

*These were my bar notes. You can use them. I passed every bar I took. Looking at my notes won't help you, except maybe if you want to see how to make notes for the bar.*

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## Agency

- 1) Liability of principle to third parties for torts committed by the agents
  - a) Respondeat superior/vicarious liability
    - i) Employer can always ratify tort actions, but the employer must have **knowledge of all material facts**
      - (1) An employer can later recover 100% of the damages from the employee
      - (2) Being on call means that one is an employee, but they can be acting outside the scope of the agency arrangement
    - ii) *The Principal will be liable if two things are true* (relationship and scope)
      - (1) Principal-Agent Relationship (three things must be true)
        - (a) **Assent** is defined as an informal agreement between the principal and the agent (doesn't need to be formal).
          - (i) No consideration is needed

- (ii) Consent must be manifest or implied by statute or estoppel
- (iii) There may be agency even if the statute of frauds requires that there be an agency relationship
- (iv) Types of authority
  1. **Actual express** authority is defined as when the principal uses words to express authority to an agent
    - a. creation
      - i. Can be oral “narrow”
      - ii. It can be private (can be “go out there and enter the deal”)
      - iii. These words are “narrowly construed” – can’t do too much more than what is necessary
      - iv. In NY if you have a contract involving the conveyance of land, if the contract involves a conveyance of land, the expression of authority must be in writing.
      - v. A failure of a agent who requires a license to have a license means that they cannot collect their commission.
    - b. Termination of actual express authority
      - i. by the unilateral act of either party
      - ii. a change of circumstances that should cause an agent to realize the principle would not want the agent to exercise the authority terminates the authority
      - iii. Death or incapacity terminates the relationship with or without knowledge of the surviving party, unless one is given a **durable power of attorney** . Exception: with soldiers, there must be actual knowledge of death.
      - iv. Banks may collect on commercial paper until they receive notice of death
    - c. Irrevocable agency
      - i. Under some views, an agency with an interest (for example selling a chattel pledged as security) creates an irrevocable agency, however, there must be consideration
  2. **Actual implied** authority is defined as Real authority, which the agent believes to have by virtue of conduct or circumstance. This is real authority to do all small tasks necessary to accomplish an express tasks (‘close the deal’ implies renting a conference room). From prior dealings between the principal agent which have built up an understanding.
  3. **Apparent authority:** Principal hasn’t really given authority, but he will be liable by virtue of the appearance (two part test)
    - a. Principal has **cloaked the agent** with the appearance of authority
    - b. An agency by estoppel can be created if a principle fails to stop an imposture from acting as his agent (whether deliberately or negligently)
    - c. **3<sup>rd</sup> party relied** on that authority
    - d. **example:** “secret limited authority” is defined as “do not sell” – the principal is liable
  4. “Lingering authority” – where actual authority is terminated, but the agent continues to work on behalf of the principal. Even after termination, the principal is still liable based on apparent authority.
    - a. The only way to cure this is that the Principal must give notice of termination to get rid of the apparent authority. Until they receive notice, the customers may continue to rely reasonably upon the appearance of apparent authority.
  5. **Ratification** is defined as authority conferred after the contract has been entered into.
    - a. **In New York there is a two part test**
      - i. You must find that the **principal has knowledge of all material facts regarding the contract**

- ii. Must find that the principal has **adopted the deal and accepted the contract's benefits**
    - b. Ratification in NY has to be complete. Cannot be incomplete, but not partial.
    - c. Ratification will not be effective, if it will prejudice third parties who have acquired rights in the mean time
    - d. Behavior that would be illegal at the time of ratification cannot be ratified
  - (b) **Benefit** is defined as agents conduct is for the benefit of the principal
  - (c) **Control** is defined as principal must have the right to control the agent
    - (i) Principal must have the "power to supervise the manner of the agent's performance"
    - (ii) Variations
      - 1. Sub-agent: Agents who work for other agents. There must be assent, benefit, and control. In general there is no liability, because there is no **assent**
      - 2. Borrowed agents: one employer who borrows another employer's agent. Usually no liability because there is no control
      - 3. If there is no control, there is an **independent contractor** arrangement. Principals can still be liable if there is no control if it is an **ultra-hazardous** activity, or there was a principal-agent relationship created by **estoppel**.
- (2) Tort must have occurred within the **scope** of that relationship
  - (a) In NY there is a three part weighing test, for determining whether or not the tort occurred within the scope of the agency
    - (i) Was the tortious conduct of the kind that the agent was hired to perform within the **job description**
    - (b) Did the tort occur on the job during **working hours**. *frolic and detour*: principal is liable for torts of agent committed in the scope of agency
      - (i) **detour** (inside the scope of agency) is defined as mere departure from an assigned task: inside the scope of agency. "In this case, the employee was on a mere departure from an assigned task" ("on the way back to work") – this is a mere departure for an assigned task
      - (ii) **frolic** is defined as a new and independent journey: outside the scope of agency ("taking a company car after working hours to go to a party")
  - (c) did the agent **intend to benefit** the principal by its conduct
  - (d) negligence based on smoking
    - (i) NY view: if there is a failure to instruct, employer liable. However, someone is smoking on the job and a tort occurs, the employee is liable.
- (3) **intentional torts** intentional torts are usually outside the scope of agency (three exceptions)
  - (a) if the conduct is **authorized** by the principal, it is still within the scope
  - (b) if the conduct is **natural** from the nature of employment, it is still within the scope (for example bouncers get paid to bounce)
  - (c) if the conduct is **motivated** by a desire to serve the principal it is still within the scope
- 2) Liability of principle to third parties for contract entered into by the agents
  - a) Principal is liable for contracts entered into by the agents, if two things were true.
    - i) Principal-agent relationship (assent, benefit and control)
      - (1) Limitations on agency relationship for contract purposes
        - (a) minors in the entertainment industry are an exception. Their contracts can be guaranteed against disaffirmance by a prior judicial decision.
        - (b) Agents cannot represent both sides of the transaction
    - ii) Principal must have authorized the agent to enter into the contract with its authority. In NY there are four types of authority (actual apparent, inherent, ratification, estoppel or statute)
      - (1) If there is no authority, agent becomes liable on the contract

- (2) If you find that the principal has authorized the contract, this usually means that the agent is not liable on the contract. Authorized agents are not liable on the authorized contracts.
  - (3) **However, in New York, if there is any measure of concealment of the the identity or existence of the principal, an authorized agent may still be liable on an authorized contract at the election of the 3<sup>rd</sup> party.**
- 3) What do the agents owe to the principals within the principal-agent relationship
  - a) Duty to use reasonable care (commensurate with what a similar person in their position would get, so an unpaid person will be judged according to the volunteer standard)
  - b) Duty to obey reasonable instructions
  - c) Duty of loyalty
    - i) Agent may not engage in **self-dealing**
      - (1) Agents may not receive a benefit for themselves to the detriment of the principal
      - (2) Agents can't make a secret profit at the principal's expense
    - ii) Duty not to usurp
    - iii) Duty not to make secret profit at principal's expense
  - d) Remedies for agent disloyalty possible
    - i) Recover losses caused by the breach may be recovered
    - ii) Moreover, in addition to losses caused by the breach, the principal may disgorge the profits made by the breaching agent (ill-gotten gains)
- 4) Agents warrant to third parties that they are actually the agent. A breach of this warranty leave the agent liable

## Commercial Paper

- 1) Defining a negotiable instrument
  - a) **Types of negotiable instruments**
    - i) **Promissory note:** I promise to pay to the order of X, signed
      - (1) Contains an affirmative promise to pay and not simply a statement of a debt
      - (2) Promisee maker is defined as *the payee*
    - ii) **Draft:** "pay to the order of X signed" – a check
      - (1) Drafts are really checks
      - (2) Draft is "the commander" – it contains an order or a command or order
      - (3) Three parties
        - (a) **Dawer** gives the order
        - (b) **Drawee** is ordered to do the paying
        - (c) **Payee** is the beneficiary of the order
        - (d) **Indorser** signs on the back
  - b) Deciding whether or not it is a negotiable instrument (triggering application of article 3 rules)
 

SWOUPPS

    - i) **S:** for a sum certain – or can relate to a specific source
      - (1) Can use index and attorneys fees
    - ii) **Writing**
    - iii) **Order:** Payable to Order or Bearer (or order of bearer)
      - (1) Options
        - (a) Order
        - (b) Order of bearer
        - (c) Bearer
        - (d) Cash
        - (e) Pay to order of X
        - (f) And assigns
      - (2) Cannot say "Pay to X"
    - iv) **u** unconditional promise and no additional promises
      - (1) no additional promises or orders – no other documents incorporated by reference

- (2) if there is an incorporation clause (it incorporates something else, or is subject to)
- v) **payable on demand or at a definite time**
  - (1) demand is okay, because it states that it is payable on demand or at “site” or presentation (as is “site” or “presentation”)
  - (2) if silent at the time of the payment it is still negotiable and payable on demand
    - (a) it is payable at time, if, on its terms it is payable on or before a stated date or at a fixed period after a stated date
    - (b) acceleration clauses do not destroy negotiability
- vi) **payable in currency**
  - (1) must be payable in money – includes foreign currency
  - (2) money doesn’t mean goods
- vii) **Signed: signed by the maker or drawer: no real formal standard for what a signature is**
  - (1) Must be signed by the maker if it is a promissory note
  - (a) Or by the drawer if it is a draft
- 2) When a negotiable instrument is **duly negotiated to a holder in due course, the holder in due course takes the instrument free of personal claims, and is subject to only real defenses.**
  - a) Two theories of suit
    - i) Contract or signature liability: defendant is liable based on his signature (unless without recourse is written on the check)
    - ii) Warranty or transfer liability – based on whoever signs or endorses becoming liable
      - (1) Exception: donors do not make the warranties on the checks.
        - (a) If defendant didn’t indorse, then only the defendant’s immediate transferee may sue
      - (2) warranties run with the instrument if the defendant indorsed
        - (a) If defendant indorsed, any Plaintiff in possession of the instrument may sue
        - (b) When defendant indorses, warranties run with the instrument (so long as they did not give the check away)
      - (3) Five warranties – ME-BAT
        - (a) instrument has not been materially altered
        - (b) instrument is enforcement (no defense to enforcement)
        - (c) no bankruptcy or insolvency proceedings involving maker
        - (d) signatures are genuine and authorized
        - (e) good title to the instrument
  - b) becoming an HDC though negotiation (value, good faith, and without notice)
    - i) Negotiation is negotiated by delivery of the instrument to that payee
      - (1) Any further negotiation requires that the payee indorse the instrument and deliver it to the transferee
      - (2) to be an HDC The endorsement must be genuine if an instrument is payable to order, the payee has to be indorsed
    - ii) requirements for indorsement
      - (1) if the instrument is payable to bearer then indorsement is not required
      - (2) types of indorsements
        - (a) special
          - (i) one that names a particular person as an indorsee
          - (ii) indorse must sign in order for the instrument to be further negotiated
        - (b) blank: can be negotiated by delivery alone
        - (c) restrictive (for example for deposit only) (cf. restrictions on the front)
          - (i) a bank is liable in conversion for cashing a check which is marked “for deposit only”) if the check was stolen
        - (d) unrestricted
    - iii) requirements to be a holder in due course
      - (1) HDC is a holder who take the instrument
        - (a) For value: Consideration (past or present), Security interest, Payment of a debt or Irrevocable commitment
          - (i) Value can be less than face amount
        - (b) In good faith (pure heart, empty head) – subjective standard of honest – doesn’t require diligence

- (c) Without **notice that it is overdue** or really suspicious circumstances
  - (i) Notice of claims or reason to doubt validity constitute notice of bad circumstances
  - (ii) If there is knowledge that the principal is overdue, there is no good faith. But Interest can be overdue
- (2) Shelter rule: Transferee (even if not HDC) gets whatever rights a transferor had
- c) HDC and subsequent sheltered transferees takes the **instrument free from claims and free from personal defenses and subject only to real defenses**.
  - i) HDC takes free from all personal defenses that would be found in a regular contract: Lack of consideration, Unconscionability, Waiver, Estoppel, Fraud in the inducement
  - ii) Cf. HDCs are still subject to real defenses MAD FIFI FOUR
    - (1) **Material alteration**
      - (a) This is a change in the terms of the instrument (sticking an extra number in there)
      - (b) Maker is liable for only the initial amount
      - (c) If maker is negligent (for example a blank check) he is estopped from raising it as a defence
    - (2) Duress
    - (3) Fraud in the factum
      - (a) Real fraud is defined as has been a misrepresentation about the instrument
      - (b) Even in the hands of an HDC, someone who signs something that was misrepresented renders it unenforceable
    - (4) Incapacity
    - (5) Illegality
    - (6) Infancy
    - (7) Insolvency

## Conflicts

- 1) Identification of a conflicts problem
  - a) There were be two or more jurisdictions
- 2) Recognition of foreign judgement recognized by NY
  - a) General rule: Under the full faith and credit clause of the constitution a state must recognize and enforce a judgement of a sister state
  - b) Exceptions
    - i) Default judgements (for example Defendant never showed up), in such case, the defendant may only challenge the personal jurisdiction of the issuing state
    - ii) Public policy exception: if the judgement is against a fundamental public policy of NY
    - iii) Obligation to enforce only extends to how far the sister state would enforce
  - c) Foreign country judgements: *comity* – NY will generally recognize foreign country judgements if they are fair and unbiased
- 3) Conflict of laws: NY court was decide whether to apply its own law to the controversy, or some other state or jurisdiction in
  - a) Determining Domicile: Every person has a domicile
    - i) By operation of law
      - (1) Default rule is the domicile of origin where one is born – the domicile of the parents or the custodial parent, which changes when the parents move
      - (2) incompetents: incompetents will be assigned the domicile of their custodian or their custodial parents

- (3) Married people: need to know old and new rule
  - (a) Old rule: wife took the husband's domicile
  - (b) New rule: permissible for husband and wife to have separate domiciles
- ii) By choice:
  - (1) Present and
  - (2) Manifest intent to remain permanently
    - (a) Multiple dwellings: If one is a principal home, and one is a seasonal home, the principal home is normally the dwelling home
- b) Choice of laws: going to have the mention of a foreign law, otherwise it only matters when the difference matters (for example different statutes of limitations)
  - i) In order to present a choice of law issue, there must be at least two state's laws that could be chose
  - ii) To chose possible states – two steps
    - (1) **Is it constitutional** to allow another state's law to be chosen
      - (a) Applying the due process clause and full faith and credit clause, the supreme court announce that for a choice of law to be constitutional, the state must have a significant contract, or aggregation of contacts, creating state interest such that jurisdiction is not fundamentally unfair
        - (i) Corporations: incorporation or chartering of a corporation will give the state a contact
        - (ii) Natural persons: Domicile will give the state a contact
      - (b) The constitutional allows the choice, but doesn't require it – NY could chose the foreign state's law
    - (2) **Limitations** found in **state statutes**: For example NY state statutes identify which states it will recognize
  - iii) Choice of law
    - (1) Old rules followed the *Vested rights doctrine*: Would identify a particular event, and apply the event where the event occurred
      - (a) In Tort cases, the significant event was the injury
      - (b) Contract
        - (i) if it involved validity, the significant event was the place of formation
        - (ii) if it was breach of contract, it was the place of the breach
    - (2) new rules: *government interest analysis*: Babcock v. Jackson: Which state has the greatest interest in apply its law to the case
      - (a) steps
        - (i) start by identifying competing state rules
        - (ii) identifying what the policy is behind the rules
        - (iii) identify the contact of the parties
          - 1. domicile of the parties
          - 2. key events underlying the lawsuit
        - (iv) ask whether the contracts implicate or trigger the state's policies
          - 1. if the policy favors the Plaintiff and the Plaintiff is from that state
          - 2. if the policy favors the defendant and the defendant is from that state

3. if the policy regulates the events and events took place in that state
- (b) resolution
  - (i) False conflict: if only one state has an interest, apply the law of the interested state
  - (ii) True Conflict: where there is a direct conflict, Forum will reconsider its own policies and then – seeing if it can reconstrue. NY normally picks its own law
  - (iii) Disinterested forum – two competing sets of state law, where forum non is not an option:
    1. Can decide who has the better law
    2. Can apply the law of the state that most closely resembles its own
- (3) Refinements to the general government analysis
  - (a) Torts
    - (i) Conduct governing or conduct regulating: In general, where the rules in conflict different in defining the appropriate level of conflict, NY will normally apply the rule of the place of the tort because with conduct regulating rules, that the state normally has the materially greater interest
    - (ii) Loss allocating rules: States may be in agreement as to the wrongfulness of the conduct, but they disagree as to what happens after this conduct takes place, but the law of the situs has less of an interest
      1. Guest passenger statute
      2. Charitable immunity
      3. Wrongful death
      4. Vicarious liability:
        - a. Rental car companies: this is loss allocating rule
    - (iii) To resolve these conflicts, NY applies a modified government interest through the *Neumeier* rules
      1. Look at the policies of the two states
      2. Decides whether the states are disputing the wrongfulness or the consequences (loss allocating)
      3. *Neumeier*
        - a. *Neumeier* One: Same domicile: When parties are in same domicile, the law of that state should control and determine the standard of due care
        - b. *Neumeier* two: Provided For: Where a tortfeasor is in his home state, and his law would hold him not liable, he should not be held liable, as he would be held liable in another state
        - c. *Neumeier* three: Unprovided For: Normally will be the law of the state where the tort occurred, unless it can be shown that displacing the territorial approach will advance the relevant substantive law purposes without impairing the



smooth working of the multistate system or producing uncertainty

- (b) Contracts cases: contracts are consensual relationships and therefore the interests of the parties matter more than government issues
  - (i) Party autonomy
    - 1. NY courts recognize the choice of law clause unless
      - a. It is an adhesion contract
      - b. There is no reasonable relationship between the law chosen and the parties or the transaction
      - c. The law chosen leads to a result contrary to a strong public policy of NY, and NY law would otherwise be applied
    - 2. New York courts will recognize a contract done under foreign law that would be void under NY law, unless it is wildly against public policy
    - 3. New York taking jurisdiction over big things
      - a. Uniform commercial code: calls for recognition of the parties choice of law if the transaction bears a reasonable relationship
      - b. **General obligations law** :
        - i. Over 250k: may chose NY even if there is no reasonable relationship to NY
        - ii. Over 1m: will apply NY law so long as there is jurisdiction
  - (ii) If there is no choice of law, clause, the NY courts use the “most significant relationship” or the “center of gravity” or the “proving of contacts”
    - 1. Determine the relevant contracts in each states: Place of negotiation, execution, performance, and domicile
    - 2. Special rules
      - a. Usurious contracts : NY will sustain the loan, if the loan is valid under any jurisdiction with a significant relationship to the parties or the contract
      - b. Insurance policies: place where the policy is issued is the source of the governing law
- (c) Real Property follows a situs rule: All legal questions regarding real property are decided under the law of the place where the land is located
- (d) Personal Property
  - (i) *Inter vivos* transactions: apply the law of the situs of the property at the time of the transaction
  - (ii) Filing of security interests
    - 1. Under the old uniform commercial code Article 9, with tangible goods one must file in the place that the goods were located

2. Under the new uniform commercial code article 9, you file in the place of the **debtor's location**, and that is the place where the debtor was incorporated, or their residence
- (e) Inheritance: rights in the property after the owner has died
  - (i) if the real property is located in NY, NY law will apply if it is done correctly, if it would be valid under the law of any one of three places – NY will validate the law
  - (ii) Real property
    1. NY law will say that where a will has been written disposing of that Real property – if it is valid under one of these three sets of laws, it will be enforced
      - a. NY
      - b. Place of execution
      - c. Domicile at execution or death
    2. If the land is located elsewhere, apply that law
  - (iii) Personal property: When the decedent has died without a will, NY courts apply the law of decedent's domicile at death
    1. Intrinsic validity – if intrinsically valid **where executed** – the bequest is good and it stays intrinsically valid
  - (iv) Interpretation: Pick the law of the decedent's domicile at execution
  - (v) Revocation or alteration: Domicile at time of revocation
  - (vi) Issue of electing against the will: EPTL: if a will of a non-domiciliary designates NY law (choice of law clause in a will), NY will apply its law to all property in the state, thus testator can defeat the otherwise applicable rule that personal property is governed by decedent's domicile at death
- (f) Family law
  - (i) Marriage: If a marriage is valid where it was entered into it is valid everywhere Unless it violates a strong public policy of the state of NY
    1. *Cf.* If it invalid where entered into, it is invalid everywhere unless it is a very picky technicality that was inadvertently missed
  - (ii) Divorce: Generally governed by the law of Plaintiff's domicile, which is always almost the forum court
  - (iii) Alimony, child support is entirely statutory – there is no room for fluid choice of law issues, and will be covered in Domestic relations
  - (iv) Legitimacy: determined by place of birth
  - (v) Adoption: court applies its own rules – picks its own law
- (4) Overarching exceptions
  - (a) Procedural rules: when you see procedural rules, apply NY law
    - (i) For example mechanics of the lawsuits
    - (ii) We deal with the CPLR – we don't borrow
    - (iii) Burdens of proof, we apply forum law

- (iv) As to presumptions,
  - 1. Irrebuttable presumptions are substantive, and governed by substantive rules as above
  - 2. Rebuttable presumptions are procedural, and apply NY law
- (v) Statutes of limitations is considered to be procedural
  - 1. When a suit is brought in NY, and NY law will govern
  - 2. NY will apply its own statutes of limitations unless NY's borrowing statute applies
  - 3. Borrowing statute: if the Plaintiff is a non-resident of NY and the cause of action arose outside of NY -- apply the shorter of the NY statutes of limitations and the statutes of limitations of the place where the cause of action arose
    - a. A statute of repose is a statute of limitations-like statute that focuses doesn't focus on on the Plaintiff's injury at all – it is measured from when a person parted with possession (to give merchants comfort). Courts will apply shorter statutes of limitations in a statute of repose
    - (b) Where the forum law is completely contrary to American public policy
    - (c) We never apply a forum a state's criminal law
    - (d) Never apply a forum state's tax law – but can enforce judgement
- c) Federal law and state law
  - i) Federal law in state courts
    - (1) If a federal claim is stated, the state court decides that claim
    - (2) Federal law may prohibit a state court from hearing certain kinds of claims
  - ii) State law in federal court
    - (1) In diversity case, federal courts must apply state laws, and apply the choice of law in the state in which it sits
    - (2) Proof of forum law – must be plead and proved
      - (a) Has to plead
      - (b) And prove that content
  - iii) Foreign law
    - (1) A state will take judicial notice of a sister state's law
    - (2) Where the court doesn't take judicial notice, and where the party has failed to raise it, NY applies its own law, on the theory that probably everyone else's law is like NY

