Civil Procedure – Fall 2012

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# Pleading

## COMPLAINT (FRCP Rule 8)

### What must a pleading include? (i, ii, AND iii)

* + 1. **SMJ (8a1):** short and plain statement of the ground for the court’s **jurisdiction**
    2. **Short & Plain Statement Showing (8a2):** **short and plain statement** of claim **showing** that the pleader is entitled to relief
       1. **Legal Sufficiency:** The pleading must assert a claim for a cause of action that exists. If no cause of actions exists, a court can dismiss sue sponte or with a 12b6.
       2. **Factual Sufficiency:** A pleading must have a short and plain statement of a claim showing that the pleader is entitled to relief.
          1. **Path 1: short and plain** (lenient standard) (NOT SUFFICIENT ALONE)

No set of facts standard:

Short & plain ≠ evidentiary standard:

* + - * 1. **Path 2: Showing-Twombly/Iqbal Two-Step:**

**Step 1 – Conclusory Test:**

**Step 2 Plausibility Test:**.

* + - * 1. **Heightened Factual Requirement for Fraud/Damages (9b/g):**
    1. **Relief (8a3):** a demand for relief sought

## Is this a special matter?

# The Reply

A D has **three options** after they have been served with a complaint: **(1)** answer, **(2)** motion, **or (3)** nothing.

## ANSWER (FRCP Rule 8)

### Timing to Serve a Response & Default Judgment

### Elements (AND)

1. **Short and Plain Statement (8b1A):** State in short and plain terms its defenses to each claim asserted **AND**
2. **Reponses to Allegation (8b1B):** Admit or deny the allegations asserted against it by an opposing party

### Methods for asserting denials (FRCP Rule 8b)

1. General denial, partial denial, lack of knowledge

### Affirmative Defenses (FRCP Rule 8c)

### Alternative Statements; Inconsistencies (FRCP Rule 8d)

## MOTIONS (FRCP Rule 12) – Generally Asserted by D, Some Can Be Asserted by P

* + 1. FRCP 12i – 12b1-7 and 12c must be heard **AND** decided before trail **UNLESS** the court orders a deferral until trial

### General Rule for Timing

* + 1. 21 days from service/60 days from waiver/
    2. Counterclaims/Crossclaims 21 days from service
    3. Court-ordered 21 days from order

### What can be presented as a separate motion, and when?

* + 1. Motion for more definitive statement (12e) **before answer**/**with answer?**
    2. Least favored defense (PJ, venue, process, service of process) **before answer**
    3. More favored defenses (failure to state a claim, failure to join necessary parties, legal defense) in **response to pleading, in judgment on pleading, at trial.**
    4. Most favored defenses (SMJ) **at any time, and court had independent obligation.**

### Motion for Judgment on Pleadings

### Motion to Strike

## DO NOTHING (FRCP 8)

### Did the D do nothing (Default judgment rule)

# Certifications and Sanctions (FRCP Rule 11)

## Certification (NOT APPLICABLE TO DISCOVERY)

### Was this a pleading, motion, other paper (not discovery)? Must be signed.

### Did the Pleading have an affidavit/verification? (not required)

### Did the attorney fail to verify? (prompt correction once made aware)

### Continued Monitoring Requirement (FRCP 11b)

* + 1. Improper purpose (harassment, delay); nonfrivolous; supportable with evidence, warranted denial.
    2. Conducted reasonable inquiry

## Sanctions (FRCP 11c)

### Requirements – Violation of Continued Monitoring Requirement (FRCP 11b)

### Methods for Sanctioning in Rule 11

* + 1. **Motion for sanctions (FRCP 11c2)** 
       1. Separate motion
       2. Description of specific conduct
       3. Service – (attorney or laundry list)
       4. 21-day correction period
    2. **Court’s initiative (FRCP 11c3)**
       1. On its own

### Limitations on Monetary Sanctions

* + 1. If represented by the attorney, cannot drill backwards to underlying party.
    2. Court cannot impose sanctions before issuing a show-cause

### Requirements for an Order to Sanction

* + 1. What action was sanctioned + basis of sanction.
    2. Sanction applies to law firm as well.

