I. Pleading

a. General

i. Trend from Historical to Modern

1. Under the old rule of code pleading, back and forth pleading went on until the parties came to an agreement about what the issue was and then went to the court to decide it. This lowered the number of frivolous law suits and ensured that only tested cases were able to make it to court, but it was also complicated and technical, requiring special lawyers just for pleadings and resulted in a lot of inequity. The old rules also required the pleading to establish facts.
2. Under the current rules of notice pleading, the complaint must only include enough information to make the defendant aware of the issue in contention. Under the current rules, the court is wide open at the pleading state, waiting until discovery to weed out cases, thereby giving everyone an equal opportunity to file their grievance, but there are a large number of frivolous law suits.

ii. Give Notice of Claims/Defenses/Issues in Dispute

iii. Types

1. complaint
    a. Filed by the plaintiff in the court of his or her choosing. Sets out certain facts and claims. If the complaint does not state a claim that would entitle the defendant to relief, then the complaint should be dismissed. *Case v. State Farm Mutual Insurance. Co.*
    b. Rules 4, 7, 8, 9, 10, and 11 are applicable.
    c. As part of the adversarial system, the court will not look outside of or reform the complaint. Doing so

would violate judicial efficiency and prejudice the court against the defendant.

d. The complaint will usually provide or establish:
    i. A brief (slanted) description of the events and issues.
    ii. Jurisdiction
    iii. The parties
    iv. The Accident; the event; etc.
    v. Injuries/grievances, etc.
    vi. Cause of Action
    vii. Prayer for Relief.

2. answer: there must be a claim and an answer (Rule 7).
    a. Reduces the number of issues in dispute.
    b. In lei of an answer, the defendant has two options.
        i. Do nothing, resulting in default judgment (Rule 55)
            1. Often done to avoid the expense of litigation.
        ii. File a Rule 12 motion
            1. If these motions fail, defendant must then file answer.
            2. Rather than making a separate Rule 12 motion, the defendant can include these motions within his answer.
    c. Rule 7(c) eliminates demurrers, pleas, and exceptions.
    d. After all claims, counterclaims, crossclaims, and 3rd party claims are answered, no other pleas will be allowed, unless specifically ordered by the court (Rule 7).
3. counterclaims

a. The defendant's answer can include counterclaims against the plaintiff.
b. Rule 7: there must be a complaint and an answer allowing for counterclaims. If counterclaims are filed, the plaintiff must then answer those counter claims.
c. Rule 13(a): Compulsory counterclaims, that is, counterclaims that must be asserted in the action or be barred, have to arise out of the same transaction or occurrence as the original claim. This expedites judicial efficiency.
d. Rule 13(b): Permissive counterclaims, that is, counterclaims that do not arise out of the same transaction or occurrence as alleged in the complaint, do not have to be asserted.
e. *U.S. v. Heyward-Robinson*: Courts must have independent jurisdiction over a permissive counterclaim in order to hear it. Court uses a logical relationship test to determine if claims are permissive or compulsory, that is, if one claim has a logical relationship to another, it arises out of the same transaction.

4. crossclaims
    a. claims occurring between the defendant (Rule 7).
    b. Arise out of the same transaction or occurrence.
    c. Are permissive.
5. 3rd party claims: bring third parties into the lawsuit. In such instance, the third parties must answer (Rule 7).
    a. The defendant's answer can include claims against third parties.

iv. Rule 11 (and ethical rules)

1. Party must sign attesting to good faith representations, objectively and subjectively
    a. Parties must mention all controlling authority, even controlling authority that does not support their position.
    b. Rule 11 prior to 1983 provided for a subjective test as to whether or not counsel had good faith basis.
    c. Objective tests were put into place in 1983.
    d. As a result of its amendment in 1993, parties can now make allegations based on further investigation.
2. Sanctions discretionary but varied
    a. Possible sanctions include monetary sanctions, preclusions, injunctions, or dismissal of the case.
    b. As a result of its amendment in 1993, monetary sanctions are rarely imposed on clients for legal statements or on lawyers for factual statements.
3. Safe Harbor Provision—21 days to withdraw after notice that a motion will be filed.
    a. A grace period seeks to ensure that justice is done rather than getting people on technicalities. *Hadges*.

v. Time to answer or otherwise move
1. 20 days
2. 60 days if service is waived
3. Extended by consent or by leave of court

b. Complaint

i. Rule 8: short and plain statement showing entitlement to relief
1. Complaint must meet the standard that if all the plaintiff's complaints were true, he would be entitled to relief under the law.

2. Rule 8(e): a pleading should be concise and direct
3. Even if a complaint is poorly written, if it states a reason the plaintiff is entitled to relief and gives the defendant fair warning, it is valid and should withstand a motion to dismiss. Pleading a prima facie case is not required. The Supreme Court adopted *Dioguardi v. Durning* as an appropriate interpretation of Rule 8.
4. Rule 18(a): Plaintiff can bring any complaints he has against the defendant, whether or not they are related to the incident at hand. *M.K. v. Tenet*.
5. *Temple v. Synthes Corp*., (U.S.): Joinder is not required for permissive parties as defined in Rule 19.

ii. Standard after *Bell Atlantic* is unclear—may be higher "plausibility standard"
1. Supreme Court ruled that plaintiff needs more than just an allegation under Rule 8. Plaintiff needs something to give rise to the plausibility of the allegation. The Court held that the claim must be plausible, not just possible, thereby disregarding the standard set in *Connley v. Gibson*.
2. This case prevents fishing expeditions.
3. There is still some uncertainty as to the implications of this ruling. If the court reads it narrowly in the future, then the standard set in this case may just apply to certain cases.