## Constitutional Law

- 1) **Judicial Branch:**
  - a) Congressional influence:
    - i) Congress does not have the power to limit jurisdiction of federal courts.
    - ii) Article III Courts can always utilized their **equitable powers** unconstrained by Congress.
  - b) Federal courts can't issue **advisory opinions**
    - i) No one in another branch can set aside the judgement of a court
    - ii) Federal courts decide cases, they don't issue recommendations to executive officers
    - iii) *Cf.* State courts can issue advisory opinions. However, federal courts won't review
  - c) Case and controversy requirement

- i) Ripeness
  - (1) Plaintiff can challenge before actually injured , but must show **actual harm or immediate threat of harm**
  - (2) However, if there is uncertainty as to if/how a state statute will be enforced the matter is not ripe.
- ii) Moot cases:
  - (1) effect
    - (a) if a case is dismissed at the district court, it is as if it never happened
    - (b) if the case is dismissed on appeal, the judgement never happened (vacated)
  - (2) exception: controversies capable of repetition yet evading review
    - (a) usually involving disputes with an internal time limit (abortion)
    - (b) in class actions, suits are live so long as it is live with respect to any member
- iii) standing – **injury, causation, and redressability**
  - (1) must show **injury** either past or future (have been or will be injured)
    - (a) just about anything constitutes injury
      - (i) potential injury of employer or cancellation of a contract is an injury
      - (ii) ideological objections are not injury
    - (b) if legislature creates a substantive right and that right is infringed upon, it is an injury
  - (2) redressability: ability of the court to fashion a remedy (might have standing for one remedy, but not another)
    - (a) past injury: remedy is damages
    - (b) present injury: remedy is injunction
      - (i) for example courts can't grant order the revocation of a license granted to someone because the Plaintiff wasn't granted that license (doesn't remedy the harm)
  - (3) **organizational** standing: but if the members have real injury, the organization has standing
    - (a) if the member have only ideological objection then there is no standing
  - (4) Taxes. Taxpayers can challenge their specific tax liability because it is a real injury. However, once a tax is collected the money is no longer theirs and there is no standing to challenge the spending of taxpayer money.
    - (a) exception: establishment clause if it is government spending, but not government property liquidation
  - (5) legislatures
    - (a) only have standing to attack things that attack legislators personally
      - (i) for example excluded, not being allowed to vote
    - (b) no standing for legislators to challenge properly enacted laws because the law may be unconstitutional. Someone who is injured by the law must sue
    - (c) legislation creating the line item veto could only be challenged by someone whose line item was vetoed (not just a senator)
  - (6) 3<sup>rd</sup> party standing
    - (a) to raise the rights of someone else, you must have suffered actual injury even if indirect
    - (b) examples: 1) for example one can raise the right of another to speak, if they want to hear it 2) for example a doctor can cast his right to be paid, in terms of how it injures his women patients
- iv) causation: have to show that your injury was somehow caused by the government's conduct
- d) Adequate an independent state grounds – can arise when the Supreme Court Reviews decisions of a state supreme court.
  - i) supreme court can review a state court judgement only if it turned on federal grounds
  - ii) **no supreme court review if the federal issue** doesn't effect the outcome
    - (1) if the highest state court rules on both under state and federal law, Suprme Court can't review the federal claim because the issue has been decided on adequate an independent state grounds
    - (2) A state supreme court can say that something violates its own constitution, provided it is on adequate and independent state grounds

- (3) Federal constitutional rights are a floor, not a ceiling (states and their courts can always grant people more rights)
  - iii) In the case of unclear state grounds: when a state court is unclear as to whether things are based on the federal or state grounds.
    - (1) If the Supreme Court agrees: it is affirming the judgement only on the federal issue
    - (2) If the Supreme Court disagrees: it will vacate and remand, so the state SC can decide for itself its own constitutional issues
  - e) **Republican form of government** (guaranty clause): cannot enforce it in court
  - f) Political questions are non justiciable
    - i) True foreign affairs, or military command decisions cannot be reviewed
      - (1) Note: there is a balance between the Executive and the legislature about control over the military
    - ii) Internal party question of whether or not delegates are seated is termed to be a justiciable
    - iii) Impeachment questions are political questions – can be delegated to a subcommittee of the senate
      - (1) supreme court said that it wasn't going to get involved in the procedures
  - g) sovereign immunity: 11<sup>th</sup> amendment:
    - i) suits against states generally prohibited unless sovereign immunity waived.
      - (1) private people can't sue states in federal court for money damages
      - (2) states can consent to be sued unless the state consents
      - (3) US Congress can expressly state that a state can be sued for civil rights.
        - (a) Congress must say this expressly – that congress is authorizing suit against the state. (Must say "state" not – "any person")
        - (b) Congress must be enforcing 14<sup>th</sup> amendment rights, not is powers under the commerce clause – civil liberties (can't sue states under normal federal question issues)
      - (4) Federal government can sue states
      - (5) Citizens cannot sue a legislature
    - ii) Who *can* be sued
      - (1) Can sue a locality (localities are not – cities, counties, towns, etc. can be sued)
      - (2) Can sue a state officer by name, individually (a civil rights action)
        - (a) Can sue a state officer in equity, to enjoin unconstitutional action
        - (b) Can sue a state officer legally if the damages come from his own pocket
- 2) Legislative branch
- a) Powers
    - i) Military powers to run its own tribunals: Military courts can be used to punish service members for crimes that are not connect to their duties
      - (1) But former military can be court marshalled
      - (2) Civilians can't be court marshalled
    - ii) Other powers
      - (1) Property (dispose of government proper). Government has almost unlimited power to do so.
      - (2) Immigration; Patent; Copyright; Postal
      - (3) District of Columbia
    - iii) Taxing and spending:
      - (1) provides a basis to do whatever is not prohibited in the constitution
      - (2) Spending power can be used to bribe the states into going the federal government's way when it comes to booze
    - iv) Commerce power
      - (1) Federal regulation of any power or activity in interstate commerce can be regulated by congress.
        - (a) Though the government can tax, when it taxes for the purpose of regulation, it does so under the commerce clause
      - (2) Congress can regulate purely intrastate activity having a **substantial cumulative effect** on interstate commerce *Rickert v. Fillman*

- (3) Limits on commerce power: reluctant to regulate activity that is both local and non-commercial, unless Congress can explain how it is commercial
  - (a) Where things are non-commercials, non-economic, etc.
  - (b) But where the local conduct is commercial or economic in nature, then there can be substantial effect on interstate commerce
- (4) Congress **can** regulate state employers wages
- v) Cf. congressional staff
  - (1) Can hire people who investigate, and propose legislation
  - (2) can't investigate things that it has no power to legislate in
  - (3) can hire and fire people who monitor compliance with federal programs
  - (4) cannot give executive power to anyone it can hire or fire (a legislative officer)
  - (5) can appoint its own members to investigative bodies.
- b) Anti-commandeering: congress can't force states to implement state programs
  - i) Congress can't force states and localities to carry out federal programs
    - (1) Congress, on the other hand, can enforce them through federal employees
    - (2) Congress can bribe the states
  - ii) Congress has the power under the 13-15 amendments to enforce their provisions by appropriate legislation
    - (1) 13<sup>th</sup> amendment; slavery
      - (a) Congress has broad power to regulate against racial or ethnic discrimination
      - (b) includes legislation prohibiting discrimination against minorities
    - (2) 14<sup>th</sup>: broad power to remedy violations of individual rights
      - (a) Congress doesn't have the power to go around inventing new rights that the states must uphold (cf. Congress can create federal rights)
        - (i) (for example there is no individual right to religious accommodation)
        - (ii) Congress can create federal laws, but they cannot impose new substantive rights upon the states
      - (b) Can do reasonable things to prevent violations of individual rights as they have been defined by the courts
    - (3) Non-freestanding powers
      - (a) Necessary and proper clause : It has to be necessary and proper to do something else (it isn't a free standing power)
      - (b) General welfare clause (preamble) is not a power of congress but congress can tax and spend for the general welfare
    - (4) Delegation is permitted: so long as congress provides standards for the exercise of the delegated power
    - (5) Speech or debate on the floor of Congress creates an evidentiary privilege
      - (a) Official acts: Voting, debating and speaking about legislation are not protected
      - (b) Unofficial things (for example hidden cameras in hotel rooms where there is a videotape) are not protected
    - (6) Legislative veto is unconstitutional because it violates **bicameralism and presentment**
- c) Prohibition on retroactive legislation (*ex post facto* laws).
  - i) Prohibition on expanding criminal liability retroactively or increasing penalties
  - ii) Congress can't declare someone guilty with a *bill of attainder*.
  - iii) there can be no retroactive impairment of contracts unless there is an overriding need such as means something in the nature of an emergency (for example economic collapse, great falling of revenues.)
- d) creation of property rights by legislative branch brings about procedural due process for protection of new property, property, life, or liberty
  - i) there is a requirement that **notice and a hearing** be given if life, liberty, or property being taken by the government?
    - (1) Liberty is defined as physical confinement, or physical confinement
      - (a) taking away of a legal right
        - (i) When a schoolchild is spanked for disciplinary reasons, it a loss of liberty
        - (ii) Curtailment of a legal right is a loss of liberty
        - (iii) taking away a right to buy a drink is a loss of liberty

- (b) Doesn't mean practical opportunities
- (2) Property
  - (a) real estate is protected by procedural due process
  - (b) Government jobs that are tenured (however they must be true government jobs, not just jobs in organizations that are partially funded by the government)
  - (c) Custom alone does not create due process rights, but there may be contract rights created by custom
  - (d) Government benefits
    - (i) **Entitlement** to a government job or benefit is property
      - 1. One is entitled when the government says so
      - (ii) **Mere expectation** of a government job or benefit is nothing
    - (ii) Deprivation of property is defined as *intentional* deprivation, not accidents (still may have a tort action)
    - iii) If there is a property right, what process is due the deprivant? (variable guarantee)
      - (1) Three factor balancing
        - (a) **Importance** of the interest at stake
        - (b) **Value** of the procedure in protecting that interest
        - (c) **Cost** of the procedure
      - (2) **Timing of hearing**
        - (a) Tenure, for many years required some opportunity to be heard before hearing, unless there is a significant reason not to keep the employee on the job
          - (i) Suspension with pay is because people need a hearing
          - (ii) Exception is for Police Officer formally charged with a felony
        - (3) **When the government tried to rely on a post-deprivation hearing, that hearing must be 1) prompt and it 2) must offer complete relief**
- e) Establishment clause: Apparent favoritism of one religion over another will be viewed under strict scrutiny, and the law must be tailored to meet a compelling government interest
  - i) *Lemon test*: in doubt
    - (1) Neither inhibit or advance religion
      - (a) The government cannot endorse a particular religion, such as Christianity
      - (b) Government can't endorse religion generally
        - (i) Can't be an isolation, humiliation, or coercion
        - (ii) Can have bible reading in schools, so long as it is not inspirational
      - (c) But the bible can be admitted for any reason for any purpose other than its truth
    - (2) Secular purpose
    - (3) No excessive entanglements (in doubt)
  - ii) can pray in legislatures
  - iii) nativity scenes
    - (1) old: Christmas is no longer religious
    - (2) new: can have something else there with it to dilute the religious message (so if someone steals Rudolf it becomes illegal)
- 3) Executive power
  - a) Generally to enforce, not to make law (except for delegated powers)
    - i) Presidents can't authorize breach of statutes (including anti-bugging statutes)
    - ii) President can't order people to not follow statutes (for example appropriations)
  - b) Exclusive executive powers
    - i) Power to prosecute
      - (1) Congress can't order criminal prosecution of anyone
      - (2) Special prosecutors: appointed to investigate executive officers accused of wrongdoings
        - are appointed by courts, not by congress
    - ii) President can control the pardon power, congress has no control
    - iii) Personnel
      - (1) Executive officer is defined as anyone who takes action on behalf of the US whether at a high level or a low level

- (2) Congress cannot hire or fire executive officers other than the elaborate procedure of impeachment. On the other hand, Congress can create a position, but it can't hire and fire the people
  - iv) External powers
    - (1) President can order the president around without congress's approval
    - (2) Presidential commander in chief decision
  - v) Impeachment
    - (1) Bill of impeachment is an accusation against a government officer. Only Remedy on conviction is removal from office (not a fine)
    - (2) Unless and until removed from office, he is absolutely absolved from all official acts
    - (3) Thing done before the officer was an officer are not official
- 4) Federal system (vertical and horizontal dimension)
  - a) Vertical dimensions: relationship of federal government to states
    - i) Valid federal law preempts state law, or overrides conflicting state law
      - (1) State law is not pre-empted because it addresses the same topic as a federal statute – or applies to the same person. Only is pre-empted when there is a true conflict.
        - (a) Congress can assert exclusive regulation in some fields
        - (b) State laws can regulate in a stricter way than Federal laws (for example stricter pollution controls)
        - (c) Preemption of the field – if Congress says that *in this area* there shall be no state law
    - ii) No state interference with foreign relations
    - iii) No state regulation or taxing of federal entities without federal consent
    - iv) Treaties and executive agreement will pre-empt state laws, however, executive agreements will not override federal statutes
  - b) Horizontal dimension: when are the powers of one state constrained by the interests of another state (two provisions)
    - i) Full faith and credit clause: Judgements will be enforced on their merits. But states can second-guess jurisdiction
    - ii) *Privileges and immunities of state citizenship* under article 4
      - (1) Applies to citizens persons
        - (a) Does not apply to corporations
        - (b) Does not include a right to inherit!
        - (c) Does not apply to aliens!
      - (2) Forbids serious discrimination against out of state natural persons (not corporations)
        - (a) For example employment discrimination – no residency requirement for access to the private job market
        - (b) States can't require residency for admission to the NY bar
        - (c) City can't require that all employers hire a fixed percentage of city residents
      - (3) *Cf.* if the government is a market participant, then upon a good reason, can require that its own employees be city residents (for example Many cities require police officers to live in the jurisdiction)
    - iii) Privileges and immunities of *national citizenship* (this is never a correct answer on the bar) a.k.a. dormant commerce clause. National citizenship only includes: right to vote in national elections, petition congress for redress, vote in national elections, and safety in the custody of federal marshals
    - iv) Dormant commerce clause prevents states from discriminating against each other's commerce and burdening interstate commerce
      - (1) Congress has the power to regulate interstate commerce, but if they don't, in the absence of federal action, the state cannot step in and regulate commerce for itself
        - (a) No state discrimination against out of state interests (including out of state corporations)
      - (2) No discriminatory Taxing: no higher taxes of out-of-state companies
      - (3) States can discriminate against out of state interests, where there is a compelling interest, and there is no other way to do it (health reasons), but will apply strict scrutiny
      - (4) States can positively favor their own citizens



- (a) When a state hands out money, it can restrict that money to in state persons. For example residency requirement for welfare benefit) or state universities scholarships.
- (b) if a state is a market participant it can discriminate
- (c) nondiscriminatory regulation is almost always valid, unless it is unduly burdensome
  - (i) to tell whether something is unduly burdensome courts balance the reason for having the law against the cost of complying with it
  - (ii) if the two are roughly the same, the law is valid
  - (iii) disclosure requirements, such as labeling the goods for point of origin are burdensome
- (d) Congress can to state regulation of commerce. **nothing the state does will violate the congress clause**, even if it is discriminatory
- (5) exception: 21<sup>st</sup> amendment: gave the states the right to control consumption of booze within the borders -- **this give states a power that congress doesn't have**
- (6) state taxation of interstate commerce (can be thought of as a form of regulation of interstate commerce)
  - (a) congress can authorize or forbid virtually any kind of taxation or regulation
  - (b) no discriminatory taxation – it is unconstitutional, just as any kind of discriminatory regulation would be
  - (c) requirements for nondiscriminatory taxation
    - (i) must be a *substantial nexus* between the taxing state and the activity or property to be taxed
      - 1. states can force in-state sellers to collect sales tax since they have this nexus.
    - (ii) a state cannot force an out of state seller to collect an out of state sales tax, unless the seller is doing substantial business in the state
      - 1. for example other states can't force mail order companies to collect sales tax
      - 2. if the out of state seller lacks substantial nexus, they can tax the in-state purchaser in the form of a *use tax* (ineffective)
      - 3. can require people to send a tax to the state in an amount equal to what they would have collected had the purchase been made in state
    - (iii) state can tax on the worldwide income a corporation doing business in the state because there is a substantial nexus!
      - 1. Must be **Substantial nexus**
      - 2. Must be **Fair apportionment** – when more than one state has a substantial nexus, there must be fair apportionment of tax liability among those states. (trucks can be taxed based on the time they spending traveling through various states)
  - (d) Ad valorem – value based taxes on personal property
    - (i) Real property stays put so substantial nexus is found where it is
    - (ii) Personal property and commodities in interstate commerce, or the goods made in one state and sold in another state
      - 1. taxation of commodities
        - a. one can pay the full tax to every state, where goods are stopped for a business purpose on the tax day
        - b. no liability where the goods are in the state only for transportation
      - 2. business purpose is defined as manufacture, sale: **doesn't matter** that goods stop and rest overnight – they can stop and rest overnight (or in a warehouse for six months)
      - 3. instrumentalities of interstate commerce are taxed provided that their tax burden is apportioned: can tax out of state instrumentalities only if they have a nexus, and their usage is **apportioned**
- 5) due process clauses in the constitution
  - a) Federal v. State due process clauses
    - i) 5<sup>th</sup> amendment due process applies to the national government
    - ii) 14<sup>th</sup> amendment states and localities.
      - (1) Only one equal protection clause (which applies to states and localities)

- b) one must decide whether or not things are subject to state action limitations. **State Action** is defined as government action whether state or local
- i) Defining state action beyond the fact that it is only government action
    - (1) State actions include actions by localities
    - (2) partial funding of private institutions is not state action
  - ii) Government cannot encourage, or profit from private discrimination
    - (1) **state action is different than anti-discrimination** legislation – when there is anti-discrimination legislation, state action is irrelevant (but this is not on the bar exam). legislatures can, and routinely do legislate about private activity
    - (2) Government can't enforce an agreement to discriminate
    - (3) Government is not required to prevent private discrimination
      - (a) Government can constitutionally enforce trespassing laws so long as the laws are enforced evenhandedly
    - (4) Government action which encourages, assists or facilitates discrimination in violation of the Equal Protection clause of the 14<sup>th</sup> will be enjoined
  - iii) Liquor licenses are not an encouragement of racial discrimination. There must be substantial government involvement in order for an activity to be classified as state action.
- 6) Equal protection and due process levels of review (states call it equal protection under the 14<sup>th</sup>, and 5<sup>th</sup> amendment under the federal constitutional )
- a) Rational basis: is the law rationally related to a legitimate end of government
    - i) Burden is on the challenger
    - ii) Law must not have to be sensible or efficient or human, it just has to be non insane
    - iii) Almost everything passes rational relationship
    - iv) Wealth. Wealth doesn't trigger equal protection analysis on itself, but it is constitutional for the government to charge a fixed price even though some people can't pay for it. However, government must pay for truly fundamental rights that require a government fee (for example marriage, appeal if there is the procedure for an appeal)
      - (1) Access to courts for indigents
        - (a) If you can afford to pay the fee, it is like a tax, and people have to pay it
        - (b) Government has to waive filing fees for divorce, but not bankruptcy
        - (c) Only have to waive a filing fee when charging it would deny a fundamental right
          - (i) Bankruptcy is not a fundamental right
          - (ii) Marriage is a fundamental right
          - (iii) Divorce is a fundamental right
          - (iv) Indigent cannot be required to bear the cost of a transcript in order to appeal the termination of parental rights, if there is a right to an appeal
          - (v) Parental rights are fundamental rights
  - b) Intermediate scrutiny: is the **law substantially** related to important government interests – substantially related to government interest
    - i) Burden of proof is on the government
    - ii) Subject matters for intermediate scrutiny: **Legitimacy and sex**
      - (1) sex based laws will be struck down almost always, but not quite strict scrutiny
        - (a) There is now language that suggests that for sex, the test is “exceedingly persuasive”.
        - (b) Exceptions
          - (i) Statutory rape. Permissible for state laws to distinguish between men and women in terms of who can consent (because higher risk of pregnancy)
          - (ii) Draft for combat units
            1. Ok because of average physical characteristics
      - (2) Legitimacy: government must show that the regulation is substantially related to an important government interest
  - c) Strict scrutiny: “is the law necessary for a compelling interest” which applies to curtailment of any implied fundamental rights
    - i) Burden of proof on the government to show that the law is necessary
    - ii) Applies to
      - (1) Discrimination against suspect classes by the states.

