* **II. Jurisdiction Over Persons and Property**
  + Subject to two restrictions, (1) due process and (2) state law (long-arm statutes)
* **A. Territoriality and Consent**
  + *Pennoyer v. Neff* - The State has physical power within its territory over the things (*in rem*) and people contained therein. These powers are very limited to anything out of the State.
    - Very limited exceptions (*e.g.* fraud *Wyman v. Newhouse*).
  + *Hess v. Pawloski* - Consent to the appointment of an agent for the service of process can be implied by taking part in particular activities within a State (*e.g*. driving).
* **B. The Minimum Contacts Standard (Due Process Test)**
  + *International Shoe v. Washington* - Long arm statute jurisdiction complies with Due Process if sufficient contacts exists with the forum state so that suit is consistent with traditional notions of fairplay and substantial justice.
    - Specific jurisdiction - Contacts and the claim are related. (*e.g. McGee v. International Life*; one contact may be sufficient).
    - General jurisdiction - The claim is unrelated to the contacts, yet a state still has jurisdiction (will require continuous and systematic contacts *e.g. Perkins v. Benguet*).
* **C. State Long-Arm Statutes**
  + Three varieties: laundry list, limits of due process, hybrid - "arising out of the business done in the state"
* **D. Modern Development: Purposeful Availment, Reasonable Anticipation, "New" *In Rem* Jurisdiction**
  + *Hanson v. Denckla* - For jurisdiction to apply, one would have to had purposefully availed itself of the privilege of conducting activities in the forum which would invoke the benefits and protections of the laws of the State.
    - Conduct and connection with the forum State are such that one should reasonably anticipate being sued in the forum State.
  + *Burger King v. Rudzewicz* - If a commercial defendant has purposefully directed his activities at forum residents it must present a compelling case of convenience issues to render jurisdiction unreasonable.
  + Personal jurisdiction can be based upon intentional actions (wrongful conduct) expressly targeted at a defendant whom the plaintiff knows to be a resident of the forum state ("targeted effects" - a variation of reasonable anticipation).
  + *Shaffer v. Heitner* - For *in rem* jurisdiction there must be a three-way relationship between the defendant, the forum, and the litigation, in accord with the "fairness" tests.
* **E. "Tag" Jurisdiction: Serving a Nonresident Within the Forum**
  + *Burnham v. Superior Court* - The exercise of personal jurisdiction due to the voluntary presence of a person in a particular forum does not violate due process.
* **F. Jurisdiction by Consent, By Contract (Forum Selection Clauses), or by Broader Federal Rules**
  + **1. Implied Consent**
  + Implied Consent - Implied consent most commonly involves corporations doing business within the state (required to appoint an agent), and nonresident motorists.
  + Generally, a nonresident consents to jurisdiction if he appears in the action to defend it (must object very early on, otherwise you waive that objection).
  + **2. Private Contracts Fixing Jurisdiction**
  + There is nothing fundamentally unfair about forum selection clauses as it can eliminate confusion regarding where a suit can be brought saving litigants and the courts time and expense.
  + **3. Broader Federal Rules**
  + Jurisdiction by necessity - a forum lacking consent or relationship to the claimants may be justified in exercising jurisdiction simply because there is no more appropriate forum to adjudicate a question which requires resolution.
  + Rule 4(k)(1) - Congress has provided for nationwide service of process to establish personal jurisdiction over a defendant who is subject to the jurisdiction under the state long-arm law.
    - Nationwide service involving a few federal statutes (e.g. FTC, securities, etc...).
  + Rule 4(k)(2) - Jurisdiction can be claimed over a person when the claim (1) arises under federal law, (2) personal jurisdiction is not available in any other state or under any federal statute, (3) the person's contacts with the nation as a whole as enough to satisfy applicable constitutional requirements (allows jurisdiction to the limits of due process).
* **G. Challenging Personal Jurisdiction**
  + Collateral attack - challenging jurisdiction in your home state after a court has rendered a default judgment.
  + Rule 12(b)(2) - lack of personal jurisdiction motion to dismiss, may also include in answer.
    - Rule 15(a) - can amend answer within 20 days unless calendared for trial.
    - Rule 12(h)(1) - must make 12(b)(2) motion or defense waived
  + *Harkness v. Hyde* - Can make a special appearance and move to dismiss, which will subject you to the court's jurisdiction for the purposes of determining jurisdiction. If you lose, you will be subject to that court and must defend the charges on the merits. Can appeal both the ruling on jurisdiction and the verdict.
  + Can only collaterally attack the judgment or specially appear to challenge jurisdiction.
* **H. Compliance with Rules for Service of Process**
  + Two issues for service of process
    - Due Process (reasonably calculated to give defendant notice of the action and an opportunity to respond; however you must follow the Rules, simply complying with due process is not enough).
    - Compliance with the governing rule (*e.g.* Rule 4(e) or state law)
  + Rule 4(c) - Any person who is at least 18 years old and not a party may serve a summons and complaint (or by a marshal or someone specially appointed by the court).
  + Rule 4(e) - Four ways for successful service of process:
    - (1) Following state law (*e.g.* TX registered mail, publication, subst., Sec'y of State)
    - (2)(A) Personal delivery of a copy of the summons and the complaint,
    - (2)(B) Leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there (*Leigh v. Lynton*).
    - (2)(C) Delivering a copy of each to an agent authorized to receive service of process
  + Rule 4(h) - Serving a corporation or association:
    - *Morton v. Paschen* - Following state law for an individual - Rule 4(e)(1)
    - Delivering a copy of each to an officer, manager, general agent, or any agent authorized by appointment or law (must mail copy of each to defendant as well).
  + Rule 4(d)(1) - Defendant can request a waiver of service to save time and money.
    - When subject to service, one has a duty to save costs by executing the waiver.
    - If you do not waive, you must pay the cost of normal service (unless good cause).
      * If close to statute of limitations a defendant can decline to execute a waiver and you are then required to serve normally.
      * If close to this date, just serve normally; do not attempt to execute a waiver.
    - 60 days to answer if waiver executed (as opposed to 20 days with normal service).
    - Waiving of service does not waive any objection to personal jurisdiction or to venue.
  + Rule 4(m) - Must serve within 120 days of the filing of a complaint to avoid dismissal.
  + *Butler v. Butler*- If due process is not violated, state laws on substituted service are valid.
  + Generally, Federal Courts have no greater jurisdiction (including service of process) than that of state courts for state-law claims (*e.g.* defined by long arm statutes).
    - Remember Rule 4(k)(2) exception ("arising under").
* **I. Venue and Venue Transfer; Forum Non Conveniens**
  + Venue is a matter of privilege of the defendant and has to be asserted, not of right like jurisdiction (used when multiple possible jurisdictions).
  + 28 USC § 1391 - For diversity cases § 1391(a) and federal question cases § 1391(b)
    - (1) In a district and division where any defendant resides if from the same state
    - (2) In a district in which a substantial part of the events of the claim took place.
    - (3) In a district in which any defendant is subject to personal jurisdiction if there is no other district in which the action may otherwise be brought.
  + 28 USC § 1391(c) - A corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction (wherever minimum contacts and long-arm are satisfied).
  + 28 USC § 1404(a) - For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought (by the plaintiff - *Hoffman v. Blaski*). Does not require dismissal.
  + You must make a timely motion to transfer/dismiss for improper venue or you have consented to jurisdiction in that particular venue.
  + 28 USC § 1400 - A civil action for patent infringement may be brought in the district in which the defendant resides or where the infringement occurred if the defendant has a regular and established place of business.
  + *Forum non conveniens* will dismiss a claim so that it may be brought again before a more appropriate forum (state-to-state or from fed-to-foreign courts, not from fed-to-fed).
* **III. Subject Matter Jurisdiction**
* **A. "Arising Under" Jurisdiction (or Federal Question Jurisdiction)**
  + 28 USC § 1331 - The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.
    - Ingredient Test - A right or immunity created by the Constitution or laws of the U.S. must be an essential element (or substantial ingredient) of the plaintiff's cause of action
    - Creation Test - Federal law creates the plaintiff's cause of action.
    - *Louisville and Nashville Railroad v. Mottley* - § 1331 is not satisfied by writing an anticipated defense asserting a Constitutional issue into the complaint.
  + Special Jurisdictional Statutes - U.S. as a party, bankruptcy, patents, and copyright.
* **B. Diversity Jurisdiction**
  + 28 USC § 1332(a) - The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds $75,000 and is (1) between citizens of different States and (2) between citizens of a State and citizens of a foreign state.
    - *Strawbridge v. Curtiss* - Diversity must be complete; no party on one side may be a citizen of the same state as any party on the other side.
    - *Mas v. Perry* - For diversity purposes, citizenship means domicile, mere residence in a state is not sufficient. A change in domicile is only effected by the taking of another residence with the intention of remaining there.
    - Permanent resident aliens are treated as citizens of the place in which they reside.
  + 28 USC § 1332(c) - A corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principle place of business.
    - *Hertz Corp. v. Friend* - The principle place of business for a corporation is to be determined by the location of the corporation's nerve center.
* **C. Supplemental Jurisdiction**
  + 28 USC § 1367(a) - The district court shall have supplemental jurisdiction over all other claims that are so related to the claims in the action that they form part of the same case.
    - This shall include claims that involve the joinder or intervention of additional parties as well as counter and cross-claims.
  + 28 USC § 1367(b) - The districts courts may decline to exercise supplemental jurisdiction if...
    - The claim raises a novel or complex issue of State law
    - The state or non-jurisdictional claim substantially dominates the federal claim
    - The district court has dismissed all claims over which it had original jurisdiction
  + The exercise of supplemental jurisdiction is always at the district court's discretion.
* **D. Removal**
  + 28 USC § 1441(a) - Any action brought in a state court may be removed by the defendant(s) to a U.S. District Ct. which has original jurisdiction (be sure there is proper diversity + $75K).
  + 28 USC § 1441(b) - Any action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties, or laws of the U.S. may be removed without regard to the citizenship or residence of the parties.
  + Any other act removable if none of the defendant(s) are a citizen of the state in which such action is brought (local defendant cannot remove to federal court, not with "arising under").
    - Can join a local defendant to prevent diversity-based removal.
  + 28 USC § 1446(a) - Notice of removal must contain a short plain statement of the grounds for removal and all defendants must join in notice.
  + 28 USC § 1446(b) - Must remove within 30 days of receiving the pleadings (or service). Limit of removal to 1-year after commencement of the action.
  + 28 USC § 1446(d) - Must give notice of removal to plaintiff (no permission needed for removal, just file it) and to state court to stop state court actions (unless remanded).