iii. Can plead inconsistent/alternative allegations
1. Rule 8(e)(2) allows for pleading as many claims and facts as the plaintiff desires, even if the allegations are inconsistent.

iv. Rule 9
1. Certain things, such as special damages, must be pled with particularity (Rule 9).

a. Special damages are non-economic damages (physical harm, mental harm, etc.).
b. Special damages that aren't presented in the complaint cannot be introduced in the trial. *Ziervogel v. Royal Packing Co.*

2. Allegations of fraud must be pled with particularity (Rule 9(b))

v. Rule 23.1: The plaintiff must verify the complaint.

c. Answer
   i. Must assert affirmative defenses here or in prior motion or they are waived
   ii. Must specifically admit or deny each allegation.
      1. Each allegation in the complaint must be specifically admitted or denied.
      2. General denials mean nothing and so count as an admission.
      3. Estoppel: a party will not be allowed to issue an ineffective denial to the other party's detriment.
      4. If the defendant doesn't know, he can deny if for insufficient information. "The defendant does not have sufficient information to admit or deny, and therefore denies it." Requires a good faith basis.
      5. Defendant can refuse to answer an allegation on the basis that it is a conclusion of law and not fact.
   iii. Evasive denials are ineffective.
      1. Conjunctive denials: using an "and" to deny the existence of all three elements simultaneously, though one of more may be true.

d. Rule 12 Motions
   i. 12(b)(6): to dismiss

1. if the complaint does not make a sufficient claim for relief, a motion for dismissal may be granted.
2. May be made by way of motion or in the answer.
3. 12(b)(6) motions must be raised in the first pleading, whether that be in the answer or through a motion, or they're waived.

ii. 12(e): more definitive statement. Requires that the motion spell out what in particular is unclear about the complaint.

iii. 12(f): motion to strike material that is scandalous or impertinent from the complaint.

iv. Rule 12 motions look only at the complaint

v. Plaintiff loses 12(b)(6) motion—Now what?

e. Amendments

i. Rule 15(a)

1. Once as a matter of right before responsive pleading or within 20 days if no response.
    a. Amended complaint supersedes the old complaint.
    b. Amending the complaint waives plaintiffs right to challenge a 12(b)(6) dismissal on appeal.
2. Leave of court/written consent
3. Leave freely granted if just
    a. Delay
    b. Prejudice
    c. Good/bad faith on the part of the plaintiff
    d. Repetitive attempts

ii. Rule 15(b)

1. Amendment by consent to conform to evidence
2. Automatic, but parties may want to formalize it

iii. Rule 15(c): relation back

1. Amended pleading to be effective as of the date of the original pleading. Allows the plaintiff to amend his

complaint to change the defendant after the statute of limitations have run (assuming that the original complaint was filed before the statute of limitations had run) if the amendment is made within 120 days of the filing of the original complaint and the defendant is informed and aware that he is the proper party in the suit.

2. Allowed:
    a. If state law allows it
    b. If new claim arises from same transaction/occurrence
    c. Party change—ok if (c)(3) is satisfied
    d. If party name changes, can just substitute
3. Occurs most often when corporations are sued under the wrong name.

II. Joinder of Claims and Parties: Expanding the Scope of the Civil Action

a. Joinder of Claims
    i. Determines who is and isn't involved in the lawsuit, and what is and isn't an issue.
    ii. Original defendant can bring a third party in as the proper defendant.
    iii. Liberal joinder rules get everything on the table at once while parties are together, thereby preventing inconsistent judgments. On the other hand, it gives rise to complexities.
    iv. A lack of subject matter jurisdiction, personal jurisdiction, or venue will prevent even mandatory joinder.
    v. Rule 42 allows a trial judge to sever parties in trial.
    vi. Historical Limitations on the Permissive Joinder of Claims.
        1. *Harris v. Avery*: provides a basic statement of joinder rules.
    vii. Permissive Joinder Under Federal Rule of Civil Procedure 18.
        1. *M.K. v. Tenet*

b. Addition of Claims

i. Counterclaims
    1. *United States v. Heyward-Robinson*
ii. Cross-claims
    1. *LASA v. Alexander*: Uses the logical relationship test to allow for liberal joinder rules. Court overrules a lower court's decision to throw out cross claims, because they were unrelated to the original complaint. Court held that logical relationship should be defined liberally in determining whether or not the cross claims arose out of the same transaction.

c. Identifying Parties Who May Sue and Be Sued
    i. Rule 17
        1. Prevents defendant from having to pay damages twice, prevents duplicative litigation, and encourages the finality of the lawsuit.
        2. Rule 17(a): The action must be between the real parties in interest.
        3. Rule 17(b): The capacity to sue or be sued is determined by state law.
        4. Rule 17(c): Infants and incompetents may bring suit through a guardian.
    ii. *Ellis Canning Co. v. International Harvester Co.*: Court held that plaintiff, who had already been fully compensated by his insurance company for the event in dispute, was not the real party in interest, and so the case was dismissed.

d. Claims Involving Multiple parties
    i. Permissive Joinder of Parties
        1. Historical Limitations on permissive Joinder of Parties
            a. Under common law, causes could not be joined if different substantive laws were involved.
            b. Rule 20: permissive joinder of parties

i. Rule 20(a): If the right to relief arises out of the same transaction or occurrence or series of transactions or occurrences, and if any question of law and fact is common to all parties.
ii. Rule 20(b): gives the judge discretion to separate any claims that may confuse a jury or to alleviate any of the burdens of complexities that may arise from joinder.

c. Rule 21: misjoinder of parties
i. Does not require a lawsuit to be dismissed. Court has discretion to add or drop parties.

d. *Ryder v. Jefferson Hotel Co.*: Husband and wife thrown out of a hotel for allegedly not being married. Sued together for slander (Mrs.) and loss of business and damage to reputation (Mr.). Court said that claims could not be joined, and that their close relationship does not automatically assume that their claims are close enough to be joined. Under Rule 20, however, it is likely that the claims would have been joined.