- (a) Aliennage: Federal government can reasonably regulate aliens because of the overriding interest in immigration and naturalization
- (i) For states and localities, alienage is triggered sometimes, but not others
    - 1. No legal requirement of US citizenship for access to the *private* job market or government benefits
      - a. Admission to the bar is access to the private job market
    - 2. US citizenship for in-state tuition: is a violation of equal protection (though one can discriminate against out of state people) because it discriminates against lawfully resident taxpaying aliens in-state
  - (ii) US citizenship can be required for certain government jobs – namely policy making or implementing officials. However, prohibitions must be limited to government jobs.
    - 1. Things that require US citizenship for the states to grant: Police officers, Jail guards, Parol officers. Teachers – yes
    - 2. Things that don't. However, a teaching license – no (because it is required for private school teachers, who are not government officials)
- (b) Race or ethnicity triggers strict scrutiny if there is proof of discriminatory purpose. A law is not unconstitutional simply because it effects one racial group differently than another. **Have to show that it was intended to treat people differently based on race or ethnicity**
- (i) You must show discriminatory purpose, but it must be written on the face of the law, and it could be written from any competent evidence
  - (ii) *De Jure* segregation is unconstitutional, but it has to be intentional conduct of any kind (for example intentionally locating schools where it would cause discrimination)
    - 1. Remedies: Scope of the remedy is limited by the scope of the violation
      - a. For example if a city is guilty of *De Jure* segregation, it can be required to bus to achieve racial segregation, unless the suburbs are also involved in the *De Jure* segregation
      - b. If only the city is guilty, only the city is required to bus
    - 2. *De facto* segregation is constitutional
  - (iii) Affirmative action At the moment that law is that affirmative action is governed under a strict scrutiny standard.
    - 1. **affirmative action is always valid where it is specifically corrects past discrimination against minorities**
      - a. for example requiring someone to do something if they would have had something all along is ok. But a “nation” having a bad past is not a reason for affirmative action. One schoolboard cannot right the wrongs of a nation in the past.
    - 2. racial diversity in higher education as a compelling interest, the SC still sticks to the fact that it is, but most courts don't
- (c) Fundamental rights are subject to strict scrutiny. They are protected under both due process and equal protection, but there is no right for the government to pay for a fundamental right, but the government usually can't charge people for the fundamental right.
- (i) Religion -- protects religious belief absolutely. People are entitled to any religious belief you like.
    - 1. Courts won't look at the validity of the belief, but they can look at the belief in terms of the importance and sincerity
    - 2. Protects religious conduct against laws aimed at religion
      - a. Can't prohibit religious conduct in order to prohibit religion
    - 3. No constitutional right to accommodation. No right not to obey laws regulating your conduct simply because your religious beliefs are different (so long as they are not named at one religion)
    - 4. Campus access (free speech): When a public university or high school allows student groups to use its facilities after hours, it must allow student

religious groups to use these facilities on the same terms. This also applies to universities that collect activities fees.

5. Neutral laws which protect state interests, which happen to effect a religion are valid
- (ii) Privacy (umbrella term) – similar to substantive due process
  1. Marriage and divorce, but only at the core (to marry whoever you want is fundamental. However, most laws governing marriage and divorce are judged under rational relationship (for example incest, procedure.
    - a. can't charge indigent people for marriage because it is a fundamental right
  2. contraception: everyone has a right to buy, but not use, contraception. **The only people clearly with a constitutional right to use contraception are traditional married couples**
- (iii) abortion is a fundamental right until viability of the fetus
  1. procedural regulations are valid so long as they do **not unduly burden** the right to terminate their pregnancy
    - a. informed consent are okay (for example providing people with information)
    - b. 24 hour waiting periods are okay
    - c. parental **notification** requirements are okay, but must have judicial bypass which **must** be given if the girl is mature
  2. parental and spousal **consent requirements** are not okay
- (iv) Obscenity in the home is a fundamental right but there is No right to import, distribute, or sell such materials
- (v) Family relationships: Families living together with close relatives if they want you to, but there is No right to live with unrelated purposes (question of zoning laws)
- (vi) Raising kids
  1. Kids can be raised in whatever religious tradition
  2. Parents can chose Medical care **so long as the condition isn't life threatening**. Parental rights can be lost with abuse, abandonment, neglect
- (vii) For now, No fundamental right to homosexual relations
- (viii) Voting is a fundamental right – protected under the 14<sup>th</sup>, and 15<sup>th</sup> amendment
  1. Qualifications to vote
    - a. Poll taxes violate equal protection
    - b. Property qualifications violate equal protection
    - c. Certain narrow elections which effect few people (for example water board suffrage can be restricted)
  2. Apportionment: One person one vote
    - a. this means districts of equal size.
    - b. Cannot have a system where smaller areas have a greater per-person say in selecting representative
  3. Exception: elections for specifically defined boards (for example water boards) can be limited suffrage
  4. **racial gerrymandering**
    - a. to disadvantage minorities (vote dilution) – this scatters minorities around, so that in no areas are they decisive
    - b. **racial gerrymandering to advantage minorities** (majority minority districts)
      - i. **voting rights act requires racial gerrymandering to favor minorities**, but the SC has said that if you go too far, you violate the constitution.
      - ii. **J. O'Conner**: that you can take race into account in drawing districts, so long as the results are not too funny looking.

5. **Political gerrymandering.** SC: *in theory, political gerrymandering violates equal protection. In fact, it flourishes and the SC does nothing about it because the SC requires a very high degree of proof. "It has to be really effect, and it has to be really durable"*
6. Electoral process (campaign finance): Campaign Contributions can be limited, including coordinated expenditures (asking people what bills they) but Direct expenditures of campaigns cannot be
- (ix) Right to travel is a fundamental right
  1. Long term residency requirements. Burden the fundamental right of interstate travel and burden the fundamental right of equal protection
  2. Can require that that a state live here briefly before running for office or getting benefits. However, it can't be too long (for example over one year)
- (x) Education, is generally not a fundamental right, but most laws dealing with education are under strict scrutiny.
  1. But there is a case that holds that some minimally adequate education through 12<sup>th</sup> grades is fundamental
  2. most laws dealing with education are under strict scrutiny
- (d) 1<sup>st</sup> amendment (note: different level of scrutiny – just have to convince judge that it makes sense to restrict in a neutral fashion)
  - (i) when government regulates time, place or manner restrictions the **burden of proof is on the government to show that they are narrowly tailored to serve a significant state interest**
  - (ii) restraints on speech cannot be vague or overbroad – can usually be used to attack anything that resembles a content-based restriction
    1. vagueness is defined as if the law gives no clear notice of what is prohibited, it is vague
    2. overbreadth is defined as if the law is substantially broader than necessary to protect a compelling interest, it is overbroad
      - a. a law that bans all nudity in drive in movies is overbroad, because there is some nudity that isn't legally obscene
      - b. zoning and adult theaters:
        - i. simply saying "adult theatre" is not a good enough standard
        - ii. some adult films may be legally obscene, and some may not
        - iii. can zone adult theatres, either together or apart
    3. freedom not to speak – unless it is narrowly tailed to a particular goal
      - a. government cannot force people to endorse a symbol or slogan
        - i. no requirement to say pledge, salute, etc.
        - ii. no requirement to have slogan on license plate
      - b. power company monopolies can't be forced to sponsor the speech of its critics
      - c. oaths are okay, provided that they be narrowly tailored to avoid violation of first amendment rights of free speech and association.
  - (iii) content neutral regulations can be allowed, but the burden is on the government to show that there is no other way to meet this significant interest (which is whatever makes sense to a judge)
    1. must be truly content neutral: can't prohibit picketing of a foreign embassy (place) if it calls the foreign government into odium
    2. cannot be no executive discretion:
      - a. first come, first serve is ideally content-neutral
      - b. if the chief of police finds it in the public interest it is not content neutral
    3. law must allow substantial other opportunities for other expression to take place if there is a restriction on some speech (for example Hare Kritnas can be forced into booths like all religions)
    4. note: when there is a captive audience, there is no right to speak
    5. Public forum doctrine: have to have some place to speak

- a. Public forum is defined as government owning proper streets, parks, and public sidewalks
- b. Non public forums
  - i. Jails, prisons, offices, etc.
  - ii. In a non-public forum speech can be regulated in any reasonable way
- (iv) content based regulations of speech: some speech cannot be banned
  1. require a compelling interest and are generally invalid: for example laws against flag desecration were laws restricted use of the flag to one set of views (for example pro-US views), and were unconstitutional)
  2. exceptions in which speech can be regulated based on content
    - a. incitement if it is intended to incite immediate violence
      - i. intended
      - ii. to incite
      - iii. immediate
      - iv. violence
    - b. fighting words: not protected speech
      - i. hate speech
      - ii. all words banning fighting words are unconstitutionally vague and/or overbroad
      - iii. have to be addressed to someone who might then hit back
      - iv. people who babble profanity are not using fighting words
      - v. this speech is not protected, but this statute is vague and overbroad and can't be enforced
  3. obscenity – four Ss that define
    - a. Serious: must lack serious value – not obscene no matter what the jury may think
      - i. Education
      - ii. Artistic: for example: good reviews, no obscenity
      - iii. Scientific
      - iv. Political
    - b. Sexy or Erotic (purulent interest in sex) (must make you itch or long). Disgusting filth and bloodshed won't do
    - c. Sickening: Grossly offensive to the average person in the community (can be national community)
    - d. Standards: law has to have the rights standards (a law that doesn't have the constitutional standards is vague and overbroad) – must be sexy, sickening,
      - i. Can't be thing that incites lust
  4. Broadcast restrictions because of limits on bandwidth: can ban **broadcast**, **not print** of seven dirty words during hours when children might hear (this isn't technically obscenity – the material isn't sexy)
- (v) can ban child pornography – can be prohibited whether or not it is legally obscene, because of the injury to children
- (vi) defamation: the torts of liable and slander – will be covered in the torts outline
- (vii) Government employees speech
  1. In general, cannot be hired or fired based on political party membership
  2. Can't fire government workers because they belong the wrong party, etc.
  3. Doesn't apply to high-level policy makers or to their confidential advisors
- (e) commercial speech (intermediate test)
  - (i) three part test
    1. substantial government interest
    2. directly advances the interest
    3. narrowly tailored to serve the substantial interest (doesn't need to be the least restrictive method to serve the government interest).
      - a. There is never a complete ban on lawful advertising of a lawful product

- (ii) can be suppressed if it is informational and if it persuades the consumer to believe something that it isn't true is true but it doesn't apply to political speech
- (iii) commercial speech can be banned if it pertains to an illegal product but it doesn't apply to political speech
- (iv) laws can be valid if it directly advances a **substantial** government interest, and it is narrowly tailored
- (v) Increasingly, laws restricting commercial speech are struck down
  - 1. USPS can't prohibit unsolicited adds for condoms
- (f) Press:
  - (i) it is freedom of the owner or the publisher, not the public. Government can't enforce a right of reply.
  - (ii) No right to specially advantageous treatment.

## Contracts

- 1) Vocabulary
  - a) Contract is defined as legally enforceable agreement either express (with words) or implied (with conduct)
  - b) *Quasi-contract* will have an equitable remedy to which maxims of equity apply, however it is only to avoid unjust enrichment.
- 2) Choice of law – **important to recite**
  - a) Goods under uniform commercial code (doesn't matter how much money is involved)
  - b) Leases of goods & property UCC article 2A (which follows article 2)
  - c) Services under common law
  - d) Mixed deal (in part good, and in part services)
    - i) General rule is that either article 2 will cover the entire contract, or none of the contract depending on what the more important part of the contract is
    - ii) Decapage exception: that if the contract price is expressly divided into two pieces with one amount allocated for the goods, and the other price allocated for the services then each law is applied to the respective part of the contract
- 3) Problems with pre-contract dealings
  - a) Illegality
    - i) Illegal subject matter: no recourse to courts for breach of contract
    - ii) Illegal purpose: there is still a cause of action by the party who did not have the illegal purpose
    - iii) Non-compete clauses: in conjunction with employment or transfer of a business interest
      - (1) Must be for unique good, in which a legal remedy would be inadequate
      - (2) Must be reasonable to reasonable scope and duration
      - (3) Must be reasonably necessary to protect
  - b) Misrepresentation as to material factor: becomes *voidable* against misrepresenting party
    - i) Representations as to information that render a contract *voidable*
      - (1) Deliberate misrepresentation: actual reliance necessary
      - (2) Inadvertent misrepresentation: reasonable reliance
    - ii) Misrepresentation as to purpose of agreement (for example lease when it is a sale): void
  - c) Duress: requires improper action on the part of the defendant
    - i) The Plaintiff must be put in a situation where there is no reasonable alternative
    - ii) Plaintiff will have to prove that there is no reasonable alternative but to agree
  - d) unconscionability (probably not too big an issue)
    - i) always resolved by the judge
    - ii) Tested at time of the contract
    - iii) New York unconscionability gives exclusions
      - (1) Purchase money mortgages do not fall within general obligations law statute
      - (2) Usury restrictions do not apply to corporations (NYPL)

- e) Ambiguity
- i) Bilateral ambiguity: no contract unless both parties intended the same meaning (doesn't really matter if neither or both parties were aware of the ambiguity)
    - (1) Material term open to two materially different interpretations
    - (2) Has to be basic mistake as to be the subject matter, not the value that was mistaken
      - (a) If something is later determined to be of a different subject matter that neither knew about it is a mistake
    - (3) Neither had reason to know that the other had a different thing in mind
    - (4) Will look at what the parties subjectively thought at the time of contracting
  - ii) Unilateral: general rule is that it is enforceable
    - (1) If one party knows of the other's mistake, it will be a legally enforceable agreement under the terms of the person who was not aware of the ambiguity
    - (2) *Palpable mistake exception* is defined as obvious mistake
      - (a) For example a bid that is clearly under everyone else's bid
    - (3) Will look at what the parties subjectively thought at the time of contracting
- 4) Formation: The question is, in essence going to ask you whether the deal was made, and whether it was legally enforceable
- a) Modes of formation: Looking at the offer, one can tell whether or not the contract is Bilateral (preferred by courts) or unilateral
    - i) Bilateral contracts open as to the method of acceptance
      - (1) New rule and multistate: any reasonable means of acceptance is acceptable. Cf. old rule where authorized acceptance by the means of communication offer used to communicate the offer
    - ii) Unilateral is defined as a contract that results from an offer that requires performance
      - (1) Examples: Rewards or Prizes (A prize is accepted by winning the competition)
  - b) Existence of offer
    - i) Offers can be made by words or conduct that evidence a person's willingness to make a deal. Typically, and offer will be the initial communication between two people
      - (1) Advertisements are not offers unless it specifies quantity and how they will select the winners of the race (for example first 11 people)
      - (2) A price quotation can be an offer if it is response to a specific inquiry – if it is specific as to quantity and as to who can accept
    - ii) Offers must create a reasonable expectation in the offeree that the offerer is willing to enter into a contract on the basis of the offered terms.
    - iii) Terms of offer
      - (1) General rule is that you don't need all of the terms
        - (a) Common law: rule is that for sales of real estate the communication must state the price and must describe the land, or it is not an offer.
          - (i) Land sale contracts must contain price of land
        - (b) Article 2: a communication can be an offer, even if there is no price term – if the parties so intend
      - (2) Vague or ambiguous material term (something is said but it vague “fair price”)
        - (a) To satisfy the statute of frauds, a writing does not need to include price
        - (b) U.C.C. and common law “fair price or reasonable price” they want to work out the price term, no contract has been formed yet
          - (i) A contract where there was an agreement to agree based on a commercially accepted method (for example conformation) may be enforced by specific performance
          - (ii) Something is not vague if it relies on a published index
        - (c) Note: under the uniform commercial code a missing price term can be filled in later
        - (d) U.C. C.: Can have a price set by the seller, but must be in good faith
          - (i) If an agreement to agree later on the price fails, then court may set a reasonable price
        - (e) Requirements contracts are allowed but the increase in requirements cannot be unreasonably disproportionate
          - (i) have to compared it in proportionate with other fact patterns



- (ii) requirements contracts can only be cancelled in good faith, and not on whim
- iv) Termination of offers:
  - (1) Time passing
    - (a) If no time is stated for the offer to expire it is good for a reasonable time
    - (b) Revocation of an offer (requires knowledge of the offeree)
      - (i) Someone who makes an offer and then does something inconsistent with the offer does not revoke it, unless the target knows.
        - 1. If someone makes an offer to two people, who both validly accept there is a breach of contract question and a property question, not a formation question
      - (ii) Offers made to the public are assumed to be revoked, if notice is made in the same manner that the offer was made
        - 1. Offers for unilateral offers can't be revoked if one side relies on them
      - (iii) Revocations are effective at the time of receipt
    - (c) Revocations must be made before acceptance
  - (2) There are four ways in which an offer can be rendered irrevocable
    - (a) Option contract: must be supported by consideration
      - (i) Option contracts that fail for lack of consideration can still constitute an offer to sell, and tender of the purchase price is an acceptance
      - (ii) Rejection of an option offer doesn't terminate it, unless there is reliance of the rejection of the underlying contract.
    - (b) Article 2: Firm merchants offers
      - (i) Must be for goods
      - (ii) Must be by merchant
      - (iii) Must be signed
      - (iv) Must state that the offer is irrevocable
      - (v) Times
        - 1. For a maximum of three months (if longer than 3 months, it is only irrevocable for 3 months)
        - 2. If there is no time period, it is a reasonable time period up to 3 months
        - 3. **New York common law** : will enforce an offer that states *in writing* irrevocable up to a reasonable time from the offer
    - (c) Estoppel: Offer can't be revoked if detrimental reliance reasonably foreseeable
      - (i) Offers for unilateral offers can't be revoked if one side relies on them
      - (ii) Reliance on offers in the course of subcontractors submitting bids to contractors can be held to create an binding option contract supported by a theory of Promissory Estoppel
    - (d) Part performance
      - (i) multistate: must be real part performance (not preparation)
      - (ii) New York: part performance doesn't make offer irrevocable (but there can still be detrimental reliance and estoppel)
  - (3) Rejection of an offer will end it (unless the mailbox rule applies)
    - (a) Direction rejection
    - (b) Rejection by counteroffer
      - (i) Once you have made a counteroffer, it is just like a rejection and the bargaining will have to begin again
        - 1. Conditional acceptance is the same as no
          - a. No is the same as indirect rejection
        - 2. However, if there is part performance, there can be an implied contract
      - (ii) *Cf.* bargaining does not kill – if the response is in the form of a question
        - 1. Common law followed the *mirror image rule*: Acceptance must look like offer.
        - 2. Conditional acceptances are deal-breakers (“the word ‘if’ will not be an acceptance”)
        - 3. Uniform commercial code § 2-207: Offer to sell goods, and there is a response that sets out some additional terms

- a. If one party is not a merchant then the terms of the original offer govern
  - b. If both parties are merchants, the additional terms become part of the contract
    - i. Other party can seasonably object
    - ii. Terms can't materially alter contract, if they do, they are eliminated from the contract (between merchants)
    - iii. Additional terms can't limit acceptance to the terms of the offer
    - iv. If the offeror has already said he doesn't like the terms they can't be included
    - v. Some courts follow the *knock-out rule* in which conflicting terms are eliminated, and any remaining or resulting gaps will be filled by the uniform commercial code's gap fillers
- (4) If either party dies before the offer is accepted, it terminates the offer (and resulting contracts are still good)
- v) Acceptances
  - (1) Acceptances must be to valid offers or counteroffers, not to invitations to deal
  - (2) Persons who can accept offer: General rule is that it can only be accepted to whom it was made
    - (a) In a reward situation or unilateral offer, the person must know of offer at the time of performance
    - (b) Option exception – options are generally assignable
- vi) Conflicting acceptances and revocations
  - (1) Bilateral: start of performance is generally performance
    - (a) performance is acceptance, or performance if the offer indicates performance as the terms of acceptance
      - (i) If the offer does not specific a mode of acceptance, one is generally able to accept by promising
    - (b) *Adams v. Lindsell* : Mailbox rule
      - (i) If an offeree sends a rejection than acceptance the one received first governs
      - (ii) If an offeree sends an acceptance than a rejection, the mailbox rule governs.**  
A later revocation (which is accepted by all) is a rescission.
        - 1. However, if the offeree receives the rejection first and then changes position, he is estopped from enforcing the contract
      - (iii) Revocations are only good when received (makes sense, since a revocation must be known to the parties)
      - (iv) Summary: unless otherwise agreed
        - 1. On receipt
          - a. Offer
          - b. Rejection
          - c. Revocation
          - d. Receipt of option exercise
        - 2. On dispatch: acceptance
  - (2) Unilateral: if the contract says “can only be accepted by performance” – it is unilateral, so there is no obligation to finish performance
    - (a) If the offer expressly provides that they can accept only by performing, than starting to perform isn't enough
      - (i) Merely starting to perform creates no legal obligation on the offeree
    - (b) Quandary: an offer which is made in the bilateral mode does not obligate the acceptor to finish the job once they accept
    - (c) In a sale of goods when the seller sends the wrong goods they simultaneously create and breach a contract since it is an acceptance and breach
      - (i) *Cf.* accommodations: The seller not only sends the wrong stuff, but with an explanation it is a counteroffer with no breach and no liability
- vii) General rule is that acceptance must be communicated to the party