  + 28 USC § 1447(c) - A motion to remand the must be made within 30 days after the filing of the notice of removal. § 1447(d) states that an order to remand is not appealable.
* **IV. THE ERIE DOCTRINE (Multiple Choice)**
* **A. State Substantive Law in Federal Courts**
  + *Erie Railroad v. Tompkins* - a federal diversity case follows state substantive law but federal procedure to avoid forum shopping and irrational differences in results. Therefore, it is important to determine whether a given law is substantive or procedural.
* **B. Federal Procedural Law**
  + Five Approaches to the Substance-Procedure Distinction
    - (1) Outcome Determination - the outcome of the litigation in the federal court should be substantially the same as in state court.
    - (2) Absolute Outcome Determination - any rule that does not have an absolute effect on the outcome is not necessarily substantive.
    - (3) Federal-State Interest Balanced - the federal interest in applying federal law is much stronger than the state interest in having federal courts apply state law.
    - (4) Deference to a Controlling Federal Rule - when the substantive-procedure distinction in ambiguous, deference should be made to the controlling provisions in the federal rules.
    - (5) Policies of Erie - if the choice of law would produce irrational differences in results and encourage forum shopping, the matter is substantive, if not procedural.
  + In applying the Erie Doctrine, first examine if there a controlling federal rule and then look to the other Erie applications (*Hanna v. Plumer*).
  + In a diversity case applying state law, apply the law of the FORUM state.
* **C. Choice of Law**
  + Types of State Law (different states have different rules):
    - *lex loci delicti* - law of the place of the offense
    - Most significant relationship to the issue in question, which state has the most interest in having its laws enforced (*Pennington v. Dye*).
  + Federal courts will apply the substantive laws of the forum state (even if that state would follow another state's laws).
    - If state law is unclear or there is no decision by the State's highest court, the federal court will make an educated guess as to what the State's highest court would do (based upon other decisions of that court or lower court rulings etc...)
* **V. PLEADINGS**
* **A. Functions of Pleadings**
  + Federal Notice Pleading of a Claim - the type of claim and the factual context.
    - Substantive standard: must make an allegation which can lead to recovery under the law (to avoid a Rule 12(b)(6) motion to dismiss)
    - Specificity standard: must give notice of factual context and enough detail to plausibly infer a claim (to avoid a Rule 12(e) motion for a more def. statement).
  + Cause of Action Pleading (State) - notice of legal and factual basis for each element that must be proved for recovery (*e.g.* for negligence - duty, breach, causation, and damages).
* **B. Standards for the Federal Complaint**
  + Must state a claim, show jurisdiction and claim relief
  + Rule 8(a) - A pleading must contain a short and plain statement of the claim showing that the pleader is entitled to relief.
  + Rule 12(b) - Defenses to claims for relief in any pleading must be asserted in the responsive pleading if required. A party may also 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.
      * Rule 12(b)(6) motion to dismiss - construe the complaint in the light most favorable to the plaintiff, assume all the facts are true, then dismiss only if, as a matter of law, plaintiff cannot possible recover.
  + Rule 12(e) - A party may move for a more definitive statement of a pleading if it is so vague or ambiguous that the party cannot reasonably prepare a response.
  + Rule 12(f) - Motion to strike any immaterial or scandalous material from a complaint.
  + Rule 9(b) - In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.
  + Rule 9(g) - If an item of special damage is claimed, it must be specifically stated by category.
* **C. Defendant's Pleadings (Admissions, Denials, and Affirmative Defenses): Contents of an Answer.**
  + Any Rule 12(b), (e), (f) motions (personal jurisdiction, venue objection waived if not raised).
    - Can file these motions before the answer.
  + Rule 8(b) Defenses, Admissions, and Denials.
    - (1) In responding to a pleading, a party must state in short plain terms its defenses to each claim asserted against it; and admit or deny the allegations asserted.
    - (2) A denial must fairly respond to the substance of the allegation.
    - (3) A party that does not intend to deny all the allegations (including jurisdictional grounds) must either specifically deny designated allegations or generally deny all except those specifically admitted.
    - (4) A party that intends in good faith to deny only part of an allegation must admit the part that is true and deny the rest.
    - (5) A party that lacks knowledge or information sufficient to form a belief about the truth of an allegation must so state, and the statement has an effect of a denial.
    - (6) An allegation is admitted if a responsive pleading is required and an allegation is not denied.
  + Some state jurisdictions will allow general denials which has the effect of asking the plaintiff to prove their allegations (not literally denying everything in the complaint).
  + Rule 8(c) Affirmative defenses - rather than denying or rebutting an element of the plaintiff's claim, the affirmative defense adds a new set of facts that defeats the claim even if the plaintiff proves all of the elements. Must claim at time of responsive pleading; federal notice pleading standard.
* **D. Certifications and Sanctions**
  + Rule 11(b) - By presenting to the court pleading, written motion, or other paper the attorney certifies:
    - (1) it is not being presented for any improper purpose
    - (2) it is warranted by existing law
    - (3) the factual contentions have evidentiary support (or discovery will likely provide support - must specifically state in claim).
    - (4) the denials of factual contentions are warranted on the evidence (or lack of sufficient information)
  + Rule 11(c)(1) - If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may (discretionary) impose an appropriate sanction on any attorney, law firm, or party.
  + Rule 11(c)(2) - A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b).
    - Safe Harbor Provision - the motion must not be filed or be presented to the court if the challenged item is withdrawn or appropriately corrected within 21 days.
  + Rule 11(c)(4) - 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.
  + Statutory power to sanction vexatious multiplication of litigation (requires willfulness).
  + The court has "inherent power" to sanction bad-faith litigation conduct which is not based upon any federal or state rule or statute (*Chambers v. Nasco Inc.*).
  + To avoid Rule 11 sanctions: send a demand letter, thoroughly cross-examine client, hire an expert, document "reasonable investigation", do proper legal research, undertake prompt discovery and react to inaccurate information in allegations or denials.
* **E. Amendment**
  + Rule 15(a) - Amendments Before Trial.
    - (1) A party may amend its pleading once (original or responsive) 21 days after serving it or 21 days after motion under Rule 21(b) dismiss, (e) def. statement, or (f) strike whichever is earlier.
    - (2) In all other cases a party may only amend its pleadings with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires; the burden is on the opposing party to show prejudice.
    - (3) Any required response to an amended pleading must be made within the time remaining of the original pleading or 14 days, whichever is later.
  + Rule 15(b) -Amendments During and After Trial
    - (1) If a party objects that evidence is not within the issues raised in the pleadings, the court may permit the pleadings to be amended (unless objecting party shows that the new evidence will be prejudicial).
    - (2) 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.
  + Rule 15(c) - An amendment to a pleading relates back to the date of the original pleading if:
    - The statute of limitations allows.
    - The amendments assert a claim or defense that arose (or attempted to set out) conduct, transactions, or occurrences in the original pleading.
    - It changes that party or the naming of the party against whom the claim is asserted (if the party will not be prejudiced in defending on the merits or should have known that action would be brought against it).
  + Rule 15(d) - On motion and reasonable notice, the court may 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.
* **VI. MULTIPLE PARTIES AND CLAIMS (Multiple Choice)**
* **A. Counterclaim and Cross-Claim**
  + Rule 13(a) Compulsory Counterclaim - arises out of the same transaction or occurrence as the plaintiff's suit (must be asserted at the time of the plaintiff's suit or it is barred) and does not require adding a party whom the court has no jurisdiction.
  + Rule 13(b) Permissive Counterclaim - a pleading may state as a counterclaim against an opposing party any claim that is not compulsory (not out of the same transaction or occurrence; can be asserted anytime).
  + Rule 13(g) Cross-claim - arises out of the transaction or occurrence that is the subject matter of the original action.
* **B. Third-Party Claims (or Impleader)**
  + Rule 14(a)(1) - A defending party may (not compulsory) serve a complaint on a nonparty who is or may be liable to it for all or part of the claim against it.
  + Rule 14(a)(5) - A third-party defendant may claim against a non-party (fourth-party defendant) who is or may be liable to the third-party defendant.
* **C. Permissive Joinder, Consolidation, Separate Trial, and Severance**
  + Rule 19 Required Joinder - A person must be joined as a party if in that person’s absence, the court cannot accord complete relief among existing parties or as a practical matter impair or impede the person’s ability to protect the interest (needed for just adjudication).
  + Rule 20(a) Permissive Joinder - Persons may join an action as a plaintiff or be joined as a defendant if any right to relief is asserted which arises out of the same transaction, occurrence, or series of transactions or occurrences. Also, persons may join if any common question of fact or law.
  + Rule 42(a) Consolidation - If actions before the court involve a common question of law or fact, the court may join for hearing or trial or consolidate the actions to avoid unnecessary cost or delay.
  + Rule 42(b) Separate Trials - For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims.
  + Rule 21 Severance - The court may sever any claim against a party.
* **D. Intervention, Interpleader, Class Actions, and Multidistrict Litigation**
  + Rule 24(a) Intervention of Right - Upon motion, the court must permit anyone to intervene (1) who is given an unconditional right by federal statute or (2) claims an interest relating to the subject of the action such that disposing of the action may impair or impede the ability to protect one's interest (unless existing parties adequately represent that interest).
  + Rule 24(b) Permissive Intervention - Upon motion, the court may permit anyone to intervene (1) who is given a conditional right by federal statute or (2) has a claim or defense that shares with the main action a common question of law or fact.
  + Rule 22 Interpleader - Persons with claims that may expose a plaintiff to multiple liability may be joined as defendants and required to interplead; inconsistent claims (requires ordinary diversity jurisdiction and over $75,000).
    - Interpleader applies when a stakeholder is faced with conflicting demands (such as an insurance policy with two different named beneficiaries).
  + 28 USC § 1335 - The plaintiff (stakeholder) deposits the money or property and is dismissed from the action. The rival claimants are given the right to litigate their claims, and they will be bound by the decision of the court. Only minimal diversity required (any one diverse from another).
  + Rule 23(a) Class Action Prerequisites:
    - (1) Numerosity - members must be so numerous that their joinder is impractical.
    - (2) Commonality - questions of law or fact common to the class.
    - (3) Typicality - the entire class will be represented by one or a few members of the class. The representatives claims or defenses must be typical of the class.
    - (4) Adequate Representation - the named parties must fairly and adequately protect the interests of the class.
  + Rule 23(b) Types of Class Actions:
    - (1) Inconsistent Results - the inconsistency can be either in the form of inconsistent standards for the party opposing the class, or results in earlier cases that would affect later class members (*e.g.* a limited fund involving numerous claimants).
    - (2) Uniform Injunctive or Declaratory Relief - relief is granted with respect to the class as a whole (*e.g.* civil rights class action, in which representatives sue to have a statute declared unconstitutional).
