DISCOVERY & DUTY TO DISCLOSE

1. Values

a. Efficiency, speedy settlement, truth, ethics, less of a game and more of a fair contest
b. Works for and against the adversarial system

2. Types of Disclosures Required

a. Party has obligation to make reasonable inquiry into facts of case

b. Parties disclose all information then reasonably available

   i. NO privileged or protected as work product
   ii. **26(a)(1)(E)** – NOT relieved from obligation due to failure to complete investigation or other party has not made disclosures

3. Timing

a. **Conference – 26(f)** - as soon as practicable

b. **General (a)(1)(C)** – At or within 14 days after 26(f) conference unless different set by court

c. **Partiers Served/Joined After Conference (a)(1)(D)** – Within 30 days after being served or joined unless different by court

d. Request → objects/protective orders 26(c) – limit nature and scope of examination or to terminate examination if discovery is abused

4. Initial Disclosures – 26(a)(1)

a. **(a)(1)(A)(i) –** Names, addresses and telephone numbers of individuals likely to have discoverable information that disclosing party may use to support its claims or defenses, unless solely for impeachment
   i. ***Chalick* –** violated by only disclosing doctor's name without more info

b. **(a)(1)(A)(ii)** – Copies or descriptions of documents, ESI, and tangible things
   i. In possession or control AND
   ii. Party may use to support claims or defenses

c. **(a)(1)(A)(iii)** – Computation of damages claimed AND copies of materials upon which computation based

d. **(a)(1)(A)(iv)** – Copies of insurance agreements under which insurer might be liable for all or party of any judgment that might be entered

5. Exemptions from Initial Disclosure – (a)(1)(B)

a. Action for review on administrative record
b. Habeas corpus or other proceeding challenge criminal conviction or sentence
c. Action brought without attorney by person in US custody

d. Action to enforce or quash administrative summons or subpoena
e. Action by US to recover benefit payments
f. Action by US to collect on student loan guaranteed by US
g. Proceeding ancillary to proceeding in another court
h. Action to enforce arbitration reward

6. Disclosure of Expert Testimony – 26(a)(2)

a. **(a)(2)(A)** – Must disclose ID of witness may use at trial to president evidence

b. **(a)(2)(B)** – Report: prepared and signed by each witness stating:
   i. Complete statement of all opinions and basis and reasons
   ii. Facts or data considered in forming opinions
   iii. Exhibits used to summarize or support them
   iv. Witnesses' qualifications
      1. AND list of all publications authorized in last 10 years
   v. List of all other cases testified at in last 4 years
   vi. Statement of compensation for testimony

c. **(a)(2)(D)** – **Time –** Absent court stipulation make disclosures:
   i. At least 90 days BEFORE set trial date or for case to be ready at trial OR
   ii. Within 30 days
      1. If evidence is to contradict or rebut evidence on same subject matter ONLY under 26(a)(2)(B)/(C)

7. Pretrial Disclosures – 26(a)(3)

a. **Timing (a)(3)(B)** – At least 30 days before trial
   i. Within 14 days after made → party may serve and promptly file list of objections to use of depositions at trial and to admissibility of disclosed documents/exhibits
      1. WAIVE objections if not made except objections that evidence is irrelevant, prejudicial, or confusing under evidence rules

8. Scope of Discovery – 26(b)

a. **(b)(1) – General –** Any non-privileged matter that is relevant to any party's claim or defense

   i. ***Blank v. Sullivan & Cromwell*** – party entitled to discovery of both material which is relevant and admissible at trial + that which appears reasonably calculated to lead to discovery of admissible evidence

   ii. So long as information sought is reasonably calculated to lead to discovery of admissible evidence, it is not required that info itself be admissible at trial

   iii. Attorney-client privilege bars while in course of legal representation (***Upjohn v. United States***)

	Required Initial Disclosures 26(a)	Discovery Requests 26(b)
When	• ≤ 14 days after conference 26(a)(1)(C) • 30 days after being served/joined (D)	• If 26(a), then can only after 26(f) conference 26(d)(1) • Any sequence is ok 26(d)(2)
Scope	That disclosing party may use to "**support its claims or defenses**" 26(a)(1)(A)(i)-(ii)	• That is "**relevant to any party's claim or defense**" AND is **admissible** or appears reasonably calculated to lead to the discovery of admissible evidence 26(b)(1) • "**Any matter relevant to the subject matter**" (old standard) iff court order for good cause 26(b)(1)
Exceptions	• Certain proceedings 26(a)(1)(B) • Information is not reasonably available to disclosing party 26(a)(1)(E) • If only for impeachment 26(a)(1)(A)(i)-(ii)	• **Privilege** 26(b)(1), (3), (5) = privilege logs (see below) • Required limitations on # by court order if: ○ Unreasonably cumulative or less burdensome alternative 26(b)(2)(C)(i) ○ Party seeking had ample opportunity (ii) ○ **Burden/benefit balancing test** (weigh factors) (iii) • Limits on e-discovery for undue burden 26(b)(2)(B) • **Motion for protective order**, which can: ○ Forbid 26(c)(1)(A) / limit discovery (D) ○ Specify terms (B) or method (C), etc. (E)-(H) may be issued if good cause to prevent annoyance, undue burden or embarrassment iff tried in good faith first (c)(1) (either way, $ penalty unless unjust 37(a)(5))
What must be Disclosed (subject to scope and exceptions)	• People w/ discoverable info, their contact info, and subject matter 26(a)(1)(A)(i) • Things in disclosing party's control (ii) • Amount of damages (iii) & insurance (iv) • Experts (see below) • **Pretrial disclosures** of witnesses and exhibits ≥ 30 days before trial 26(a)(3)	Anything asked for subject to scope and exceptions
How	• Written, signed by attorney, and served 26(a)(4) ○ Complete and correct 26(g)(1)(A), nonfrivolous 26(g)(1)(B)(i), proper (ii) and reasonable (iii) ○ Subject to **sanctions** 26(g)(3) and if not signed, no duty to act 26(g)(2)	

Supplements	Timely manner if learn it is incomplete and others don't know 26(e)(1)(A)	See **discovery tools** below

b. Objections to Discovery

	Hickman (= summaries of attorney's interviews with witnesses are protected)	**26(b)(3)**
What	Tangible & intangible things	Tangible things (A)
Who	Attorney	Attorney or other representative (A)
Why	Because of litigation (as opposed to the normal course of business)	In anticipation of litigation (A)
Except	Necessity	Otherwise w/in scope (A)(i) and substantial need/undue burden (A)(ii), but never mental impressions, aka "**opinion work product**" (B)

i. **Attorney-Client Privilege** – still must disclose existence of, but not content of information so opposing counsel may assess claim of privilege (***Upjohn v. United States***)

ii. **5th Amendment vs. Self-Incrimination**

iii. **Work Product** (***Hickman v. Taylor***)

iv. *Underlying facts are still discoverable!!*

1. **(b)(3) – Trial Preparation Materials** – may NOT discover documents and tangible things prepared *in anticipation of litigation* or for trial by or for another party or its representative BUT materials may be discovered if
   a. Otherwise discoverable under 26(b)(1) and
   b. Party shows substantial need for materials to prepare its case and cannot without undue hardship, obtain substantial equivalent by other means
      i. **Exception - (b)(3)(B) Protection -** Even where showing made, mental impressions, conclusions, opinions, or legal theories SAFE

2. Work Product Categories (3)

   a. Documents prepared in anticipation of litigation that contain info that can reasonable by obtained through other means – NO DISCOVERY

   b. If requesting party demonstrates substantial need for materials developed in anticipation of litigation and that similar info cannot be obtained through other means without substantial hardship – COURT MAY ORDER DISCOVERY

c. ***Opinion Work Product*** – Counsel's though process – NO DISCOVERY

v. Trial Preparation: Experts – 26(b)(4)

1. **(b)(4)(A) – Deposition of Testifying Expert** – party may depose any person ID'd → from 26(a)(2)

2. **(b)(4)(B) –** Protects drafts of any report or disclosure required under 26(a)(2) regardless of form of draft

3. **(b)(4)(C) –** Protect communications between attorney and any witness required to provide report under 26(a)(2)(B) regardless of communications EXCEPT: to extent communications
   a. Relate to compensation
   b. ID facts/data provided by counsel and that expert considered in forming opinions expressed or
   c. ID assumptions that party's counsel provided and that expert relied on in forming opinions

4. **(b)(4)(D) – Consulting Witnesses –** MAY NOT discover facts known or opinions held by expert retained by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as witness UNLESS:
   a. Showing of exceptional circumstances where impracticable to obtain facts or opinions by other means