2. Permissive Joinder Under Federal Rule of Civil Procedure 20
a. *M.K. v. Tenent*: Allowed joinder of parties based on Rule 20(a), because all plaintiffs alleged similar claims against the defendants. Rule 20(b) requirements were met by the agency's alleged violation of the Privacy Act.
b. *Tanbro Fabrics Corp v. Beaunit Mills, Inc.*: Ruled that when there was potentially only one party at

fault, it was permissible to file suit against the two possible candidates.

ii. Mandatory Joinder of Persons

1. Rule 19(a): Directs the court to add parties whose presence will be necessary for a just result, whether or not the party wants to be a party of suit.
2. Rule 19(b): Indispensable parties are those parties without whom the case cannot proceed. If there is an indispensable party that cannot be joined, then the case must be dismissed.
3. Question to ask: Is the party a party that must be joined? Is the party a party that must be joined to the extent that the case cannot proceed without them?
4. *Bank of California*: Case cannot continue without indispensable parties. Court distinguishes between necessary parties (parties that should be joined but whose absence will not prevent the case from continuing) and indispensable parties.
5. *Provident Tradesmen*: After using Rule 19(a) and Rule 19(b), court determines that the case can proceed without the joinder of other parties. The joinder would not be feasible, as required by Rule 19(a), as it would lead to the dismissal of the case. Court lays out four interests under Rule 19(b) to examine if the case in equity and good conscious can proceed.
    a. To what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties.
    b. The extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided.

c. Whether a judgment rendered in the person's absence will be adequate.
d. Whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

e. Impleader
    i. Rule 14(a): Defendant can bring in a third party if he believes the third party should be responsible for all the damages the defendant could be liable for. Plaintiff can also assert claims against third party defendant, but those claims have to arise from the same transaction. Impleader must occur within 10 days of answering claims, and then after that at the leave of court.
    ii. Rule 14(b): Plaintiff can implead a third party when there is a counterclaim.
    iii. *Jeub v. B/G Foods, Inc.*: Defendant has the right to implead a third party, whether or not the plaintiff amends his complaint to include a claim against the third party.
    iv. *Too, Inc. v. Kohl's Department Stores, Inc.*: Court says that you have to balance benefits of impleader against the prejudice against the parties, delay, cost, etc. Court has a lot of discretion in determining whether or not to grant impleader. Court also says that impleader is going to be allowed unless the cause of action is meritless under state law, a decision highly criticized.
f. Interpleader (Rule 22): a mechanism that allows a punitive defendant, someone who is going to be sued by multiple parties, to preempt that suit and bring all the claimants in under one law suit.
g. Intervention (Rule 24): allows an individual who wants to be a party in a lawsuit to inject himself into the lawsuit without the parties consent.
    i. Rule 24(a): Intervention as of right. When a federal statute confers the right to intervene or if the party claims an interest and that interest is not adequately represented by the existing parties.

ii. Rule 24(b): Permissive intervention. A party can apply for intervention if a federal statute allows it permissibly, or if the party's claim or defense has a common question of law or fact with the main action. Often invoked by the U.S. government when a lawsuit challenges the constitutionality of a federal statute.

III. Class Actions

a. Overview and Themes

i. Class actions are representative litigations. Those who aren't parties can be bound in a class action lawsuit. One party represents many people who aren't parties in the lawsuit.

ii. Class actions law suits

1. Enable class members to pool their resources so that litigation as a class will be economical, when it wouldn't have been as individual claims.
2. Encourages lawsuits that have merit that otherwise wouldn't be filed as a practical matter.
3. Allows the defendant to lump all claims again him into one action.
4. Often used to remedy social ill, such as discrimination. Mass torts, securities fraud, anti-trust cases, and consumer fraud are other common class action suits.

b. History of the Class Action

c. Operation of the Class-Action Device

i. Introduction

ii. The Initiation of Class Actions

1. A class action lawsuit looks the same as any other lawsuit, except at the onset the court determines whether or not it is an appropriate class and settlements must be approved by the court in order to ensure fairness to members who aren't parties.

iii. Certification

1. Federal Rule 23(a): “Prerequisites to a Class Action”
    a. (1) Numberosity: joinder must be impractical; many courts require that there be at least 25 potential parties.
    b. (2) Commonality: There must be questions of law or fact common to the entire class. Two questions of law or fact that are common is enough to satisfy the commonality requirement of Rule 23(a), and the majority of jurisdictions say one is enough.
    c. (3) Typicality: the representative claims have to be typical of the class’s claims. Court will determine if the class representative is the right person to represent the class. The representative must preserve due process and fairness for the rest of the class.
    d. (4) Adequacy: the representative must adequately address the concerns of the class. Class counsel also has to be adequate for the class case to be certified.
    e. This is a pretty low threshold. While all class actions must pass this threshold, passing this threshold does not ensure certification.
2. Federal Rule 23(b): The Kinds of Class Actions that are “Maintainable”
    a. (1) Prejudice classes
        i. (a) If there are separate suits, there could be varying results. Inconsistent obligations could be imposed upon the defendant.
        ii. (b) Same as A but applied to plaintiff.
    b. (2) Discrimination cases are all about the defendant’s conduct. Relief sought is generally

conjunctive or declaratory. Damages are more an individual issue.