    - (3) Common Questions Predominate and a Class Action is the Superior Means of Managing the Case - there are many claimed victims of a single course of conduct by the party opposing the class (*e.g.* consumer class actions, antitrust class actions, securities fraud class actions).
  + Four-Factor Test for (b)(3) Class Actions:
    - (A) class members interest in individually controlling their own actions
    - (B) other pending litigation
    - (C) appropriateness of the forum
    - (D) the likely difficulties in managing a class action
  + Rule 23(c) Certification and Notice - Court must certify the class according to Rule 23(a) and fit class into 23(b) category. The court must direct notice to 23(b)(3) members and provide for members to request exclusion if they desire.
  + Rule 23(e) Settlement, Voluntary Dismissal, or Compromise - The court must approve any settlement, voluntary dismissal, or compromise and notice must be given to members of the class in these events. Class members must be given a second opportunity to opt-out once the know the terms of the settlement.
  + 28 USC § 1407 Judicial Panel on Multidistrict Litigation - Either on its own initiative or by motion, the Panel may order actions involving one or more common questions of fact pending in different districts transferred to any district for coordinated or consolidated pretrial proceedings (to be remanded to the original districts thereafter). The panel need only determine that transfer will be for the convenience of parties and witnesses and will promote the just and efficient conduct of the actions. This is only for federal litigation.
* **VII. Discovery and Disclosure**
  + Objectives of discovery:
    - (1) Finding out about the lawsuit.
    - (2) "Freezing" the harmful evidence (pin a witness to a story)
    - (3) Preserving evidence or putting it in usable form (e.g. taking a deposition of an expert witness not available at the time if trial).
    - (4) Deliberately abusive discovery (expose sensitive information or to impose unnecessary costs).
* **A. Scope of Discovery: "Relevant" and "Not Privileged"; Broad but with Limitations**
  + Rule 26(b)(1) - The scope of discovery is any non-privileged matter that is relevant to any party’s claim or defense that is reasonably calculated (not just possible) to lead to the discovery of admissible evidence.
    - Privileged relationships include: doctor-patient, attorney-client, spousal, clergy.
  + Rule 26(b)(2) Limitations on Frequency and Extent.
  + (C) 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 (it is unduly inconvenient), 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 burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.
    - Work product
    - Not under protection order
* **B. Work Product; Discovery of Experts**
  + Rule 26(b)(3) Trial Preparation: Materials. Work Product.
  + (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 (including the other party’s attorney, consultant, surety, indemnitor, insurer, or agent).
    - In "anticipation if litigation" can be a difficult question to answer.
  + But, subject to Rule 26(b)(4), those materials may be discovered if:
    - (ii) the party shows that it has substantial need for the materials and cannot, without undue hardship, obtain their substantial equivalent by other means.
  + (B) 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.
  + Rule 26(b)(4) Trial Preparation: Experts.
  + (A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial (only after the report is provided, if necessary).
  + (B) Drafts of any report and any communications are protected except those that:
    - relate to compensation for the expert’s study or testimony, identify facts, data, or assumptions that the expert considered in forming the opinions to be expressed.

(D) Ordinarily, a party may not discover facts known or opinions held by an expert who has been retained 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) Request for Mental or Physical Examination; 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. (such as 3 experts in the world and all three have been consulted; evidence has been destroyed in testing).
      * *Ager v. Jane C. Stormont Hospital* - The party seeking disclosure carries a heavy burden in demonstrating the existence of special circumstances.
  + Informally contacted experts are not discoverable (one court ruled this way).
  + Expert consulted not in connection with litigation; fully discoverable.
  + (E) Unless manifest injustice would result, the court must require that the party seeking discovery to pay the opposition's expert a reasonable fee for time spent in responding to discovery; for non-testifying expert must pay a fair portion of the other party fees incurred.
* **C. Protective Orders**
  + To fight discovery one can object to the court or move for a protective order (use a protective order instead of an objection if what your opponent is asking for is within the realm of relevant discovery).
    - *Kerr v. US District Court* - must state with specificity the rationale of the claimed privilege instead of raising a blanket objection covering all documents requested.
  + Rule 26(c) Protective Orders.
  + (1) A protective order 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, for the disclosure or discovery;
    - (C) prescribing a discovery method other than the one selected by the party seeking discovery;
    - (D) 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 or other document 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.
  + For protective order for trade secrets etc., movant shows harm and how much, other party shows need and how much; court balances harm against the need.
* **D. Mechanics of the Discovery Devices**
  + Types of discovery:
    - Oral and written depositions,
    - written interrogatories (parties only, non-parties must be deposed),
    - requests for admissions,
    - requests to produce or inspect (parties only, non-parties must be subpoenaed),
    - motions for physical or mental examinations.
  + Generally discovery will proceed with:
    - Rule 26(f) discovery conference and Rule 26(a)(1) initial disclosures. Typically the discovery plan developed will not go into much detail concerning the use of discovery tools or the sequence in which they will be used.
    - The "second wave" of discovery will usually consist of interrogatories to obtain basic info not covered by the initial disclosures (people, documents, etc...).
    - After the basics have been established by disclosures and interrogatories, the "third wave" of discovery consists of requests for production followed by depositions.
    - A last step may be a request for admissions to eliminate undisputed issues and to authenticate documents to be used at trial.
  + **Depositions**
  + Funnel Sequence - let the witness describe the event in narrative form; prompt more narrative; exhaust narrative; only after this should you begin to question him specifically.
    - (1) Preliminaries (stipulations, introduction, impeachment enhancement);
    - (2) Getting to know all about you (name, address, children, marriage, school, occupation);
    - (3) Move to the area of complaint/incident , any previous litigation, previous medical history, witnesses (names addresses), any statements/admissions made;
    - (4) Then move to damages (doctors [names/addresses], follow-ups, repercussions [job loss, permanent disability, or other harms]), any other relevant fact.
  + Preparing a client for a deposition: purpose is to help the other side, anticipate the areas of questions and discuss the answers to be given, explain the types of questions which will be asked (general q's, leading q's, etc.), simulate the deposition, be explicit and emphatic in advising the client to tell the truth.
  + Rule 28(a)(1) A deposition must be taken before an officer authorized to administer oaths.
  + Rule 29: Unless the court orders otherwise, the parties may stipulate that:
  + (a) a deposition may be taken before any person, at any time or place, on any notice, and in the manner specified — in which event it may be used in the same way as any other deposition; and
  + (b) other procedures governing or limiting discovery be modified — but a stipulation extending the time for any form of discovery must have court approval if it would interfere with the time set for completing discovery, for hearing a motion, or for trial.
  + Rule 30(a)(1) A party may, by oral questions, depose any person 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) A party must obtain leave of court:
    - (A) if the parties have not stipulated to the deposition and:
      * (i) the deposition would result in more than 10 depositions;
      * (ii) the deponent has already been deposed in the case; or
      * (iii) the party seeks to take the deposition before the discovery conference.
  + Rule 30(b)(1) 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 (parties only) to produce documents and tangible things at the deposition.
  + (3)(A) The notice must state the method for recording the testimony. Unless the court orders otherwise, testimony may be recorded by audio, A/V, or stenographic means. The noticing party bears the recording costs. Any party may arrange to transcribe a deposition.
  + (B) 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 unless the court orders otherwise.
  + (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.
  + (5)(A) The officer must begin the deposition with an on-the-record statement that includes:
    - (i) when, where, who
    - (iv) the officer’s administration of the oath or affirmation to the deponent; and
    - (v) the identity of all persons present.
  + (B) If the deposition is recorded non-stenographically, the officer must repeat the items in Rule 30(b)(5)(A)(i)–(iii) at the beginning of each unit of the recording medium.
  + (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.
    - *Salter v. Upjohn Co.* - deposition of a corporation by its agents and officers should ordinarily be taken at its principle place of business
  + Rule30(c)(1) The examination and cross-examination of a deponent proceed as they would at trial under the Fed Rules of Evidence.
  + (2) An objection at the time of the examination must be noted on the record, but the examination still proceeds.
    - Some substantive issues (such as inadmissible prejudicial testimony or hearsay) can be objected to later at trial while most procedural issues (such as those concerning the form of a question [leading, etc.]) must be noted on the record because it could have been cured upon timely objection.
    - Parties can stipulate to hold all objections until trial (the "usual agreements")
  + Signature (the deposition must be signed in front of a reporter, or can be filed without a signature and signed in front of a notary at a later date).
  + (3) 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.
    - Weak form of discovery as the officer cannot revise the questions nor can follow-up questions be asked; most used is for the authentification of documents.
  + Rule30(d)(1) 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)(2) if needed to fairly examine the deponent if the exam is impeded or delayed.
  + **Rule 32 Using Depositions in Court Proceedings**
  + (2) Any party may use a deposition to contradict or impeach the testimony given by the deponent as a witness, or for any other purpose allowed by the Federal Rules of Evidence.
  + (3) An adverse party (opponent) may use for any purpose the deposition of a party or anyone who, when deposed, was the party’s officer, director, managing agent, or designee.
  + (4) Unavailable Witness. A party may use for any purpose a deposition if the court finds:
    - (A) that the witness is dead;
    - (B) that the witness is more than 100 miles from the place of hearing or trial
    - (C) that the witness cannot attend or testify because of age, illness, infirmity, etc.
    - (D) that the party offering the deposition could not procure the witness’s attendance by subpoena; or
    - (E) on motion and notice, that exceptional circumstances make it desirable—in the interest of justice to permit the deposition to be used.
  + (6) Using Part of a Deposition. If a party offers in evidence only part of a deposition, an adverse party may require the offeror to introduce other parts.
  + **Interrogatories**
  + Interrogatories are the best first line of discovery as they are an efficient way to learn:
    - who knows the facts supporting the claims or defenses (witnesses, persons interviewed [may be work product], others with liability, whether the defendant has been sued using the correct name, explain contentions in the pleadings)
    - what documents exists pertaining to the claims or defenses
    - areas meriting deposition discovery
    - general background materials
    - info which may supplement initial disclosures
  + Ask clear, precise, direct questions.
  + Brief questions requiring brief answers are winners as they are difficult to dodge.
  + Avoid vague or broad questions - they usually get zero answers as attorneys will usually give the least amount of info possible and present answers in the most favorable light.
  + The characteristics of interrogatories is significant because an attempt to force a corporation to give its corporate knowledge by a deposition is not easy to accomplish when that knowledge is possessed by numerous different persons.
  + **Rule 33 Interrogatories to Parties**
  + (a)(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.
  + (2) 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 (pure questions of law not allowed).