	Required Initial Disclosures Re: Experts	**Discovery Re: Experts**
Rule	26(a)(2)	26(b)(4)
When	• ≥ 90 days before trial 26(a)(2)(D)(i) • If solely to contradict other party's expert's written report, then ≤ 30 days after that disclosure (ii)	If written report is required, then only after it is provided 26(b)(4)(A)
Testifying	• Identity of experts 26(a)(2)(A) • If retained to provide expert testimony/employee who regularly does, then **written report** prepared and signed by expert 26(a)(2)(B) containing: ▪ Opinions expert will express (i) ▪ Facts/data considered (ii) ▪ Exhibits that will be used (iii) ▪ Expert's qualif. & publs. (iv) and cases (v) ▪ Compensation (vi) • If **no written report** required, then just subject matter and summary of facts and opinions 26(a)(2)(C)(i)-(ii)	May depose any person identified as expert 26(b)(4)(A) Note: privilege log requires descriptions 26(b)(5)(A)
Non-testifying	None	Cannot depose or give interrogatory unless:

		• 35(b) examiner's report 26(b)(4)(D)(i) or • Showing of <u>exceptional circumstances</u> (ii)
Exceptions	• Draft reports are protected as **work-product** 26(b)(4)(B) • Communications between attorney and expert required to give a report is protected except for: ○ Compensation 26(b)(4)(C)(i) ○ Identity of facts and data considered (ii) ○ Assumptions provided by attorney and relied on (iii)	
Supplements	Supplement report & deposition by time pretrial disclosures are due 26(e)(2)	
Payment	N/A	Party seeking must pay expert unless injustice 26(b)(4)(E)(i) & must compensate other party if seeking info from non-testifying expert (ii)

vi. **How to Claim Privilege – 26(b)(5)**

1. **(b)(5)(A)** - Withhold: expressly claim it <u>and</u> describe nature of tangible things

2. **(b)(5)(B)** – Info already produced: notify party who must return/destroy it or give it to judge to decide

vii. **Protective Orders – 26(c) –** Limit nature and scope of examination or to terminate examination if discovery is abused

9. Pretrial Conference – FRCP 16

a. Can allow mini discovery on things like PJX before suit really gets going
b. No appellate review or written decisions but we need to play referee before discovery
    i. Result = **managerial judges** pushing for ADR
c. Pro – costs less and avoids all-or-nothing results
d. Con – precedents on record are public good, enforce substantive law, yardstick for settlements, engagement through jury duty

10. Discovery Enforcement – FRCP 37

If party fails to provide discovery or provides incomplete discovery, other party may move to compel.

a. Note: Can't appeal discovery decisions until case concludes (unless holding attorney in criminal attempt, like *Hickman*) and only if you lose, no interlocutory appeals.
   i. So follow court's order, don't and be held in contempt, or settle

b. **Motion to compel** disclosures or discovery responses (after good faith effort) 37(a)(1) in appropriate court 37(a)(2)

c. *Optional* sanctions on motions for:
   i. Filing a bad protective order or opposing a good protective order 37(a)(5)

   ii. Failing to comply with court order 37(b)

   iii. Failing to disclose, supplement, or admit 37(c) = can't use it and/or $ or "other" (ex. *Chalick* = failure to disclose doctor until SOL had passed, so sanction is allowing relation-back)
      1. No penalty for too much disclosure (*Merck-Medco*)

   iv. Failing to attend own deposition, serve answers to interrogs or respond to requests 37(d)

   v. Failing to provide e-discovery 37(e)

   vi. Failing to participate in framing discovery 37(f)

d. Attorneys must take responsibility for their clients and not be willfully ignorant (*Qualcomm* = different firms handling different aspects of the case, but no one made sure the huge company completed a thorough document search = $8 million sanction)

e. Note: must be raised in a pending action (can't raise them after judgment)

f. Penalty for a party that does not disclose information (i.e. the info required under rule 26a):
   i. The non-disclosing party shall not be allowed to use the undisclosed information as evidence at trial or at a hearing

   ii. Sanctions may be imposed if:
      1. There is no substantial justification not to disclose the information; and
      2. The failure to disclose was harmful

   iii. The court may also impose other sanctions, including:
      1. Payment of reasonable expenses and/or attorney's fees caused by failure
      2. Any action authorized under 37b2a, b, and c, which are
         a. Conclude that matters sought to be discovered by a party are to be found in that party's favor
         b. Refuse to allow the disobedient party to support or oppose designated claims or defenses
         c. Render a default judgment or strike a pleading
      3. Informing the jury of the failure to disclose

g. 37(a) – Motion: Order Compelling Disclosure or Discovery

i. (a)(1) – Certification that movant has good faith conferred or attempted to with person failing to make disclosure

ii. (a)(2) – Court where action is pending

iii. (a)(3)(A) – Compel disclosure – failure to disclose under 26(a) → move to compel disclosure and for appropriate sanctions

iv. (a)(3)(B) – Move for order compelling answer, designation, production, or inspection IF
    1. (i) deponent fails to answer question asked under FRCP 30 or 31
    2. (ii) corporation or other entity fails to make designation under 30(b)(6) or 31(a)(4)
    3. (iii) Party fails to answer interrogatory under FRCP 33
    4. (iv) party fails to respond that inspection will be permitted under FRCP 34

h. Optional Sanction on Motions for:

i. Filing a bad protective order or opposing a good protective order 37(a)(5)
ii. Failing to comply with court order 37(b)
iii. Failing to disclose, supplement, or admit 37(c) = can't use it and/or $ or "other" (ex. *Chalick* = failure to disclose doctor until SOL had passed, so sanction is allowing relation-back)
    1. No penalty for too much disclosure (*Merck-Medco*)
iv. Failing to attend own deposition, serve answers to interrogs or respond to requests 37(d)
v. Failing to provide e-discovery 37(e)
vi. Failing to participate in framing discovery 37(f)

i. 37(b) Sanctions for Failure to Comply with Court Order

i. If party fails to comply/*time has passed* with order to provide discovery court may
    1. Order matters treated as admitted
    2. Prohibit party from supporting or opposing designated claims/defenses
    3. Strike pleadings, stay or dismiss action, or render default judgment
    4. Hold delinquent parties or witness in contempt
    5. Assess reasonable expenses incurred because of refusal

j. 37(c) – Automatic Sanction

i. Against part who without substantial justification, fails to disclose information as required under 26 or
    1. Who fails to supplement or amend responses under 26(e)
ii. Will not be permitted to use info withheld as evidence unless failure = harmless
iii. Court may impose sanctions including (see 1 – 5 above)

k. 37(d) – Immediate Sanction

i. Party may move for immediate sanctions if party fails to attend own deposition or fails to provide any answer interrogatories

ii. Court may order as are just
    1. Ordering matters treated as admitted
    2. Prohibiting party from supporting/opposing designated claims/defenses
    3. Striking pleadings, staying/dismissing action, or rendering default

l. Attorneys must take responsibility for their clients and not be willfully ignorant (*Qualcomm* = different firms handling different aspects of the case, but no one made sure the huge company completed a thorough document search = $8 million sanction)

m. Note: must be raised in a pending action (can't raise them after judgment)

11. **Formal Discovery Tools**

	Interrogs 33	**Depositions 27-32, 45**	**Request for Production 34, 45**	**Physical & Mental Exams 35**	**Requests for Admission 36**
Define	Written Q&A	Oral in person/phone 30(b)(4) or written read to deponent 30(c)(3)	Allows party to inspect tangible things/places	Certified examiner report 35(b)	Written request to admit matters
Pro/Con	Cheap, quick and easy, but proofed answers	Lock parties into facts with spontaneous answers and follow up, but expensive			Help avoid unnecessary areas of discovery
Who	Any party 33(a)(1)	• Any party 30(a)(1) • Nonparties if subpoenaed under 45 (brings under Jx) ○ Subpoena from court where depo is 45(a)(2) ○ Subpoena must be quashed on motion for reasons in 45(c)(3)(A)	• Any party 34(a) • Nonparties under 45 (see left for quashing)	Any party whose mental or physical condition is "in controversy" (aka suing over it) 35(a)(1)	Any party 36(a)(1)
When	Response within 30 days after being served 33(b)(2)	• **Without leave** except as provided in 30(a)(2) where leave must be granted • Before action is filed 27(a) • Pending appeal 27(b)	Response within 30 days after being served 34(b)(2)(A)	Under court order for good cause 35(a)(2)	Admitted unless denials or "idk after inquiry" ≤ 30 days of service 26(a)(3)-(4)
Supplements	See 26(e)(1) above	No, but review within 30 days and note changes 30(e)	See 26(e)(1) above	No	See 26(e)(1) above
Objections	Stated with specificity 33(b)(4)	• Noted, but proceeds (unless privileged) 30(c)(2) • Motion to terminate if in bad faith 30(d)(3)	Specifying part while allowing inspection of rest 34(b)(2)(C)		Grounds must be stated 36(a)(5)
Sanctions in addition to Rule 37		• $ for impeding fair examination 30(d)(2) • $ if party fails to show or serve subpoena 30(g) • $ for not taking reasonable steps to avoid undue burden on subpoenaed 45(c)(1) • Contempt if served and no excuse for not obeying 45(e)	• $ for not taking reasonable steps to avoid undue burden on subpoenaed 45(c)(1) • See left for contempt		