c. (3) If it doesn't fall under discrimination or prejudice classes, there can be a class action only if the advantages outweigh the disadvantages. Common issues have to predominate over individual issues. Courts consider:
    i. Whether class mechanism is the superior device
    ii. Interest of the members litigating individually
    iii. Extent of the litigation already being prosecuted
    iv. Implications of concentrating litigation into a single forum
    v. Manageability difficulties

3. Subclass can be created. Some argue that a class must be recognized before a subclass is created. Others say that they should be treated like several classes.
4. *General Telefone*: Mexican American allegedly discriminated against in promotion practices moved for class action status representing Mexican Americans discriminated against in hiring and promotions. Motion was denied, because plaintiff was not typical of the class. He was not discriminated against in hiring practices and so could not represent those who were. His motion may have been sustained had he been able to show that the practices that discriminated in promotions necessarily manifested themselves in hiring.
5. *Castano v. American Tobacco Co.*: demonstrates the difficulty of massive Rule 23(b)(3) class actions. Court

reverses certification of the class, because it didn't meet the superiority requirement, that is, the class mechanism disguised weak claims with strong one, limiting defendant's ability to oppose the issues on their merits. Defendant must fight the class action or settle, creating what the court called "judicial blackmail." Court also rules the class action is unmanageable.

6. The Certification Decision
    a. Rule 23(f): While parties usually must wait until judgment before appealing, parties can immediately appeal rulings on motions to certify a class.
7. Notice
    a. The Court's Role
    b. The content of notice and who should receive notice
        i. In Rule 23(b)(3) classes every class member must be given notice and class members can opt out of the suit if they wish. If the class member opts out, he can't receive any reward or settlement that is given, but he also isn't bound by anything that happens in the class action.
        ii. Rule 23(b)(1) does not require notice or that the members be given the opportunity to opt out.
        iii. Rule 23(b)(2): opting out is prohibited.
    c. Costs
8. Orders Appointing class counsel
9. Interlocutory Appeals from Certification Orders
10. Orders Regulating the Conduct of Pretrial and Trial Proceedings
11. Settlement

a. Rule 23(e) sets the requirement for settlement. After settlement is reached, plaintiff has to give notice to every class member, and every class member must be given the opportunity to object.

12. Attorney's Fees

d. Settlement Classes
    i. *Amchem Products, Inc. v. Windsor*: Defendants seek to have asbestos cases certified as class actions. Court denies the motion, ruling that the interests are different. Court says that the settlement is relevant to the certification decision. It relaxes Rule 23's requirement, while at the same time forcing heightened attention to Rule 23's requirements.
    ii. *Ortiz*: Defendant cannot pick a certain amount as a limited fund that a class member can draw from. The amount must be determined by factor's independent of the defendant. Also, court ruled that there was collusion, that is, some class members negotiated with the defendant to gain some benefits at the expense of other class members.
e. The Preclusive Effect of a Class-Action Judgment
    i. *Cooper v. Federal Reserve Bank of Richmond*
f. The Problem of the Mass Tort Case

IV. Pretrial Devices for Obtaining Information: Depositions and Discovery
a. The General Scope of Discovery
    i. The Purposes of Discovery
        1. Preserve facts for trial
        2. Identify any undisputed facts that exist
        3. Understand what the facts are
        4. Eliminate surprise.
    ii. Discovery Prior to commencing a Lawsuit
        1. *In re Petition of Sheila Roberts Ford*: Rule 27 allows for pre-suit discovery to perpetuate testimony, that is, to make

sure it doesn't disappear. It does not allow pre-suit discovery for investigatory purposes. Other courts disagree, arguing that if a suit cannot be filed under Rule 11 provisions, Rule 27 will allow pre-trial discovery.

iii. Rule 26(b)(1): Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party.

iv. Rule 26(b)(2): Courts may place limitations on the scope of discovery if it is unduly burdensome on the other party. The party can object if it's unreasonably cumulative or duplicative, or if's obtainable from some other source less burdensome. In other words, if the burden of production outweighs the benefit to the party requesting it, the party can object.

v. Rule 26(f): A discovery conference is required with the court.

vi. Rule 26(g): Attorney must sign recovery requests to certify that the requests are being made in good faith.

vii. Inadmissible evidence is discoverable if there is a reasonable likelihood that it will lead to admissible evidence.

viii. The Scope of Discovery: Relevance

1. *Kelly v. Nationwide Mut. Ins. Co.*: Though not the outcome in this case, if the party being questioned in an interrogatory knows the answer to the question that is not part of his own personal knowledge, he must answer.

ix. Rule 37: Courts can sanction parties for abuse of discovery tactics.

x. The Concept of Proportionality and Discretionary Limits on Discovery

1. *Marrese v. American Academy of Orthopaedic Surgeons*: Demonstrates how involved courts can be in the discovery process.
2. *Seattle Times Co. v. Rhinehart*: Confidentiality orders do not violate the Constitution.