# Amendments (FRCP Rule 15)

## General Information

### When can you amend?

* + 1. **Pre-Trail**
    2. **During Trial**
    3. **Post-Trial**

### Reponses to Pre-Trial Amended Pleading (MAX. RULE; at least 14 days)

.

## When are you amending & can you amend? (STEP 1)

### Pre-Trial Amendments (FRCP 15a)

* + 1. **Matter of Course (Is this ≤ 21 days)**
    2. **After 21 days**
       1. **Consent**
       2. **Leave to Amend – Justice so requires**
          1. **Undue Delay**
          2. **Prejudice**
          3. **New issue in bad faith**
          4. **Futile new issue**

### During and Post-Trial Amendments (15b)

* + 1. Objection at trial – amendment would aid presentation of merits AND no prejudice
    2. Express/Implied consent of the parties through action at trial.

## Has the statute of limitations run? (STEP 2)

### Borrowing Rule

### Transactionally related (new claim, same party)

* + 1. Same basic injury
    2. One-Episode in Suit
    3. Byproduct of original complain
    4. Common core of operative fact

### Transactionaly Related = Adding/changing Party

* + 1. Tranactional test above
    2. 120 days from service
    3. Receipt of notice
    4. Knew or should have known

# Joinder of Claims and Parties

## Is the joinder supported by the FRCP? (Part 1 of 3)

### Can P join a claim? (FRCP 18)

* + 1. **As many claims against party, doesn’t matter about transactional relationship.**
    2. **Judicial Discretion to Split**:

### Can a party be joined? (FRCP 20)

* + 1. **Same series, transaction, or occurrence (real world-grouping)**
    2. **at least 1 common question of law or fact**
       1. **Common Question Test:** there is at least one common question of law **or** fact.
    3. **Class Action Rule** 
       1. Numerosity: so many Ps or Ds that a normal joinder would not work
       2. Commonality: there is a common question of fact or law
       3. Typical: the claims or defense by the representative are typical of the class
       4. Adequately Represent: the representative party will fairly represent the class
    4. **Misjoinder Leads to Severance (FRCP 21):**
    5. **Consolidation (FRCP 42a):**

## Do the joined parties/claims invoke SMJ? (Part 2 of 3)

### Constitutional Grant

### Diversity Statutory Grant

### Federal Question Statutory Grant

## Do the joined parties/claims invoke Supplemental jurisdiction? (Part 3 of 3)

### At least 1 claim with original jurisdiction

### So related to original claim (common core of operative fact)

### Diversity/Alienage Exception

### Discretionary factors

* + 1. New/complex issue of state law
    2. SJ claim predominates
    3. Other claims dismissed by court
    4. Exceptional circumstances

## Common Law Doctrines of Preclusion

### Claim Preclusion (res judicata):

### Issue Preclusion (collateral estoppel):

# Counterclaims, Cross-Claims and Necessary and Indispensable Parties

## Can a D assert a counterclaim? [NO VENUE ASSESSMENT REQUIRED]

### Is the claim a compulsory counterclaim (FRCP 13a)? (Part 1a of 3)

* + 1. **Transactionally-Realted** 
       1. Issue, res judicata, evidence, and logical relationship
    2. **Party has PJ over party (or proposed party)**.

### Is the claim a permissive counterclaim (FRCP 13b)? (Part 1b of 3)

* + 1. **Applies to all other counterclaims**

### Can a D join a party to a counterclaim (13h) (Like Joinder rule, but for a D)?

* + 1. **Transactional Relation Test (Broad Rule)**
    2. **Common Question of Law**

## . Do the joined parties/claims invoke SMJ? (Part 2 of 3)

### Constitutional Grant

### Diversity Statutory Grant

### Federal Question Statutory Grant

## Do the joined parties/claims invoke Supplemental jurisdiction? (Part 3 of 3)

### At least 1 claim with original jurisdiction

### So related to original claim (common core of operative fact)

### Diversity/Alienage Exception

### Discretionary factors

* + - 1. New/complex issue of state law
      2. SJ claim predominates
      3. Other claims dismissed by court
      4. Exceptional circumstances

## Can a party assert a crossclaim? (When the parties are on the same side)

### When can the party assert a crossclaim (13g)? (Part 1 of 3)

* + 1. **Transactional Relation Test**
    2. **Claim relates to property that is the subject matter of the first cause of action**
    3. **Claim against a co-party for contribution or indemnity**
    4. **No Venue Assessment:**  There is no requirement to assess venue on counterclaims.