1. Trial by Jury

a. How
   i. Sua sponte 39(b)
   ii. By party's written demand for any issue triable by jury if served in pleading ≤ 14 days after last pleading and filed under 5(d) 38(b) (or else waived 38(d))
      1. Then must be by jury unless parties stipulate or issues do not have right to jury 39(a)
   iii. By consent 39(c)

b. Note how these rules and the 7th Amendment guarantee are affected by the following pre-trial through post-trial motions
   i. Who ought to decide, a judge or jury?
   ii. Who is more fair? Accurate? Efficient? What about dignity of parties and jurors?
   iii. <u>But ok because these are all based on the premise that there's really nothing for the jury to do</u>

2. Dismissal – Rule 41

a. 41(a) - Voluntary Dismissal
   i. 41(a)(1) - By π
      1. Without prejudice by filing notice of dismissal
         a. Before Δ's answer or MSJ <u>or</u>
         b. With consent
   ii. 41(a)(2) – By Court Order
      1. At π's request by court order on terms court considers proper

b. 41(b) - Involuntary Dismissal
   i. If π fails to prosecute or comply with rules or court order → Δ may move to dismiss action or any claim against it

c. **41(c) – Dismissing Counterclaim, Cross claim, or Third-Party Claim**
   i. Made before service of responsive pleading
   ii. If no responsive pleading → before evidence introduced at hearing at trial

3. Default Judgment (Rule 55)

a. When P can show D has failed to plead or otherwise defend, default judgment <u>must</u> be entered 55(a)

4. Offer of Judgment (Rule 68)

a. D can offer to settle by serving P ≥ 14 days before trial.
   i. If P serves acceptance within 14 days, then court must enter judgment 68(a)
b. If final judgment is less favorable to offeree than unaccepted offer, then offeree pays costs 68(d)

	When?	Law?	Facts?
12(b)(6) MTD for failure to state a claim	Complaint through trial	Lose on law	Assume facts as plead are true
12(c) motion for judgment on pleadings ***you don't really need this when you have the 12(b)(6)***	After pleadings are closed (We have an answer)	Lose on law	Assume facts as plead are true
56 motion summary judgment	Any time until 30 days after close of all discovery	Movant entitled to judgement as a matter of law **AND (facts)**	No genuine dispute as to any material fact

5. Motions

a. 12(b) – Motion to Dismiss: Failure to State a Claim
   i. When: Complaint through trial
   ii. Lose on law
   iii. Assume facts plead as true

b. 12(c) – Motion for Judgment on Pleadings
   i. When: After pleadings are closed / we have an answer
   ii. Lose on law
   iii. Assume facts plead as true

6. Rule 56 – Motion for Summary Judgment

a. Purpose: to get rid of cases where P meets minimal burden of pleading elements through allegations in the complaint, but hasn't produced enough facts during discovery to prove those allegations

b. How:
   i. Either party may move for summary judgment on some or all claims 56(a) or
   ii. **Sua sponte** after notice and reasonable time to respond 56(f)

c. When: ≤ 30 days after close of discovery 56(b)

d. **Standard:** court shall grant MSJ if movant shows: No genuine dispute as to material fact and Movant is entitled to judgment as a matter of law 56(a)
   i. **No genuine dispute as to a material fact** and
      1. What to consider:
         a. Cited documentary materials, but can consider anything in the record 56(c)(3)
            i. But cannot just rely on allegations in pleadings!
         b. Facts supported by admissible or likely to be admissible evidence 56(c)(2)
            i. But if no one objects, the court may consider inadmissible evidence (*Celotex* = hearsay letter was not objected to and points to possible trial testimony, so court may consider it as proof of someone who can create a genuine issue)

      2. Court cannot weigh the evidence/credibility because that is the jury's role (*Flynn* = credibility of conflicting witnesses w/ inferences that could be made for P, so leave the assessment up to trier of fact)
         a. But judge should **peek ahead** to trial and see what the **standard of proof** is (*Liberty Lobby* = libel claim requires clear and convincing evidence instead of preponderance of the evidence, so MSJ qs is whether evidence presented is such that a jury applying the evidentiary standard could reasonably find for P (like Directed Verdict!)

i. So if it's 50-50 **tie**, then P has to lose b/c hasn't met preponderance of the evidence standard (*Reid* = cow case with two holes in fence)

b. Theoretically just about adequate existence of facts for a reasonable jury (production, not persuasion)
   i. But not about statistics (ex. 90% chance D's cab wasn't there is not the same as saying it's more likely than not that the accident was caused by D's cab)

3. Court must make <u>all **reasonable inferences**</u> <u>in favor of the **nonmoving**</u>
   a. But if the only favorable inference is implausible, then it's not enough (*Matsushita* = could give rise to legal or illegal motives, but illegal motive is implausible b/c not economically rational, so conduct doesn't give rise to inference of conspiracy)
   b. Can use indirect and circumstantial evidence, but must be more than piled inferences leading to **mere speculation** (ex. *Flynn* employment discrimination)
   c. Law may also come into play with certain presumptions

ii. Movant is entitled **to judgment as a matter of law** 56(a)

e. Burdens
   i. Moving party must meet burden before shift to nonmoving party (*Adickes* = owner didn't submit affidavits from cops denying presence, so he didn't show absence of genuine issue of material fact so no MSJ)
   ii. Burden depends on who bears burden of proof at trial:

1a) ID Parties **1b) Figure out what burden is**	**2) Movant's initial burden = show absence of genuine dispute of material fact <u>and</u> entitlement as matter of law by...**	**3) Nonmovant's burden (only if initial burden is met)**
Movant = bears burden of proof at trial	Affirmatively producing evidence to meet burden of persuasion at trial (i.e. must prove all elements)	Affirmatively produce evidence that there is a genuine dispute of material fact <u>or</u> movant can't win as a matter of law (can't just reiterate disagreement from pleadings) Effectively shifts trial forward on paper record (*Liberty Lobby*)
Movant = does not bear burden at trial (Adickes= high burden)	Affirmatively producing evidence negating claims or defenses of non-movant (i.e. prove the negative of at least one element)	
Movant = does not bear burden at trial (Celotex 1986 = low burden)	Pointing out the holes in non-movant's claims or defenses, <u>but more than mere conclusions</u>! →This is now enough←	

f. Relief where a party cannot support facts, court <u>may</u>:
   i. Defer or deny motion 56(d)
   ii. Give more time to properly support or address facts through discovery 56(d)-(e)
   iii. Grant summary judgment by considering facts undisputed 56(e)
   iv. Issue any other appropriate order 56(d)(e)

g. Policies

i. Efficiency, Accuracy, fairness and legitimacy could go either way

1. Lose a lot on a paper record since can't weigh credibility of witnesses or nullify
2. But avoids risk of an irrational jury finding for party with no legitimate basis

1. How a trial works

a. Opening arguments (P then D, or D can reserve for after P's case)
b. P's case in chief (must produce every element of her claim to reach the jury), then D's (rebut evidence or provide affirmative defenses)
    i. Presentation of evidence by calling witnesses (P examines, D cross, P redirect…)
        1. Verdict must be solely on evidence not objected to
    ii. Motions testing sufficiency of evidence (JMOL) (D moves after P rests, and P or D after D)
c. Closing arguments and jury instructions (proposed by lawyers and delivered by judge)
d. Jury deliberates → jury delivers verdict → judge enters judgment on verdict