b. Mandatory Disclosure and the Discovery Plan

i. Mandatory Disclosure
    1. Rule 26(a): All tangible things, including documents, a party may use to support its claim or defenses, computations of claimed damages including the basis for these damages, the identity of witnesses likely to have discoverable information and the subject on which those individuals are likely to have knowledge, with their address and phone numbers, and insurance policies that would cover any judgment issued against parties (for settlement purposes). These must be disclosed within 14 days of the discovery conferences mandated by 26(f).
    2. *Cummings v. General Motors Corp.*: Rule 26(a) requires only the production of documents that will support the party's own claim or defenses. Mandatory discovery does not require the party to produce evidence in support of the other side's case.
    3. Discovery of a Party's Financial Worth and Insurance Coverage
ii. The Discovery Plan

c. The Mechanics of Requested Discovery
    i. Depositions
        1. Rule 30
            a. Deponent can only refuse to answer the question if the question calls for privileged information. To initiate a deposition, party must send a document of notice to another party in the suit or a subpoena to a third party. Depositions are under oath and they are limited to one day per witness for seven hours, as well as ten depositions per side, though these numbers can be adjusted.

b. Rule 30(b)(6) is the mechanism used to depose a corporation.

2. *Polycast Technology Corp. v. Uniroyal, Inc.*: Court will often be more protective of third parties.
3. *Wilson v. Olathe Bank*: Without compelling reasons, the questioner gets to choose whether the deposition is taped.

ii. Deposition Upon Written Questions
1. Rule 31

iii. Interrogatories to Parties
1. Rule 33: Interrogatories can only be issued to parties. They must be answered under oath. Person responding has a duty to investigate prior to answering. Answers are not restricted to personal knowledge, extends to personal knowledge and information a reasonable person could obtain through investigation. Presumptive limit of 25 and a 30-day time limit. Contention interrogatories ask for legal theories—asking for all facts that support or undermine allegations in paragraph 10, for example.
2. *In re Auction Houses Antitrust Litigation*: Interrogatories must be answered to the best of the person's ability. If that means getting information from a third party, then the party must.
3. *In re Convergent Technologies Securities Litigation*: Generally, contention interrogatories are deferred until the end or near the end of discovery, though in some cases there may be reason to answer in advance.

iv. Discovery and Production of Property
1. Rule 34 deals with request for production. This concerns only the request for tangible things, such as documents and objects as well as electronic information. Items must be requested with reasonable particularity, and notice for

request and expected reception of items must be given with a reasonable time, place, and manner. Requests apply to anything that is within the responder's possession, custody, or control. If responder has objection, he must put those objections in writing but still must deliver the requested items.

2. When there is an exceptionally high burden of production, the producing party can argue for cost shifting to help alleviate the burden.
3. *Zubulake v. UBS Warburg LLC*: the seminal case on producing electronic documents, particularly when there is a high burden of production. Demonstrates the struggle with which the courts must engage when trying to resolve issues of burden of production. Generally, each party must bear its own financial burden for discovery.

v. Physical and Mental Examinations
   1. Rule 35 addresses requests for physical and mental examinations.
   2. *Schlagenhauf v. Holder*: Examinations are allowed only if the issue is in controversy and only on the showing of good cause. The burden of demonstrating good cause lies with the party seeking the examination.

vi. Requests to Admit
   1. Rule 36 governs request to admit. This request cannot be sent to third parties. If a party denies a fact that is later proven to be true at trial, the adverse party can request attorney fees expended on litigating that fact. Failure to respond to a request for admission result in an admission of fact.

vii. The Duty of Supplement Responses

1. Rule 26(e): If the responding party learns that a previous answer is incomplete or incorrect in some material respect, and the updated information is not otherwise known to the parties, then the party has an affirmative obligation to supplement.

viii. Use of Discovery at Trial

1. *Battle v. Memorial Hospital at Gulfort*

d. Special Problems Regarding the Scope of Discovery

i. Materials Prepared in Anticipation of Trial

1. Rule 26(b) provides work product protection, which protects documents and tangible things that are prepared in anticipation of litigation by or for a party or its representative, which includes attorneys, hired consultants, and insurers. Protects certain statements of witnesses that are obtained by the party or the party's attorney as long as they are not purely factual. Once an expert becomes a testifying expert, then everything that expert has seen becomes discoverable. There is an exception to the work product protection: if the requesting party can demonstrate substantial need for the documents and undue hardship in obtaining them by some other means, then that work product can be discovered.
2. *Hickman v. Taylor*: decided before Rule 26(b) and supplements Rule 26(b) by protecting oral statements as well. Rule 26(b)(3) protects only documents and tangible things.

ii. Privileges and Work Product—The Extent of Protection

1. Work product protection can be waived by sharing it with third parties or by disclosing it. A party cannot disclose privileged information that is good for its case but keep what it isn't. If a party attempts to do this, the court will

generally rule that the party has waived privilege on the whole subject. This is called a subject matter waiver. Showing documents to a testifying expert is also a waiver, because the other side is entitled to whatever documents a testifying expert has reviewed. Factual work product is discoverable if undue need and burden can be demonstrated by the party in obtaining the information elsewhere.

2. *Upjohn Co. v. United States*: Puts an overlay on the work product doctrine. Attorney-client privilege between a corporation and its attorneys applies to upper level management and to lower level management if their duties and actions could bind the company in some legal way. Attorney-client privilege does not protect the underlying facts. Adverse party can dispose corporation about the facts, but it cannot obtain the communication. Supreme Court also says that the exception of substantial need or undue burden is not applicable to core work product.

iii. Expert Information

1. *Krisa v. Equitable Life Assurance Society*: There is no work product protection for testifying experts under Rule 26(b)(4).
2. When it would be too inconvenient or burdensome for the witness to appear at trial, if each party has had an opportunity to question the witness in deposition, then the witness's deposition can be used at trial with the court's approval. Courts generally prefer live testimony.

e. Sanctions and Judicial Supervision of Discovery

i. Rule 37 allows for sanctions for abuse of discovery.