### Can a D join a party to a crossclaim (13h)?

* + 1. **Transactional Relation Test (Broad Rule)**
    2. **Common Question of Law**

### Do the joined parties/claims invoke SMJ? (Part 2 of 3)

### Constitutional Grant

### Diversity Statutory Grant

### Federal Question Statutory Grant

### Do the joined parties/claims invoke Supplemental jurisdiction? (Part 3 of 3)

### At least 1 claim with original jurisdiction

### So related to original claim (common core of operative fact)

### Diversity/Alienage Exception

### Discretionary factors

* + - 1. New/complex issue of state law
      2. SJ claim predominates
      3. Other claims dismissed by court
      4. Exceptional circumstances

## Is a party indispensable?

* 1. Is the party required/Feasible to Join
     1. Court cannot award complete relief
     2. Trial without party would impair/impede ability to protect their interest or leave a risk of double obligations
  2. Must the court dismiss if not feasible to join
     1. See factors in outline

# Third-Party Practice (Impleader)

If the third-party was not part of the original complaint, D can use FRCP 14 to join the party to the litigation.

## When can a defending party bring a third party into the litigation?

### Three Types of Claims

* + 1. Indemnity or contribution (14a)
    2. FRCP 14a creates three claims: (1) the impleader claim under 14a1 asserted by a defending party against an **absentee** (the TPD) who may owe her **indemnity or contribution** on the underlying claim against her; (2) the upsloping 14a claim asserted by the P against the TPD, under 14a3; and (3) the downsloping claim asserted by the TPD against the P, under 14a2d. The upward and downward sloping claims (2 and 3) **must** arise from the same transaction or occurrence as the underlying dispute.
       1. **Timing of the Summons and Complaint (FRCP 14a):** If ≤ 14 days, a defending party may, as a third-party plaintiff (TPP), serve a summons and complaint on a nonparty who is or may be liable to it for all or part of the claim against it. However, the TPP must file a leave to amend **and** obtain the courts permission to serve a third-party complaint if it is > 14 days after filing the answer.
       2. **Third-Party D’s Claims and Defenses (FRCP 14a2):** A TPD functions like a D. (1) The TPD must assert any defenses against the TPP in accordance with FRCP 12. (2) The TPD must assert any counterclaims against the TPP in accordance with FRCP 13 [remember compulsory counterclaims and permissive counterclaims]. (3) The TPD may assert any crossclaims against the TPD in accordance with FRCP 13. (4) The TPD may assert against the P any defenses that the TPP has to the P’s claim. Finally, (5) the TPD may also assert against the P any claim arising out of the transaction or occurrence that is the subject matter of the P’s claim against the TPP.
       3. **Motions to Strike, Sever, or Try Separately (FRCP 14a4):** Any party may move to strike, sever, or try separately the third-party claim.
       4. **Fourth Party Claim (FRCP 14a5):** A TPD may implead a nonparty who is or may be liable to the TPD for all or part of any claim against it.

## When a P May Bring in a Third Party (FRCP 14b)?

* + 1. Under FRCP 14b, a P may bring in a third party because of a claim asserted against P if FRCP 14a would allow a D to bring in the same party.