2. Verdicts

a. **General** (most common)
    i. Ask who wins and what damages
    ii. Pro/Con: appeals to biases of jurors and assumes they understand the law
    iii. Con: obscures the basis of jury's decision which may foreclose future <u>issue preclusion</u>

b. **General with interrogatories** 49(b)
    i. Ask who wins, what damages, and specific questions
    ii. If answers are inconsistent with the verdict, court may choose answers, ask for further consideration, or order a new trial 49(b)(3)
        1. If answers are inconsistent with each other and the verdict then more consideration or new trial 49(b)(4)
        2. Be careful about judicial coercion in supplemental instructions to deadlocked juries
    iii. Ds prefer this because forcing them to go through questions can help overrule biases
    iv. Use is at trial judge's discretion 49(b)(1)

c. **Special verdict** 49(a)
    i. Only answer factual questions, then the judge applies the law to the responses to decide (*Gallick* = jury said negligence but that D could not anticipate harm—duty of court to harmonize these if possible. Here possible jury thought D couldn't anticipate specific but could general harm, so ok to rule for P)
    ii. Issues not submitted are waived 49(a)(3)
    iii. Use is at trial judge's discretion 49(a)(1)

3. Rule 50(a) – Judgment as a Matter of Law (or Motion for a Directed Verdict)

a. Purpose: jury should not be allowed to enter an arbitrary verdict against great weight of the evidence (basically a delayed MSJ, but with all the evidence) (*Flynn* = P survived MSJ but not JMOL because facts were misstated at that stage and everything came together at trial through direct and cross examinations)

i. Courts are more reluctant to grant MSJ because it so early, so JMOL is slightly easier

ii. Taking decision-power away from jury and having judge issue it

b. How and when: by motion any time during jury trial before case is submitted to jury 50(1)(2) but only after party has been fully heard on an issue 50(a)(1) (usually at end of P's case and/or D's case)

i. No later than 28 days after entry of judgment

ii. Can be made several times and can be deferred, granted or denied

1. **Always file 50(a) so you can file 50(b) later!**

iii. Can be made before end of a party's case as long as it's at the end of a party's presentation on an essential fact to her claim (ex. after liability discussion but before damages)

c. Standard = a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue 50(a)(1)

i. Test: would jury, if it chooses to believe those witnesses, would have sufficient evidence to support verdict for π

ii. If there can be **but one reasonable inference/conclusion under the law** given P's burden after considering nonmoving party's evidence in its most favorable light as well as any un-impeached and un-contradicted evidence put forth by the moving party, then JMOL (*Galloway* = no favorable inference can be drawn from blank record for 5 years when required to show continuous disability which would have been apparent, so JMOL)

1. If legitimate conflict in facts, jury must decide
2. Non-conflicting facts w/ inconsistent inferences = JMOL for D b/c P can't reach **51%**
3. Note: depending on when it is raised, D's evidence may not even be in the record

iii. About production, not persuasion

1. Don't weigh quality of evidence or credibility of witnesses, but if it's reasonable for a jury to disregard evidence then maybe (ex. D's only witness was recently promoted) (*Flynn* = all witnesses denied that P was fired for her sex, so she cannot get to the jury simply because they might disbelieve these denials. P must have affirmative evidence the event occurred.)
2. A scintilla of evidence or mere speculation is not enough

iv. Note: while the burdens shift, the court must take the record as a whole into account (*Reeves* = prima facie + discrediting D's rebuttal is enough to permit fact finder to infer intentional age discrimination)
    1. P's prima facie case
    2. D's rebuttal
    3. Prima facie case is now no longer enough to meet burden of persuasion, so P must discredit D's rebuttal, although this doesn't mean P automatically wins

d. **Result** = grant (enter judgment for moving party), deny or reserve ruling until after the verdict

1. Values

a. Finality, fairness, efficiency and legitimacy
b. But we also want accuracy, fairness and legitimacy

2. Rule 50(b) – Renewed Judgment as a Matter of Law (Judgment Notwithstanding the Verdict)

a. Purpose: jury acted irrationally in disregard of evidence so the verdict must be flipped
   i. Not really against the 7th Amendment because just a delayed ruling on a prior motion
   ii. Possibly unconstitutional, but it's our custom

b. How and when: ≤ 28 days after entry of judgment iff a JMOL was not granted during trial
   i. Need JMOL **on the same ground** so can't sandbag opponent and point out defects too late

c. Standard: same as JMOL above – *is opponent's evidence so weak that no reasonable jury could have reached a verdict for him?*
   i. But don't ever count on winning this!
      1. Basically asks if jury acted irrationally and disregarded evidence in reaching verdict for party opposing motion
   ii. Why even have it?
      1. Because if JMOL is appealed result is new trial, but if JNOV is appealed the original judgment can simply be reinstated (more efficient!)

d. Note: since it's just a renewed/deferred 50(a), it's not really taking anything back from the jury, so it's not technically unconstitutional under the 7th Amendment right to a jury (plus it's tradition)

3. Rule 59 – New Trial / Amending a Judgment (erase it and start over)

a. How and when

i. ≤ 28 days after entry of judgment by **motion** 59(b) or
ii. ≤ 28 days after entry of judgment **sua sponte** 59(d)

Always move for 50(b) and 59 at the same time in the alternative!
See 50(c) (or lose right to seek 59 if 50(b) is overturned on appeal = efficient)

b. Standard

i. "**Any reason** for which a new trial has heretofore been granted" 59(a)(1)(A) or (B), 59(d)
ii. Note: if you fail to **object** during trial, you probably can't challenge it after

iii. Organic rule that grows over time:

1. **Error in trial process** (de novo review since matter of law)
   a. Attorney or juror misconduct
   b. Prejudice in evidentiary rulings or jury instructions
   c. Fraud on the court
   d. Example: *Sanders-El* = D dropped long paper in front of the jury to make it seem like P's criminal record was really long even though the judge already said this wasn't relevant. Since the case was close, the evidence is especially prejudicial, counsel knew this was prejudicial and alluded to it more than once, and jury did not receive a curative instruction = new trial

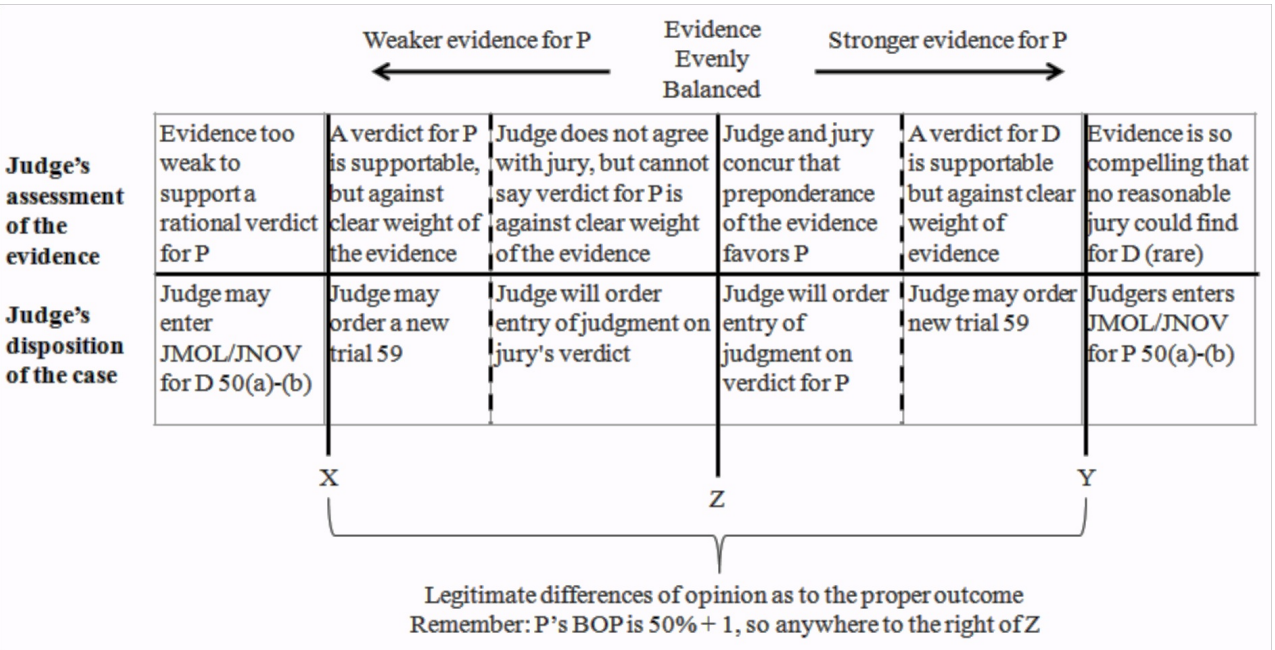
About fairness and finality

2. New evidence that could not have been discovered earlier with due diligence

3. **Verdict was contrary to the great weight of evidence** even if it could withstand JMOL (subject to abuse of discretion standard of review)
   a. So trial process was fair, but the result was wrong
   b. How is this different from 50(a) and (b)?
      i. Reasonably jury could find as it did but it's still against the weight of the evidence
         1. Weighing credibility is ok here, unlike 50, since this doesn't kill the case
      ii. The closer the case, the more likely to win a 59 and not a 50

c. Result: grant the motion = vacate the verdict and order the case retried, or deny the motion

d. Notes:
   i. If granted, must go through whole trial before appealing (usually no interlocutory review)
   ii. If x wins on 50, y can move for 59 (within 28 days, see 50(d))



