may have against plaintiff
         (iii) Can assert own cross-claim against plaintiff (Rule 14(a) claim with no name) and would have supplemental jurisdiction under §1367.
      (iv) Claims supported by §1367 towards parties joined under **Rule 14**—
         (a) Impleader under 14(a)—brings in the third party defendant
         (b) Claims by third party defendants against plaintiff (R14(a) with no name)
      (v) Claims not supported by §1367 towards parties joined under **Rule 14**:
(a) Claims by original plaintiff against third party defendant—Kroger and §1367
(b) Compulsory counterclaims by plaintiff against third party defendant—this was a SPLIT before §1367—
   i. Some lower courts would allow since plaintiff was now in a defensive posture
   ii. Other courts would not allow
   iii. §1367, read literally, knocks it out—current Supreme Court probably would not allow

X Preclusion Doctrines—based upon the policy that we don’t want to allow litigants to litigate claims more than once. It will clog up the court system, waste judicial resources, have inconsistent results, and allow actions to remain open for indefinite periods of time

A) Claim Preclusion—“res judicata”—claimant can only litigate a claim once in a court with competent jurisdiction to a final judgment.
   1) Requirements for claim preclusion—
      (a) Same claimant litigating against the same defending party
      (b) Same claim involved in both suits—SPLIT
          (i) Legal rights—distinguishes between personal and property damages
          (ii) Same transaction or occurrence—Majority view
          (iii) Earlier suit ended in valid, final judgment on the merits

B) Issue Preclusion—“collateral estoppel”—only one chance to litigate an issue—when litigated in prior lawsuit the issue will be treated as fact in the later one.
   1) Requirements for issue preclusion—
      (a) Earlier lawsuit must have ended in valid, final judgment on the merits
      (b) Must have contained the same issue (litigated and determined)
          (i) Although the standard of proof may be different between the two cases—beyond a reasonable doubt versus a preponderance of the evidence
      (c) Issue must have been essential to the judgment—would the prior case have come out differently if the issue had been decided differently
      (d) Party to be precluded must have been a party to the first suit
      (e) Party to use preclusion must have been party to first suit
   2) Some jurisdictions recognize “non-mutual” issue preclusion where the party to use preclusion does not have to be a party in the first suit. However they are more likely to allow defensive, non-mutual issue preclusion rather than offensive, non-mutual issue preclusion (b/c encourages plaintiffs to sit back and wait for a verdict before suing)
   3) Inter-jurisdictional issue preclusion—when cases have been tried in different court systems—this doctrine has the second court apply the issue preclusion doctrines of the first court (issuing the judgment) to the case. Like full faith and credit.

Mutuality of parties Required in all jurisdictions