# Personal Jurisdiction (PJ)

## Was there Proper Notice? (PART 1 of 3)

### Manner Prescribed by Statute; Does the Statute Follow Due Process

## Was there Statutory Amenability? (PART 2 of 3)

### Three-Flavors of Statutory Amenability

* + 1. Explicit full extent of constitution
    2. Non-Explicit but viewed as to the full extent of the constitution
    3. Less than the Constitution (either explicitly or via interpretation)

## Was there Constitutional Authority? (PART 3 of 3)

### Power Theory/Traditional Base of Jurisdiction (Step 1):

1. Presence
2. Consent
3. Domicile/Resident
4. Partnership/Association
5. Force and Fraud Exception

### International Shoe Test (Step 2)*:*

1. **Minimum Contact Test:** 
   * + 1. **Specific Jurisdiction (Related–Path 1):** 
          1. ***Tort Cases + Effects Test***

* + - * 1. ***Contract Cases***
        2. ***Stream of Commerce (Non-Internet)***:

Kennedy Theory

Breyer Theory

Ginsberg Theory

* + - * 1. ***Stream of Commerce (Internet):***

Interactivity Test: Active; interactive; passive.

Targeting Test: Like the Calder Effect Test

* + - 1. **General/All-Purpose Jurisdiction (Non-Related–Path 2):** 
         1. Continuous and systematic contact
         2. Essentially at home – PPB or place of incorporation

**One Safe Place Argument**: The risk of a jurisdictional challenge is eliminated for P and D has the option to its most advantageous forum

**Sovereign Interest Argument:** State has an interest in holding its citizens accountable for their bad conduct outside of the US.

1. **Fairness Test:** In *World-Wide Volkswagen*, the Court explained that
   1. **(1)** the burden on the D
   2. **(2)** the forum state’s interest
   3. **(3)** P’s interest in obtaining convenient and effective relief
   4. **(4)** the interstate judicial system’s interest in obtaining most efficient resolution of controversies
   5. **(5)** the shared interest of the several states.

### Full Faith and Credit Clause of the Article 4 of the Constitution

1. **Other State Must Adhere to Valid Judgments:** The valid judgments of the courts of one state are entitled to enforcement in the courts of the other
2. **Limited to State Courts:** The Full Faith and Credit Clause only applies to state courts enforcing the judgments of other state courts, not the federal courts enforcing the judgment of state courts
3. **Trigger:** A valid judgment flowing from a forum (court) that has **(1)** personal jurisdiction **and** **(2)** subject matter jurisdiction.

# Notice

## Was notice serviced in a statutorily authorized manner? (Step 1) FEDERAL & TEXAS

## TEXAS,

In Texas, a P may serve process through **(1)** personal service **(2)** registered/certified mail, or through **(3)** subsisted service.

### Services of Process: (120 days from when suit is filed)

* + 1. **Failure to Serve = dismissal:**.
    2. **Anybody > 18 can serve process:**
    3. **When serving process on a business (4h1B):** Under FRCP 4h1B, a P or its agent can serve process on an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process of a business.
       1. **Officer for Service ≠ Owner:**
       2. **Assessing a Managing/General Agent = responsibility/authority:**
    4. **Content and Issuance of a Summons (4a1 & 4b):** 
       1. (1) the name of the court and parties,
       2. (2) the name and address of the P or P’s attorney,
       3. (3) the time within which the D must appear or defend,
       4. (4) notice that a failure to appear will result in a default judgment,
       5. (5) the signature of a court clerk,
       6. (6) the court’s seal, and
       7. (7) be directed at the D.

### Methods of Serving Process:

* + 1. **Personal Service within the forum state (4e2A):**
       1. *Force or Fraud Invalidates Service*
       2. *Participation in Litigation Prevents Service*

* + 1. **Substituted Service and deweling/residence (4e2B):** 
       1. ***Dwelling = usual place where D lives***

* + - 1. ***Suitable Age & Discretion***

* + 1. **Service on an Agent (4e2C):**
    2. **Approved State Method (4e2):**

### Duty to Waive Service to Avoid Unnecessary Expense (4d) (60 days to respond):

### Geographical Restrictions (4k) (Must have had PJ first):

* + 1. **Statutory Exception allowing service (4k1C):**
    2. **Bulge Rule (4k1B) Exception (100 Miles from courthouse) for impleaders and indispensable parties:**

* + 1. **Federal Question Exception (4k2):** A court can serve process when no other court in the US has PJ and the exercise of PJ would be Constitutional. This is effectively a federal long-arm statute.

## Does the statute conform to Due Process requirements? (Step 2)

**(1) facial constitutional challenge**, which means that the statutory method for serving notice is not reasonably calculated, and **(2) form challenge**, which means that the party delivering notice used an inappropriate form/method.