- viii) Exception: Silence can be an exception when the parties 1) specifically agree that it is or by 2) course of dealings
- 5) Consideration: Even if we find an agreement, we are not there in terms of a contract, it has to be legally enforceable. Consideration has to be something that the person who is making the contract to do.
- a) Definition: must be something that is bargained for which somehow conveys benefit on the parties at the start
    - i) Multistate: bargained for **legal detriment**
    - ii) New York: bargained for **legal detriment** or **benefit**
  - b) limitations on consideration
    - i) adequacy of consideration is not relevant in contract law
    - ii) past consideration: in general will never be adequate (can't ask for something that has been done)
      - (1) exception: where the person who has made the promise, earlier expressly requested this very action
        - (a) must expressly promise
        - (b) action must have happened
        - (c) later promised to pay
      - (2) in New York: past consideration can be consideration if specific criteria are met
        - (a) promise is in writing
        - (b) past consideration is expressly stated
        - (c) consideration can be proven
        - (d) writing is signed by the promisor
    - iii) consideration can be based on an identified and personal cashflow which would render an option non-assignable. However, if the cashflow is considered to be a bonus, and it is not a material term of the contract, it is considered to be assignable
    - iv) pre-existing legal duties will not constitute consideration (except when the performance differs, a 3<sup>rd</sup> party is involved or there are unforeseen difficulties)
      - (1) general rule: contract or legal duty: performance is not consideration
        - (a) it is not adequate consideration if one party simply is able to do less, as there is a preexisting legal duty!
        - (b) resolving an impasse between the parties doesn't constitute additional duties, but resolving a bona fide dispute between is additional consideration
        - (c) if both parties agree to lesser performance, it constitutes consideration for modification
          - (i) in NY lesser performance requires writing
      - (2) however, if something (no matter how small) is added to the existing duty the agreement becomes enforceable under the new terms
      - (3) unforeseen difficulty exception – enforceable promise to pay more
      - (4) promises from a 3<sup>rd</sup> party: 3<sup>rd</sup> party is obligated to pay, because there was no original legal duty owed to 3<sup>rd</sup> party
      - (5) special NY rule: a written modification doesn't require consideration (hence the uniform commercial code becomes similar to the common law)
        - (a) with NY and the multistate we are only concerned about the pre-existing legal duty rule for common law contracts
        - (b) must be a good faith modification
      - (6) part payment of a debt: if whether the debt is due and undisputed then paying part of the debt is not consideration since no one has suffered a determinant
        - (a) exception: if the debt was not yet due, or was in dispute then payment of the debt is consideration as it alters the terms
        - (b) note: in accord and satisfaction situations, one can write "payment in full" on the check, but it can be cashed under protest
          - (i) this is an implied acceptance, not acceptance by silence
    - c) illusory promises do not constitute consideration
    - d) performance of contracts to third persons constitute consideration
    - e) consideration substitutes

- i) payment of debts: **written** promise to pay a debt that is barred by a technical defense: can collect the new promise
  - ii) Promissory Estoppel – is only a fallback if there is no consideration. You do consideration 1<sup>st</sup> -- required elements
    - (1) Reasonable that it would induce act or forbearance
    - (2) Detrimental (of substantial character)
    - (3) Foreseeable: and that the act or forbearance was induced
- 6) Capacity to contract: Contracts with people who do not have capacity are *voidable*
  - a) Infants (defined in NY as 18 or under), incompetents, and people who the other party has reason to know is intoxicated are only able to enter into voidable contracts
    - i) Mere fact that one of two people don't have capacity doesn't mean that there isn't an agreement. Party that has capacity can't enforce the contract.
    - ii) The minor has a right to disaffirm
    - iii) Mental incapacity.
      - (1) multistate: voidable
      - (2) NY: if adjudicated incompetent, contract is void.
        - (a) unadjudicated incompetents make voidable contracts only if they can restore the party to their previous position
  - b) Ratification cures voidability
    - i) Implied affirmation: retained the benefits of the agreement without paying for them after disability lifted
    - ii) Minors can attempt to ratify contracts for less than their original amount
  - c) Exception: Even a person who doesn't have capacity is legally obligated to pay for things that are reasonably necessary – they can still be liable in *quasi-contract*
    - i) Multistate: Food, Clothing, Medical care, Shelter
    - ii) NY, life insurance for 14.5 (or greater) year old people is necessity as is educational loans by people 16 or older, contracts relating to the marital home, and contracts involving artistic or athletic services
    - iii) Minors can attempt to ratify contracts for less than their original amount
- 7) Statute of frauds is defined as requirement that for some contract, that there be some sort of special proof that there was a deal.
  - a) Preliminary question is whether 1) contract is within the statute of frauds; 2) whether the statute of frauds was satisfied 3) if there a defense to non-satisfaction of the statute of frauds
  - b) *Equal dignity*: Needs to have written authority to act on someone else's behalf. If the contract that is being entered into is within the statute of frauds, then the agent needs written authority. If it isn't within the statute of frauds, no writing is required.
  - c) Contracts included in the statute of frauds
    - i) Multistate
      - (1) Promise in consideration of **marriage** (not a promise to marry)
        - (a) for example a promise to do something if someone will marry them (for example a promise to marry if someone gives up a claim to property)
        - (b) prenuptial agreements must be in writing
      - (2) promises by the executor to pay obligations of the estate from his own funds (not from the estate's funds)
      - (3) **guaranty of debt**: “**answer for**”
        - (a) must be a genuine guarantee
          - (i) buying something for someone is not acting as a surety
          - (ii) paying one's own debt is not acting as a surety
        - (b) Exception: *main purpose* exception or *leading object* – if the reason that they are making the guarantee is that the deal is really for the benefit of the surety.
          - (i) Guarantee of debt: to fall within the main purpose exception, there must be an *independent duty of payment* (they would probably have an independent duty to pay under a *quasi-contract* theory anyway)
      - (4) **Service** contracts not capable of being performed within a year (not for goods)
        - (a) Any time there is an alleged specific time period stated there is no way that it could be performed within a year

- (i) The fact that a contract can be terminated within one year doesn't mean that the contract can be performed within a year
    - (ii) Contract itself will specify a particular performance date – and that particular performance date is more than a year away
  - (b) times
    - (i) Particular tasks: (doesn't matter the details of the task) so long as it is theoretical possible. Even if it takes longer, there is still no statute of frauds problem.
    - (ii) Lifetime deals are never statute of frauds problems
  - (5) Real estate (must be an actual transfer of an interest in real estate)
    - (a) The period of the interest has to be more than a year (not a year): this focuses on what is alleged by Plaintiff
    - (b) Lease of an apartment for one year is not in the statute of frauds
    - (c) Must contain the price of the land. A contract will fail due the statute of frauds if it
  - (6) Goods of \$500 or more (\$500 is within the statute of frauds)
    - (a) (use the "as modified" price)
  - ii) NY
    - (1) Leases of Goods: Article 2A statute of frauds: If the *total lease payments* over the life of the lease total over \$1,000 then statute of frauds requires writing
    - (2) Written proof of contracts to pay brokers or finders fees to people other than a non-licensed broker or auctioneer
    - (3) Guarantee of debt: to fall within the main purpose exception, there must be an *independent duty of payment* (they would probably have an independent duty to pay under a *quasi-contract* theory anyway)
- d) Satisfaction of the statute of frauds
  - i) Writing:
    - (1) Contents
      - (a) Common law: must be able to answer the questions of "who" and "what"
      - (b) under the uniform commercial code for a sale of goods: only the **quantity** terms must be stated. Don't need a price
      - (c) special rule under article 2A
        - (i) must state it is a lease
        - (ii) must describe property
        - (iii) must state property
    - (2) signature
      - (a) general rule: We are looking for the sued party's signature (though letterhead can be an exception)
    - (3) confirmation: special rule for merchants under the uniform commercial code: if both parties are merchants, and the person receives a signed writing with the quantity terms that claims that there is a contract and fails to respond within 10 days (this is the "answer the damn letter rule")
  - e) defenses to the statute of frauds
    - i) judicial admission rule can substitute for writing: in a pleading, discovery, or testimony
    - ii) primary defense to statute of frauds is performance
      - (1) Services contracts not capable of being performed within a year: full performance within a year by either party will substitute for writing
        - (a) Part performance of a services contract doesn't satisfy the statute of frauds but Might be able to recover in *quasi-contract*
      - (2) Sales of goods contracts: part performance will only satisfy the statute of frauds to the extent of performance
      - (3) Land-sale Performance: full payment alone will not satisfy
        - (a) will look to see if there is conduct that clearly indicates that there is a contract
        - (b) Part performance requires two of the following three requirements
          - (i) Possession
          - (ii) Payment
          - (iii) Improvement

- (4) Specially manufactured goods follow the Substantial beginning rule: once the seller starts work (or made a substantial beginning) the statute is satisfied)
- 8) Modifications of contracts
  - a) Clauses that modification must be in writing to be valid
    - i) Under common law: contract clauses requiring that modification is only in writing are ignored.
    - ii) *Cf.* uniform commercial code: a provision requiring that a modification be in writing controls, but can be waived so modification possible if in good faith
  - b) Modifications happen after the contract was formed, which would include the moment that a letter is dispatched
  - c) Consideration
    - i) Required under common law
    - ii) Not required under uniform commercial code if in good faith
  - d) For statute of frauds purposes, the party claiming the modification can only assert a claim for the time that the contract is within the statute of frauds.
- 9) Resolving questions of Terms of the contract
  - a) Construction
    - i) Where an agreement is silent regarding the order of obligations of performance, the party's obligation which takes longer should be performed first and is a condition precedent
  - b) **Parol**<sup>1</sup> evidence rule: effects the court's ability to consider arguments that there was some oral statement made at the time that the contract was signed. Note: statute of frauds is only about formation, it is not about Parol evidence rule
    - i) Integration is defined as written agreement that the court finds was intended by the parties to be the last word on the agreement
    - ii) steps
      - (1) Decide whether or not the writing is the final expression of the parties
        - (a) Modern courts will look at evidence reflecting the parties intent to determine whether or not it was intended to be the final expression of the parties agreement.
        - (b) Scrivener's error will be considered (contracts can be reformed)
      - (2) Decide whether the writing is a complete or partial integration
        - (a) Complete integration (merger clause creates a presumption of complete integration)
          - (i) Cannot be contradicted or supplemented
        - (b) Partial integration
          - (i) No contradiction
          - (ii) Earlier agreements can be considered to resolve ambiguities
          - (iii) Earlier written agreements can be brought in to resolve ambiguities in the terminology
      - (3) exceptions
        - (a) Court can still consider evidence of collateral agreements. The courts use a "naturally and normally" test. If the court concludes that an unrelated agreement is so different and removed from the main agreement that it would" be included
        - (b) Can't introduce evidence of things that are inconsistent – but can introduce to show that there was a mistake
        - (c) Formation defects
        - (d) There are conditions precedent (not subsequent)
        - (e) Failure of consideration (for example never tender)
        - (f) Won't apply to later modification of the terms
    - c) Other sources of terms (in terms of priority):
      - i) Course of performance (same people same contract) is defined as what the same people have already done under this contract (for example not complaining about one type of good)
      - ii) Course of dealing is defined as (same people different contract)
      - iii) Custom and usage (different people, same industry, same contract)
  - d) Uniform commercial code gap fillers
    - i) Mercantile symbols

<sup>1</sup> There are three E's in Evidence, and none in Parol

- (1) FOB (followed by seller's city it is a shipment contract), if it is any other city it is a destination contract
- (2) When the seller is a merchant risk of loss passes when the buyer receives the goods.
- ii) Seller's delivery
- (1) Shipment contract is defined as seller is only obligated to 1) get goods to common carrier 2) make reasonable arrangements for delivery 3) notify the buyer. ← This is the default position
- (2) Destination contract is defined as the seller doesn't complete his delivery obligations until the goods arrive at the buyer
- iii) Risk of loss during the time that contract has been formed but before the buyer receives
- (1) Four rules (if one doesn't apply move to the next) in sales or service contract
- (a) Agreement of parties controls
- (b) **breaching party is liable for any uninsured loss – even if the breaching matter is totally unrelated to the problem**
- (c) if there is delivery by a common carrier, the risk of loss shifts from the seller to the buyer, at the time the seller completes his delivery obligations (1) get goods to common carrier 2) make reasonable arrangements for delivery 3) notify the buyer
- (d) **only if the seller is a merchant** (doesn't matter what the buyer is) risk of loss stays on the business person as long as possible
- (i) If the seller is not a merchant, the risk of loss shifts on tender
- (ii) Mere fact that the buyer has been tendered the good by the seller, the tender shifts the risk of loss to the buyer
- (2) Risk of loss in Lease
- (a) Under Article 2A: generally speaking the risk of loss in personal property is on the lessor
- (b) *Cf.* Finance lease exception: instead of leaving the item directly from the seller that a bank comes in as an intermediary (the bank, in theory comes in as an intermediary and leases it to you)
- (i) Risk of loss won't be on the bank, **will be on the buyer**
- e) Warranties (also includes the Parol evidence rule in NY)
- i) Express warranties will be tempered by the Parol evidence rule
- (1) Words that promise, from merely sales talk
- (a) Factual statements are specific – and express warranties
- (b) “this machine is well made” is *puffing* and not a warranty
- (2) idea that a sample or model is like the actual product – this is also an express warranty
- ii) implied warranties
- (1) **Merchantability:**
- (a) only one triggering fact: Seller must be a merchant who deals in these goods (*cf.* every other rule in which *merchant* means any business person)
- (b) by operation of law, whenever someone who regularly sells the good, a term is added --- that you can use it the way you regularly use jewelry
- (2) **fitness:** where someone buys something, and the question describes why people are buying something, there is an implied warranty of fitness for the described use
- (a) if the seller hears that something is going to be used for something, the fitness warranty kicks in
- iii) finance lease exception: bank is not responsible for fitness (the buyer can claim against the seller)
- iv) disclaimer of warranties is defined as contract provision which attempts to eliminate warranties
- (1) express warranties can't be disclaimed
- (2) implied warranties can be disclaimed
- (a) “as is” is defined as there are no implied warranties (but still can't eliminate express warranties)
- (b) “with all fault” – there are no implied warranties
- (c) anything other than these two magic phrases, the language must be conspicuous
- (d) **must be conspicuous and mention the word merchantability**

- (3) limitation of remedies is defined as controlling the amount of recovery
  - (a) it is possible to limit remedies even for express warranties; for example can limit to specific things (for example replacement parts), rather than damages
  - (b) general test is unconscionability
    - (i) limiting remedies for personal injury is different (this is different than property damage) is prima facie unconscionable
- 10) performance
  - a) time is of the essence clauses: these clauses will place the contract into breach if there is the slightest temporal defect, however behavior by a party which implies that this clause is not important will result in a waiver of such a condition
  - b) performance conditions is defined as a part of the contract that was agreed to by both parties that limits an obligation to perform (an obligation to perform that is conditioned upon something else happening first)
    - i) conditions based on externalities
      - (1) true v. coupled
        - (a) **true condition** is defined as an event that is beyond the influence of either of the parties
        - (b) **condition couple with a covenant** there is an implied duty of good faith (and reasonable efforts) to make the condition come true
      - (2) constructions: Where an agreement is silent regarding the order of obligations of performance, the party's obligation which takes longer should be performed first and is a condition precedent
    - ii) conditions
      - (1) where there is an express condition in the contract, it is there to benefit one of the parties (and only one)
      - (2) conditions precedent and condition subsequent – both parties are performing. If subsequent to the performance, this conditioning event happens, then there is an obligation.
        - (a) conditions precedent is defined something that must occur before an absolute duty immediately arises
        - (b) conditions concurrent is defined as capable of occurring together, and that the parties must perform at the same time
        - (c) condition subsequent is defined as cutting off an already existing absolute duty of performance
    - (3) conditions express and constructive
      - (a) express conditions
        - (i) key words that indicate that certain events may be “deal breakers”
          1. if
          2. so long as
          3. provided that
          4. subject to
          5. in the event that
          6. on condition that
        - (ii) general rule is that there is to be *strict compliance* with conditions
          1. if there is language of express conditions, it has got to be strictly complied with
          2. *cf.* the contract provides that “shall use” (rather than *if*) it is not language of express conditions, and it doesn't have to strictly complied with
        - (iii) exception: if there is an express condition that is based on satisfaction of one of the contracting parties, is treated as satisfied if a reasonable person would approve
          1. must be honest (for example honest subjective to subjective standard)
          2. exception to the exception: something where the nature of the contract or the amount involved it involves something in the nature of personal taste, the conditions is not satisfied, and is subject to an subjective test. (for example portraits )



- (b) constructive conditions: read into by the court despite the parties intentions
    - (i) when things are constructive conditions, rather than express standards, the standard is substantial performance, rather than strict compliance
      - 1. there can be damages that will reduce things
      - 2. substantial performance must be substantial – anything less than substantial performance can be recovered in *quasi-contract*
    - (ii) constructive condition precedent (for example first performance than payment depending on course of dealings)
    - (iii) court reads into contract duty to act in good faith, so some things are inherently concurrent or precedent
  - iii) note: there must be a valid contract to start
  - c) **divisible contracts** are defined as the parties themselves have already divided the contract up themselves (for example they charge so much per unit or each individual job)
    - i) if the contract is, by the parties own words, there can be recovery under a contract theory, otherwise they are forced into *quasi-contract*
  - d) **estoppel** is defined as a statement that was made before the conditioned event was supposed to happen
    - i) two steps
      - (1) where there is an express condition in the contract, it is there to benefit one of the parties (and only one) – but they can do things to give up, or cause people to take away that condition
      - (2) has one party agreed to give up some protection?
  - e) **Waiver** is defined as the condition was supposed to have happened that the other side still performs regardless of.
    - i) where there is an express condition in the contract, it is there to benefit one of the parties (and only one) – but they can do things to give up, or cause people to take away that condition
    - ii) if one party doesn't perform, and the other party still acts as if it done, and fulfills the covenant that depends on the conditions
    - iii) waivers can be retracted, so long as one side does not act in reliance on the waiver
  - f) **excuse of condition**: when there is a condition coupled with a covenant, there is a duty to cooperate, and conditions will be excused because of a failure to cooperate.
- 11) Problems in sale of goods
- a) Perfect tender rule: means that there is no substantial compliance exception
    - i) unique to sale of goods.
      - (1) If goods get to a place early, then they can try again.
    - ii) Implied waiver of perfect tender rule occurs if the seller had reasonable grounds for believing that the buyer would settle for non-conforming goods
    - iii) Cure: in the face of the Perfect tender rule, defective performance will mean that the seller can try to correctly perform
  - b) Rejection of goods
    - i) Even if there is imperfect tender, there is still a contract, and there are still contract law rights
    - ii) Exception for installment sales contract (contract itself requires or authorizes delivery in installments) (there are no implicit installment sales contracts)
      - (1) if there is an installment contract, the perfect tender doesn't really matter, and instead of using the normal *perfect tender standard* doctrine of substantial performance will govern since the parties can deficiencies in a later shipment
    - iii) rejection of goods, which are covered under a contract which fails for statute of frauds reasons, only obligates payment for the goods that were accepted
  - c) acceptance of goods (also retention for reasonable time without objection)
    - i) any time that there is a question involving the sale of goods, in which the buyer has received the goods, and has kept them without objection
    - ii) contracts that fail the statute of frauds are enforceable to the extent that they are accepted
  - d) payment
    - i) effect of payment: payment without inspection is not acceptance
    - ii) mode of payment
      - (1) cash

- (2) but seller doesn't have to accept checks, but will give the buyer more time
- e) **revocation of acceptance** of the goods
  - i) defect must substantially impair value of good and
  - ii) accepted on the belief that a defect didn't exist or that it would be cured or
  - iii) defect not immediately present
  - iv) or reasonably believed that seller would cure defect but but didn't
- 12) excuse
  - a) performance
  - b) failure of real condition
  - c) failure to make Adequate assurances of future performance
    - i) must be a contract
    - ii) later, one party learns something which gives them reasonable grounds for insecurity
      - (1) one can delay performance, and make a written demand for adequate assurance
    - iii) can withhold assurances pending assurances, if there is good reason to believe that performance is questionable
  - d) excuse by breach of other party's duty to make a perfect tender
    - i) material breach is defined as something that is not a minor defect (question of fact)
    - ii) doesn't excuse from performance or payment
    - iii) major imperfections excuse payment
    - iv) if the counterpart's breach is material the victim may suspend performance – but the aggrieved party must give the wrongdoer time to cure
  - e) anticipatory repudiation is defined as when one party announces that they will not perform.
    - i) Nonrepudiator must wait until the time originally set for performance by the repudiating party –
    - ii) Repudiation can only be retracted if the victim has not detrimentally relied upon it
  - f) Later agreements as excuse
    - i) Rescission is defined as cancellation of the deal
      - (1) If a party completely finishes the work, and they still agree to cancel the contract it is too late, there can't be rescission
      - (2) If duties have been delegated or there are vested third party rights, the contract cannot be rescinded
        - (a) Third party's rights vest when the beneficiary learns of the contract and assets to it, determinably relies, or brings suit
      - (3) If there is some performance remaining from each of the contracting parties, neither party had finished, and it was timely and valid.
        - (a) There is no contract, but there is no *quasi-contract* rights
      - (4) A breached party can also sue in *quasi-contract* after rescinding a contract
    - ii) Accord and satisfaction (In order to excuse the old deal you need both the old deal and the satisfaction)
      - (1) Requirements
        - (a) **Accord** is defined as when the parties agree that they will do something different instead
          - (i) Accord alone merely suspends the duties
          - (ii) An accord requires consideration (but can be lesser value consideration of a different type or paid to a third party)
          - (iii) For payment of debts there must be a bone fide dispute
        - (b) **Satisfaction** is defined as performance of the substituted performance
          - (i) If the performance never occurs, then the old obligation is not excused – and suit can be brought on either the underlying contract or the accord and satisfaction
      - (2) Remedies for breach of accord
        - (a) Can sue on either underlying contract or accord
        - (b) Accord can be raised as either an equitable defense or a legal claim
      - (3) “payment in full written on check” -- will only constitute an accord
        - (a) there is a dispute about what is owed
        - (b) good faith tender
        - (c) conspicuously states that it is tendered in full satisfaction of the debt

- iii) Discharge of duty by objective impossibility that arises **after** the contract is entered (remedy is rescission) into (for example can be performed by no one, not just the promisor)
      - (1) Disappearance of party: duty is not discharged if there can be a replacement
        - (a) If there is part performance there can be a remedy in *quasi-contract*
      - (2) Disappearance of unique party (for example famous person): discharged
        - (a) Must be a person necessary to effectuate the contract
      - (3) Disappearance of subject matter
        - (a) Partial: duty discharged only to the extent of subject matter's disappearance
        - (b) Full: full discharge
        - (c) Sales: If the risk of loss is on the seller, and the material is a later unforeseen occurrence that made it impossible to perform and the risk of loss passed to the buyer, the buyer must perform.
        - (d) Supervening illegality of the subject matter of the contract: discharges contract
    - iv) Discharge by impracticability: Must be extreme unanticipated difficulty including embargoes on goods!
      - (1) Extreme problems may constitute a reason for termination
    - v) Discharge by Frustration of purpose:
      - (1) Parties had a with a purpose in mind, and something happens to frustrate that purpose it is an excuse (might be still possible to do something)
      - (2) purpose of the contract must be destroyed (for example renting an apartment to watch a parade that was later cancelled)
    - g) novation: completely releases the substituted party (substitution of all parties which requires consent)
- 13) Damages
  - a) Punitive damages – can't get punitive damages
  - b) Liquidated damages is defined as contract provisions that control the damages available **only test for Liquidated damages at the time of the contract**
    - i) Must be Hard to tell what the damages might be at the time of contract
    - ii) Reasonable forecasting of what the damages are
  - c) Three step general approach to damages
    - i) Protection of the Plaintiff's **expectation interest** (good piece of jargon for the exam)
      - (1) Injured person is entitled to recover an amount that would put them in as good a position that they would have been if the contract had been performed
      - (2) What did the Plaintiff actually get
      - (3) What is the difference between what they got, and what they were entitled to get
        - (a) This can also be explained as cost plus lost profit
      - (4) In houses, the damages will be the difference between the fair market value (even if a lower price was negotiated) and the damaged value of the house
    - ii) **Foreseeable consequential damages:** injured party can recover foreseeable consequential damages, provided that they were reasonable
      - (1) Can only recover that special kind of stuff if it was reasonably foreseeable
        - (a) People's rents are *special damages* which can be recovered if it was reasonably foreseeable
    - iii) **Incidental damages** – there is quite a difference between incidental damages and consequential damages
      - (1) Foreseeability has nothing to do with incidental damages
      - (2) Incidental damages are always recoverable
  - iv) Avoidable damages – can't recover for damages that could be avoided. The burden of proof on avoidability is on the defendant.
- d) Deposits can be used as Liquidated Damages, if such a deposit would have 1) initially been an approximation of damages and 2) it is in line with current business practices
- e) Rules for article 2 money damages
  - i) criteria
    - (1) Who has the goods
    - (2) Who breached?