4. **Relief from Judgment** (Rule 60 = let's not have this judgment take effect) Last Ditch

a. Purpose:

i. To correct clerical mistakes and oversights before appeal sua sponte or on motion 60(a)

ii. Direct attack on judgments 60(b)

b. How and when: on motion w/in a "reasonable time" and not more than a year for 60(b)(1)-(3) 60(c)

c. Standard:

i. Mistake 60(b)(1)

ii. Newly discovered evidence that couldn't have been discovered in time to move for 59(b) 60(b)(2)

iii. Fraud (extrinsic or intrinsic) or misconduct 60(b)(3) (*Kupferman* = but fraud on the court, aka extrinsic fraud where court is defiled/fraud is perpetrated by officers of the court, gets more than 1 year) (*Rozier* = nondisclosure of Trend Cost Estimate after motion to compel is intrinsic fraud, and since it would have made a difference for P's approach—since it's evidence D had knowledge and D had a duty to warn—new trial)

iv. Judgment is void 60(b)(4)

v. Judgment has been satisfied 60(b)(5)

vi. **Any other reason that justifies relief** 60(b)(6) (*Pierce* = extraordinary reason where diversity case had a different result in federal court than in state court for litigation arising out of same transaction because of intervening change of law. The court felt bad because they were involuntarily dragged into federal court and timing of new law was chance)

1. Does not include changes in substantive law once the appeals period has passed (undermines finality of judgments)
2. Must be likely to change a new trial's outcome or overcome interest in finality

d. Notes:

i. Not intended to substitute for an appeal. Often used to set aside **default judgments**.

1. We don't like to upset judgments! Use sparingly!

ii. Interplay with Full Faith and Credit Clause (*Durfee* = MO court was right to uphold NE court's decision about border of land after determining whether NE court has Jx since further inquiry is then precluded)
iii. **Effect** = make the judgment non-binding, but don't get rid of it

5. **Appeal** (FRAP 3-5 = have a bigger court review the same case)

a. File notice of appeal with D.Ct. 3(a) ≤ 30 days after judgment FRAP 4(a)(1)(A) or
b. Request permission to appeal with Circuit Court within the time authorized by statute or 4(a)
c. Exceptions:
    i. If US is a party, then ≤ 60 days FRAP 4(a)(1)(B)
    ii. If the following are timely filed in D.Ct., in which case the time to file an appeal runs from entry of the order disposing of the last motion FRAP 4(a)(4):
        1. 50(b) under FRAP 4(a)(4)(A)(i)
        2. 59 under FRAP 4(a)(4)(A)(iv)-(v)
        3. 60 if filed ≤ 28 days after judgment under FRAP 4(a)(4)(A)(vi)
        4. Motions I don't know under FRAP 4(a)(4)(A)(ii)-(iii)

EFFECTS OF JUDGMENTS

Note: only comes into play when there are multiple adjudication settings (relitigation)

1. Values of preclusion

a. Finality / stability / certainty /integrity / repose
   i. Already had a chance to directly attack w/ 50(a)/(b), 59, 60, and appeal
   ii. FRCP is liberal with amendments and joinders, so take advantage the first time! ☆
      1. See 8(a)(3), 8(d)(3), 13, 14, 18, 20

b. Efficiency (cost/time to parties and judicial resources)

c. But accuracy and fairness?

d.

2. Things to distinguish from preclusion (and try to use if preclusion isn't available)

a. Stare decisis

b. Double jeopardy

c. Law of the case
   i. = principle that issues once decided in a case that recur in later stages of the same case are not to be re-determined up and down the line of courts during that suit
   ii. Expresses a practice generally, but not a limit on court's power

3. Claim preclusion (aka res judicata) (highly context-dependent)

a. = when and how judgment in one action will be dispositive in second action among the same parties

b. Components
   i. Valid final judgment
   ii. Same parties AND
   iii. Same claim

c. Terminology
   i. If prior judgment is for P, then claim is extinguished and **merged** in the judgment
      1. Can maintain action upon judgment, where D can't use defenses that were available
   ii. If prior judgment is for D, then claim is extinguished and judgment **bars** a subsequent action

d. How to use it
   i. Usually raise in answer as affirmative defense under 8(c), but can also move for partial summary judgment under 56 (if preclusion applies, no genuine issue of material fact)
   ii. No sua sponte—if you don't bring it up, it's waived

e. **Sources of law** (USE IT OR LOSE IT, so think about this before you file)

i. **Compulsory counterclaim** 13(a) (compared to permissive in 13(b))

Easier than CL, so use if you can

1. Must state counterclaim in pleading (under 7(a)) if:
   a. At the time of service 13(a)(1)
   b. The claim arises out of the same transaction or occurrence 13(a)(1)(A) and
   c. Does not require adding another party w/out Jx 13(a)(1)(B)
   d. Subject to exceptions in 13(a)(2)
2. Pleading is the trigger (*McDonald's* = 13(a) does not apply b/c consent judgment entered before answer was filed, so no pleadings and therefore no waiver)

ii. **CL and Restatement Second of Judgments (use in federal court). Elements:**

1. **Valid final judgment on the merits** (about opportunity to be heard on merits)

Yes (even if it's on appeal):	**No (so collateral attacks are ok):**
• Trial w/ judgment on verdict, or MSJ or 50(a)-(b) (no merit) • Default judgment (you had your chance!) • 12(b)(6) dismissal (had opportunities to amend) • No standing • Settlement as consent judgment with findings of fact and conclusions of law (*McDonald's* = normally consent judgment would not be) • If any dismissal to right is specified "w/ prejudice" (*McConnell* = P joined wife's state suit & filed own in D.Ct. State was dismissed by P w/ prej., so D.Ct. was precluded since state law said can't split claims for personal and property damage (community property = medical expenses for wife, which only P could sue for)	• Lack of PJx / SMJx / venue or improper notice / service (aka Jx defect) • Improper joinder or nonjoinder (don't have to join—can sue alone) • Voluntary dismissal • Ripeness • Settlement as a contract between parties, not the court • If any adjudication to the left is specified "without prejudice"

   a. **Doesn't matter if valid final judgment was plainly wrong** (see values)
   b. Interplay with **Full Faith and Credit Clause** (so different courts = ok)

2. **Same parties or privity** (**mutuality** = parties litigated *against* each other)
   a. What counts for privity? (see privity in issue preclusion)
      i. Very narrow…usually doesn't exist (*Consumers Union* = judgment in favor of information-suppliers in reverse FOIA suit for nondisclosure does not bar new requesters from suing the same D arguing FOIA mandates disclosure)
      ii. Need to be in same legal shoes so court can say interests were already decided (ex. City was sued for racial discrimination in hiring. 5 years later, whites sue the city arguing they are now discriminated against = precluded)

3. **Same claim or claims you had the opportunity to raise** (*Fetter* = old case where P sued for head injuries after an accident, but after he won his skull fell apart and he wanted more money. Benefit of full compensation < burden of new litigation and uncertainty, recover all past and future damages in first action, or file 60(b)(2) within a year)

   a. **What is a claim?**

      i. Usually **same transaction or occurrence** (mirrors joinder rule)(§24) BUT: (*McConnell* = when 2 people are injured in accident each has own claim. Every person's injury from a T/O is a distinct claim!)
         1. Even if claims arise out of same transaction, may not be same occurrence and therefore ok (ex. sue for breach of contract, then he breaches again… can't predict the future so second breach claim wasn't available at time of first suit)

      ii. Could also be:
         1. Same cause of action (can be more than one)
         2. Same evidence / same primary right
         3. If new claim would nullify rights established in first judgment (*McDonald's* = P suing for antitrust on contract where breach was settled)

      iii. → Very broad and all about context. Matters that logically belong together should be tried together

   b. **Artful pleading** is NOT ok (*Moitie* = after losing in federal court, tried to turn federal claims into state claims and file in state court, but the court didn't buy it)

   c. **Includes defenses and remedies**
      i. But unlike 13(a), no compulsory counterclaims

Interplay with MSJ: if denied, still have a chance to prove!