  + (b)(1) Responding Party. The interrogatories must be answered:
    - (A) by the party to whom they are directed; or
    - (B) if that party is a corp., a partnership, an association, or a gov. agency, by any officer or agent, who must furnish the information available to the party.
  + (2) 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) Each interrogatory must be answered separately and fully in writing (unless objected to).
  + (4) The grounds for objecting to an interrogatory must be stated with specificity. Any ground not stated 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) An answer to an interrogatory may be used to the extent allowed by the Fed. R. of Evid.
  + (d) If the answer to an interrogatory may be determined from a party’s business records (including electronically stored information), and if the burden of 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 identify them as readily as the responding party; and
    - (2) giving the interrogating party a reasonable opportunity to examine and audit the records and to make copies, compilations, abstracts, or summaries.
  + **Rule 36 Requests for Admission**
  + (a)(1) A party may serve on any other party a written request to admit the truth of:
    - (A) facts, the application of law to fact, or opinions about either; and
    - (B) the genuineness of any described documents (must provide copy).
  + (3) Time to Respond; Effect of Not Responding. A matter is admitted unless, within 30 days after being served, unless answered or objected to. A shorter or longer time for responding may be stipulated to under Rule 29 or be ordered by the court.
  + (4) 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 (*e.g.* lack of knowledge or information)
  + 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.
  + (5) The grounds for objecting to a request must be stated.
  + (6) The requesting party may move to determine the sufficiency of an answer or objection. Unless the court finds an objection justified, the court may order either that the matter is admitted or that an amended answer be served.
  + (b) 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.
  + **Request for Production**
  + Rule 34(a)(1) A party may serve on any other party a request to produce and inspect, copy, test, or sample the following items in the responding party’s possession, custody, or control:
    - (A) any designated documents or electronically stored information;
    - (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.
  + Rule 26(b)(2)(B) 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 (must show on motion to compel discovery or for a protective order; judge may order discovery nonetheless if very important information).
  + Rule 26(b)(5)(B) If information (already) 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.
    - Useful when dealing with large amounts of electronically discovered documents.
  + Rule34(b)(1) The request:
  + (A) must describe with reasonable particularity each item to be inspected;
  + (B) must specify a reasonable time, place, and manner for the inspection; and
  + (C) may specify the form(s) in which electronically stored information is to be produced.
  + (2)(A) The party to whom the request is directed must respond in writing within 30 days after being served; unless a different time stipulated to or ordered by the court.
  + (B) For each item or category, the response must either state that inspection and related activities will be permitted as requested or state an objection to the request, with reasons.
  + (C) An objection to part of a request must specify the part and permit inspection of the rest.
  + (D) 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) 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;
    - (iii) A party need not produce the same electronically stored information in more than one form.
  + **Rule 45(d) Duties in Responding to a Subpoena.**
  + (2)(A) 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.
  + **Rule 35 Physical and Mental Examinations**
  + (a)(1) In General. The court where the action is pending may order a party whose mental or physical condition is in controversy (issue raised by pleadings) to submit to a physical or mental examination by a suitably licensed or certified examiner.
  + (2)(A) The order may be made only on motion for good cause and on notice to all parties and the person to be examined; and must specify the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it.
  + The examiner files a report that will be available to both parties.
  + (2) Contents. The examiner’s report must be in writing and must set out in detail the examiner’s findings, including diagnoses, conclusions, and the results of any tests.
  + (3) After delivering the reports, the party who moved for the examination may request — and is entitled to receive — from the party against whom the examination order was issued like reports of all earlier or later examinations of the same condition.
  + (4) Waiver of Privilege. By requesting and obtaining the examiner’s report, or by deposing the examiner, the party examined waives any privilege it may have — in that action or any other action involving the same controversy — concerning testimony about all examinations of the same condition.
  + (5) If the report is not provided, the court may exclude the examiner’s testimony at trial.
* **E. The Duty to Supplement**
  + Rule 26(e)(1) 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.
* **F. Self-initiated Disclosures**
* **Rule 26(a) Required Disclosures.**
  + **(1) Initial Disclosure.**
  + (A) Except 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 (include yourself), along with the subjects of that information, 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, unless the use would be solely for impeachment;
    - (iii) a computation of each category of damages along with documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based;
    - (iv) 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.
  + (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.
  + (E) 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.
  + **Rule 26(a)(2) Disclosure of Expert Testimony.**
  + (B) An expert witness' 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 ten years;
    - (v) a list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition; and
    - (vi) a statement of the compensation to be paid.
  + (C) 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
    - (ii) a summary of the facts and opinions to which the witness is expected to testify.
  + (D) Time to Disclose Expert Testimony. Absent a stipulation or a court order, the disclosures must be made: at least 90 days before the date set for trial or for the case to be ready for trial; or within 30 days if the evidence is intended solely to contradict or rebut evidence on the same subject matter after the other party’s disclosure.
  + **Rule 26(a)(3) Pretrial Disclosures.**
  + (A) In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide:
    - (i) the name, address, and telephone number of each witness (include yourself);
    - (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.
  + (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 file a list of the objections, together with the grounds for it, that may be made to the admissibility of materials identified. An objection not so made is waived unless excused by the court for good cause.
* Rule 37(c)(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, may impose other appropriate sanctions.
* **G. Discovery Certifications. Conferences, Abuse, and Sanctions**
  + **Rule 26(f) Conference of the Parties; Planning for Discovery.**
  + (1) The parties must confer as soon as practicable — and in any event at least 21 days before a scheduling conference is to be held unless the court orders otherwise.
  + (2) Conference Content; Parties’ Responsibilities. In conferring, the parties must consider settling or resolving the case, make or arrange for the initial disclosures required and develop a proposed discovery plan (due 14 days after the conference).
  + (3) A discovery plan must state the parties’ views and proposals on:
    - (A) what changes and 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 or discovery 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 prep. materials;
    - (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.
* **Rule 26(g) Signing Disclosures and Discovery Requests, Responses, and Objections.**
* (1) Signature Required; Effect of Signature. Every disclosure and discovery request, response, or objection must be signed. 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) a disclosure 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) warranted by existing law or by a nonfrivolous argument for modifying 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.
* **Rule 37 Failure to Make Disclosures or to Cooperate in Discovery; Sanctions.**
* (a)(1) 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.
* (3)(A) To Compel Disclosure. If a party fails to make a disclosure or discovery response any other party may move to compel disclosure and for appropriate sanctions.
  + - (4) An evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.
    - 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.
* Whoever loses in a motion to compel pays the other party's reasonable expenses incurred in making the motion, unless the opposing party's actions were substantially justified.
* (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.
* *Roesberg v. Johns-Manville Corp.* - When objecting to an interrogatory (including multiple), It must be specifically shown how each interrogatory meets these criterion by submitting affidavits revealing the nature of the burden (not just overly broad, burdensome, oppressive, not reasonably calculated to lead to admissible evidence, or privileged).
* **Rule 37(b) Failure to Comply With a Court Order**
* (2)(A) For Not Obeying a Discovery Order. The court may issue orders:
  + (i) establishing facts
  + (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.
  + (C) Instead of or in addition to the orders above, the court must order the disobedient party 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.
* (2) A failure to act 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.
* (e) Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.
* (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.
  + Gamesmanship between attorneys maintains the adversary system. Judgment is necessary to determine if attorney is pushing or tripping on “reasonableness” standard.
    - *Pushing* – using unreasonable discovery requests
    - *Tripping* – Unnecessarily hindering the discovery of relevant non-privileged information by a variety of means ranging from delay to concealment to the destruction of evidence.
* **VIII. Pretrial Conferences and Case Management (Multiple Choice)**
* **A. Pretrial Conferences and Orders**
  + **Rule 16 Pretrial Conferences; Scheduling; Management**
  + (a) In any action, the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences for such purposes as:
    - (1) expediting disposition of the action;
    - (2) establishing early and continuing control so that the case will not be protracted because of lack of management;
    - (3) discouraging wasteful pretrial activities;
    - (4) improving the quality of the trial through more thorough preparation; and
    - (5) facilitating settlement.
  + (b)(1) The district judge or magistrate must issue a scheduling order:
    - (A) after receiving the parties’ discovery conference report under Rule 26(f); or
    - (B) after consulting with the parties’ attorneys at a scheduling conference.
  + (2) Time to Issue. The judge must issue the scheduling order as soon as practicable, but in any event within the earlier of 120 days after any defendant has been served with the complaint or 90 days after any defendant has appeared.
  + (3)(A) Required Contents. The scheduling order must limit the time to join other parties, amend the pleadings, complete discovery, and file motions.
  + (B) Permitted Contents. The scheduling order may:
    - (i) modify the timing and extent of disclosures and discovery;
    - (v) set dates for pretrial conferences and for trial.
  + A schedule may be modified only for good cause and with the judge’s consent.
  + At any pretrial conference, the court may consider and take appropriate action on:
    - (A) formulating and simplifying the issues, eliminating frivolous claims or defenses;
    - (B) amending the pleadings if necessary or desirable;
    - (C) obtaining admissions and stipulations about facts and documents to avoid unnecessary proof, and ruling in advance on the admissibility of evidence;
    - (E) determining the appropriateness and timing of summary adjudication
    - (F) controlling and scheduling discovery,
    - (G) identifying witnesses and documents, scheduling the filing and exchange of any pretrial briefs, and setting dates for further conferences and for trial;
    - (H) referring matters to a magistrate judge or a master;
    - (I) settling the case and using special procedures to assist in resolving the dispute;
    - (J) determining the form and content of the pretrial order;
    - (K) disposing of pending motions;
    - (L) adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;
    - (M) ordering a separate trial under Rule 42(b) of a claim, counterclaim, crossclaim, third-party claim, or particular issue;
    - (N) ordering the presentation of evidence early in the trial on a manageable issue that might, on the evidence, be the basis for a judgment as a matter of law under Rule 50(a) or a judgment on partial findings under Rule 52(c);
    - (O) establishing a reasonable limit on the time allowed to present evidence; and
    - (P) facilitating in other ways the just, speedy, and inexpensive disposition of the action.
  + (e) Final Pretrial Conference and Orders. The court may hold a final pretrial conference to formulate a trial plan, including a plan to facilitate the admission of evidence. The conference must be held as close to the start of trial as is reasonable. The court may modify the order issued after a final pretrial conference only to prevent manifest injustice.
    - The factors considered before modifying a pretrial order are:
      * (1) the degree of prejudice to the plaintiff
      * (2) the degree of prejudice to the defendant
      * (3) the impact on orderly presentation of the case
      * (4) the degree of willfulness, bad faith, or inexcusable neglect
  + (f)(1) On motion or on its own, the court may sanction for:
    - (A) failing to appear at a scheduling or other pretrial conference;
    - (B) being substantially unprepared to participate—or does not participate in good faith — in the conference; or
    - (C) fails to obey a scheduling or other pretrial order.