- ii) General formula: contract price-current market price plus incidental damages and foreseeable consequential damages minus avoidable damages contemplated damages-realized goods or money
    - (1) In the case of a volume seller, one gets the lost profits
- 14) equitable remedies
  - a) **Reclamation** – when a seller learns that a buyer has received delivery of goods on credit while insolvent, he may reclaim the goods upon demand made within 10 days after the buyer's receipt of the goods. But BIOCObS take priority. Also can reclaim from a common carrier
    - i) no specific performance for accidental wrongful **Entrustment** is defined as wrongfully selling something. Bone fide purchasers for value who buy from a merchant in the ordinary course of business take good title
    - ii) but not that bankruptcy does not cause a material breach
  - b) Specific performance – should use equitable remedies only if money damages are inadequate
    - i) With respect to sale of goods, the rule of thumb is no specific performance
    - ii) The concept is unique goods – the buyer can force the seller to give specific performance if they are unique (antiques or custom made goods)
    - iii) Mutuality of remedy usually not required
      - (1) Both parties are capable of performing
      - (2) The court can secure counter-performance
  - c) There is no specific performance in personal services contracts
  - d) Negative specific performance: court can order someone not to perform
  - e) Reformation is possible for scrivener's errors
- 15) Third party beneficiaries
  - a) Assignment are defined as contract **between two people and two people only, and only later one of the parties transfers rights in that contract to a third party**
    - i) assignment must be in the present test – must be “I assign” and not “I promise to assign” or “I shall assign”
    - ii) parties
      - (1) Promisor:
      - (2) Promisee
      - (3) Beneficiary (rights only vest with acknowledgement, suit, or reliance)
        - (a) Intended Beneficiary: usually they are named in the deal
          - (i) Creditor beneficiaries: owed the third party a debt before the deal
            - 1. Creditor beneficiary **Can sue either the promisor or the promisee, but can only get one satisfaction**
            - 2. Defenses that can be raised are based on either whether or not it was a promise to pay the debt, or a promise to pay whatever is owed
          - (ii) Donee (can vest rights through detrimental reliance)
        - (b) Unintended Beneficiary - People who just happen to benefit
    - iii) Warranties in assignment
      - (1) Not to defeat assigned right
      - (2) Right is not subject to defenses
      - (3) Assignor warrants that the obligor can perform
      - (4) Third party rights
        - (a) Assignor will take subject to third party's rights if there is notice
        - (b) Assignor will take free of third party's rights if there is no notice
        - (c) Obligor cannot raise any defenses that the assignor has against the obligee
    - iv) Limitations on assignments
      - (1) If a contract prohibits assignment, it generally refers to the duties, not the rights unless specifically intended
        - (a) Output contracts can be assigned given good faith
        - (b) If there is no contract provision about assignment, you cannot make an assignment that substantially changes the duties of the obligor
          - (i) If all that you are doing is to pay someone else instead, it is never a problem, but when you look at the last fact pattern

- (ii) where there is an initial contract, where one then assigns his rights to someone else, if the assignee will be performing something totally different
  - (2) There is a difference between language which says “no assignments” or “assignments are void”
    - (a) If the contract prohibits assignment (“no”: If the assignee takes without knowledge of the prohibition the assignee can still collect from the Obligor
    - (b) If the contract states that assignment is void assignments will be invalid but there will still be a cause of action against assignor
  - (3) consideration
    - (a) multistate – don’t need consideration
  - (4) cause of action for assignments
    - (a) by virtue of one’s status as an assignee he can enforce a contract that he did not make
    - (b) obligor has the same defenses against the assignee as they do against the assignor -- any defenses against they obligor they ought to have against the assignee
  - (5) obligor can continue to perform until they are notified of the assignment
    - (a) negotiations or modifications are not effective until there is notice
  - (6) priority of assignments (promise to assign doesn’t work) (check this)
    - (a) multistate
      - (i) revocable assignments are revoked by later assignments
      - (ii) irrevocable assignments
        - 1. general rule: first in time, first in line
        - 2. exceptions
          - a. second assignee who pays value and takes without notice of the first prevails
          - b. but if there is a judgement for a subsequent assignee gets the first judgement against the obligor, she will prevail
          - c. subsequent assignees who get payments from the obligor have priority
          - d. a later novation gives priority
          - e. can be estoppel theories (for example when a later assignee knows of the earlier ones)
        - 3. in NY a gratuitous assignment is irrevocable if signed by the assignor
        - 4. note: an assignment of a construction contract is not valid until filed – a subsequent assignee in good faith, who failed first prevails over the party who failed to file
      - (iii) gift assignments are generally valid v. assignments for consideration, the general rule is that the later one prevails
        - 1. while gratuitous assignments are okay, they can be wiped out
        - 2. first to notify is irrelevant – what matters is who gets a judgement or payment
          - a. very very limited exception: a subsequent assignment assignee take priority over earlier assignees who paid value **value** only if he doesn’t know if the earlier assignment **and** they got payment or a judgement
      - (iv) warranty of assignment is defined as assignees warrant assignee can be collected upon. All of the other assignees can’t collect from the obligor, but they can sue the assignor for breach of the warranty of assignment.
        - (b) NY: if this gift to was made by means of a writing, then it is not freely revocable – if it is a written assignment, then in NY earlier would win (check this)
- b) Delegations is defined as first two people make a deal, and then they later one of them tries to get them to do the work
  - i) delegation is different than assignment, because delegation is a delegation of duties, but things might be called different things by the examiners
    - (1) delegator will remain liable, unless the obligee consent, but this can be construed as an offer of a novation
  - ii) General rules is that everything can be delegated
    - (1) Can contractually prohibit delegations
    - (2) Personal service contracts can’t be delegated

- (3) Nondelegating party cannot compel the delegate to perform. Delegation is a power not a right
- iii) Formality of delegation: Can be either written or oral – but must be done in the present
  - (1) Delegations may also be called assignments – one has to ask themselves whether or not it is a transfer of rights, or is it a transfer of duties
  - (2) The bar examiner is going to end up calling it an assignment
  - (3) There are no consideration or consent requirements for delegations
- iv) Delegator remains liable on the contract – unless there is consent
  - (1) Agreement for someone else to do work – can be coupled with a transfer of the right to assign money.
- v) wording
  - (1) General rule: can always delegate unless the contract prohibits delegation
  - (2) If the contract prohibits assignments: also means no delegation
  - (3) If the contract says no delegation there can be no delegation
  - (4) If the contract is silent, then they can still delegate
- vi) The only time that common law steps in and imposes a restriction on delegation is when we are talking about someone who is famous
  - (1) It is not how good the delegate is, it is whether or not the person has special skills, then it is no delegable
- c) Factual difference between delegation and novation – novation requires both parties
  - i) Delegate is liable only if he receives consideration from the delegating party
  - ii) If the delegation doesn't excuse the delegating party – the delegating party remains liable
    - (1) However, the delegating party is liable to the obligee only if he received consideration (doesn't matter whether or not there was an agreement)
    - (2) The delegate is liable whether or not he received consideration
- d) Assumption is defined as Any time there is a delegation for consideration, a **third party beneficiary is created**

## Corporations

### Liability

- 1) Foreign corporations doing business in NY must qualify
  - a) Inqualified foreign corporation can't be sued but can be sued. However payment of fees and penalties cures this problem
- 2) Organization of NY corporations
  - a) Formation requirements
    - i) People: Adults Humans (cf. other states where corporations can incorporate)
      - (1) Incorporators execute the certificate
      - (2) Incorporators deliver the certificate to the department of state (moment of birth of the corporation)
      - (3) Incorporators hold organizational meeting
    - ii) Paper: certificate of incorporation which is a contract between the corporation and the shareholders and a between the corporation and the state this paper must include various provisions
      - (1) A series of names and addresses: must have one of the following words or abbreviations. Must have one of three titles: Incorporated, Incorporated or Limited
      - (2) Have to tell the county in New York where you have the office of corporation, but need not designate where the office is.
      - (3) Must Designate the NY secretary of state for service of process. (may also name a registered agent for service of process)
      - (4) List the name and address for your incorporators
        - (a) Duration: If the certificate is silent, it is presumed to be perpetual

- (b) Purpose: not required, but violation of a statement of purpose is a *ultra vires*
    - (i) Contracts that are entered into that are ultra virus are valid
    - (ii) Shareholders can seek an injunction
    - (iii) Responsible officers and directors are **liable** to the corporation for *ultra vires* losses
- (5) Capital structure
  - (a) **Authorized stock** is defined as maximum amount of stock that can be sold
  - (b) **Outstanding stock** is defined as stock that has been issued on the part of the corporation
  - (c) Number of shares per class: **at least one class per stock must have unlimited voting rights, and at least one must have unlimited dividend rights**
  - (d) Must state Par value (if any)
  - (e) Relative rights of each class
    - (i) If preferred shares are issued in series (series is a subset of class) you need to have a statement of variations in the series, and a statement of the board's authority to fix the series.
    - (ii) Authorized stock and number of shares per class
- (6) Acts:
  - (a) Signed
  - (b) Acknowledge before the notary
  - (c) At the moment it is filed, then someone is a *De Juri* corporation
  - (d) Afterwards they hold an organizational meeting, to adopt bylaws and adopt directors.
    - (i) Incorporators may act on written consent without a meeting
- b) Significance of forming a corporation:
  - i) Internal affairs are governed by the law of the state of the corporation
  - ii) Corporation is a separate legal person, and so it has broad powers by statute
    - (1) Contract, transfer property, buy and sell securities, make political contributions (can't contribute more than 5k per year to any person or organization)
    - (2) Can make charitable contributions without limits
  - iii) the people who run it are not liable for its obligations (e.g. contract or tort liability)
- c) *De facto* corporation doctrine and estoppel: A business failing to achieve *De Juri* corporation status can still not be liable for the debts of the business. Cannot invoke *De facto* corporation status as a shield against state action.
  - i) *De facto*: just as good as being a *De Juri* corporation except in an action by the state. This doctrine might be dead. (Examples: a failure of the state to file). Have to tell examiner that it is possibly an outdated doctrine.
    - (1) Must be an incorporation statute
    - (2) The parties made a good faith, colorable attempt to comply with it
    - (3) There has been some exercise of corporate privileges
  - ii) Corporation by estoppel: one dealing with a business by a corporation and treating it as a corporation
    - (1) This doctrine is abolished in New York. *Cf.* partnership by estoppel is still recognized
- 3) Bylaws: *De Juri* corporations can exist without bylaws
  - a) bylaws, as binding on the corporation make it binding
  - b) If bylaws are inconsistent with the certificate, the certificate controls
    - i) The incorporators are the ones who introduce the initial bylaws which have the statutes of a shareholder bylaw
  - c) Repeal of bylaws
    - i) Shareholders are the only ones (in general) who can repeal the bylaws
    - ii) The board can repeal the bylaws only if they are allowed by the certificate or a shareholder bylaw
- 4) Pre-incorporation contracts
  - a) Promoter is a person acting on behalf a person who is not yet formed
    - i) Before incorporation
      - (1) Promoters are joint venturers
      - (2) Since there are no outside investors, they can engage in self-dealing

- (a) However, promoters must provide notice to future outside investors of their self-dealing in the form of accounting
  - (b) If the outside investors have notice of the accounting then they are on notice
  - (3) No inherent right to compensation
- ii) Fiduciary duties that promoters have runs specifically to two classes of investors
  - (1) Investors who subscribed while promoters were in control
  - (2) Transactions that were fixed in their terms while the promoters were in control even if the subscribers purchase and the transactions are consummated after the promoters dispose of their interest
- iii) the promoter may enter into contract on behalf of the corporation not yet formed
  - (1) a corporation is not liable on pre-incorporation contracts until and unless it **expressly or implicitly** adopts the pre-incorporation contract
    - (a) implicit adoption happens when the corporation accepts the benefits
  - iv) unless the contract clearly indicates that the parties do not intend a promoter to be liable, the promoter remains secondarily liable until there has been a *novation* --- the promoter remains liable until *novation*.
- v) Personal liability of promoters
  - (1)
- b) Secret profit rule: where the promoter is dealing with the corporation (only applies to promoters)
  - i) Must be secret and profit – if it is disclosed there are no damages
    - (1) Profits are allowed
  - ii) One rule: the promoter can't make a **secret** profit on her dealings with the corporation
    - (1) where there is a sale to the corporation of property acquired **before becoming a promoter**. Damages are **price paid by the corporation minus fair market value**. Doesn't matter what the original price of the property sold to the corporation was
    - (2) Where there is a sale to the corporation of property acquired **after becoming a promoter**: **price paid by the corporation minus price paid by the promoter**
- 5) Issuance of stock is defined as: when a corporation sells or trades its own stock
  - a) This is one way that a corporation can raise capital.
    - i) Stock is an equity security – meaning that the person is an owner of the corporation
    - ii) Cf. bonds where The holder of a bond is a creditor not an owner of the corporation
      - (1) A debenture is simply a loan, the **repayment of which is not secured by corporate assets**
  - b) All rules about issuance of stock only apply when the corporation is selling its own stock
    - i) Stock can be sold with **subscriptions** which are written offers to buy stock
      - (1) Revocation of pre-incorporation subscriptions
        - (a) Pre-incorporation offers are irrevocable for 3 months unless they provide otherwise or all subscribers agree, so that the people forming the corporation can rely on the money being there
        - (b) A person who makes a pre-incorporation subscription is bound unless released
      - (2) Revocation of post-incorporation subscriptions
        - (a) post-incorporation subscriptions are irrevocable up until acceptance
          - (i) they are obligated up until the board accepts the offer
        - (b) subscription is an offer
        - (c) breach of offer to pay for the corporation
          - (i) if the subscribers defaults on payments if has paid less than 50% of the purchase price and he fails to pay the rest within 30 days of the written demand, the corporation can keep the money and cancel the shares. The shares become authorized and unissued (and can be resold)
          - (ii) if the subscriber pays more than 50% and fails to pay within 30 days of a written demand, the corporation has to try and sell the shares
          - (iii) if someone pays more than the remaining balance due – then the original subscriber recovers any excess over the total he agrees to pay
  - c) consideration (form and amount of stock when a corporation is selling its own stock)
    - i) when a corporation is selling its own stock,



- (1) form of consideration is defined as may pay for an issuance for any of these five things listed here -- if it isn't it is watered stock
  - (a) money
  - (b) tangible or intangible
  - (c) labor or services already performed for the corporation: includes services in forming the corporation – except that promoters don't get paid for being promoters (NY)
  - (d) new: **may pay with a binding obligation to pay the purchase price in the future to pay for it in cash or property, or future services having an agreed value**
  - (e) new: **binding obligation for future services having an agreed value**
- (2) can't pay for stock with things are not allowed – and the stock is treated as water
- ii) par is defined as minimum issuance price in unprohibited consideration paid for stock newly-issued stock
- d) treasury stock is defined as stock that was previously issued as was reacquired by the corporation. Treasury stock is treated as no par value stock
- e) issuing stock to acquire property
  - i) in acquiring property with stock, the stock cannot be exchanged for than its par value
  - ii) the court won't second-guess the board on whether it was a bona fide exchange unless there was fraud. Liability attaches, as this is considered a wasting of corporate assets.
- f) watered stock (issuing par stock for less than par value, or improper form of consideration)
  - i) corporation or its creditors can sue for water.
  - ii) Directors liable if they knowingly authorized the issuance for less than par
    - (1) BONA FIDE PURCHASER without notice not liable. However, it doesn't change the liability of everyone else.
    - (2) Boardmembers will also always be liable
- 6) Pre-emptive rights is defined as the right of an existing shareholder to maintaining their percentage of ownership by buying stock whenever there is a new issuance of stock for money
  - a) Unless the certificate says otherwise new issuance doesn't include the sale of treasury shares
  - b) An issuance of stock for property may trigger preemptive rights
  - c) Pre-emptive rights don't extend to the sale of shares authorized by the original certificate and sold within 2 years of the formation
  - d) Pre-emptive rights are the right to maintain a percentage if the corporation is issuing stock for money
  - e) **If the certificate is silent regarding pre-emptive rights do they exist**
    - i) **Old corporation** (formed on or before February 22, 1998): preemptive rights for all shares with voting rights or unlimited dividends (common stock)
    - ii) **New corporation** (formed after February 22, 1998): there are only preemptive rights if the certificate says so
  - f) If the certificate provides for preemptive rights, and the corporation issues stock to pay for property, there are no preemptive rights – because there has to be an issuance for money
  - g) Three reasons for no pre-emptive rights
    - i) After February 22, 1998
    - ii) Were issuing stock within 2 years of formation – so no preemptive
    - iii) An issuance that doesn't for money
- 7) Directors and officers
  - a) Directors
    - i) Statutory requirements
      - (1) 1 or more adults natural persons. the number can be set in the bylaws or by shareholder action or by the board
        - (a) if no number is set by such action then there will be one director
        - (b) the number is not set in the certificate
        - (c) if you want to change the number of directors you don't have to amend the certificate
      - (2) the incorporators elect the initial directors, but afterwards the shareholders elect the directors at the annual meeting
        - (a) the board can be elected all at once, or the board can be classified.
          - (i) A.k.a. staggering the board
          - (ii) No class can have less than 3 directors

- (3) Removal of directors
  - (a) With cause:
    - (i) can be removed by shareholders
    - (ii) or by the board, if the certificate includes a provision allowing it
    - (iii) Directors elected by class vote or cumulative voting can never be removed
  - (b) Without cause:
    - (i) Can only be removed by the shareholders unless there is a provision allowing for removal by the directors
  - (c) Can be removed if 10% of the shareholders sue, and a court agrees, or the attorney general does so
- (4) Vacancies on board
  - (a) General rule: board of directors select new board
  - (b) If the director was removed by the shareholders, the shareholders have to select the new one – **unless certificate or a shareholder** bylaw says otherwise
- (5) Board action: unanimous director consent in writing to act without a meeting or a meeting.
  - (a) Meeting
    - (i) Conference telephone call qualifies as a meeting.
      1. Can't be a chain of telephone calls
    - (ii) Meeting can be anywhere
    - (iii) Quorum: to do business we must have a majority of the entire board if there were no vacancies.
      1. certificate or bylaw can decrease the quorum to less than a majority -- **but never to 1/3 of the directors**
        - a. can not decrease the requirement that a majority vote of those that are present are required to approve an action
        - b. **the certificate, not the bylaw** can increase a quorum to a supermajority
      2. Passing a resolution: Once there is a quorum, it requires a majority of those present
        - a. 9 on board – 5 to pass
        - b. 9 on board, 5 show up, 3 to pass
        - c. 9 on board, 2 resign and no successors have been selected (so if there are only serving now), there still needs to be five on the board
  - (b) Unanimous written consent
  - (c) Actions that are made with flawed process can still be ratified
- (6) Notice to board
  - (a) Special meetings require notice
    - (i) Can waive in writing at any time
    - (ii) Waive by attending board meeting without objection
  - (b) If there is objection to the form of notice the action is void
- ii) Proxy voting not allowed on the board
- iii) Voting agreements not allowed. Cf. shareholder voting
- iv) duties of the board:
  - (1) manage the company
  - (2) delegation: if the certificate or bylaws allow, a majority or the entire board can delegate substantial management functions to a committee – the board cannot delegate all powers to a committee
    - (a) a committee cannot amend, repeal, or adopt bylaws
    - (b) a committee can't recommend actions to the shareholder that will require approval
      - (i) fundamental corporate changes, etc.
    - (c) a committee can recommend to the board
- v) director as defendant
  - (1) **breaches of the duty of care:** director must discharge duties in good faith, and with the idea of due care and skill that a director would exercise in like positions
    - (a) if someone is not acting within the duty of care, then there is liability