1. If one side refuses to cede relevant non-privileged information during discovery, the opposing party can file a motion to compel following a meet and confer. If that

motion is granted and the uncooperative party still refuses to cede the information, a motion for sanction can be filed. Possible sanctions include contempt, which can include jail time or monetary fines, fee or cost shifting for bringing motion to compel or motion for sanctions, jury instructions for an adverse inference, the court precluding the sanctioned party from introducing other documents that are of the same category, or dismissal, if the uncooperative party is the plaintiff, or precluding the party from introducing elements concerning damages, if the uncooperative party is the defendant.

ii. *Cline Forty-Second Street Theatre Corp. v. Allied Artists Pictures Corp.*: Dismissal and other harsh penalties are appropriate in some cases of discovery abuse where the party fails to comply with court orders.

V. Case Management

a. Rule 16 and the Development of Case Management Techniques

b. The Operation of Rule 16

i. Rule 16 addresses the role of the judge as overseer and supervisor of the case as it develops.

ii. Rule 16(a): the court has authority to call pretrial conferences on issues at its own discretion.

iii. Rule 16(b): Contemplates a specific order by the court. After the parties comply with Rule 26(f), the court issues a scheduling order.

iv. Rule 16(c): gives the court a lot of leeway and authority to discuss a variety of different things that may come up in individual cases in pretrial conferences.

v. Rule 16(d): deals with final pretrial conferences, which basically discuss the trial.

vi. Rule 16(e): pretrial orders to guide the case.

vii. Rule 16(f): Sanctions can be imposed for not abiding by court orders or not participating in good faith.
viii. *Velez v. Awning Windows, Inc.*: Sanctions are appropriate under Rule 16 for a party's failure to comply with court ordered deadlines.

c. Extrajudicial Personnel: Masters and Magistrates
    i. Magistrate Judges
    ii. Masters
        1. Rule 53: The court can appoint a master to oversee a particular issue. A master can be appointed over the objection of the parties or at their consent.

d. The Final Pretrial Order
    i. *Payne v. S.S. Nabob*: Court was justified in refusing to allow introduction of evidence that violated the pretrial order.

e. Case Management and Sanctions
    i. *Nick v. Morgan's Foods, Inc.*: the party is responsible for the actions of its counsel

VI. Adjudication Without Trial or by Special Proceeding

a. Summary Judgment
    i. Movement for summary judgment is almost always made after discovery proceedings have been closed.
    ii. Rule 56(a): Plaintiff can't move for summary judgment until 20 days after the precedings have begun or the defendant moves for summary judgment.
    iii. Rule 56(b): Defendant can move for summary judgment at any time.
    iv. Rule 56(c): Summary judgment shall be rendered if the evidence shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. (A material fact is one that will affect the outcome of the case.) The

court is ruling that a reasonable jury could reach no other result than to find for the movant.

v. Rule 56(d): The case doesn't have to fully adjudicate on the motion. Parties can move for summary judgment on particular issues of fact.

vi. Rule 56(e): Affidavits are based on personal knowledge when used in support of motions for summary judgment. Other evidence can be used to support a motion for summary judgment, but they all have to be admissible in court.

vii. *Lundeen v. Cordner*: It is difficult to get the judge to grant summary judgment when the movant has the burden of evidence at trial.

viii. *Adickes v. S.H. Kress & Co.*: It's the movant's initial burden to essentially disprove a critical fact that the plaintiff is suppose to show. If the movant fails, then summary judgment is denied. Nonmovant doesn't have to do anything. If the movant succeeds, however, then the nonmovant has to introduce evidence. If the nonmovant does nothing, then summary judgment may be granted.

ix. No evidence motion for summary judgment: the party that does not bear the burden of proof can move for a no evidence summary judgment, in which the party argues that the plaintiff has no evidence to prove causation. If defendant does this, plaintiff must then come forth with evidence demonstrating that there is an issue of fact.

x. The movant has the initial burden of showing that there is no issue of material fact. If movant meets his or her initial burden, then the nonmovant has the burden of producing admissible evidence that raises a genuine issue of material fact. If the movant does not meet the initial burden, the motion must be denied, regardless of what is filed in opposition.

xi. The burden of proof is required is important when determining summary judgment, since the issue is whether or not a jury could find for no other according to this burden of proof. If reasonable juries could differ, summary judgment is inappropriate.

xii. If the inference that the plaintiff is pointing to is just as likely to give rise to legal conduct as illegal conduct, then it is impossible to make an inference in favor of illegal conduct, and so a reasonable jury could not find for the plaintiff.

xiii. *Celotex Corp. v. Catrett*:

b. Dismissal of Actions

i. Voluntary Dismissal

1. Rule 46(a)(1): Voluntary dismissal can be done (i) as of right by the plaintiff before summary judgment motion or answer is filed or (ii) by consent of the parties at any time, often after settlement. Unless it's stated in the motion of dismissal or the plaintiff has voluntarily dismissed the case before, a voluntary dismissal is without prejudice.
2. Rule 41(a)(2): Except as provided in (a)(1), an action shall not be dismissed at the plaintiff's insistence except upon order of the court and upon such terms and conditions as the court deems proper. This is done after an answer or a motion for summary judgment. If granted, it is without prejudice unless otherwise stated. If the court finds that in dismissing the claim it would have to dismiss the counter also, then the court won't grant the dismissal without the acting plaintiff's consent.

ii. Dismissal for Failure to Prosecute

1. Rule 41 (b): Involuntary dismissal. These are initiated by the defendant at any time at a triggering event, which is either failure to prosecute or noncompliance with the rules

or orders of the court. Dismissal is with prejudice. Party can move for lesser sanctions under this rule.