### Reasonably Calculated Notice:

### Knowledge Based on Notice & Improper Service:

### Actual Receipt Not Necessary:

### E-mail Notice:

# Venue

## State Analysis

### Is the case a location action or a transitory action?

* + 1. **Local Action – in rem, QIR, remedy in real property, damage to realty = subdivision where property is.**
    2. **Transitory Action (all other actions) = appropriate subdivision**

### Removal-Only to federal district embracing the state.

## Federal Analysis

### Venue Based on Residence (where all Ds reside or where any of the Ds reside, so long as they are within the same state).

* + 1. **Residence of Natural Person = Domicile = presence + intent to make home**
    2. **Residence of Business Association [PJ ANALYSIS] 1391c2/d:** 
       1. Any district where PJ, if none, then the one where there was the most significant contact.

### Venue Based on Events = Substantial part of the events

### Venue based on Property = where the property is

### Fall-Back Provision = Any district with PJ, if A, B, and C are failed.

## Transfer of Venue

### Assuming Proper Initial Venue (28 USC 1404)

* + 1. **Transfer for the Convenience of the Parties (1404a):**
    2. **Other Transfers within the same District (1404b):**
    3. **Sue Sponte Transfers (1404c):**

### Assuming Improper Initial Venue (28 USC 1406) = dismissal

1. **Waiver (1406b):** If venue is improper, a party waives its right to challenge J if it does not interpose a timely and sufficient objection to venue.

### Forum Non Conveniens (FNC)

1. **Proper Forum to Begin with**
   1. **Venue**
   2. **SMJ**
   3. **PJ**
2. **Is there an adequate, available and alternative forum?**
3. **Justifiable Belief**
   * + - 1. **Inadequate Justifiable Belief = massive corruption or procedural barrier:** unfavorable law
         2. **Conditional Dismissal:**

1. **Public/Private Interest Factors:** Less deference is given to the forum chosen by an alien than chosen by an alien than a forum selected by a citizen.
2. **Public Factors**
3. Administrative difficulties
4. Forum Interest – Local interest in having localized controversies decided at home (Choice of Law)
5. Desire to have a case tried in a forum well versed in the law that will apply
6. Avoiding undue problems with conflicts of laws or in the application of foreign law
7. Unfairness of burdening citizens with jury duty in a case unrelated to the forum.
8. **Private Factors**
9. Relative access to sources of proof (viewing evidence site, etc.)
10. Ability to compel attendance of witnesses at trial through subpoena
11. Whether judgment could be enforced
12. All other practical problems that make trial of a case easy, expeditious, and inexpensive.

# Subject Matter Jurisdiction (SMJ)

## Does the court have subject matter jurisdiction over the case?

* + 1. **Timing of a Dismissal for lack of SMJ = Sue Sponte or b/c Motion at any time:**
    2. **Timing of SMJ Assessment = when P filed case:**

## Was there constitutional authority? (PART 1 of 3)

### Article III §2 Heads of Jurisdiction:

**(1)** cases arising under the law or treaties of the U.S.;

**(2)** cases affecting ambassadors, other public ministers, and consuls;

**(3)** cases of admiralty and maritime jurisdiction;

**(4)** controversies to which the US is a party;

**(5)** controversies between a state and citizens of another state;

(6) controversies between citizens of different states;

**(7)** controversies between citizens of the same state claiming lands under grants of different states;

**(8)** controversies between a state and a foreign state or citizen; and

**(9)** controversies between a citizen and a foreign state or citizen

* + 1. **Minimum Diversity Jurisdiction:**

## Was there statutory authority? (PART 2 of 3)

### Is this a diversity of citizenship case?

* + 1. **Are the parties diverse? (Step 1 of 2)**
       1. **Complete Diversity based on CITIZENSHIP Rule**:
          1. **Statutory Impleader Exception 🡪 Minimum Diversity:**
          2. **Multiparty, Multiforum Trial Jurisdiction Act Exception 🡪 Minimum Diversity:**
          3. **Class Action Fairness Act 🡪 Minimum Diversity:**
       2. **Severing Jurisdictional Spoilers under FRCP 21 (Misjoinder) for non-essential parties:**
       3. **Citizenship:**
          1. **Natural Person Citizenship = US Citizens + Domicile:**