  + *United States v. First National Bank* - A party need offer no proof at trial as to matters agreed to in the order, nor may a party offer evidence or advance any theories at the trial which are not included in the order or which contradict its terms.
* **B. Judges as Managers**
* **Rule 53. Masters.**
* (a)(1) Unless a statute provides otherwise, a court may appoint a master only to:
  + (A) perform duties consented to by the parties;
  + (B) hold trial proceedings and make or recommend findings of fact on issues to be decided without a jury if appointment is warranted by:
    - (i) some exceptional condition; or
    - (ii) the need to perform an accounting or resolve a difficult computation of damages; or
  + (C) address pretrial and post-trial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district.
* Rule 53(c)(1) Unless the appointing order directs otherwise, a master may:
  + (C) if conducting an evidentiary hearing, exercise the appointing court’s power to compel, take, and record evidence.
* (2) Sanctions. The master may by order impose on a party any noncontempt sanction provided by Rule 37 or 45, and may recommend a contempt sanction.
* (f)(1) In acting on a master’s order, report, or recommendations, the court may adopt or affirm, modify, wholly or partly reject or reverse, or resubmit to the master with instructions.
* (2) A party may file objections to — or a motion to adopt or modify — the master’s order, report, or recommendations no later than 21 days after a copy is served, unless the court sets a different time.
* (4) The court must decide de novo all objections to conclusions of law or findings of fact made, but may set aside a master’s ruling on a procedural matter only for an abuse of discretion.
* **Rule 72. Magistrate Judges: Pretrial Order.**
* **28 USC § 636. Jurisdiction, Powers, and Temporary Assignment.**
* (b)(1)(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, and for dismissal of an action. A judge of the court may reconsider any pretrial matter where it has been shown that the magistrate’s order is clearly erroneous or contrary to law.
* (B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A).
* (3) Resolving Objections. The district judge must determine de novo any part of the magistrate judge’s disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.
* Rule 73. Magistrate Judges: Trial by Consent; Appeal.
* (a) Trial by Consent. When authorized, a magistrate judge may, if all parties consent, conduct a civil action or proceeding, including a jury or nonjury trial.
* (c) Appealing a Judgment. In accordance with 28 U.S.C. § 636(c)(3), an appeal from a judgment entered at a magistrate judge’s direction may be taken to the court of appeals as would any other appeal from a district-court judgment.
* **C. Docket Control and Case Flow Management**
  + Rule 6. Computing and Extending Time; Time for Motion Papers.
  + When the period is stated in days, exclude the day of the event that triggers and count every day, including intermediate Saturdays, Sundays, and legal holidays; and
  + When the period is stated in hours, begin counting immediately and count every hour, including hours during intermediate Sat., Sun., and legal holidays.
  + (c) Motions, Notices of Hearing, and Affidavits.
  + (1) A written motion and notice of the hearing must be served at least 5 days before the time specified for the hearing.
  + (2) Supporting Affidavit. Any affidavit supporting a motion must be served with the motion. Except as Rule 59(c) provides otherwise, any opposing affidavit must be served at least 1 day before the hearing, unless the court permits service at another time.
  + Rule 79. Records Kept By the Clerk
  + (2) Items to be Entered. The following items must be marked with the file number and entered chronologically in the docket:
    - (A) papers filed with the clerk;
    - (B) process issued, and proofs of service or other returns showing execution; and
    - (C) appearances, orders, verdicts, and judgments.
  + (b) Civil Judgments and Orders. The clerk must keep a copy of every final judgment and appealable order; of every order affecting title to or a lien on real or personal property; and of any other order that the court directs to be kept.
* **IX. The Litigator’s Life**
  + Q. What is the key issue in managing your life as a litigator?
    - 1.TIME MANAGEMENT IS KEY.
  + Q. What tends to drive new associates crazy when working at large firms?
    - 2. SIX MINUTE INCREMENTS DRIVE YOU CRAZY.
  + Q. What type of calendaring system would a malpractice insurer want you to have?
    - 3. DOUBLE TICKLER CALENDAR SYSTEM = GOOD
  + Q. What is the best way to handle a Rambo opponent?
    - 4. IGNORE A RAMBO OPPONENT.
  + Q. Before working for a firm, what business related concern should you look at?
    - 5. KNOW THE BUSINESS PLAN.
  + Q. What’s the general rule for how much you spend on your office?
    - 6. SPEND A LOT ON YOUR OFFICE.
  + Q. What is the executive monkey, and why is that a better way to be?
    - 7. BE THE EXECUTIVE MONKEY.
  + Q. What inevitability in legal practice does law school do a poor job of preparing you for?
    - 8. LAW SCHOOL DOESN’T PREPARE YOU TO LOSE.
* **X. Summary Judgment, Dismissal, and Default**
  + 1. Dismissal for failure to state a claim - assume all allegations true.
  + 2. Judgment on the pleadings - no disputed facts, judgment as a matter of law.
  + 3. Summary judgment - no genuine issue of material fact, a reasonable juror properly applying the law could only find in favor of the movant (moving party is entitled to prevail as a matter of law).
  + 4. Judgment as a matter of law (directed verdict) - when all evidence received viewed in light most favorable to the non-movant permits but one reasonable inference.
  + 5. Judgment as a matter of law after trial (judgment n.o.v.) - same as directed verdict but after the verdict has been received.
  + 6. Appellate reversal because evidence doesn't support verdict - same as directed verdict but done by the appellate court.
* **A. Judgment on the Pleadings**
  + Rule 12(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.
  + After pleadings have been filed and time for amendment has passed, a judgment on the pleadings can be granted. There must be no material fact left to be decided. If, for example, defendant admits all allegations of the complaint, plaintiff can file a Rule 12(c) motion for judgments on the pleadings. Also, the defendant may move for a judgment on the pleadings on the theory that the plaintiff's complaint fails to state a claim. This is similar to a Rule 12(b)(6) motion to dismiss, but technically the motion to dismiss is proper before pleadings are closed and a motion for judgment on the pleadings is proper after.
* **B. Summary Judgment**
  + When trying to obtain summary judgment, send an interrogatory/request to produce to the other party asking to identify all facts and evidence that will be used to prove your case (this can be used to support your motion); then move for SJ based upon these facts.
  + Rule 56. Summary Judgment.
  + (a) 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.
    - Based upon evidence produced during discovery
  + (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.
  + (c)(1) 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
    - (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) 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.
  + (3) 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.
    - To "the best of my knowledge" not good enough
  + (d) When Facts Are Unavailable to the Non-movant. If a non-movant 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.
  + (e) 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) 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.
  + (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.
  + There is no express or implied requirement that the moving party support its motion with affidavits or other similar materials negating the opponent's claim.
  + **C. Dismissal**
  + Rule 41 Dismissal of Actions.
  + (a)(1) Voluntary Dismissal By the Plaintiff.
  + (A) The plaintiff may dismiss an action without a court order by filing:
    - (i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or
    - (ii) a stipulation of dismissal signed by all parties who have appeared.
  + (B) Unless the notice or stipulation states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.
  + (2) Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff’s request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff’s motion to dismiss, the action may be dismissed over the defendant’s objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.
  + (b) Involuntary Dismissal; Effect.
  + If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule — except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19 — operates as an adjudication on the merits.
  + **D. Default**
  + Rule 55. Default; 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.
  + (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 (liquid assets), 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 (non-liquid assets), the party must apply to the court for a default judgment. 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.
  + (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 default judgment under Rule 60(b).
  + (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.
* **XI. Trial**
  + Text on pg. 627-8 order of trial events
* **A. Right to Trial by Jury**
  + U.S. Constitution Amendment VII - In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.
    - The 7th Amendment establishes a right to jury trial in "suits at common law" which are distinct from suits in equity. The equity courts did not try cases by jury before the passing of the 7th Amendment and therefore no right to a jury trial is preserved in these courts.
    - When both legal and equitable issues are presented in a single case, only under the most imperative circumstances can the right to jury trial be lost through prior determination of equitable claims. Judge will determine equity based claims, jury will determine law based claims
  + Rule 38. Right to a Jury Trial; Demand.
  + (b) Demand. On any issue triable of right by a jury, a party may demand a jury trial by:
    - (1) serving the other parties with a written demand — which may be included in a pleading — no later than 14 days after the last pleading is served
  + (c) Specifying Issues. In its demand, a party may specify the issues that it wishes to have tried by a jury; otherwise, it is considered to have demanded a jury trial on all the issues so triable. If the party has demanded a jury trial on only some issues, any other party may — within 14 days after being served with the demand or within a shorter time ordered by the court — serve a demand for a jury trial on any other or all factual issues triable by jury.
  + (d) Waiver; Withdrawal. A party waives a jury trial unless its demand is properly served and filed. A proper demand may be withdrawn only if the parties consent.
  + (e) Admiralty and Maritime Claims. These rules do not create a right to a jury trial on issues in a claim that is an admiralty or maritime claim.
* **B. Demand and Waiver of the Right**
  + Rule 39. Trial by Jury or by the Court.
  + (a) When a jury trial has been demanded under Rule 38, the action must be designated on the docket as a jury action. The trial on all issues so demanded must be by jury unless:
    - (1) the parties file a stipulation to a nonjury trial or so stipulate on the record;
    - (2) the court, on motion or on its own, finds that on some or all of those issues there is no federal right to a jury trial.
  + (b) Issues on which a jury trial is not properly demanded are to be tried by the court. But the court may, on motion, order a jury trial on any issue for which a jury might have been demanded.
  + (c) In an action not triable of right by a jury, the court, on motion or on its own:
    - (1) may try any issue with an advisory jury; or
    - (2) may, with the parties’ consent, try any issue by a jury whose verdict has the same effect as if a jury trial had been a matter of right, unless the action is against the United States and a federal statute provides for a nonjury trial.
  + Rule 81(c) Removed Actions.
  + (A) A party who, before removal, expressly demanded a jury trial in accordance with state law need not renew the demand after removal. If the state law did not require an express demand for a jury trial, a party need not make one after removal unless the court orders the parties to do so. The court must so order at a party’s request and may so order on its own. A party who fails to make a demand when so ordered waives a jury trial.
* **C. Jury Selection**
  + Rule 47 Selecting Jurors.
  + (a) The court may permit the parties or their attorneys to examine prospective jurors or may itself do so. If the court examines the jurors, it must permit the parties or their attorneys to make any further written inquiry it considers proper, or must itself ask any of their additional questions it considers proper.
  + (b) The court must allow three peremptory challenges
  + (c) During trial or deliberation, the court may excuse a juror for good cause (unlimited).