2. *Link v. Wabash*: The court dismissed the action under Rule 41(b) after the plaintiff's attorney failed to attend a pre-trial conference. The Supreme Court said that the actions of counsel are attributed to the client.

c. Default Judgment
    i. Rule 55: Default. Occurs when defendant fails to answer.
    ii. Rule 55(a): If defendant doesn't answer, court will enter a default against the plaintiff. After there has been a default, then there can be default judgment. This either happens automatically or after further proceedings.
    iii. Rule 55(b): (1) If there has been a default, then there's an automatic default judgment entered by the clerk if the complaint specifies the damages sought. (2) If the damages sought are not specified, then there will be a hearing to determine the amount of damages to be awarded. The defendant must be given three days notice before the hearing.
    iv. Rule 55(c): allows the defendant to go to court and contest the default judgment. If defendant can show good cause, then a default judgment can be fairly easily set aside.
    v. *Coulas v. Smith*

VII. Alternative Dispute Resolution
    a. The Critique of Adversarial Justice
    b. Alternative Dispute Resolution processes
        i. Negotiation
        ii. Mediation: negotiation with an independent third party that helps facilitate the process.
        iii. Neutral Fact-finding and Ombudspersons
        iv. Early Neutral Evaluation
        v. Mini-trials

vi. Summary Jury Trial

vii. Arbitration: independent decision makers that act as a more informal court. Arbitration is generally done by contract. There's usually a panel of three arbitrators. There is a federal preference for arbitration. Since it's contractual, it often results in unequal bargaining power from the beginning. Arbitrators are generally lay decision makers.

viii. Private Judging

c. ADR and Civil Litigation

i. ADR and the Judicial Preference for Settlement

1. Rule 68 encourages settlement, and it protects the defendant from the costs of unnecessary litigations. If the judgment obtained by the offeree is not more favorable than the offer, than the offeree must pay the costs that were accrued after the offer. Rule 68 applies only to offers to prevailing offerees, not to prevailing offerors.

ii. ADR in the Courts

1. *In re African-American Slave Descendants' Litigation*: Courts may only order nonbinding mediation.

VIII. Trial

a. Trial by Jury

i. The Province of Judge and Jury

1. *Markman v. Westview Instruments, Inc.*: Takes a functional approach as to whether the question at hand was one for a judge or one for a jury.

ii. Tactical Considerations in Deciding Between Trial by Judge or by Jury

1. Institutional Factors: Jury trials take longer.
2. Psychological Factors

iii. Demand and Waiver of Trial by Jury

1. Rule 38 requires a jury demand within 10 days of the answer. Either party can request a jury. If the plaintiff requests the jury, it will usually be in the pleading. If it isn't requested within 10 days, it can be waived.

iv. Selection and Composition of the Jury
    1. Size
        a. Rule 48: the court can decide the size of the jury as long as it's no fewer than six and no more than twelve.
    2. Empaneling the Jury
    3. Challenging Individual Jurors
        a. Exclusions for bias or inability to follow the law and preemptory challenges.
        b. Supreme Court said a blanket exception for wealth was unconstitutional.
        c. Physical disability is usually not a reason to be excluded from the jury.
        d. *Flowers v. Flowers*: Jurors who have a preconceived bias that will reflect upon the outcome of the case should be stricken for cause.
        e. Preemptory challenges can be made for almost any reason, except on the basis of race or gender. Each side usually gets three preemptory challenges.
        f. *Edmonson v. Leesville Concerte Company, Inc.*: Litigant cannot use a preemptory challenge to strike a juror based on race.
    4. Conducting the Voir Dire
        a. Rule 47: Voir Dire is left to the judge, that is, determining what jurors should be precluded from sitting on the jury. Some judges let the parties do it.

Some judges ask the questions, while some judges let the parties ask the questions.

b. There are certain classes that cannot participate in the jury: members in active service in the armed services of the United States, public officials and servants, etc.

b. Taking the Case from the Jury—Motions for Judgment as a Matter of Law

i. Rule 50 allows for judgments as a matter of law.

ii. The Constitutional Issues

1. *Galloway v. United States*: Judgment as a matter of law, when used properly, does not violate the 7th Amendment, because no rational jury could possibly come out another way.

iii. Standards for motions for Judgment as Matter of law (Directed Verdict and Judgment Notwithstanding the Verdict)

1. The standard is the same as a motion for summary judgment, except it is based upon the evidence brought up at trial rather than the evidence ascertained through discovery. These are rarely granted, as a motion for summary judgment has probably already been made and denied, and so it is unlikely that the burden of proof is met during the course of the trial.
2. *Denman v. Spain*: Defendant can move for a no evidence JNOV.
3. *Rogers v. Missouri Pacific R. Co.*: As long as there is some evidence, including reasonable inferences, in support of the jury verdict, the verdict should stand.
4. The Motion for Judgment as a Matter of Law After the Verdict (J.N.O.V.): If the motion for judgment as a matter of law is rejected, it can be renewed by refiling it within 10 days after judgment has been entered. Failure to move for

a directed verdict precludes the party from moving for a JNOV because of the 7th amendment requirement that no issue of fact should be reexamined by the court. The court can grant a new trial or grant the JNOV. If the judge denied the directed verdict without condition, a JNOV cannot be granted, but a new trial can be. JNOV can only be granted when the judge determines that no rational jury could have come out the way the jury did.