4. **Exceptions §26:**
   a. If valid final judgment, same parties and claim, NO claim preclusion effect if:
      i. Parties agree to **split claims**/court expressly reserved right to 2nd action
      ii. Court reserved right for π to maintain second action
      iii. SMJx limits of first court meant theories/remedies were unavailable (ex. if claim is exclusively federal, or if administrative hearing couldn't give punitive damages—don't want to force you to go to the most inclusive court first)
      iv. Judgment in first action plainly inconsistent with fair and equitable implementation of statutory of constitutional scheme
      v. Extraordinary reasons (see (e) and (f)) (ex. "two disease rule" which allows asbestos P to sue for later-developing cancer, or where judgment has prospective application, like child support, & sum should be adjusted for inflation, ok to reopen)

f. What if the law changes?

i. Too bad! (*Moitie* = after losing in federal court, other plaintiffs appealed but this P filed in state court—see artful pleading. When a change in law happened soon thereafter, the other plaintiffs benefited from it but P was barred b/c essentially same claim and same parties. P made a calculated choice to forego appeal!)

ii. Should have appealed to keep the case alive or Rule 60 it (See *Pierce* in Rule 60)

1. If the case is under appeal and the law changes, court should apply the law when appeal is decided, not as the law stood during trial

g. Note: court hearing second suit will ask whether a second suit would have been barred in court that rendered original judgment (federal law determines effect of federal court judgments §87).

4. Issue preclusion (aka collateral estoppel) (highly context-dependent)

a. = prevents a party who has had a full and fair opportunity to litigate a question from relitigating the same matter based on the same or separate events

b. How to use it

i. Usually raise in answer as affirmative defense under 8(c), but can also move for partial summary judgment under 56 (if preclusion applies, no genuine issue of material fact)

1. Ok under 7th Amendment b/c no further fact finding for the jury and tradition (*Parklane*)

ii. No sua sponte—if you don't bring it up, it's waived

c. Sources of law = CL and Restatement Second of Judgments (use in federal court). Elements:

i. Same issue of fact that

1. Don't need the same claim in both suits
2. Can be procedural issues (like PJx)

ii. Was actually litigated and determined (about full and fair opportunity to litigate) (§27) and

1. Different from claim preclusion (doesn't apply to issues that could have but weren't)
2. If a claim goes to trial on 2 issues and the court finds for P on 1, issue preclusion will not bar relitigation on the 2nd issue since it was not decided even though was litigated
3. Administrative proceedings don't provide the same full opportunity to litigate as trial
4. Settlements don't count as actually litigated and determined (see above)

iii. Valid final judgment on the merits where

1. See discussion for this element in claim preclusion, above

iv. The issue to be precluded was essential to the judgment

1. If factfinder decides something, like D made a ladder, which ends up not mattering since the ladder did not cause then injury, then no preclusive effect
2. **Alternative holdings**: if the court finds for a litigant on two independent, sufficient grounds, then can't tell which was necessary so neither is precluded (§27)

3. General verdicts may be inscrutable and not have issue preclusive effect (ex. general verdict saying D was not negligent could mean P was contributorily negligent, assumed the risk, or suffered no damages)

v. Non(mutuality) → remember the right you're depriving a possible litigant of

1. If same parties (**mutuality** = parties litigated *against* each other) or **privity**, then ok
   a. Privity is super rare, but may exist if sufficient commonality of interest:
      i. Nonparty succeeded to a party's interest in property
      ii. Nonparty who controlled the first suit (*Montana* = US required first case be filed, reviewed and approved complaint, paid fees, directed the appeal, and effectuated abandonment. US was laboring oar and P was effectively a puppet)
      iii. Nonparty whose interests were represented adequately/so closely aligned by the original suit (*Allen* = P wanted to sue cops for illegal search after issue of legality of search was decided against him in state criminal court…state and cops are not in privity)
      iv. Substantial identity between party and nonparty
      v. Express or implied legal relationship where parties in first suit are accountable to parties who file a subsequent suit with identical issues
   b. Simply sharing the same lawyer or in same accident ≠ privity

Same privity analysis for claim

2. Nonmutuality is ok iff used against the repeat player (*Blonder-Tongue* = P1 sued D1 for patent infringement and lost, then sued D2 for infringement of the same patent. SCOTUS reversed its rule against nonmutuality b/c unfair and inefficient to keep litigating as long as unrelated Ds existed)

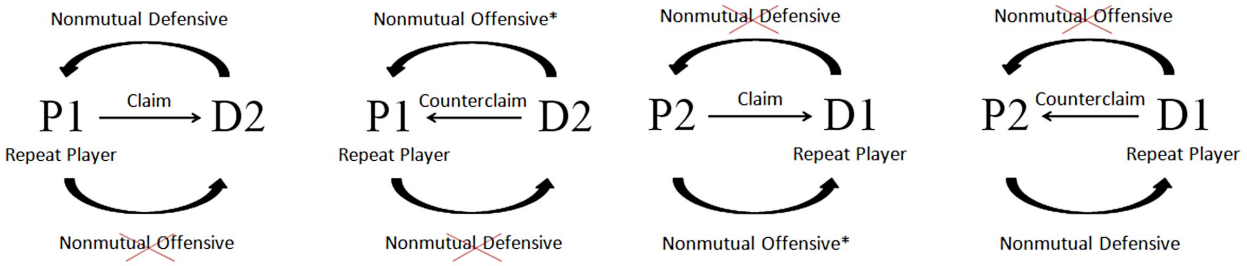
   a. Nonmutual defensive (generally accepted after *Blonder-Tongue*)
      i. = used to defend against a claim or counterclaim (as a shield)
      ii. Generally accepted, since party being precluded usually chose the first forum and D and therefore gave it his best shot
      iii. Still important that party had a full and fair opportunity to litigate

   b. Nonmutual offensive (limited*)
      i. = used offensively w/ a claim or counterclaim (to establish/as a sword)
      ii. Limited since party being precluded was usually D1 so did not choose the forum or adversary, so harder to say he tried his best
         1. Judicial discretion is all about fairness, efficiency, and finality
      iii. **Parklane factor-based test** where ok if, considering the following factors, the *issue was fully and fairly* decided (see §29, too) (*Parklane* = SEC sued D, then stockholders sued D and wanted to preclude him from relitigating an issue. Offensive issue preclusion was ok b/c P could not have joined,

Remember: other 4 elements of issue preclusion matter, too!

D had every incentive to litigate against SEC, and no new procedural opportunities):

1. Repeat party had strong motive to litigate vigorously in #1 (stakes weren't too small/forum wasn't too inconvenient)
    a. Full and fair opportunity to litigate earlier action
2. New party did not "wait in the wings" (*could have joined* but decided to wait and see how #1 ended and use this) (§29(3))
    a. But Ps are masters of their suits…
3. First action was inconsistent with other, earlier judgments (can't pick and choose among judgments… too arbitrary)
4. Second action does not give new procedural opportunities
    a. Having a jury in #2 doesn't count as a new (*Parklane*)
5. Miscellaneous considerations
    a. Counsel was experienced and competent in first action
    b. No new evidence or changed circumstances
    c. No difference in applicable law
    d. Future litigation was foreseeable
    e. No public interest implicated



vi. **Exception: intervening legal developments allow relitigation of issues** (*Sunnen* = issue as to whether gift royalties are taxable income, but not claim preclusion b/c new tax year so new claim. Would be issue preclusion except new law)
    1. Policy concern = don't want to keep moving a mistake of law forward
    2. Not about fixing mistakes, that's done through a FRCP 60

d. Notes:
    i. Because standard of proof is different, issues in civil actions can't be used to preclude in **criminal actions**, but issues in criminal actions can preclude issues in civil actions

    ii. Applies to §1983 actions (DPC claims against state actors) (*Allen* = although mutuality was required when §1983 was written, no reason to think Congress intended to provide a person claiming a federal right an unrestricted opportunity to relitigate)

1. Sources of Authority

a. Constitution – case or controversy
b. Rules and Decisions Act § 1652 law of the several states
   i. State constitutions, statutes, and common law
   ii. Effect of different interpretations on state claims in District Cts. sitting: diversity jx
c. Rules Enabling Act § 2072
   i. FRCP cannot abridge, enlarge, or modify any substantive right

	Procedure in D.Ct.	**Substance in D.Ct.**
Pre-1938 under *Swift*	Vertical uniformity (state law)	Horizontal uniformity (fed CL if no state statute/const., since judges don't make law, they declare what natural law is)
Post-1938 after *Erie*	Horizontal uniformity (FRCP)	Vertical uniformity (state statutes , const. and CL) (No fed CL b/c no transcendental law, only what ppl make)