Domicile = permanent home +intention of returning; CHANGE requires (1) presence + intent to make home

Permanent resident = alien

Foreign-Domiciled US Citizen = No access to court via diversity

* + - * 1. **Corporation Citizenship:**

Place of incorporation

PPB = Nerve Center\*\*/Muscle Center Test

* + - * 1. **Non-Incorporated Association Citizenship = every state member is a citizen:**

* + - * 1. **Representative’s Citizenship for Estate = Decedent’s Citizenship:**
      1. **Alignment and Realignment to check Diversity:**
    1. **Does the case exceed the amount in controversy requirement? (Step 2 of 2)**
       1. **75K w/o interest and cost**
          1. **Interest Exception when basis of suit (Bonds):**
          2. **Attorney’s Fees if recoverable exception:**

* + - 1. **Aggregation Rule:** 1P v. 1D, aggregate; >1P v D or 1P v >1D, no aggregation unless joint and severable liability

* + 1. **Exceptions Where there will be NO Federal SMJ, even though there is Diversity:**
       1. **Collusive Joinder [Third-Party Assignments of claim]:** 
          1. **Factors:** (1) actual business purpose for the assignment; (2) character of any interest retained by the assignor; and (3) subjective intent of the parties.
       2. **No Divorce Cases**
       3. **No Probate of Wills:**

### Is this an alienage case?

* + 1. **Is this a citizen of a State v. a Foreign National (Step 1 of 2)** 
       1. **Both Parties Alien = No Alienage J:**
    2. **Does the case exceed the amount in controversy requirement? (Step 2 of 2)**
       1. **75K w/o interest and cost**
          1. **Interest Exception when basis of suit (Bonds):**
          2. **Attorney’s Fees if recoverable exception:**

* + - 1. **Aggregation Rule:** 1P v. 1D, aggregate; >1P v D or 1P v >1D, no aggregation unless joint and severable liability

### Is this a federal question case?

* + 1. **Well-Pleaded Complaint Limitation (Step 1 of 2):** only @ P’s complaint; Parts supporting P’s claim. Whether P is trying to vindicate some right given under federal law?
       1. **Artful Pleading:**

* + 1. **Centrality of the Federal Issue (Step 2 of 2):**
       1. **Completed Federal Preemption Doctrine (Path 1):** ERISA, LMRA, and National Banking Regulations claims.
       2. **Substantial Federal Question Doctrine (Path 2):**
          1. Holmes Test = Suit arises under the law that creates it
          2. Litigation Reality Test

(a) the case necessarily raises a federal issue;

(b) the federal issue is actually disputed;

(c) the federal issue is substantial; and

(d) the federal J will not disturb “any congressionally approved balance of federal and state judicial responsibility.”

* + - * 1. Fed Law Create Private Right of Action

## Was there Supplemental Jurisdiction?

### Is there ≥ 1 basis with original J? (PART 1 of 3)

* + 1. **Diversity**
    2. **Federal Q**

### Is the claim supplemental under §1367? (PART 2 of 3)

* + 1. **So Related to Anchor (1367a): = Common Nucleus of Operative Fact/Logical Relation Test**
    2. **Diversity/Alienage J Exception (1367b):**

### Should the federal court exercise its discretion to not hear the case? (PART 3 of 3)

* + 1. the claim raises a novel or complex issue of State law;
    2. the SJ claim substantially predominates over the original J claim or claims;
    3. the district court has dismissed all claims over which it has original J; or
    4. in exceptional circumstances, there are other compelling reasons for declining J.