    - Not citizens, do not speak English, bias, prejudice, pecuniary interest
  + A juror's misconduct during examination must be quite severe to justify a new trial.
  + The objector must, in a timely fashion, make out a *prima facie* case, usually by statistics that his opponent has exercised his peremptories disproportionately on persons of one race, ethnicity, or gender. The burden then shifts to the opponent to make a neutral explanation (*i.e*. one not based upon race or gender; in a lawsuit before insurance adjuster).
  + The problem with attorney voir dire is that it starts the trial with a personality contest. The trouble with judge voir dire is that the judge is less familiar with the case and lacks the motive to probe for disqualification.
  + Usually, one side would be benefitted by more educated businessman who are experienced in making difficult decisions (defense) while the other (plainitff) will want those who will react more emotionally (blue collar and beauticians).
  + Voir dire techniques:
    - Emphasizing favorable law or facts/ limiting the effect of unfavorable law
      * Carelessness (plaintiff) vs. unreasonable act (defense)
    - Inoculation against unfavorable facts
    - Obtaining commitments (damages)
    - Personalizing the client (my client is John; this is John's company)
    - Arguing the case itself
    - Conditioning the jurors to accept one's proof
    - Building rapport (humor, folksy mannerisms)
    - Stealing the adversary's thunder (adversary will argue X, can you put that emotional argument aside and decide this case on the evidence?)
    - Increasing or decreasing the impact of concerns that are outside the evidence (insurance, can be unethical)
    - Guiding the conduct of the jurors in deliberations (nominate a foreperson)
    - Disqualifying unfavorable jurors
      * Gathering information during examination is difficult for an attorney as they must make a favorable impression while being inquisitive enough to address potential concerns (and to elicit a definitive stance on an issue which could be contentious).
      * Make disqualifying position seem reasonable and attractive
      * Try to force a decision and anticipate your adversary trying to rehabilitate
    - Using members of the panel as "witnesses" (all jurors will listen, ask questions about a particular subject to one; may be unethical).
* **D. Opening Statements**
  + Invoking the Rule - sequester witnesses during testimony
  + Should be clear, direct, and positive expressed in layman's terms
  + Previews the evidence so that the jurors understand how it fits with the legal theory
  + Avoid overstating the case, opponents may use against you if you do not do what you said.
  + Establish a thematic or scenario approach rather than a chronological preview of the witnesses. Jurors form tentative judgments very early in the case.
* **E. Evidence and "Proof**"
* **Rule 43. Taking Testimony.**
* (a) For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.
* (b) When these rules require an oath, a solemn affirmation suffices.
* (c) When a motion relies on facts outside the record, the court may hear the matter on affidavits or may hear it wholly or partly on oral testimony or on depositions.
* (d) Interpreter. The court may appoint an interpreter of its choosing; fix reasonable compensation to be paid from funds provided by law or by one or more parties; and tax the compensation as costs.
* **Rule 45. Subpoena.**
* (a)(1)(A) Requirements — In General. Every subpoena must:
  + - (i) state the court from which it issued;
    - (ii) state the title of the action, the court in which it is pending, 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(c) and (d).
* (2) A subpoena must issue as follows:
  + - (A) for attendance at a hearing or trial, from the court for the district where the hearing or trial is to be held;
    - (B) for attendance at a deposition, from the court for the district where the deposition is to be taken; and
    - (C) for production or inspection, if separate from a subpoena commanding a person’s attendance, from the court for the district where the production or inspection is to be made.
* Rule 45(b) Service.
* (1) 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.
* (2) Service in the US Subject to Rule 45(c)(3)(A)(ii), a subpoena may be served at any place:
  + - (A) within the district of the issuing court;
    - (B) outside that district but within 100 miles of the place specified for the deposition, hearing, trial, production, or inspection;
    - (C) within the state of the issuing court if a state statute or court rule allows service at that place of a subpoena issued by a state court of general jurisdiction sitting in the place specified for the deposition, hearing, trial, production, or inspection; or
    - (D) that the court authorizes on motion and for good cause, if a federal statute so provides.
* (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.
* **Rule 45(c) Protecting a Person Subject to a Subpoena.**
* (1) 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 issuing court 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 issuing court 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)(A) On timely motion, the issuing court must quash or modify a subpoena that:
  + - (i) fails to allow a reasonable time to comply;
    - (ii) requires a person who is neither a party nor a party’s officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person — except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;
    - (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies;
    - (iv) or subjects a person to undue burden.
* (B) When Permitted. To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:
  + - (i) disclosing a trade secret or other confidential research, development, or commercial information;
    - (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; or
    - (iii) a person who is neither a party nor a party’s officer to incur substantial expense to travel more than 100 miles to attend trial.
* (C) Specifying Conditions as an Alternative. In the circumstances described in Rule 45(c)(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.
* (e) Contempt. The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty’s failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).
* **Fed. Rule Evid. 801(c) Hearsay.** — “Hearsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.
  + - Hearsay - you can't give someone else's version of the facts in a trial. Example: someone else's written statement is hearsay.
    - If statement itself is a fact it is not hearsay (witness overheard formation of a contract, what is important is what person heard).
* **Fed. Rule Evid. 803(6) Hearsay Exceptions** - Records of regularly conducted activity. — A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term “business” as used in the paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.
* Fed. Rule Evid. 803(8) Hearsay Exceptions - Public records and reports. — Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.
  + All relevant evidence is admissible at trial (unless excluded by a particular exclusionary rule) and is defined as evidence having any tendency to make a fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. This rule is liberal and there is no requirement of certainty, only that there is some tendency to support the inference.
    - Judge balances relevance vs. potential for prejudice
    - Only personal knowledge allowed (exception: experts).
    - Privileged matters excluded.
* Offering something into evidence:
  + - Mark with court recorder
    - Lay the predicate for admission; have the witness identify the document
    - Tender to opposing counsel
    - Offer to the judge for admittance (can be implied offer and admittance; risky)
    - Show the evidence to the jury
* **F. Jury Argument**
  + The rational component of jury argument implies at least three separate functions:
    - (1) to help the jury understand the court's charge (*e.g.* explaining the confusing concepts of promissory estoppel);
    - (2) to legitimately use argument to select, arrange, and interpret those portions of the evidence that are relevant to their theories; and
    - (3) guiding the jury in judging the credibility of the witnesses.
  + Improper jury arguments can be based upon:
    - race, religion, national origin (etc...),
    - wealth (not improper if relevant to punitive damages),
    - existence as a corporation,
    - diverting the jury from following the law (urging the jury to decide the case on a standard other than a legal one),
    - facts outside the record and not inferable from it (usually liberal inferences are allowed),
    - harsh rhetoric about credibility and conduct if not supported by evidence.
  + The doctrine of "cured" or "harmless" error probably result in affirmation of the majority of cases in which jury argument is held to be improper. Reversal is only required in the extreme case in which the impropriety cannot be removed by an instruction to disregard.
    - Misconduct of counsel may not be urged as a ground for reversal absent both timely objection and request for admonition (reprimand) in the trial court.
  + Methods and organization of a jury argument:
    - P1: Introduction (thank jury/praise system) and defining legal terms
    - Answer questions (each one): read, translate, marshal the evidence, answer
    - D1: argument answering a few of P1's points (do not structure around P's argument)
    - Thank jury/praise system as P
    - Answer questions with D's spin: read, translate, answer
    - Add emotional value
    - P2: argument answering a few of D1's points
    - Summarize Ps best points
    - Add emotional value
* **G. Jury Instructions; Verdicts**
  + Rule 49. Special Verdict; General Verdict and Questions.
  + **(a) Special Verdict**.
  + (1) The court may require a jury to return only a special verdict in the form of a special written finding on each issue of fact. The court may do so by:
    - (A) submitting written questions susceptible of a categorical or other brief answer;
    - (B) submitting written forms of the special findings that might properly be made under the pleadings and evidence; or
    - (C) using any other method that the court considers appropriate.
  + (2) Instructions. The court must give the instructions and explanations necessary to enable the jury to make its findings on each submitted issue.
  + (3) Issues Not Submitted. A party waives the right to a jury trial on any issue of fact raised by the pleadings or evidence but not submitted to the jury unless, before the jury retires, the party demands its submission to the jury. If the party does not demand submission, the court may make a finding on the issue. If the court makes no finding, it is considered to have made a finding consistent with its judgment on the special verdict.
  + **(b) General Verdict with Answers to Written Questions**.
  + (1) In General. The court may submit to the jury forms for a general verdict, together with written questions on one or more issues of fact that the jury must decide. The court must give the instructions and explanations necessary to enable the jury to render a general verdict and answer the questions in writing, and must direct the jury to do both.
  + (2) Verdict and Answers Consistent. When the general verdict and the answers are consistent, the court must approve, for entry under Rule 58, an appropriate judgment on the verdict and answers.
  + (3) Answers Inconsistent with the Verdict. When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may:
    - (A) approve an appropriate judgment according to the answers, notwithstanding the general verdict;
    - (B) direct the jury to further consider its answers and verdict; or
    - (C) order a new trial.
  + (4) When the answers are inconsistent with each other and one or more is also inconsistent with the general verdict, judgment must not be entered; instead, the court must direct the jury to further consider its answers and verdict, or must order a new trial.
  + Special verdicts reduce the emotional and prejudicial aspects of jury decisions by focusing upon the facts and the law. The jury, however, may not understand what it is being asked and the consequences. A general charge may allow the rounding of the rough edges of the law and temper some of its unfairness.
  + Must object to the charge before jury retires or the issue cannot be appealable.
* **H. Trial to the Court Without a Jury**
  + **Rule 52(a) Findings and Conclusions.**
  + (1) In General. In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately.
  + (2) For an Interlocutory Injunction. In granting or refusing an interlocutory injunction, the court must similarly state the findings and conclusions that support its action.
  + (5) Questioning the Evidentiary Support. A party may later question the sufficiency of the evidence supporting the findings, whether or not the party requested findings, objected to them, moved to amend them, or moved for partial findings.
  + (6) Setting Aside the Findings. Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous.
  + (b) Amended or Additional Findings. On a party’s motion filed no later than 28 days after the entry of judgment, the court may amend its findings—or make additional findings—and may amend the judgment accordingly. The motion may accompany a motion for a new trial.
  + **28 USC § 144 Bias or Prejudice of the Judge**
  + Whenever a party to any proceeding in a district court makes and files a timely (10 days before proceedings) and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
  + **28 USC § 455. Disqualification of Justice, Judge, or Magistrate.**
  + (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
  + (b) He shall also disqualify himself in the following circumstances:
    - (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
    - (3) Where he has participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;
    - (4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding.