2. *Erie* Concept

a. Federal courts must apply law that would be applied by courts of state in which they sit
b. A federal court exercising diversity jurisdiction is required to apply
   i. Substantive law of the state (including conflict of law rules)
   ii. Procedural (federal) law

Substantive:
Standard of care
Conflict of laws
Statute of limitations
Burden of proof
Agreement to arbitrate

Procedural
Burden of pleading
Discovery physical exams
Venue transfer and effect: forum selection clause

3. Process

a. Are you in federal court
   i. If state court → apply state law

b. If so, is this diversity suit with state law claim?
   i. If § 1331 – federal law
   ii. If federal and state claim → treat them differently

c. If § 1332, is there a conflict between state and federal law?
   i. Try to interpret laws narrowly so there isn't one! (*Gasperini* = no conflict between FRCP 59(a) and state law setting specific standard for review of damage award)(*Ragan* = no conflict between FRCP 3, when suit is commenced, and state law requiring service to toll SOL)
      1. Conflict will be found where explicit, fed is discretionary standard and state particular, or federal provision was meant to "occupy the field"
   ii. If not, no *Erie* issue so apply state law since no federal law requires otherwise

d. If conflict, is the rule you're looking for apply to substantive or procedural?
   i. Rule: if substantive apply state law, procedural apply federal law (*Erie*)
      1. *York* = outcome determinative test (but can't that be everything?)
         a. Issue is substantive if it substantially affects outcome of case
      2. *Hanna* = modified outcome determinative test
         a. Presumption that FRCP governs as long as it's ok under REA (*Hanna*) (*Shady Grove* Scalia = FRCP 23 controls where it and state law seek to answer the

same question, but Ginsburg = more concerned with state deference so try not to find a conflict)

i. And it always is since SCOTUS promulgates these rules, although D.Ct. may apply them wrong

b. All about *Erie*'s twin aims:

i. Discouraging **forum shopping** and

ii. **Inequitable** application of laws (discrimination)

1. The question: before filing, would I have chosen one state over another based on this rule? If so, then substantive! You don't

i. How to argue for federal:

1. Emphasize procedural characteristics
2. Characterize the rule as affecting fairness and efficiency of litigation (rather than primary human behavior outside the courtroom)
3. Stress federal court system's interest in applying its own rule
4. Minimize concerns about outcome determinatives and forum shopping

ii. Trump card = *Byrd* considerations

1. Countervailing fed policies that arise from status as an independent judicial system
2. Only examples we have are about having juries and judge/jury divisions (*Gasperini* = state law on standard of review for appellate judges of a jury's damage award is both substantive and procedural. We should follow state law on standard of review, but federal interest in 7th Am. says D.Ct. should apply it, not Cir.)

b. If procedural, apply federal laws

i. The Constitution and statutes (like §1404 on venue transfers)
ii. FRCP as governed by §2072
iii. Federal common law (ex. preclusion)

c. If substantive, which state's law should you apply?

i. *Klaxon* = look at state choice of law statute for the state the D.Ct. is in to find right substantive law (note: waivable) (ok b/c every court is presumed to be competent to research)

1. Usually place of the injury or most significant relationship w/ case
2. So still differences between D.Ct.'s that might encourage forum shopping…
3. And if you transfer fed. venues you take the law with you! (*Van Dusen* in Glannon)

ii. **How do you interpret it?** As the state SC would (can ask SC to certify a qs)

2. Venue Transfer

- **a. § 1404 – Transfer Venue (but it was proper)**
  - i. Take conflict laws of first court with you wherever you go
- **b. § 1406 – Improper Venue**
  - i. Conflict laws of where you're transferring

Situation	Transfer?	By whom?	Conflict Law Applied
Forum 1 venue **proper, but inconvenient.** Personal jurisdiction satisfied	Yes - § 1404	Δ, π, or court	Forum 1
Forum 1 venue **improper**. Personal jurisdiction satisfied.	Yes - § 1406	Δ, π, or court	Probably Forum 2
Forum 1 venue **improper**. **No personal jurisdiction**	Yes - § 1406	Δ, π, or court	Forum 2
Forum 1 venue **proper**. **No personal jurisdiction**	Yes - § 1404, §1406, or gloss on both	Δ, π, or court	Forum 2

Case	YR	Rule	Sub: (state)	Proc: (fed)
Erie R.R. Co v. Tompkins	1938	Standard of care (PA injury, S.D.NY, PA law)	X	
Cities Service Oil v. Dunlap (if relates to a substantial right)	1939	Burden of proof	X	
Klaxon Co. v. Stentor Elec.	1941	Conflict of laws	X	
Sibbach v. Wilson	1941	Discovery--physical examinations		X
Palmer v. Hoffman	1943	Burden of pleading (no conflict between 8(c) and state law requiring P prove no contributory negligence since 8(c) is about pleading, not proving)		X
Guranty Trust Co. v. York (outcome determinative test)	1945	SOL	X	
Cohen . Beneficial Industrial	1949	Liability for cost of defense for shareholder suits (designed to discourage filing these kinds of suits)	X	
Ragan v. Merchants Transfer	1949	Tolling SOL	X	
Woods v. Interstate Realty Co.	1949	Must qualify under state law before you can do business and have the right to sue there	X	
Byrd v. Blue Ridge (essential fed characteristics trump)	1958	Right to a jury for worker's compensation coverage claim (state said for a judge) • Not really outcome determinative since judge and jury should say the same thing • SCOTUS said this was triable by a jury in federal court b/c 7th Am. preference for juries = affirmative countervailing considerations		X
Bernhardt v. Polygraphic Co.	1956	Agreement to arbitrate	X	
Hanna v. Plumer (mod. test = FRCP presumption)	1965	Service of process (ok to use FRCP even though state statute requires service + process to toll SOL)		X
Stewart Org v. Ricoh Corp.	1988	Effect of forum selection clause and venue trans.		X
Chambers v. Nasco	1991	Inherent power to sanction (b/c depends not on who wins, but on conduct, so no forum shopping)		X
Gasperini v. Center for Hum.	1996	Standard for app. judge to overturn jury $ award	X	
Shady Grove v. Allstate	2010	Law = no class actions in suits seeking "penalties"		X

SUPPLEMENTAL JURISDICTION

1. Sources of Authority

a. **Power =** Constitution Article III § 2 (*Gibbs* – case or controversy test § 1367(a))
b. **Permission =** FRCP on point
c. **Authority =** 28 USC § 1367 → then ask under § 1367(c)
   i. Steps
      1. **Civil action which DC has <u>original jx</u> over (aka good anchor claim)**
         a. Civil action = related claims by all πs even if only one is >$75K as long as complete diversity maintained

      2. **If anchor = § 1331 supplemental JX exists where**
         a. So related it is part of same case or controversy – common nucleus
         b. <u>AND</u> does not implicate § 1367(c) discretionary factors

      3. **If anchor <u>solely § 1332</u> supplemental JX exists where**
         a. So related it is part of same case or controversy – **common nucleus of operate facts** § 1367(a) **<u>BUT NO:</u>**
         b. Does not implicate § 1367(c) discretionary factors
            i. Raises novel or complex state law issue
            ii. Claim substantially predominates over original jx claim
            iii. DC dismissed all claims over which it had original jx
            iv. Other compelling reasons
         c. <u>AND BUT NO</u> § 1367(b) applies
            i. Claims by πs against persons made parties under 14, 19, 20, or 24
            ii. Claims by persons joined under Rule 19
            iii. Or seeking to intervene as πs under Rule 24
            iv. Destroys diversity requirements
               1. One party $$ OK (*Tuna*)
               2. NEVER destroy diversity of citizenship π/Δ (*Owen*)
                  a. Only destroyed if it crosses the P → D line <u>in that direction</u>!

3rd Party D's claim against P is ok, but P's counter is not, even if required under 13(a) (<u>then</u>

Ex. P (CA) → D(NY)
↓ FRCP 14 (<u>If 14 then meets §1367</u>)
3rd Party D (CA)

               3. <u>Exception</u>: P can sue dispensable intervenor (24) b/c of tradition (covered by **last phrase in §1367(b)** which captures CL construction on §1332)

   ii. §1367(d): Tells states how to **toll** so they can be filed in state courts if they don't meet §1367
      1. Tolled while claim pending and for 30 days after it is dismissed <u>unless</u> state law provides longer tolling period

d. **Case law** pre-§1367 is still good unless explicitly overruled!