- (b) one has to act like a prudent person would do
  - (i) nonfeasance – where the director does nothing at all
    - 1. must state the duty of care standard. For example for example an ordinarily prudent person would attend some meetings
    - 2. it may be tough to show causation: example of how you could show causation is where someone is an anti-trust expert – that director is arguably liable for this – given this expertise in anti-trust – because someone with some knowledge would give them some breach
    - 3. there is liability only if his breach caused a loss to the corporation
      - a. it is not enough just to show that the director breach the duty of care
  - (ii) misfeasance is defined as where the board does something but it hurts the corporation
    - 1. causation is clear
    - 2. duty of care – have to act in good faith, diligence care, skill, that an ordinary person would use under similar circumstances
      - a. a director is not liable if she meets the business judgement rule (is she acting in good faith and is she being prudent)
    - 3. **prudent people do appropriate homework**
      - a. prudent people, before they do a big business decision do appropriate homework
      - b. prudent people **inquiry**
      - c. prudent people **deliberate**
  - (iii) **business judgement rule is defined as a court will not second-guess business decision if it was 1) rational basis 2) good faith 3) reasonably informed**
    - 1. don't have to be right just have to be prudent
- (2) duty of loyalty: must act in good faith where they are bound by all those rules of conscientiousness, fairness, morality, and honesty in purpose that the law imposes as guidance for those who are under fiduciary obligations and responsibilities
  - (a) no business judgement rule since it is a conflict of interest issue
  - (b) interested director transactions: any idea where on one side is the corporation, and on the other deal is a director where a director is a substantial owner
    - (i) interested director disclose his interest
    - (ii) interested director transactions will be okay if
      - 1. the deal is fair and reasonable to the corporation (even if the interested director doesn't disclose)
      - 2. or it is approved by one of these three
        - a. board approval, by a vote of the non-interested directors
        - b. unanimous vote of the disinterested directors if interested directors are needed to make a quorum
        - c. shareholders approve the transaction by vote
- (c) board can fix compensation in any capacity, but compensation must be reasonable and in good faith and waste
  - (i) use of stock options must be approved by shareholder vote if it is in a closely held corporation, if it publicly traded doesn't require
- (d) competing ventures – potential liability for breaching the duty of loyalty
  - (i) we must state the duty of loyalty standard
  - (ii) a director cannot go into competition with his corporation
  - (iii) if a director goes into competition with his corporation, then the corporation can recover her profit
- (e) corporate opportunity doctrine
  - (i) we must state the duty of loyalty standard
  - (ii) **director can't usurp a corporate opportunity**
  - (iii) this means that he can't take it for himself until he informs the board of its existence, and waits for the board to reject it
    - 1. the corporation's financial ability to pay for the opportunity is not a defense

- (iv) a corporate opportunity is defined as something that the corporation needs, is seeking, or has a tangible expectancy in
  - (v) the remedy for usurpation is a constructive trust
    - 1. must sell to the corporation at his cost, or must have sold it at a profit
    - 2. it is a usurpation with an interested director transaction
      - a. defendant usurps an opportunity and takes the profit for himself, and then sells or leases the profit to the corporation
  - (f) *ultra vires* acts creates liability for directors
  - (g) watered stock
  - (h) improper loans – to directors
    - (i) before 2/22/98: if the certificate is silent, it must be approved by shareholder vote
    - (ii) after 2/22/98: can okay by board conclusion that the loan is in the corporation's interest –
    - (iii) guy who borrowed the money is liable. Board is also liable if he doesn't repay.
  - (i) Improper distributions
    - (i) Directors are presumed to have concurred with board action unless the dissent is in writing
      - 1. Has to be in minutes
      - 2. Or in writing to the corporate secretary at the meeting
      - 3. Registered letter
    - (ii) Absent directors are not liable if they register their dissent in a reasonable time after learning of the action
    - (iii) Good faith reliance on information, opinions, reports or statements by officers or employees whom the directors whom the director believes are liable, Esq or CPA who they believe are acting in their duties, or a committee of which the person who is relying is not a members, but it has to be something that it is in the committees
- b) Officers – owe the same duty of care and loyalty as directors
  - i) Officers are agents of the corporation – so there may be a cross-over with agency
  - ii) Board may select a secretary, present, or treasury, and however officers the board wants to provide
    - (1) One person can hold multiple officers
    - (2) they are selected by and removed by the directors unless the certified allows them. If the shareholders elect them, then only the shareholders can fire them
      - (a) Corporation can be liable for breach of contract damages but they don't have to give him his job back
      - (b) Board could allow shareholders to directly hire the officers
  - iii) State attorney general, or holders of 10% of all the shares may sue for a judgement removing an officer for cause
  - iv) Removal of officers
    - (1) Officers appointed by shareholders can be removed with or without cause by the shareholders
    - (2) Officer appointed by the board may be removed by the board without cause
    - (3) An officer of a corporation may be removed at any time without or without cause by a majority of the board of directors unless the officers are elected directly by the shareholders pursuant to a provision of the certificate of incorporation
- 8) Indemnification of directors and officers
  - a) Suits against directors in their official position
    - i) if there is an action by or on behalf of the corporation, there are a few possibilities
      - (1) indemnification prohibited if officer held liable to the corporation
      - (2) Corporation must indemnify if the officer was successful on the merits or otherwise
        - (a) If it is partially successful there needs to be an action by the board (quorum of disinterested directors) or shareholders or written opinion of independent legal counsel that director acted appropriately
    - (3) Reimbursement can't be allowed if it were contrary to the bylaws

- (4) Court can order indemnification if the court finds that the director was entitled to.
  - ii) Certificate or bylaws can provide for indemnification for later-arising (no retroactive indemnification)
    - (1) The corporation can advance the expenses but they must be repaid if the officer or director is not entitled to indemnification
    - (2) The corporation can buy insurance to cover liability
- 9) Shareholders liable for the debts or the acts of the corporation
  - a) Generally not done
  - b) A court may pierce the corporate veil if they have abused the privilege of incorporation
    - i) If you abuse the privilege of having a corporation, in the interest of fairness, a corporation might reach through the corporation and hit you with personal liability
    - ii) NY Courts may pierce the corporate veil to prevent fraud or to achieve equity
      - (1) Courts will prevent the use of the corporation as a cloak for illegality
      - (2) Alter ego (a.k.a. identity of interest, excessive domination, agency)
        - (a) If there is commingling of corporate and personal funds, a creditor of the corporation can collect from either X or Y
          - (i) General rule: shareholders not liable
          - (ii) Pierce the corporate veil to achieve equity or prevent fraud
          - (iii) A court might pierce the corporate veil if X so dominates the corporation that it is his "mere agent"
        - (b) **There is no pierce the corporate veil if the corporation has any mind, existence, or will of its own, even if someone is not paying creditors, if there is a commingling**
      - (3) Dummy corporation – where shareholders are carrying on business in their personal capacity: Where there is a parent corporation that so controls the operations of its subsidiary so as to act as the true prime mover – could have a group of corporations so as to act as one
        - (a) If we did pierce the corporate veil (and it is tough), probably only the wrongdoing shareholders would be liable
      - (4) Undercapitalization is another basis to pierce the corporate veil but there still must be no independent existence
      - (5) Courts are generally more willing to pierce the corporate veil for a tort victim than for a contract claimant
    - iii) **Wages:** in a closely held or close corporation, the ten largest shareholders are personally liable for the wages and benefits to the employees
      - (1) Professional service corporation: shareholders are personally liable for rendering services for a professional service corporation
        - (a) However, shareholders are not liable for the lease
  - c) Liability when Shareholder managers (generally they are not managers as there is a public policy against encroachment). However, there is an exception for closely held corporation – a close corporation has few shareholders, and the shares are not publicly traded
    - i) There can be a provision in the certificate can restrict or transfer board power to others (for example shareholders)
      - (1) shareholders must approve it
      - (2) all subsequent shareholders have to have notice of this
      - (3) If the shares are not listed on an exchange or regularly over the counter
    - ii) If the shareholders are managing the corporation – the managing shareholders owe the duty of care and duty of loyalty – so they could be liable
  - d) There is a trend toward imposing fiduciary duties with shareholders in their duties with each other
    - i) Controlling shareholders can't use their power for personal gain at the expense of minority shareholders
    - ii) They owe a duty of utmost good faith – courts may step in to protect the minority shareholders in a close corporation, because a minority shareholders in a close corporation, cannot exist as there is no public market for shares where the big guys are sticking it to them (similar to a partnership)
  - e) Shareholders as Plaintiff

- i) In a derivative suit, a shareholder is suing to enforce the corporation's claim against a third party or against a corporations officers or directors breaching a duty
    - (1) Requirements for bringing suit
      - (a) Plaintiff must own stock: (or a voting trust certificate) at the time the claim arose, or they must have gotten that stock by operation of law by someone who did own the stock, all the way through entry of judgement. If someone inherits stock, they can bring suit
      - (b) court must find that the Plaintiff can adequately represent the interests of the corporation and the shareholders
      - (c) Plaintiff must make a Demand that the directors bring suit – unless futile
        - (i) The Plaintiff must plead **with particularity** the efforts to secure the board's initiation of suit, or explain why the demand was excused
        - (ii) NY court of appeals definition of futility: -- must plead with particularity
          - 1. Futility exists when some of the directors would be defendant (for example sue yourself)
          - 2. If a majority of the board is interested, or under the control of the interested directors
            - a. The board did not inform itself of the transaction
          - 3. The transaction is so egregious on its face that it could not be the result of sound business judgement
          - 4. If the board already refused to do something it is futile
        - (iii) Bond required if Plaintiff owns under 50k
    - (2) Corporation's action to dismiss
      - (a) corporation can move to dismiss the derivative suit based upon the a finding by independent directors, or a committee of independent directors (sometimes called a special litigation committee) that the suit is not in the corporation's best interest (for example no chance of recovery)
      - (b) court will only look at independence and whether the committee's procedures were adequate
    - (3) defenses to a derivative suit
      - (a) can make real defenses and personal defenses (for example Statute of frauds, etc.) substantive defenses that could have been raised against the Plaintiff itself
      - (b) can disqualify Plaintiff, saying that he knew of the activities and benefited
    - (4) No dismissal or settlement without court approval
    - (5) Remedies available
      - (a) Recovery in any derivative suit goes to the corporation
        - (i) Plaintiff Gets costs and attorney's fees
        - (ii) Plaintiff may get damages directly, if the corporation recovering would be inequitable to the very people being complained of – at the court's discretion
      - (b) In unsuccessful derivative suits, Plaintiff must pay costs and attorney's fees
    - (6) A derivative suit is *res judicata*, so it can't be brought again as the corporation is a nominal Plaintiff
    - (7) Limitation of liability – certificate of incorporation can limit liability of directors to shareholders if breach is not found to be :
      - (a) In bad faith
      - (b) Due to intentional misconduct or knowing violation
      - (c) Results in a financial protect or advantage to the director (which he wasn't entitled)
      - (d) Violate statutory duties of directors
  - ii) Direct suits: Most direct suits can be brought as class actions. However, it is possible to cast a failure to declare dividends as a breach of a duty to the corporation, so it can be a derivative suit
- f) Shareholder as voter
  - i) Who possesses the right
    - (1) In general, the shareholder who is in the corporae records on the "reorord date is the voter
      - (a) Record date is between 10 and 60 days from meeting
    - (2) Exceptions to the general rule –

- (a) Corporation doesn't vote treasury stock (stock the corporation issued once upon a time, that they don't get back)
      - (i) Doesn't vote treasury stock
  - ii) Proxies: A proxy is a writing signed by the record shareholder or an authorized agent authorizing another to vote the shares
    - (1) Statute of frauds
      - (a) A fax is a writing for proxy purposes
      - (b) Don't need the shareholders signature, if electronic telegram or fax makes it clear
      - (c) Proxies are good for 11 months unless it says otherwise
    - (2) In director voting, directors cannot have proxies
      - (a) Can't even agree to elect a director based on a promise to do something
    - (3) Revocation of trusts
      - (a) Proxies are revocable – unless they are coupled with consideration (even if it says irrevocable)
      - (b) An "irrevocable" proxy is irrevocable if it is coupled with an interest for example if the proxy holder owns the shares, but could be with an option or a pledge or some other interest
- iii) Voting trusts and voting agreements
  - (1) Voting trust –
    - (a) Must have a written trust agreement
    - (b) Corporation must be given a copy
    - (c) Must transfer the legal title of the shares to the voting trustee (separating legal and equitable title)
    - (d) Original shareholders must retain voting trust certificates
    - (e) Length
      - (i) Up to ten years.
      - (ii) Within six months of the end of the trust, can renew for another ten years
  - (2) Voting agreement (pooling agreement) among shareholders
    - (a) Must be
      - (i) In writing
      - (ii) Signed
    - (b) Proxies are given pursuant to a voting agreement irrevocable if they say so
    - (c) Material in the agreement
      - (i) Members Can vote each other on the board
      - (ii) Can't include specific promises to complete certain actions once on board
    - (d) In NY, voting agreements are not specifically enforceable, and all you can sue for is damages at law
      - (i) If there is an illegal part (for example agreement to do certain actions once on board, the court can sever the illegal parts)
- iv) Meetings
  - (1) Two ways that there can be corporate action
    - (a) Unanimous written consent
    - (b) Meeting
    - (c) If the certificate provides that action without a meeting can be done by less than 100% of the shareholders without a meeting then it can be done
  - (2) Types of meetings
    - (a) Must have an annual meeting
    - (b) Special meetings
      - (i) must be called by the board if there is a failure to elect enough directors.
        - 1. 10% of the shareholders can demand that such a meeting be held
    - (c) The notice requirement is quite harsh – between ten and 60 days before the meeting
      - (i) Have to explain when and where the meeting is
      - (ii) Must state who called it, and it must state the purpose of the meeting
        - 1. Statement of purpose is important because it limits the business that can be done

2. If a proper person calls a special meeting, and the stated purpose of the meeting is to remove particular officer because the meeting must be for a proper shareholder purpose
  - a. Directors hire and fire officers
  - b. The shareholders hire and fire directors
3. Failure to give proper notice
  - a. action is **void** – unless waived
  - b. Can be express waiver
  - c. Implied waiver is attendance without objection
- (iii) Notice of meeting must inform if the proposed action would entitle shareholders to appraisal rights
- (3) Voting by shareholders
  - (a) Determination of a quorum focuses on the number of shares represented and the number of shareholders
  - (b) It doesn't matter how many shareholders there are
  - (c) There needs to be at least a majority
- (4) Votes
  - (a) General rule: Majority required – except for fundamental corporation changes in an old corporation
  - (b) Quorum
    - (i) General rule: majority of the entire board constitutes a quorum
    - (ii) Bylaws can modify quorum requirement to 1/3<sup>rd</sup> (not less)
    - (iii) Bylaws can never provide for a greater quorum
    - (iv) Certificate can provide for a quorum requirement over 1/2
- v) Cumulative voting: vote at large
  - (1) Number of votes is the number of shares times the number of votes to be elected
  - (2) Votes are taken at large, and so people can pool their votes so that smaller shareholders can be represented
  - (3) When is cumulative voting possible: only exists if the certificate allows
  - (4) Formula for cumulative voting: the percentage of shares required to elect voting required  $shares = 1 + (100/(x+1))\%$  where X is the number of directors being elected
- g) Shareholder transfer of stock
  - i) Amount of consideration: shareholders can transfers stock to almost anyone they want absent an agreement, there are no requirements that it be sold for a certain value
  - ii) Stock transfer restrictions: in NY they must be reasonable
    - (1) Right of first refusal (required to offer it to corporation first)
    - (2) Approval before selling stock is usually not enforceable
      - (a) It might be okay if it says that corporation's approval can't be withheld unreasonably
    - (3) Remedies
      - (a) Can enforce against transferor
      - (b) Can't be invoked against the transferor unless there was actual knowledge – must be on the shares themselves
- h) Shareholder can inspect the books and records (not the plant)
  - i) Corporation must also allow access to the list of current officers and directors within two days of written demand
  - ii) Statutory right
    - (1) Shareholder may be required to give an affidavit, that he purpose is in the interest of the shareholders, and that within 5 years he hasn't tried to sell a list of shareholders
      - (a) Interest as a shareholder could be hostile to the management or hostile to the board
      - (b) Can solicit for a tender offer. Must own shares for over 6 month or over 5%
      - (c) Shareholder can make a written request for the corporation's latest balance sheet – by mail
    - (2) Statute gives a right to inspect and copy these document
      - (a) Minutes of shareholder proceedings
      - (b) Records of shareholders
    - (3) Any shareholder can demand on five days written demand



- iii) Common law right: reasonable time, reasonable place, and for a proper person – this may be broader than the statute regarding documents available
  - i) Distributions to shareholders: no shareholder right unless distribution is declared
    - i) courts won't interfere with the discretion of the board to do something unless there is bad faith or dishonest purpose
      - (1) *cf.* stock split is different – there is a right in the shareholder to take based on a stock split
    - ii) **cannot pay distributions if corporation is insolvent**
    - iii) types
      - (1) Dividends
        - (a) **preferred** gets paid first – not more.
        - (b) Participating gets paid as a preferred shareholder and as a common shareholder
        - (c) **cumulative** – gets paid the accrued dividends in the prior years in which no dividend was paid
      - (2) **Repurchase shares**: individually negotiated, except in the close corporation – can't repurchase for improper purpose
      - (3) **redemption** – forced sale to corporation at a price in the certificate. must be done proportionately within each class of stock
    - iv) distributions can only be paid out of surplus
      - (1) **surplus** and stated capital is defined as assets minus liabilities minus stated capital (a.k.a. net assets minus stated capital)
      - (2) **states capital** is defined as par value in aggregate of par shares plus consideration for no par shares (unless within 60 days the board moves it to surplus) and any amounts transferred to stated capital by the board
    - v) directors are personally liable for unlawful distribution, as are the shareholders who knew the dividends were unlawful when they got it however, they can rely on professional advice
- 10) fundamental corporate changes: will trigger a right of appraisal by the dissenting unless there is an open market
  - a) minor changes can be made just by filing with the secretary of state
    - i) but specialized amendments will require a supermajority requirement of voting stock
      - (1) split
        - (a) new – for corporations formed after 2/22/98 – must get board approval and a majority of the shares entitled to vote
        - (b) old – for corporations formed before 2/22/98 – you must get board approval and approval of 2/3 of the shares entitled to vote
          - (i) old corporation can adopt the new view in its certificate
      - (2) if an amendment is approved, deliver to the secretary of state
    - b) five actions will trigger the right of appraisal (check this)
      - i) creation of new classes of stock – right of appraisal in both corporations (unless public market)
        - (1) votes required 2/3 requirement new: 1/2 requirement (2/22/98 is cutoff date)
      - ii) consolidation (where none of the corporation survives and a new corporation is formed) – right of appraisal in both corporations unless public market
        - (1) old: 2/3 requirement new: 1/2 requirement (2/22/98 is cutoff date)
      - iii) note no appraisal rights for either corporation in a short form merger (90% of one corporation into another)
        - (1) short form merger is defined as where a parent corporation already owns 90% of the outstanding shares of each class of stock of a subsidiary
      - iv) merger into another. There is only the right of appraisal in the “victim” or merged corporation
        - (1) new corporation succeeds to the rights and liabilities of the old one
      - v) one corporation transfers all of its assets (one company gobbling up the other). Gobbled corporation's shareholders have appraisal rights
        - (1) old (before 2/22/98): 2/3 of the shares
        - (2) new (after 2/22/98): 1/2 of the shares
      - vi) one corporation acquires others in a share exchange (one company gobbling up the other) – facts tell us the buyer that most approve the sale must approve the fundamental corporation change for the buyer

- vii) dissolution
  - (1) voluntary dissolution
    - (a) formed before 2/22/98 – need 2/3<sup>rd</sup> formed after 2/22/98 – need ½ of shareholders
    - (b) board doesn't have to approve
  - (2) judicial involuntary dissolution – someone is asking for a court order of dissolution
    - (a) attorney general can ask for it
    - (b) directors can ask for it, saying that the corporation doesn't have enough assets
    - (c) simple majority can ask for it
    - (d) 20% or more of the voting shares who aren't in a securities market may petition on either of these grounds
      - (i) management's illegal, oppressive, or fraudulent acts to the complaining shareholders
      - (ii) management's wasting, diverting or looting assets
    - (e) a court may deny dissolution if there is some other way the complaining shareholder can retain a fair return on his investment – the court can order a buyout. Court will consider whether liquidation is necessary and is the only way to get a fair return on their investment
    - (f) **corporation or non-complaining shareholders can avoid by purchasing at fair value on terms approved by the courts**
- viii) winding up
  - (1) gather all assets
  - (2) convert to cash
  - (3) pay creditors
  - (4) distribute the remainder to shareholders after the creditors are paid
    - (a) there may be a dissolution preference which means "pay first" – is it a dividend preference, or is it a dissolution preference
- 11) controlling shareholder consideration
  - a) federal securities never tested
  - b) outside the closed corporation, shareholders don't owe fiduciary duties to each other or in a close corporation: oppression
    - i) a controlling shareholder owes a fiduciary duty to minority shareholders including the shareholder corporation themselves
    - ii) can't use a dominant position at the expense of the corporation or at the expense of the minority shareholders
    - iii) it is usually the some shareholder does have dominate control
  - c) sale of the controlling shareholders premium (extra money which is paid for shares from someone who, by virtue of their share in the company has the ability to control it)– they carry with it the right to control the corporation
    - i) they can keep the premium – no case imposes liability just for this
      - (1) the minority shareholders are not going to share in that premium
    - ii) courts may impose liability in here if there are **unlawful purposes** for the sale of stock
      - (1) controlling shareholder sold to looters without making a reasonable investigation
        - (a) they have to be on notice
        - (b) for example agent approaches a controlling shareholder on behalf of an undisclosed principal
        - (c) if we violate we are liable for all damage to the corporation
      - (2) the controlling shareholder *De facto* sells a corporation assets – if she does, all shareholders should share in the premium
        - (a) there is a looting problem and a *De facto* sale
      - (3) controlling shareholder sells a corporation office (for example sells an interest and then resigns from the board)
        - (a) we are going to disgorge this profit
      - (4) controlling shareholder uses power to oppress or to hurt the closed corporation
        - (a) because the controlling shareholders can't get out of it, there is a breach of fiduciary duty
      - (5) freeze-out mergers: all mergers must have a legitimate corporate purpose