    - (5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
      * (i) Is a party to the proceeding, or an officer, director, or trustee of a party;
      * (ii) Is acting as a lawyer in the proceeding;
      * (iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
      * (iv) Is to the judge’s knowledge likely to be a material witness in the proceeding.
  + (c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.
  + (e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.
  + (f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, disqualification is not required if the justice, judge, magistrate, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.
* **XII. Directed Verdict and Post-Trial Motions (Multiple Choice)**
  + The procedures for taking the case away from the jury:
    - (1) judgment on the verdict;
    - (2) judgment as a matter of law (both during and after trial);
    - (3) new trial (miscarriage of justice) and;
    - (4) relief from judgments (miscarriage of justice).
  + **Judgment on the Verdict**
  + If the jury has rendered a general verdict, the entry of judgment on the verdict is straightforward. Special verdicts however, may present a complex question of law.
  + **Judgment as a Matter of Law**
  + A judgment as a matter of law aborts the trial after the non-movant has rested on the ground that reasonable minds could not differ with the position of the movant (no legally sufficient evidence supported the finding or verdict sought by the non-movant).
  + Rule 50(a) Judgment as a Matter of Law.
  + (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.
  + The court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence (a jury function). The court should give credence to the evidence favoring the nonmovant as well as evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that the evidence comes from disinterested witnesses.
  + **Rule 50(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 a new trial under Rule 59. In ruling on the renewed motion, the court may:
    - (1) allow the 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.
  + The court is unable to grant a judgment as a matter of law *after* trial, unless the same grounds for judgment as a matter of law *during* the trial is motioned for.
    - TX, CA, NY do not have this requirement.
  + The judgment as a matter of law standard is sometimes expressed in the terms of having introduced "no evidence" or no "substantial evidence "(which does not literally mean no evidence but insufficient evidence to make a case).
  + The courts state that a "mere scintilla" is not legally sufficient evidence from which a reasonable factfinder can draw a legitimate inference. But if there is substantial evidence such that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, then the case must be submitted to the jury. The "scintilla" rule does not apply to conflicts in the direct evidence (whether the traffic light was red or green) but only applies to the jury's ability to draw inferences from circumstantial evidence.
  + The judge can reserve decision of a Rule 50(a) motion until after the jury has returned a verdict. This allows the jury to potentially decide the case the "right" way while still having the ability to grant the motion. Also, if the appellate court disagrees with the judgment as a matter of law, then it may reinstate the jury verdict without the necessity of a new trial.
* **B. New Trial**
  + Rule 59. New Trials; Altering or Amending a Judgment.
  + (a)(1) Grounds for New Trial. The court may, on motion, grant a new trial on all or some of the issues — and to any party — as follows:
  + (A) after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law or a suit in equity without a jury in federal court; or
  + (2) Further Action After a Nonjury Trial. After a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment.
  + (b) A motion for a new trial must be filed no later than 28 days after the entry of judgment.
  + (c) When a motion for a new trial is based on affidavits, they must be filed with the motion. The opposing party has 14 days after being served to file opposing affidavits. The court may permit reply affidavits.
  + (d) No later than 28 days after the entry of judgment, the court, on its own, may order a new trial for any reason that would justify granting one on a party’s motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. In either event, the court must specify the reasons in its order.
  + (e) A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment.
  + A new trial can be granted for a great variety of reasons (trial error, newly discovered evidence, misconduct, result contrary to the great weight of the evidence, etc...) and is subject to the discretion of the trial judge.
    - Newly discovered evidence - you could not have discovered the new evidence with due diligence before trial and the new evidence must change the result.
    - Juror misconduct must be extrinsic and prejudicial to allow a new trial.
    - For a new trial, a judge does not use a preponderance of the evidence but must use the great weight of the evidence.
    - Remittitur - conditional new trial - reduce your damages by X amount or a new trial will result.
* **C. Rule 60. Relief from a Judgment or Order.**
* (a) 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) 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.
  + (c)(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.
  + (c)(2) The motion does not affect the judgment’s finality or suspend its operation.
  + (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.
  + Rule 60 motion allows a narrow escape valve when other remedies are unavailable. (*i.e*. Rule 59 motion for a new trial).
* **XIII. Appeals (Multiple Choice)**
* **A. Scope of Appellate Review**
  + Must file within 30 days
  + FRAP Rule 7 - cost bond of $500 must be filed and is the cost of appeal (filing briefs, etc...).
  + FRAP Rule 8 - appeal does not stop collection from the judgment, must get court to stay judgment. Supersedeas bond is required in the amount of the judgment + costs during pendency of the appeal.
  + mandamus - order to a public official to do his duty (equitable device - no adequate remedy at law).
  + The court should ignore errors that do not affect the essential fairness of the trial.
    - A litigant in entitled to a fair trial but not a perfect trial.
  + Rule 61 provides that no error is ground for disturbing a judgment or order unless justice requires otherwise.
  + Preservation of objections - As a general rule, a party must make objections known to the court the action which the party desires the court to take or the objection to the court's action and the grounds for the objection at the time the ruling is made. Otherwise, no complaint can be made about the court's action on appeal.
  + In many procedural systems, there is a concept called plain or fundamental error. When this type of error has been committed, failure to make an objection or obtain a ruling may be excused (some courts will only allow things like jurisdiction to go unchallenged while others will allow serious denials of a party's rights as plain error; must be so egregious that the courts will correct the wrong).
  + Any ruling that is within the discretion of the judge will be reviewed under an abuse of discretion standard. A discretionary decision will not be reversed unless the appellate court is convinced that the trial court was clearly wrong (judge has discretion in pretrial processes, evidence, conduct of the trial, jury charge, new trial, etc... No discretion in stating the law, granting summary judgment or another j.m.o.l.).
    - If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even when convinced that had it been sitting as the trier of fact it would have weighed the evidence differently (unless clearly against the evidence)
  + Rule 77(d) has been amended to allow trial courts to grant extensions of time as allowed by amended FRAP 4(a) - excusable neglect or good excuse.
  + Rule 62. Stay of Proceedings to Enforce a Judgment.
  + (a) Automatic Stay; Exceptions for Injunctions, Receiverships, and Patent Accountings. Except as stated in this rule, no execution may issue on a judgment, nor may proceedings be taken to enforce it, until 14 days have passed after its entry. But unless the court orders otherwise, the following are not stayed after being entered, even if an appeal is taken:
    - (1) an interlocutory or final judgment in an action for an injunction or a receivership; or
    - (2) a judgment or order that directs an accounting in an action for patent infringement.
  + (b) Stay Pending the Disposition of a Motion. On appropriate terms for the opposing party’s security, the court may stay the execution of a judgment — or any proceedings to enforce it — pending disposition of any of the following motions:
    - (1) under Rule 50, for judgment as a matter of law;
    - (2) under Rule 52(b), to amend the findings or for additional findings;
    - (3) under Rule 59, for a new trial or to alter or amend a judgment; or
    - (4) under Rule 60, for relief from a judgment or order.
  + (c) Injunction Pending an Appeal. While an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party’s rights.
  + (d) Stay with Bond on Appeal. If an appeal is taken, the appellant may obtain a stay by supersedeas bond, except in an action described in Rule 62(a)(1) or (2). The stay takes effect when the court approves the bond.
* **C. Appealable Orders**
  + Final judgment rule means that a judgment must dispose of the claim, not merely some aspect of the claim. Generally, a final judgment terminates the entire litigation and disposes of all claims and defenses in the case, must be final to all parties, and must adjudicate all grounds for relief.
  + § 1291. The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the US.
    - Interlocutory (provisional) orders - non-final orders (*e.g.* preliminary injunction). There are special mechanisms to deal with cases such as these.
  + § 1292(a) Interlocutory Decisions.
  + (a) The courts of appeals shall have jurisdiction of appeals from:
    - (1) Interlocutory orders of the district courts of the United States, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;
    - (2) Interlocutory orders appointing receivers or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;
    - (3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases.
  + (b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order.
  + Rule 54(b) Judgment on Multiple Claims or Involving Multiple Parties.
  + When an action presents more than one claim for relief — whether as a claim, counterclaim, crossclaim, or third-party claim — or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay.
    - In effect, Rule 54(b) gives the trial judge the power to artificially make some non-final orders into final judgments by including certain recitations in them.
* **D. The Supreme Court**
  + To go to the Supreme Court, the applicant files a petition for certiorari (discretionary order allowing review of a lower court's decision). The purpose of this document is not to argue on the merits; instead it is to convince the court that there are "special and important reasons" for the case to be heard.
  + Affirmative votes by four members of the Court suffice to grant certiorari.
  + Among the most important issues viewed by the Court are those in which there are intolerable conflicts between the Ct. of Apps or between a Ct. of App. and a state court of last resort, or those in which substantial issues of federal law have not been, but should be, decided by the Supreme Court. Thus, review by certiorari addresses systemic problems rather than problems of individual justice.
  + Review of state court decisions is limited to federal questions. The Court will decline important issues of federal law if the lower court's decision rests upon adequate state ground. The Court has indicated a greater willingness to consider cases in which state and federal grounds are interwoven and the basis for decision in ambiguous.
* **XIV. Remedies, Judgments, and Their Enforcement (Multiple Choice)**
* **A. Seizure: Attachment, Garnishment, Sequestration, Replevin, etc...**
  + Rule 64 Seizing a Person or Property
  + (a) Remedies Under State Law — In General. At the commencement of and throughout an action, every remedy is available that, under the law of the state where the court is located, provides for seizing a person or property to secure satisfaction of the potential judgment.
  + (b) The remedies available under this rule include the following — however designated and regardless of whether state procedure requires an independent action:
    - arrest;
    - attachment - allowing seizure of a debtors non-exempt property in which the creditor does not have a specific security or other ownership interest;
    - garnishment - pre-judgment remedy allowing seizure of property in the hands of a third person;
    - replevin - a pre-judgment remedy involving seizure of a chattel on application of a person entitled to its possession, when it may be subjected to waste, removal, destruction, etc.;
    - sequestration; and
    - other corresponding or equivalent remedies.
  + The remedy may be named "replevin", "claim and delivery", "sequestration", or merely "seizure". The statute and procedure used most conform to *Fuentes-Mitchell* requirements (cannot make a conclusory statement, must involve some sort of judicial process, proof that there is a need for pre-judgment seizure because the debt will otherwise be lost).
  + Private repossessions are outlined by the UCC and as long as there is no "breach of the peace" (force, threat, unauthorized entry into buildings) they are allowed (and not subjected to *Fuentes-Mitchell* requirements).
  + Notice of lis pendens - A notice of a pending dispute over real property. The notice is filed in the records maintained by the local county clerk and effectively discourages the transfer of title unless the purchaser is able to satisfy herself that it is safe to ignore the dispute.