# Removal

# Choice of Law

1. Erie **could** only be relevant if (**Three Conditions**)
   1. A Federal Court (**Condition 1 of 3)**
   2. Adjudicating state law cause of action **(Condition 2 of 3)**
   3. Federal Source of Law “Procedural” or Substantive (**Condition 3 of 3)**
      1. Questions that are so utterly bound up with the substantive question that will decide the case that the Erie dictates that a court must apply state law to find an answer.
      2. Substantive provision are so bound up with substantive rights such that Erie requires the use of state law.
      3. Federal Statute

# Discovery

## Scope of Discovery

### Is the information relevant?

* + 1. **Tendency to Make Existence of Fact More/Less Probable Standard:**
       1. **No Requirement for Admissibility (26b1):**
       2. **Court-Ordered Discovery (26b1):**

### Is the discovery proportional?

* + 1. **Unreasonably Redundant Discovery (26b2Ci) (Test 1 of 3) = unreasonably cumulative + obtainable from another source:**

* + 1. **Undue Delay in Discovery (26b2Cii) (Test 2 of 3) = waited to long before asking:**
    2. **Burden > Benefit (26b2Ciii) (Test 3 of 3):** (1) needs of the case; (2) the amount in controversy; (3) the importance of the issues; and (4) the parties resources.

### Is the information privileged?

* + 1. **Relationship Test:** Approved relationships are (1) doctor and patient, (2) lawyer and client, (3) clergy member and pastor, and (4) husband and wife.
    2. **Confidential Communication Test:**
       1. **(a) [Location of Communication]**
       2. **(b) [Provision of Professional Service]**
          1. **Attorney-Client Privilege Test: (1)** the relation of attorney and client existed at the time the communication was made, **(2)** the communication was made in confidence, **(3)** the communication relates to a matter about which the attorney is being professionally consulted, **(4)** the communication was made in the course of giving or seeking legal advice, **and** **(5)** the client has not waived the privilege.
    3. **Privilege Log Available and Required for Assertion of Privilege (26b5A):**
    4. **Accidental Disclosure (FRE 502b):**

### Is the information a work product?

* + 1. **“Ordinary” Work Product – Tangible Evidence + Prepared in Anticipation of Litigation + by or for a party (26b3A):**
       1. **(1)** documents and tangible things [Common Law extension to Intangible]

* + - 1. **(2)** prepared in anticipation of ligation or for trial.
      2. **(3)** by or for a party
      3. **Material Prepared During Normal Course of Business = Discoverable:** .
      4. **Use of Interrogatories to Discover Work Product Prohibited:**
      5. **Privilege Log Available and Required for Assertion of Privilege (26b5A):**
    1. **Exceptions To The “Ordinary” Work Product Rule (26b3Aii) :** 
       1. **Substantial Need**
       2. **Undue Hardship**
       3. **“Core”/Opinion Work Product are Absolutely Protected Work Product (26b3B):** 
          1. **Strict Reading = One Opinion Negates (Majority View):**
          2. **Broad Reading = Applies to Any (Minority View**

**Non-Discoverable Material Should be Separated/Redacted from Document Containing Discoverable and Non-Discoverable Material:**

* + - 1. **Right to Own Statement Exception (26b3C):**

### Is the party an expert?

* + 1. **Consulting Experts (26b4D):**
       1. **Work Product Protection for Drafts and Communications (26b4B/C):**
    2. **Expert Witness (26a2):**

# Judgment as a Matter of Law

## Motion for Summary Judgment (MSJ) [Same Standard for JNOV & JML]

### Genuine Dispute as to a Material Fact

* + 1. **Substantive Law Determines Materiality:** Factual disputes about irrelevant facts don’t stop MSJ
    2. **Has the Movant Met Its Burden?**
       1. **Movant’s Burden (Slight Burden) = No BOP on Underlying:**
          1. Majority = Show me what you got
          2. Minority (White) = provide some evidence (how much?)

**Non-Movent Burden = reasonable jury + underlying evidentiary standard:**

* + - 1. **Movant’s Burden (High Bar) = No reasonable jury (probably clear & Convincing evidence standard):**
    1. **Has the Non-Movant Met Its Burden?**
       1. **Reasonable Jury Standard to Combat MSJ = evidence in record + underlying evidentiary standard:**
       2. **Plausibility of Allegations = benefit of all reasonable inference on evidence:**
  1. **Timing**
     1. **MAX = 30-Days Before Conclusion After Conclusion of Disovery (56b):**