- (a) this is solely a cashing out of minority shareholders unfairly
- (b) if the majority shareholder caused the shareholder to merge with another corporation which they owned (could be a non-voting short-form)
  - (i) if the minority shareholders were purchased for cash – will look to the transaction as a whole or whether they were dealt with fairly
  - (ii) there has to be an adequate, business reason for the merge
- (6) non-disclosure of special fact or special circumstances
  - (a) all directors and officers and probably controlling shareholders owe an affirmative duty to disclose special facts if they were a controlling shareholder
    - (i) since officers and directors have special knowledge of the corporations, they cannot use that knowledge to profit off shareholders ignorance (such as encouraging them to sell shares to directors below what they think the stock will cost in the near future)
  - (b) special facts is defined as facts that a reasonable investor would consider in making a potential decision
    - (i) for example something that a reasonable investor would consider important in making an investment decision
    - (ii) will require a disgorgement of the profit, which is defined as the difference between the sale price and the final price
  - (c) damages: difference between the price paid and the price a reasonable time after disclosure

## Substantive Criminal Law

- 1) Mental states for crimes
  - a) General ones
  - b) Specific intent (knowingly on the MODEL PENAL CODE) crimes with the additional defenses
    - i) Additional defenses is defined as
      - (1) Voluntary intoxication
      - (2) Any mistake of fact reasonable or unreasonable
    - ii) Other mistake of fact
- 2) Transferred intent
  - a) Doesn't merge because there are different victims
- 3) Accomplice liability: must intend that the crime be committed
  - a) Accomplices are liable for the crime itself and all other foreseeable crimes
  - b) Accomplices need to aid, abet, or counsel
    - i) Must have some knowledge of the criminal aims of the principal
  - c) Accomplices need to have the intent to aid or encourage the principal in the commission of the crime charged.
  - d) Consent or failing to consent isn't a crime
  - e) Mere knowledge is not enough – one must believe that they will commit their crime and their actions are in the course of aiding them
    - i) They must act in a way that they wish the criminal venture to succeed
- 4) Inchoate crimes
  - a) Solicitation
  - b) Conspiracy – definitely on bar
  - c) And attempt
- 5) Defenses
  - a) insanity
  - b) Intoxication
  - c) Infancy
    - i) Under 7 – no criminal liability

- ii) Under 14 rebuttable presumption
- iii) In NY: 16 for Criminal purposes one is an infant for counsel purposes
- d) Self-defense
  - i) Killing of fleeing felon is privileged
    - (1) Killing a misdemeanant is not
  - ii) Killing in defense of store is privileged
- e) Mistake of fact
- 6) Crimes
  - a) Homicide
  - b) Defenses to felony murder
  - c) Common law property crimes
    - i) Larceny
    - ii) Embezzlement
    - iii) False pretenses
  - d) Robbery
  - e) Burglary
  - f) Arson
- 7) Jurisdiction: either conduct (or omission) or result gives state jurisdiction
  - a) States do not lose jurisdiction for double jeopardy purposes if defendant has been tried by another state.
    - i) Municipalities count the same as the state
  - b) Federal Government has jurisdiction to try after states have
- 2) merger
  - a) **solicitation and attempt merge into the substantive offense**
    - i) attempt merges into the completed offense, and therefore the complete defense to a charge of attempt is success
    - ii) Conspiracy doesn't merge with the substantive offense
- 3) Elements of crimes
  - a) Requires an act or an omission
    - i) Requires a bodily movement
      - (1) bodily that don't qualify for liability
        - (a) Conduct that is not the product of defendant's volition: for example 1 person pushes a second person into a 3<sup>rd</sup> person is not a movement
        - (b) reflexive or convulsive acts, such as seizures
        - (c) conduct performed while someone is unconscious or asleep
      - (2) negligent bodily movements (such as sleeping when defendant should be awake) are bodily movements)
    - ii) there is generally no duty to rescue: however, if you start to rescue, it can be a crime to not finish rescuing someone
      - (1) duty can arise by statute (for example filing tax returns)
      - (2) by contract (doctor or nurse)
      - (3) by relationship between parties (parents, children, and spouses, or people of close relationship)
      - (4) legal duty arises because of someone voluntarily assuming their duty of care, and then failing to adequately perform it
        - (a) once they start saving someone (even if there is no conduct) they have to stop
        - (b) there does not need to be physical contact for this legal duty to attach
    - ii) legal duty to act where one's conduct created the peril
  - b) transferred intent is defined intending one result, but getting another (for example missing someone who you shoot at)
    - i) never merge any crimes that have different victims (different crime of attempting to kill on person and missing, and then hitting the next person)
      - (1) but note, since specific intent is required for attempt, the attempt at killing the 2<sup>nd</sup> person was not done with specific intent.
    - ii) there is no double jeopardy or merger for transferred intent, it can count as murder and attempted murder

- iii) however, in voluntary manslaughter, the killing of another person is a separate crime
- iv) doesn't mere because there may be different victims
- c) mental state required for a crime
  - i) 4 common law mental states for crimes
    - (1) specific intent: the act of doing something with a *specific act or objective*. Therefore, these will qualify for additional defenses not available for other types of crimes
      - (a) inchoate offenses (all require a specific intent to accomplish some result)
        - (i) solicitation
        - (ii) conspiracy
        - (iii) attempt
      - (c) 1<sup>st</sup> degree murder (*cf.* general intent crime of homicide a.k.a. 2<sup>nd</sup> degree murder)
        - (i) there are additional defenses to 1<sup>st</sup> degree murder since it is a specific intent crime
      - (d) assault is defined as an attempted battery, requires specific intent
      - (e) felonies against property
        - (i) larceny (requires intent to trespassorily carry away the personal property of another for an extended period of time) Joyriding is not larceny
          - 1. larceny merges into robbery
          - 2. a taking by a lower-level employee violates the possession of the employer, because the employee only has possession of it
          - 3. destruction of the property may satisfy the asportation requirement
        - (ii) larceny by trick is defined
          - 1. intending to permanently deprive the victim of property
          - 2. fraudulent induces the victim to deliver possession
          - 3. property is converted to the defendant's own use
            - a. but title is not conveyed
        - (iii) false pretenses (requires intent to defraud) – title is conveyed
        - (iv) embezzlement (requires intent to take property of which one has custody over)
          - 1. a person who steals from a conspiracy can embezzle
        - (v) robbery (requires intent to larceny with force). Note: the force cannot come from an unrelated person
          - 1. larceny merges into robbery
          - 2. first degree robbery: when armed, and with another person
        - (vi) burglary (requires intent to commit a felony at night in someone's house after breaking into it)
          - 1. breaking into a house can be accomplished by simply opening a door, but entering through an open window is considered not to be a breaking, since no force is required
          - 2. there is no breaking when someone would have had access to the house anyway.
          - 3. breaking with intent to borrow is not burglary
          - 4. break with intent to commit something that is not a crime is not a felony – requires intent to commit a felony
        - (vii) forgery (requires intent to deceive someone)
      - (5) malice: defendant recklessly regarded a high risk that the harmful result would occur
        - (a) only two malice crimes: murder and arson
      - (6) general intent:
        - (a) awareness of all (or high likelihood of factors) constituting a crime.
          - (i) most crimes are general intent crimes
          - (ii) someone who deliberately doesn't look in a compartment in a truck is guilty of whatever was in the truck.
          - (iii) Someone who doesn't actually know if the crime isn't guilty of it
        - (b) for example rape and battery are general intent crimes
        - (c) Receiving stolen goods: they stop being hot when the police recover them
      - (7) strict liability is defined as a "no intent" crime
        - (a) to tell the formula for strict liability use the formula for strict liability

- (i) **if the crime is in the administrative, regulatory, or morality area, and there are no adverbs like knowingly, willfully, etc. then it must be a non-intent crime of strict liability**
    - (ii) strict liability is also called a *public-welfare* crime – the higher the punishment the more intent required, the less likely it is to be a strict liability crime
  - (8) any defense that negates intention cannot be a defense to a no intent crime
- b) legal cause
- 8) Accomplice liability is defined as accomplices are liable for the crime itself and all other foreseeable crimes
  - a) They must aid, abet and counsel that crime
    - i) Mere Presence does not make one an accomplice
    - ii) Accomplices are liable for the crime itself and all other foreseeable crimes
  - b) Accomplices must be actively involved in the crime
  - c) New York Distinctions for accomplice liability
    - i) If accomplice in NY didn't have the required mental state, then he is still liable
      - (1) An accomplice can't benefit from the principle's defense that goes to negate mental state
      - (2) For example if the perpetrator was insane, the accomplice is still liable
      - (3) Accomplice isn't absolved, even if the principle is acquitted, immune or not prosecuted
    - ii) **Person may not be convicted solely on the uncorroborated testimony of the accomplice, except in police disciplinary proceedings**
- 9) Inchoate offenses
  - a) Solicitation is defined as asking someone to commit a crime – if there is no request to commit a crime, there is no solicitation
    - i) The crime of solicitation ends when you ask them
    - ii) Merges with solicitation when they agree: the crime becomes a conspiracy it merges, and the only crime left is the crime of conspiracy
    - iii) Solicitation occurs when the defendant advises, commands, counsels, or requests another to commit a crime
  - b) Conspiracy
    - i) People must be pursuing an unlawful objective: breaking into your own house is no a crime
    - ii) Elements of conspiracy are
      - (1) An agreement – requires an intent to agree
        - (a) Agreement doesn't need to be express
        - (b) Various people can be in a conspiracy even though they don't know each other
        - (c) Must be at least 2 guilty minds on the MBE
        - (d) An intent to agree
        - (e) An intent to achieve the unlawful objective
          - (i) Feigned agreement does not constitute agreement for the purposes of conspiracy
      - (2) Overt act
        - (f) Majority (MBE) and NY rule: there must be an agreement and some overt act beyond the agreement itself
          - (i) Any little overt act is enough (for example showing up at site of crime)
        - (g) Minority and common law rule: liability attached with the agreement itself
      - iii) Conspiracy doesn't merge with the substantive offense (can be convicted of conspiracy to rob and robbery)
      - iv) Liability
        - (1) Each conspirator is liable for all of the crimes if those crimes were committed **in furtherance** of the conspiracy, and were foreseeable
        - (2) **And were foreseeable**: For example a multi-state conspiracy would have liability for all acts, so long as they acted in favor of the conspiracy
        - (3) Withdrawal from the conspiracy can never take away liability from conspiracy itself, but it can withdraw them from liability for the other's conspirator's subsequent crimes
      - v) New York
        - (1) Liability limited for conspiracy liability:
          - (a) **In NY a person who only conspires to commit an offense is not liable for the offenses of the other conspirators**

- (2) Requires agreement and an overt act
  - (3) Unilateral theory of conspiracy
    - (a) Can conspire with a police officer
    - (b) If the statute only states that one person is guilty of a crime (for example statutory rape, or accepting a bribe) then only one person is guilty of conspiracy even if they planned it together
  - (4) Can withdraw from conspiracy
    - (a) Must renounce from the conspiracy
    - (b) Must prevent the commission of the crime
    - (c) One is still guilty for crimes that the conspiracy did up to the withdrawal
- c) Attempt is defined as specific intent plus a substantial step **beyond mere preparation** in the direction of the commission of the crime
  - i) This is different than the overt act requirement for conspiracy theory
  - ii) Mere preparation is a lot more (a substantial step) beyond mere preparation to commit the crime
  - iii) After mere preparation, abandonment is not a defense
  - iv) The fact that someone is factually impossible does not absolve one of attempt
  - v) Some jurisdictions provide criminal liability in cases where people have committed all of steps necessary to accomplish something, but they fail because of a **factual impossibility**
- 10) Defenses
  - d) defense: Four different tests
    - i) *M'Naughton* and New York: test for insanity: at the time of his conduct **defendant lacked the ability to know the wrongfulness of his action or understand the nature and quality of his actions**
      - (1) In New York This is a defense to all crimes including strict liability crimes
      - (2) Hallucinations must be judged under what the defendant thought the hallucination to be.
    - ii) Irresistible impulse test for insanity: defendant lacked the capacity for self-control and free choice
    - iii) *Durham* Rule: Defendant's conduct was a product of a mental illness
    - iv) MPC test: **Defendant lacked the ability to conform his conduct to the requirements of law**
  - e) Intoxication
    - i) Voluntary intoxication
      - (1) Addicts and alcoholics are voluntarily intoxicated
      - (2) Voluntary intoxication is a defense to specific intent crimes
      - (3) Voluntary intoxication is not a defense to general intent or strict liability
    - ii) Involuntary intoxication
      - (1) People who are forced to drink, or have something slipped in them are involuntary intoxicated, or don't know what the drink is
      - (2) This is a defense to all crimes including strict liability crimes
  - f) Infancy
    - i) Under 7 – no criminal liability
    - ii) Under 14 – rebuttable presumption of no criminal liability
  - g) Self-defense
    - i) Nondeadly force: A victim may use non-deadly force in self-defense any time that victim reasonably believes that force is about to be used upon them
    - ii) Deadly force
      - (1) By police, police can use deadly force against fleeing felons, but not against felling misdemeanants. Mistakes by police are privileged (so long as reasonable). However, mistakes by civilians are not.
      - (2) By victims
        - (a) Majority rule would allow a victim to use deadly force in self-defense **any time the victim reasonably believes that deadly force is about to be used on them**
        - (b) **Minority and the NY rule:** victims are required to retreat to the wall if it is safe to do so
          - (i) Three exceptions if there is a duty to retreat

1. Don't have to retreat out of home
2. Don't have to retreat from rape or robbery
3. Police officers have no duty to retreat
- (c) Self defense cannot be used against the original aggressor if withdraws and then stops, announce his intent to withdraw, and then the original victim beats him up. There must be a communication
- (3) can't kill mere trespassers
- iii) defense of a dwelling –
  - (1) deadly force may never be used solely to defend your property: no spring guns aimed at doors
  - (2) solely protecting property, doesn't allow for deadly force, but defending family does
- iv) defense of third party
  - (1) defender steps into the shoes of the victim – and takes is evaluated based on whether, given what the victim knew or knows, whether something is reasonable or not
- v) duress: defenses to all crimes except for homicide
- i) Mistake
  - (1) Defense of mistake of fact: how this defense works varies depending upon the mental state that the defendant is charged with. Must be reasonable.
    - (a) Malice or general intent crime: must be reasonable
    - (b) Specific intent: any mistake of fact even if unreasonable
      - (i) For example mistaking very different cars
      - (ii) Can't be guilty of bigamy if one person thought the other was really married
    - (c) Strict liability: never a defense to strict liability<sup>2</sup>
  - (2) Defense of mistake of law
    - (a) Usually no defense
    - (b) If it negates the state of mind (for example purposefully, knowingly) required for the definition of the crime
    - (c) Has to be ignorance of some aspect of the law other than the statute making the offense criminal (for example selling a gun to someone who they know committed a crime, but being unaware that the committed crime counted as a felony)
    - (d) Mistakes as to title may negate specific intent
    - (e) One has a defense if a statute was not reasonably published
- ii) Consent defense: rarely used
- iii) Entrapment: almost never used
  - (1) Predisposition on the part of the defendant to commit the crime negates entrapment
  - (2) Entrapment is an affirmative defense – defendant must raise it and prove it by a preponderance
- iv) Burdens of defenses
  - (1) Defenses: if the defense is a defense, then once the defendant raises it, the prosecution must disprove it beyond a reasonable doubt.
    - (a) Examples
      - (i) Infancy
      - (ii) Self-defense
  - (2) Affirmative Defenses: defendant must raise and prove by a preponderance of the evidence
    - (a) Duress and necessity, and entrapment and insanity

<sup>2</sup> Mental State of the crime	Application of the defense
Specific intent	Reasonable mistakes only
Malice and general intent	Any mistake, reasonable or unreasonable
Strict liability	never



- (i) Necessity: if the choice is between letting one person live and other people die, the law regards the needs of the many and greater than the needs of the one. A one for one swap is not considered to be a defense
  - (ii) There must be
    - 1. 2 course of action
    - 2. one technically violates the law, but it avoids a greater harm
  - (b) Defendant must raise them and prove them by a preponderance
- 11) Common law crimes – and NY distinctions (not on MBE) – no state has the common law now
  - a) Common law crimes (as they existed in England about 1700)
    - i) Assault is defined as (two theories) – they will explain which theory of assault they are referring to
      - (1) Assault as an attempted battery
        - (a) Swing and missing
      - (2) Intentional Threat of bodily harm other than by mere words
    - ii) Battery:
      - (1) unlawful application
      - (2) force to the person of another
      - (3) resulting in either injury or offensive touching
        - (a) can be indirect
    - iii) Homicide (common law murder is 2<sup>nd</sup> degree murder which is a general intent crime)
      - (1) Victim must be human
      - (2) Can't use *additional* defenses to specific intent crimes to murder a.k.a. common law (2<sup>nd</sup> degree murder)
        - (a) Voluntary intoxication
        - (b) Mistake of fact (**reasonable or unreasonable**)
          - (i) Can be a mistake as to what would do bodily harm
        - (c) Could use intoxication or unreasonable mistake to reduce 1<sup>st</sup> degree murder
      - (3) A homicide is murder if you show one of the four general intents
        - (a) Intent to kill
        - (b) Intent to do great bodily harm
        - (c) Highly reckless (abandoned and malignant heart murder)
          - (i) For example Russian Roulette – even if they think that they chamber is empty because it puts people at an unreasonable risk
          - (ii) Must be Positive Malice a.k.a. wanton or willful misconduct
          - (iii) Must be actual death, because there is no intent to kill
      - (d) Felony murder: intent to commit the felony, is sufficient to make the death murder
        - (i) Elements of the felony murder
          - 1. Defendant must be involved in an inherently dangerous felony
            - a. Can be robbery, first/second degree murder
          - 2. Defendant must be guilty of the underlying felony. – they must have the correct mental state.
            - a. If the defendant has a defense to the underlying felony, he has a defense to felony murder
              - i. If someone doesn't have the intent for a specific intent of robbery
              - ii. if the defendant has a defense to the underlying offense, the felony that they are committing must be something other than the killing (one can be an accomplice, for example)
          - b. death must be foreseeable
          - c. deaths caused while fleeing from a felony are felony-murder, but once the defendant reaches a temporary point of safety (for example his or his mother's house) are not in the course of fleeing
        - 3. Deaths of co-felons under the redline: liability for murder cannot be based on upon the death of a co-felon from resistance by the victim or police.
          - a. But resistance by police or by stander can cause liability for death of bystanders
    - (ii) NY defenses to Felony murder (must prove all)

1. Defendant didn't commit or aid in the commission of the homicidal act
2. Defendant wasn't armed with a deadly weapon
3. Defendant didn't reasonably believe that the co-felons were armed with a deadly weapon
4. Defendant didn't reasonably believe that any other participant intended to engage in conduct likely to result in death or serious injury
- (iii) Constitutional limitations to felony murder
  1. One cannot get the death penalty for felony murder, but this does not change innocence or guilt
- iv) Manslaughter
  - (1) Voluntary manslaughter is defined as killing with something with passion (and no time to cool off)
    - (a) Does not apply to anyone not inducing the passion (so if they kill a 3<sup>rd</sup> party it is murder)
    - (b) A subjective standard is employed (for example occupation, situation). However, drugs and voluntary intoxication are not.
  - (2) Involuntary manslaughter
    - (a) Involuntary manslaughter
      - (i) Killings from criminal negligence (for example falling asleep)
      - (ii) Killings from breaching a duty to someone
    - (b) Misdemeanor manslaughter is defined as committing someone while committing a misdemeanor or a non-dangerous felony (unremunerated felony)
- v) 1<sup>st</sup> degree murder for the for the multi-state
  - (1) common law didn't have degrees of murder
  - (2) two ways that the multistate examiners deal with first degree murder
    - (a) they will label it first degree murder
    - (b) they will give a set of statutes which define first degree murder and apply them
- vi) Statutory rape: strict liability
- vii) Crimes against nature (incest, bestiality): not covered
- viii) Common law larceny (stealing)
  - (1) Taking
  - (2) Carrying away (however slight)
  - (3) The personal property of another
  - (4) Without its consent
    - (a) Consent gained by fear or fraud isn't consent
  - (5) With intent to deprive the owner permanently of interest in the property – intent must exist at the time of the pro
  - (6) Taking property in the believe that it is yours, or that you have some right to it, is not common law larceny
- ix) Embezzlement – embezzler must have lawful possession
  - (1) Lawful possession
  - (2) Followed by an illegal conversion
    - (a) For example trustee has lawful possession
    - (b) Embezzler doesn't have to benefit themselves (for example taking from a trust fund for a donation is still embezzlement)
  - (3) a person who steals from a conspiracy can embezzle
- x) False pretenses
  - (1) Defendant persuades the owner of property to convey title via false pretenses. This must be as to a present or past fact
    - (a) False promise to do something in the future cannot ground liability for false pretenses
  - (2) Must have intent to defraud
- xi) False imprisonment: Intentional unlawful confinement
- xii) Kidnapping: false imprisonment + movement
- xiii) Robbery is defined as larceny plus assault
  - (1) Since robbery is larceny plus assault, followed by the other elements