  + Most jurisdictions provide serious damages for wrongful use of provisional remedies.
* **B. Temporary Restraining Order**
  + Rule 65 Injunctions and Restraining Orders.
  + **(a) Preliminary Injunction.**
  + (1) Notice. The court may issue a preliminary injunction only on notice to the adverse party.
  + **(b) Temporary Restraining Order.**
  + (1) Issuing Without Notice. The court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if:
    - (A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and
    - (B) the movant’s attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.
  + (2) Every temporary restraining order issued without notice must state the date and hour it was issued; describe the injury and state why it is irreparable; state why the order was issued without notice; and be promptly filed in the clerk’s office and entered in the record.
  + (3) If the order is issued without notice, the motion for a preliminary injunction must be set for hearing at the earliest possible time. At the hearing, the party who obtained the order must proceed with the motion; if the party does not, the court must dissolve the order.
  + (4) On 2 days’ notice to the party who obtained the order without notice the adverse party may appear and move to dissolve or modify the order.
  + (c) Security. The court may issue a preliminary injunction or a TRO only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained.
  + How to get a TRO fast:
    - 1. Greasing the skids.
    - 2. The bond
    - 3. The petition or complaint
      * 1. Names of the parties
      * 2. Factual allegations giving rise to your right to relief (must show irreparable harm if TRO not granted - money damages not enough to protect interest)
      * 3. The prayer - ask for TRO but cite other party to appear to show why TRO should not be converted into a preliminary. Request a permanent injunction
      * 4. The affidavit
    - 4. The TRO
    - 5. The Hearing
      * 1. Appear with client who should be ready to testify. If judge grants TRO he will (a) fill in the amount of the bond; (b) set a date, within 10 days, for hearing the application for the preliminary injunction; and (c) sign the order.
    - 6. Don't forget the filing fee
* **C. Damages (Compensatory and Punitive)**
  + Compensatory damages - loss of earning capacity, out of pocket expenses, any emotional distress suffered, impairment of reputation, personal humiliation, etc...
  + Presumed damages are a substitute for ordinary compensatory damages, not a supplement for an award the fully compensates an injury. When a plaintiff seeks compensation for an injury that is likely to have occurred but difficult to establish, some form of presumed damages may possibly be appropriate.
  + The amount of punitive or exemplary damages assessed against any defendant may be such sum as you believe will serve to punish the defendant and to deter him and others from such conduct.
  + Compensation for an undisputed injury should not be denied merely because the amount of damages cannot be precisely and exactly determined.
* **D. Injunctions and Other Equitable Remedies**
  + Equitable remedies are for irreparable injury for which there is no adequate remedy at law.
  + A TRO under Rule 65(b) can be granted without notice to the other party for a duration of no more than 10 days. A preliminary injunction under Rule 65(a) is issued with notice and after a hearing for the purpose of preventing irreparable injury during the pendency of a suit, before final judgment. A permanent injunction is the final adjudication of the issue pursuant to Rule 65(d).
  + Posner has reduced the granting of an injunction to a formula P x HP > (1-P) x Hd. To grant an injunction the probability that the denial would be an error (plaintiff will win at trial) x harm to the plaintiff must exceed the probability that granting the injunction would be an error (plaintiff loses at trial) x harm to the defendant.
  + Specific performance is an equitable remedy available when the performance required by a contract is so unique that damages will not provide an adequate remedy.
    - In land contracts, specific performance can be granted to a purchaser as the land fulfills the "uniqueness" requirement. On the other hand, specific performance is usually not available to a seller as specific performance of the contract grants money, which is non-unique.
  + Restitutionary remedies exist both at law and in equity. (*e.g.* replevin (for recovering a chattel) and general assumpsit (for the restoration of money paid by mistake)).
  + A constructive trust is an equitable remedy in which the holder of unjust enrichment is deemed to be a trustee for the proper claimant (such as property or ill-gotten profits). A constructive trust may be used, for example, to prevent unjust enrichment of a fiduciary who otherwise would be immune from a damage remedy because of such rules as the statute of frauds.
  + A resulting trust is the creation of an implied trust by operation of law, as where property gets transferred to one who pays nothing for it; and then is implied (as opposed to express contract) to have held the property for benefit of another person. The trust property is said to "result" back to the transferor.
  + An equitable lien can be imposed by the court when wrongfully taken property is used to purchase a more substantial asset; the plaintiff has a lien against the asset to secure payment (actually a special case of the constructive trust).
  + An equitable "accounting" is available in situations of complex account in which a court of equity sorts things out. An "accounting of profits" is available, for example, when the defendant wrongfully has infringed the plaintiff's trademark (plaintiff entitled to ill-gotten profits).
  + Subrogation is analogous to a constructive trust, but operates to allow one person to step into the shoes of another. The most common example is the casualty insurer who pays the injured person's loss; the remedy of subrogation allows the insurer, in some circumstance, to step into the shoes of its insured and sue a negligent third person for the amount of the loss.
  + Courts of equity have broad discretion in its orders (institutional reforms in civil rights cases, intrusions into the sovereignty of a state).
* **E. Declaratory Judgments**
  + It sometimes happens that a party needs a declaration of her rights, even though the controversy has not proceeded to a point where traditional coercive relief would be available. Any such declaration shall have the force and effect of a final judgment.
* **F. Attorney's Fees and Interest**
  + There is a general rule against the imposition of pre-judgment interest but there has been special cases where it has been judicially applied.
* **G. Enforcement of Judgments by Execution and Sale**
  + The sheriff is the agent of both the creditor and the property owner and his duty is to protect their interests and to see that the property is not sacrificed and may not levy execution upon all the debtor's property, but only so much as is sufficient to satisfy the judgment debt. If real property is capable of division, it must be subdivided and only that portion sold that is necessary to pay the debt.
    - However, some states differ in procedure. In this case, the sale was conducted in strict conformity with statutory procedure rendering any relief granted (due to oppressive or unfair conduct) inappropriate.
  + NY's homestead exemptions allows the debtor to realize the first $50K from a judicial sale. Other states have larger exemptions. Texas exempts urban homesteads under 10 acres and rural ones under 100 acres (and includes most of what most people have).
* **Rule 69(a)(1) Execution** - Money Judgment; Applicable Procedure.
* A money judgment is enforced by a writ of execution, unless the court directs otherwise. The procedure on execution — and in proceedings supplementary to and in aid of judgment or execution — must accord with the procedure of the state where the court is located.
* (2) Obtaining Discovery. In aid of the judgment or execution, the judgment creditor or a successor in interest whose interest appears of record may obtain discovery from any person — including the judgment debtor — as provided in these rules or by the procedure of the state where the court is located.
* **H. Other Enforcement Devices**
* A judgment lien creates a claim against the property as security for the judgment debt. It may create a right of foreclosure against the property (also subsequent purchasers) while also may give the creditor the right to have his debt satisfied from the property in higher priority than other creditors.
* The federal Consumer Credit Protection Act provides that an attachment or garnishment of wages due or to become due to the judgment debtor shall not exceed 25% of his disposable wages (a court of equity can reduce this number as appropriate).
* A turnover order is an order commanding a judgment debtor to turn over assets to a judgment creditor. In these situations the judgment debtor has valuable rights that are not exempt from process (attachment, execution, or seizure) but are difficult to reach by ordinary means.
* A receiver may be appointed in proceedings in aid of execution, when an execution has been returned unsatisfied, or when the judgment debtor refuses to apply his property in satisfaction of the judgment.
  + - Duties of a receiver:
      * (1) Secure the assets of the company and/or
      * (2) Realize the assets of the company and/or
      * (3) Manage the affairs of the company in order to discharge the debt owing.
* The receiver may run the company in order to maximize the value of the company’s assets, sell the company as a whole, or sell part of the company and close unprofitable divisions.
* To be held in contempt, the violated underlying order must be specific and unequivocal.
* Direct contempts are those committed in the presence of a judge, if some of the elements are not directly observed by the judge it is an indirect contempt.
  + For a judgment obtained in State X you must bring an action on the judgment in State Y i order to collect there. For a judgment taken in a federal court, an action on the judgment is unnecessary as a judge may be "registered" in any other district.
* **XV. Alternative Methods of Dispute Resolution (Multiple Choice)**
* **A. Types of ADR's; the Case for and Against**
* **B. Negotiation**
* **C. Settlement Agreements**
* A release given to one of two or more tortfeasors does not extend to the remaining tortfeasors unless its terms expressly so provide.
* **D. Arbitration and Related Procedures**
  + The arbiter is not bound to abide by, absent a contrary provision in the agreement, those principles if substantive law or rules of procedure which govern the traditional legal process.
  + An arbiter's paramount responsibility us to reach an equitable result, and the courts will not assume the role of overseers to mold the award to conform to their sense of justice.
  + Thus, an arbiter's award will not be vacated for errors of law and fact.
  + Where courts will intervene are cases in which public policy considerations, embodied in statute or decisional law, prohibit, in an absolute sense, particular matters being decided or certain relief being granted by an arbiter (such as punitive damages).
* **E. Mediation and Other Advisory Procedures**
  + Mini-trial - non-binding ; each side presents its best case before top management representatives of each side (with settling authority); presided over by a neutral advisor who moderates and advises the parties about the strengths and weaknesses of their cases.
    - Narrowing the dispute, mixed questions of law and fact.
  + Court annexed arbitration - mandatory non-binding arbitration imposed by some courts for all disputes under a certain amount (e.g. $100K). 30 days after the result, a party can get a trial in which the arbitration will be treated as if it never happened.
  + Summary jury trial - non-binding; no live testimony, 90-minute evidence statements from the lawyers to a 6-member jury who are not aware that their decision is non-binding. Jury award will be used as a basis for settlement.
    - Low chance of liability but high damages, high emotions, damages uncertain
* **XVI. Res Judicata, Collateral Estoppel, and Related Preclusion Doctrines (Multiple Choice)**
* **A. Res Judicata**
  + Res judicata - sometimes used broadly to encompass the separate doctrines of:
    - (1) claim preclusion, or merger and bar (precluding re-litigation when a subsequent suit is brought on the same claim), and
    - (2) issue preclusion, or collateral estoppel (precluding re-litigation of an issue settled in a prior suit, even if on a different claim).
  + 3 requirements:
    - (1) previous final judgment
    - (2) between the same parties (or privies or predecessors)
    - (3) same claim or same factual complex or broad procedural duty
  + Res judicata is an affirmative defense
* **B. Collateral Estoppel**
  + Collateral estoppel:
    - 1. previous final judgment
    - 2. between same parties or their privies or predecessors
    - 3. resolving an issue that is material to both judgments