2. Policies

a. Efficiency (don't want to file one in state and in federal) Fairness/consistency in results

1. Power = Constitution Article III § 2 (SMJX) AND DPC (PJX and Notice)

2. Authorization = § 1331, 1332 or § 1367 (SMJX)

a. In-State Δ can be joined as long as there is reasonable possibility that state law will impose liability on facts of case
   i. Otherwise = fraudulent joinder and will not defeat removal to federal court
b. Venue can also be an out for joined party but is not required to join

Permission = FRCP (various rules)

3. Rule 42 Consolidation and Separate Trials

a. Practical way to manipulate when you can't join but have common question of law/fact, but very discretionary
b. If action = Common question of law/fact court may
   i. (a)(1-3) Join any or all matters at issue, consolidate, or issue any other orders to avoid unnecessary cost or delay
c. (b) – For convenience, avoid prejudice, expedite and economize
   i. Court may order separate trial of 1+ separate issues, claims ,cross/counterclaims or 3rd party claims

4. Parties (Establish PJX)

a. **Rule 21 –** Misjoinder of parties not ground for dismissing action
   i. Court may add or drop party
   ii. Court may sever any claim against party

b. **Rule 19 – Compulsory** – π must join all interested parties or face dismissal of lawsuit – those subject to service and will not destroy SMJX (19(a)(1)

   i. Should absentee be joined? – When:
   1. (a)(1)(A) – Complete relief cannot be accorded among other parties to suit (*Temple* = SCOTUS joint tortfeasors do not need to be joined as required parties) OR
   2. (a)(1)(B)(i-ii) Absentee has such an interest in subject matter that decision in his absence will
      a. Impair or impeded ability to protect the interest OR
         i. Leave any of other parties subject to substantial risk of incurring multiple or inconsistent obligations (*Helzberg* = Mall won't be subject to inconsistencies under 2 leases b/c would win against breaching jewelry store.)

   ii. Can absentee be joined? (Feasibility)
   1. Can court obtain PJX over absentee and will court have SMJX over action after joinder
      a. If PJX and SMJX → must be joined

iii. **(b)(1-4) If <u>not</u> should the action proceed in his absence?**
    1. Should action proceed or dismissed (D = indispensible) – Consider:
        a. Extent of prejudice to absentee or available parties of judgment
        b. Extent to which prejudice can be reduced or avoided by protective provisions in judgment, shaping relief, or other measures
        c. Adequacy of judgment rendered without absentee
        d. Whether π will have adequate remedy if case is dismissed for non-joinder

c. **Rule 20 <u>Permissive Joinder</u>** – parties may join as πs or Δs where
    i. (a)(1) – πs sue together
    ii. (a)(2) – π sue multiple Δs in single action
    iii. Requirements
        1. Some claim is made by each π and against each Δ relating to <u>or</u> arising from the same series of transactions or occurrences <u>AND</u>
            a. Flexible (*Mosley* – common policy of discriminatory conduct shown by series of events even though difference discriminatory effects)
            b. OK to plead/sue jointly, severally, or alternative alternative (a)(1/2)(A)
            c. No need to seek all relief demanded by other parties (a)(3)
        2. Question of fact or law common to all parties
        3. <u>But</u> separate trials may be ordered to protect from embarrassment, delay, expense, or other prejudice (b)

d. **Rule 24 – <u>Intervention</u>** – absent parties who learns of action to become party → *it must be timely which is left to the court's discretion!*

    i. **(a)(1-2) – Intervention as Right –** on timely motion court <u>must</u> permit
        1. (a)(1) Unconditional right to intervene by federal statute OR
        2. (a)(2) Unless existing adequately represent interest: Claims interest relating to subject of action <u>and</u>
            - (a)(2) Disposing impairs or impedes ability to protect interest
            - (a)(2) Unless existing parties adequately represent that interest
                1. Ex: *prove show they bring something that would otherwise be ignored or overlooked if left to already-existing parties*

    ii. **Permissive Intervention**

        1. **(b)(1) General** – upon timely motion court may permit anyone to intervene who
            a. Conditional right to intervene by federal statute OR
            b. Claim or defense that shares with main action a common question law/fact
                i. Ex: *show it brings special expertise or different perspective to controversy than original parties or refusing mat lead to suits litigating same issue*

2. **(b)(2) Permissive by Government**
    a. Based on statute or executive order administered by officer or agency OR
    b. Any regulation, order, requirement, or agreement issued or made under state or executive order

3. **(b)(3) - Court must consider whether intervention will unduly delay or prejudice adjudication of original parties' rights**

e. Rule 14 – Impleader/Third Party Practice (Co-party)

i. **How?**
1. Automatically with service with 4(k)(1)(B)
    a. 3P-π must file 3rd party complaint against impleaded 3P-Δ
        i. Rule 8 through 11, Rule 4 and Respond Rule 12
2. With motion if > 14 days after serving answer 14(a)(1)

ii. **Who?**
1. Δ = 14(a)(1)
2. 3rd party = 14(a)(5)
3. Defending π (original Δ) = 14(b)

iii. **Third Party Δ**
1. **MUST ASSERT (a)(2)(A-B)**
    a. Any defense against 3P-π under Rule 12
    b. Any counterclaim against 3P-π (O-Δ) under 13(a)
2. **MAY ASSERT (a)(2)(C-D) → go across "v." ok**
    a. Non-compulsory counterclaim against 3P-π
    b. Vs. π
        i. Any defense that 3P-π (O-Δ) has vs. π's claim
        ii. Any claim arising out of T/O that is subject matter of π's claim against 3P-π (O-Δ)
3. Against nonparty who is or may be liable to 3P-Δ for all or part of claim

iv. (a)(1) –Nonparty is or may be liable to defending party for all or part of claim against defending party (usually joint tortfeasors or indemnifiers)
1. Must be **pass-through/derivative/secondary liability**
    a. 3rd party cannot exist if first arrow is not successful
        i. (*Grasso* = liability must automatically follow from proof of D's liability or non-liability, here it is not clear employer is either boat captain or fisherman, so no 14)

    b. Can't be a "him not me" situation where D claims 3rd party D is solely /independently liable to P (*Toberman* = so don't plead 3rd Party D is jointly and severally *or* solely liable in alternative b/c might lose…but can be granted leave to amend!) (using BPA water bottles before birth did it, not the BPA baby bottles after)
        i. Then just deny the allegation or plead as an affirmative defense

Can always plead in the alternative under 8(d)(2)-(3), but be clear

2. Defending party may implead non party but only if non party is or may be liable to her for any part of a judgment that π pay recover against her
    a. If no § 1331/2 JX → supplemental for sure because = common nucleus of operative fact
    b. Venue need not be proper for 3PΔ

3. Impleaded party may escape liability by defeating either π's original claim or Δ's derivative claim
    a. 14(a)(2)(A) allows asserting both
    b. 14(a)(2)(C) – defense to π's claim against original defendant

4. 13(a)(2)(B) – 3P-Δ may also file counterclaims against 3P-π and
    a. May implead further parties 14(a)(5)

5. NOT ALLOWED – Distinguish from Δ who contends another person is directly liable to π but not to Δ herself (aka offer up alternative)
    a. *Cannot suggest new targets for π*

5. Claims – CHECK FOR SMJX 1st – just because rules authorize still need it

a. *Once properly joined under Rule 20 → 13 and 18 authorize party to assert additional claims against opposing parties*

b. **Rule 18 (Broadest) –** party seeking relief from opposing party may join any independent or alternative claims but NO T/O requirement
    i. Original π
    ii. Any party seeking relief against another party: CC, CC, 3P-Claim
    iii. Strategy – once 13 used 18 may be used

c. **Rule 13** – **Counterclaims** –defending party to assert claims back against party who has claim against him
    i. Cannot be combined with π's to reach jx amount
    ii. **13(a) –Compulsory –** if defending party's CC arises from T/O as claim against him
        1. Does not need to meet jx amount requirement
        2. If same T/O 13(a)(1)(A) and
            a. Just needs to be logically related
        3. Does not require party w/out Jx 13(a)(1)(B)
        4. Then use it or lose it **unless**:
            a. Claim is subject of pending action 13(a)(2)(A) or
            b. No PJx over opposing party 13(a)(2)(B)

    iii. **Permissive (Check R42)**
        1. Arising out of unrelated matter must have independent jx basis - $$
        2. **13(b) Counterclaim –** one that is not compulsory
            a. may be permitted to file supplemental pleading if it matures late 13(e)
        3. **13(g) Cross-claim –** same T/O OR relates to subject property
            a. Includes indemnity