c. Instructions and Verdicts
    i. Instructions to the Jury
        1. Request for and Objections to Instructions
            a. Some courts write jury instructions themselves, while others allow the parties to submit drafts, often only intervening when there is some dispute.
            b. *Kennedy v. Southern California Edison Co.*: The court has a duty to provide instructions that comply with the law, no matter what the parties have suggested.
        2. Commenting on the Evidence by Judges: Judges have a historical right to comment on the evidence. If he exercises too much influence, however, he may be reversed.
    ii. Permitting instructions to be taken into the jury room; note-taking and juror discussions during trial: Most courts give jury instructions orally and do permit the jury to have them written down during deliberations.
    iii. Verdicts
        1. Submission of the Case to the Jury
            a. Unless the court gives specific instructions requiring the jury to follow specific directions as to how to answer interrogatories, those interrogatories

are guidelines for the jury to arrive at the general verdict, but the jury is not bound by them.

2. The Form of the Verdicts
    a. General Verdict: who wins plus amount if plaintiff wins.
    b. Special Verdict: a series of questions leading to who wins.
    c. The judge decides which kind of verdict is appropriate, but it is rarely an issue of appeal.

iv. Findings and Conclusions in Nonjury Cases
1. Rule 52 governs findings of the court
    a. Rule 52(a): requires the judge in a bench trial to find fact specifically with clarity as to how he reached that conclusion. A judge must make a written findings of fact that are specific, and his conclusions of law must reasonably follow those findings of fact. Courts must properly articulate the basis for its findings and conclusions.
2. *Robert v. Ross*

d. Challenging Errors: New Trial
i. The Nature and the scope of the Power to Grant a New Trial
1. Rule 59: judges can issue new trials on pretty much any or all issues that arise within the trial, as long as the issues may affect the ultimate outcome.
    a. Rule 59(b): Motions for new trials must be filed within 10 days of judgment. The court cannot grant exceptions.
    b. The court can order a new trial on its own motion within 10 days of entry of judgment, though the judge must specify why.

c. If there has been a timely motion for a new trial, the court can grant a new trial for any valid reason not mentioned in the motion.
d. The rules favor flexibility in granting new trials.

2. Rule 61: harmless error. There should not be a new trial for an error that doesn't affect the ultimate judgment.
3. Three kinds of errors:
    a. Errors that are so great that when they are corrected, the judgment will be issued for the other side. JNOV is appropriate.
    b. Errors that are so great that they may have changed the outcome. A new trial can be granted.
    c. Harmless errors, which have no recourse.
4. There is flexibility to order new trials under the Federal Rules, but they are confined for allowable instances as a matter of law. (Jury misconduct, etc.)

ii. Incoherent Jury Verdicts
1. *Magnani v. Trogi*
2. *Robb v. John C. Hickey, Inc.*

iii. Jury Misconduct and the Integrity of the Verdict
1. *Hukle v. Kimble*: Jury agreed on the damages based on taking an average before the damages were actually determined. They determined a quotient verdict, which the court ruled to be jury misconduct.
2. There is a high standard for achieving a new trial based on inaccurate information supplied by a juror during voir dire.

iv. New Trial Because the Verdict is Against the Weight of the Evidence
1. Whatever judgment is rendered, if it is against the clear weight of the evidence or based on false evidence or would

otherwise result in a miscarriage of justice, then the trial court can grant a mistrial.

2. The verdict must represent a serious error in judgment by the jury.
3. Not the same standard as judgment as a matter of law, because there may still be some evidence in support of the other side. This decision belongs to the trial court. Whereas a judge cannot weigh the evidence when determining judgments as a matter of law, he can in determining if the verdict is against the weight of the evidence.
4. *Aetna Casualty & Surety Co. v. Yeatts*

v. The Power to Grant Conditional and Partial New Trials
   1. *Fisch v. Manger*: Additur does not violate the constitution.
   2. *Doutre v. Niec*: The court cannot grant a new trial on liability without also granting a new trial concerning damages, because the issue of damages is so connected to liability that it cannot be separated from it.

vi. Timeliness of Requests for New Trial

vii. The Power to Set Aside a Judgment on Grounds Discovered After it was Rendered
   1. Rule 60: relief from judgment or orders
      a. Rule 60(a): clerical mistakes that arise from oversight or admission, the court can simply correct.
      b. Rule 60(b): Motion for a new trial on the basis of mistake, newly discovered evidence, or fraud must be made within a reasonable period of time not to exceed one year.
   2. Mistake and Excusable Neglect

    a. Issues to consider when determining whether neglect was excusable: (1) the danger of prejudice to the opposing party; (2) the length of the delay and its potential impact on the judicial proceedings, (3) the reason for the delay, and (4) whether the moving party acted in good faith.
    b. Inadvertence, ignorance of the rules, and mistakes can amount to excusable neglect.
3. Newly Discovered Evidence; Fraud
    a. Supreme Court decided in *Patrick v. Sedwick* that newly discovered evidence which could not be discovered with due diligence before the time for filing a new trial: (1) must be made as would probably change the result of a new trial; (2) must have been discovered since the trial; (3) must be of such a nature that it could not have been discovered before trial by due diligence; (4) must be material; (5) must not be merely cumulative or impeaching.
4. The Independent Action to Obtain Relief from a Prior Judgment