- (a) Threat has to be a present imminent harm – threats of future harm are extortion
  - (b) Can be a threat to someone else (your money or her life)
- (2) Assaultive elements that turn a assaultive elements into a robbery
  - (a) Must take from the person or his presence
    - (i) Presence is broadly drawn (includes all of the property) – and would cover tying a farmer up in his barn and taking stuff from his house
- (3) Small amounts of violence will do for robbery
- (4) Picking a pocket is larceny – but yanking a necklace is robbery
- xiv) Extortion is blackmail
  - (1) Differences between extortion and robbery
    - (a) Don't need to take anything from the person or his presence (unlike Robbery)
  - (2) Threats are of future harm, not imminent harm
- xv) Burglary -- which is an offense against the habitation
  - (1) Requires a breaking
    - (a) Breaking can be actual or constructive
      - (i) Coming through a open door or window it isn't a break (but if he open an interior door it is a breaking)
      - (ii) Constructive breaking: for example a servant given a key who uses the key with friends
      - (iii) Breaking can be by threats or frauds
  - (2) Requires an entering of the habitation
    - (a) Has to be a dwelling house
    - (b) Can't be a barn
  - (3) Must be at night
  - (4) **Must have the intent to commit a felony inside!**
    - (a) The intent to commit the felony inside has to exist at the time of the breaking and entering.
- xvi) Arson is defined as (at common law) the malicious burning of the dwellinghouse of another
  - (1) Elements
    - (a) Malicious (can be wanton or malicious conduct)
      - (i) If there is a strong likelihood that the house will be burned it is arson
    - (b) Burning
      - (i) Doesn't include explosions or smoke-damage
      - (ii) There must be a material wasting of the fiber of the building by fire
        - 1. If it catches the carpet on fire, there has to be a material raising of the building by fire
    - (c) Dwelling house of any other
      - (i) Has to be a dwellinghouse – not a commercial structure
      - (ii) Can't be your own house
    - (d) At common law
      - (i) Must be some damage –
      - (ii) Charring not enough
      - (iii) Peeling is enough
      - (iv) Destruction of things not affixed to the house is not enough
- b) NY aspects
  - i) Statutory arson
    - (1) Damage
      - (a) Fire, water, smoke
    - (2) Structures
      - (a) Any kind
      - (b) Whether you own it or not
  - ii) Robbery in NY (ROB2GAI)
    - (1) 3<sup>rd</sup> degree robbery: forcibly stealing property
      - (a) no physical injury
      - (b) no firearm
    - (2) 2<sup>nd</sup>: 3<sup>rd</sup> degree plus aggravating factors

- (a) aided by another
  - (b) causes physical injury
  - (c) displays a firearm
- (3) 1<sup>st</sup> degree:
  - (a) armed with a deadly weapon
  - (b) cause serious physical injury
- iii) NY burglary statute – three degrees
  - (1) 3<sup>rd</sup> degree
    - (a) breaking or an entering or remaining behind inside any kind of structure (doesn't need to be dwellinghouse)
    - (b) doesn't need to be at night
    - (c) can be any kind of crime (not just felony)
  - (2) 2<sup>nd</sup> degree 3<sup>rd</sup> degree plus one of the following (BUGHOUSE2GI)
    - (a) if it is a dwelling
    - (b) injury to a non-participant
    - (c) armed
  - (3) 1<sup>st</sup> degree burglary
    - (a) must be a dwelling and if they injure a non-participant, or they were armed, it is first degree burglary in NY
    - (b) dwelling – it was an injury to a non-participant, or it makes it second-degree murder
- iv) Kidnapping (both degrees qualify for felony murder)
  - (1) 1<sup>st</sup> degree (both degrees qualify for felony murder)
    - (a) abduction plus any one of the following three
      - (i) holding for ransom
      - (ii) restraint with intent to inflict physical injury
      - (iii) victim dies
  - (2) 2<sup>nd</sup> degree (both degrees qualify for felony murder) this is called *abduction*
    - (a) all other kidnapping
    - (b) still qualifies for felony murder
- v) Rape: slightest penetration completes the crime of rape.
  - (1) Prosecution must prove lack of consent, and if one reasonably believed that the victim consented to sexual intercourse then it is not rape.
- vi) Statutory rape: strict liability
- vii) Crimes against nature: not covered
- viii) Homicide
  - (1) 1<sup>st</sup> degree murder is defined as intentional killing plus special circumstances plus one of the long distinctions
  - (2) 2<sup>nd</sup> degree murder
    - (a) murder without one of the special circumstances
    - (b) also, highly reckless murder is a form of 2<sup>nd</sup> degree murder
    - (c) or felony murder
  - (3) manslaughter in the first degree is defined as
    - (a) intent to do serious bodily injury
    - (b) provoked killing (common law: voluntarily manslaughter)
  - (4) manslaughter in the 2<sup>nd</sup> degree
    - (a) killing from recklessness: drunken driving
  - (5) negligent homicide is defined as killing from criminal negligence
    - (a) doing something that sets someone into action negligently can be a form of criminal negligence
- ix) Burglary
- x) Kidnapping
- xi) Larceny

# Criminal Procedure

## Hot topics

- ❖ Exclusion and limitation and fruit of poisonous tree
- ❖ Search and seizure
- ❖ *Miranda*
- ❖ Pre-trial identification
- ❖ Right to jury trial and guilty pleas
- ❖ Both parties of the 5<sup>th</sup> – double jeopardy and the 5<sup>th</sup> amendment privilege against compelled testimony

## Criminal Procedure

- 1) Exclusionary rule is defined as that remedy whereby someone who has been the victim of an illegal search of coerced confession can have it removed
  - a) in order to qualify for exclusion search in question must violate either the federal constitution or a federal statute
  - b) Limitations on exclusions
    - i) Forum-based exclusions
      - (1) Grand juries are not subject to exclusionary rule
      - (2) exclusion is not available as a remedy in civil proceedings
      - (3) exclusion is not available in parole revocation proceedings
    - ii) good faith defense to exclusion (NY doesn't allow for good faith reliance on a defective search warrant)
      - (1) no exclusion when the police were relying on evidence or a theory of probable cause that was later changed by another opinion
      - (2) no exclusion when the police rely on good faith on a statute or an ordinance later declared unconstitutional
      - (3) good faith reliance on a defective search warrant doesn't count
    - iii) impeachment purposes
      - (1) All illegally seized evidence and confessions inadmissible for failure to comply with the *Miranda* warnings may be admitted to impeach the credibility of the defendant's trial testimony
      - (2) All illegally seized real or physical evidence can be admitted to impeach the credibility of the defendant's trial testimony (for example can show that someone knows what heroine is)
  - c) Fruit of the poisonous doctrine – expands exclusion doctrine
    - i) We will not only exclude all evidence, but everything derived from that illegality
    - ii) Three ways that the government can break the chain between an unlawful police action and an illegally derived evidence
      - (1) **Independent source**
      - (2) **Inevitable discovery** is defined as they would have discovered it anyway
      - (3) **Intervening acts of free will** on the part of the defendant
  - d) New York limitations on exclusions
    - i) NY doesn't allow for good faith reliance on a defective search warrant
- 2) Confrontation issues
  - a) If one suspect confesses, in order to admit the confession the confessing defendant is unable to compel the nonconfessing defendant to testify. This can be cured, if 1) statements are redacted that relate to defendant's involvement are admitted 2) confessing defendant takes the stand or 3) jury is instructed that the purpose of the testimony is not substantive (for example rebuttal charge of coercion)
- 3) Law of arrest and 4<sup>th</sup> amendment
  - a) Arrest warrants are not generally required before arresting someone in a public place

- i) Cf. non emergency arrest of an individual in their own home requires a warrant
- b) Stationhouse detention: Police need probable cause to arrest a person or to compel you to come to the police station either for fingerprinting or for interrogation.
  - i) Probable cause is defined as reasonably trustworthy facts and circumstances sufficient to warrant a reasonably prudent person to believe that the suspect has committed or is committing a crime
  - ii) In NY there is a sliding scale of police authority -- four steps
    - (1) Request for information: can request and request information, except on a "objective credible belief" but an individual's right not to respond and even to run away doesn't given the police probable cause
    - (2) Common law right to inquire
      - (a) Police must have "founded suspicion" that criminal activity is afoot
        - (i) They can ask questions
        - (ii) Detention must be short
        - (iii) If the individual gives explanations, they must be released
    - (3) Stop and frisk: Legal standard is reasonable suspicion
    - (4) Arrest: Arrest requires probable cause to believe that the individual has committed a crime
- 4) Law of search and seizure
  - a) Laws restricting search and seizure apply only to governmental conduct -- doesn't apply to illegal searches by the government
    - i) Publicly paid police
    - ii) Any private individual acting at the direction of the public police
    - iii) Deputized police
    - iv) Security guards are not government conduct unless they are deputized
  - b) Person in the question must have a reasonable expectation of privacy
    - i) Standing to object to the search
      - (1) Automatic standing
        - (a) Owner of the premises searched always has standing
        - (b) Resident of the premises search -- whether or not they live there
        - (c) Overnight guests **do** have standing to object to legality of the search of the place that they are staying
        - (d) Conspirators do not have automatic standing to challenge the seizure of illegally obtained evidence from a co-conspirator
      - (2) Occasional standing
        - (a) If you own the property seized you sometimes have standing
        - (b) If you are legitimately present when the search takes place
          - (i) Passengers in cars, who don't claim that they own the car nor the seized property don't have standing
          - (ii) An individual on the premises of someone else for the illegal purposes doesn't have standing
      - (3) Never standing on its own: people who could be incriminated based on a seizure from something else
    - ii) There is no reasonable expectation of privacy when the item that the government wants to seize is something of a public nature
      - (1) Sound of voice
      - (2) Style of handwriting
      - (3) Paint on outside of car
      - (4) Account records held by a bank
      - (5) Monitoring the location of a car on a public street or driveway
      - (6) Anything that can be seen across the open fields
      - (7) Anything that can be seen from flying over in a public airspace
      - (8) Odors emanating from luggage
      - (9) Garbage on curb is from the public
  - c) Steps to determining the validity of the search
    - i) Did the police have a search warrant?

- (1) Warrant must will issue on a showing of probable cause
  - (a) Informers information as a question of probable cause
    - (i) In NY in order to have a valid based in part on an informer's tip, the affidavit must
      1. set forth sufficient underlying facts and circumstances to allow the magistrate to know how the informer got his information
      2. the affidavit must set forth the credibility and reliability of that of that informer
        - a. past use of informer is an example of credibility
  - (2) Warrant must be precise on its face – it must state with particularity the place to be searched and thing things to be ceased
    - (a) Things that are in plain view cannot be overturned to look for other things
  - (3) Warrant must be issued by a neutral and detached magistrate – has to be neutral from law enforcement
    - (a) State AG doesn't count
    - (b) Magistrate can't go with police
    - (c) Court clerks are neutral officers – for minor issues
  - (4) Warrant cannot be based on statements in violation of *Miranda* rights.
- ii) If the search warrant is no good, or the police never had a warrant at all, can it fit into the six exceptions to the warrant requirement
  - (1) Statues that authorize probationers homes when there is reasonable suspicion s
  - (2) Search incident to a lawful arrest
    - (a) Contemporaneous in time and place with arrest
    - (b) Obscenity charges are another ballpark
      - (i)
    - (c) In the case of cars these must be searches for the same things that they were looking for (no looking in suitcases for illegal aliens)
    - (d) Must be within the wingspan of the person
      - (i) If the arrest someone in the front hall, they can't search the back hall
      - (ii) *New York v. Belton* when a person is validly arrested in a car, their wingspan will include the entire interior of the car, but not the trunk of the car
  - (3) Administrative searches
    - (a) Must be brief
    - (b) Some courts say that an agreement not to board a plane removes power to search without warrant
  - (4) Inventory searches, conducted at the police stations are valid
  - (5) Car exception – just because it has a car doesn't mean it has an automobile exception
    - (a) They need the same probable cause that they would have need to get a warrant
      - (i) If they have probable cause, then they can search the whole car
      - (ii) *US v. Ross*: they can open any package, luggage, or other container that they could reasonable contain the item for which they had probable cause to look
    - (b) The probable cause can arise after the probable cause is stopped, but not after it is searched
    - (c) Note: person's expectations of privacy in personal luggage are greater than when they are in a car
  - (6) Plain view exception: is defined as the police officer must be legitimately present where he or she does the viewing.
    - (a) Being in an apartment without a warrant doesn't mean they are legitimately present, and then sees them within plain view, you have a good plain view seizure
  - (7) Consent
    - (a) Must be voluntary and intelligent
      - (i) Competence of the defendant (infants may be incompetent)
      - (ii) Conduct of the police
    - (b) Settled outer limits:
      - (i) Lying about a warrant and saying "do you mind" – this negates consent
      - (ii) Police don't have to warn that you have a right not to consent

- (c) Authority
  - (i) Where two or more people have an equal right to use a piece of property, any one of them can consent to its warrantless search
  - (ii) Must be authority to consent (just giving someone the keys is not giving them authority)
  - (iii) Consent to search must be voluntary
  - (iv) The police's reliance on the consent is based on a reasonable belief standard
  - (v) The police may not exceed their search into areas into which consent has not been given
- (8) Search pursuant to Stop and frisk -- Standard is "reasonable suspicion"
  - (a) reasonable suspicion is defined as less than probable cause
    - (i) if they think that they might be armed and dangerous they can pat them down
    - (ii) found weapons are always admissible, so long as the stopping was reasonable
  - (b) evidence found in a stop and frisk is reviewed on the basis of how much like a weapon or contraband it would seem like from the outside
- (9) Hot pursuit and evanescent evidence (evidence that might go away) if it might go away if we took the time to get a warrant
  - (a) Scraping under the defendant's fingernails – if they took time to do it without a warrant it might get away
  - (b) This has to be hot pursuit – rule of thumb: anymore than 15 minutes isn't hot pursuit
  - (c) Once the police enter someone's home on a hot pursuit theory, there is no other effective legal limit —there is no geographic wingspan issue
  - (d) If the police are truly in hot pursuit, they can enter anyone's home
- d) Wiretapping and eavesdropping
  - i) All wiretapping and eavesdropping require a warrant
  - ii) Exception: "unreliable ear" is defined as everyone assumes the risk that the person to whom he is speaking will consent to the government monitoring the conversation
- 5) *Miranda* is defined as 1) silence 2) right to attorney and 3) can terminate interrogation at any time
  - a) *Miranda* only kicks in with **Custody and interrogation**
    - i) Examples
      - (1) Police car
      - (2) Own home
      - (3) In jail or another charge
    - ii) Probation interviews and routine traffic stops are not custodial and answers can be admitted
    - iii) There must be 1) custody and 2) interrogation (overhearing conversation with lawyer is not interrogation)
    - iv) There is no requirement for a *Miranda* warning when the suspect is custody and subject to evidence collection or a precharge lineup
  - b) *Miranda* warnings are not required prior to the admissibility of spontaneous statements
    - i) Interrogation is defined as more than just asking questions, but any conduct where the police knew or should have known that they might get a damaging statement
      - (1) Blurting out of information is always voluntary (provided that there was an appropriate arrest)
    - ii) If there is custody – they have to give the *Miranda* warning make a waiver
      - (1) Warning must be voluntary and intelligent
      - (2) There can be no waivers of *Miranda* warnings from silence or shoulder shrugging
      - (3) In NY, after a defendant requests counsel, any further waivers of *Miranda* are void
- 6) Rights to counsel
  - a) **5<sup>th</sup> amendment right to counsel** (as opposed to 6<sup>th</sup>) is defined as once the defendant asserts his right to terminate the interrogation and requests an attorney the reinitiating of interrogation by the police without his attorney present violates the defendant's 5<sup>th</sup> amendment rights to counsel
    - i) the person is saying "I need the help of an attorney with the process of interrogation"
      - (1) in New York, lawyers are analogized to parents for 5<sup>th</sup> amendment purposes (asking for a probation officer is not specific enough)
      - (2) attempts to keep children from their parents may invalidate a child's confession



- ii) the 5<sup>th</sup> amendment right to counsel is not offense specific, and therefore the police may not interrogate the guy about anything without his attorney present
    - (1) if every time you hear the *Miranda* warnings you waive, it doesn't mean that you have an attorney in another matter
  - b) 6<sup>th</sup> amendment: but *cf.* every other time you get a lawyer, you are invoking the 6<sup>th</sup> amendment to counsel is offense
    - i) the lawyer serves only for the case in which he or she is retained or appointed
      - (1) need to show that there is a 6<sup>th</sup> amended right to counsel
    - ii) counsel at trial and (with freedom from conflicts) is included in this right
  - c) NY right to counsel rule is defined as NY affords greater protection to the defendant than does the US Constitution
    - i) Pages 4-5 in distinctions outline discuss this right to counsel rule
    - ii) NY provides for "indelible right to counsel" this right attaches
      - (1) When the defendant is in custody and requests counsel
      - (2) At arraignment
      - (3) Upon the filing an accusatory instrument
      - (4) When there has been any significant judicial activity
    - iii) Waiver: Waiver may be obtained from a criminal defendant who is actually "and known to be represented by an attorney" only in the presence of counsel
- 7) Pretrial identifications since it is so likely that if you are identified at the trial that there would be a conviction
  - a) Two substantive basis to attack a pretrial ID (Denial of right to counsel and Denial of due process)
    - i) Denial of right to counsel
    - ii) Denial of due process
  - b) Post charge line-ups and show ups give rise to a right to counsel
    - i) There is no right to counsel photos
  - c) Some pre-trial ID techniques are so bad, and would produce a misidentification they are against due process
    - i) (for example only white person in a lineup of black people)
    - ii) remedy is exclusion of in-court identifications
      - (1) just because we show for the defense either a denial of the right to counsel, the government can defeat it by showing an independent, adequate source such as "ample opportunity to observe at the time of the crime"
    - iii) where the government can show that the government can show that there has been a counsel or a due process violation
- 8) bail
  - a) bail issues are immediately appealable
  - b) preventive detention is constitutional
- 9) grand juries: most states don't use grand juries
  - a) NY grand juries
    - i) Grand jury in NY consists of 16-23 people.
    - ii) 12 of whom must concur to indict
  - b) witness who has been granted immunity may consult with counsel but not in the grand jury room
    - i) witness who has waived immunity may be accompanied by counsel into the grand jury room
  - c) **grand jury indictment in NY must be based on legally sufficient evidence**
    - i) can't indict based on illegally seized drugs
    - ii) any witness who testifies before the grand jury receives transactional immunity
    - iii) transactional immunity is defined as making the person immune from prosecution from any transaction about from which he testifies
    - iv) transactional immunity is immunity from any transaction about from which he testifies
    - v) if the defendant requests the opportunity to testify before the grand jury, the defendant must be granted, provided that the defendant waives immunity
- 10) prosecutor's duty to disclose evidence in NY – *Rosario*
  - a) NY specifically provides that upon demand, Defendant may obtain for inspection and copying
    - i) His own, or a codefendant's statement to the police

- ii) Taped or bugged conversations intended to be used at trial
- iii) Relevant photos or drawings made by the police
- iv) Reports of physical, mental, or scientific tests
- v) Any other property obtained from the defendant
- vi) Approximate date, time, and place of the offense charged
- vii) Anything that the state or Federal Constitution requires to be disclosed to the defendant prior to trial
- viii) All specific instances of defendant's conduct that prosecutor intends to use at trial to impeach the defendant's credibility
- b) Between the time jury is sworn and the prosecutor's opening statement, the prosecutor must give the defense any prior written or recorded statements of person to be called as witnesses
  - i) Prosecution must give the defendant the criminal records of prosecution witnesses
- c) Failure to produce *Rosario* materials calls for a reversal of the conviction
- 11) Defendant's duties to produce
  - a) Notice of alibi
    - i) Defendant must notify the prosecutor 30 days from the not guilty plea of the intent to raise insanity as a defense
    - ii) Defendant must notify the prosecutor within 20 days after the arraignment, the prosecutor may serve the defendant with demand for the alibi defense, and the defendant must reply within 8 day
  - b) Intent to present the insanity defense
    - i) Before the defendant starts presenting their case, the defense has to make available any relevant prior written or recorded statements
    - ii) Burden of persuasion is on the prosecution
      - (1) Once the defendant properly raises the insanity defence, the burden of persuasion is on the prosecution, even though the burden of production is on the defendant
      - (2) Every element of the crime must be proven by the prosecution. A statute is unconstitutional if the state does not to prove every fact necessary for which the defendant is charged
- 12) Right to jury trial (everywhere)
  - a) Right to jury trial attaches any time the maximum authorized sentence exceeds 6 months
    - i) Criminal contempt: if the sum of the sentences for criminal contempt exceeds 6 months, there is a constitutional right to a jury trial
  - b) Number an unanimity of jurors
    - i) Minimum number is 6
    - ii) If you use 6 they must be unanimous
    - iii) There is no federal constitutional right to a unanimous 12 person jury verdict
      - (1) 10-2 and 9-3 has been approved
  - c) cross-sectional requirement for juries
    - i) you have a right the pool have it reflect a fair cross-section of the community,
    - ii) you have a right to the pool – but not a right to one's own jury
  - d) *Batson* use preemptory challenges – it is unconstitutional for the prosecutor or the defense to exercise preemptory challenges to exclude form the jury prospective jurors on account of their race or gender
  - e) Ineffective assistance of counsel
    - i) Maybe on the NY essays
    - ii) Two standards
      - (1) Deficient performance by counsel
      - (2) But for such deficiency the result of the proceeding would have been different
        - (a) Unless you think that the guy is not guilty, deny him relief
- 13) Guilty pleas and plea bargaining
  - a) Guilty pleas are waivers of the right to jury trial
    - i) Since 1970, the SC has been pursuing two agendas of not guilt pleas
      - (1) SC will not disturb guilty pleas after sentence, that it sees as an intelligent choice of a defendant, on the advise of counsel
        - (a) Four basis for withdrawing a guilty plea after sentence

- (i) Plea was involuntary
      - 1. Some mistake in the plea-taking ceremony
    - (ii) Lack of jurisdiction – can withdraw after sentencing
    - (iii) Ineffective assistance of counsel
    - (iv) Failure of the prosecutor to keep an agreed upon plea bargain
  - (2) Contract theory of plea bargaining:
    - (a) Must be on the record
    - (b) Judge must address the defendant personally – not through lawyer on the record
      - (i) Nature of the charge
      - (ii) Maximum authorized sentence and any mandatory minimum sentences
      - (iii) Must tell them that they have a right to plead not guilty
      - (iv) By pleading guilty will move directly to sentence
    - (c) If there is some mistake, the defendant can withdraw his plea and plead again
- 14) Sentencing:
  - a) As a general rule, the defendant may not be given a harsher sentence on retrial after successful appeal
  - b) Death penalty: Any death penalty statute that doesn't give the defendant a chance to present mitigating facts and circumstances is unconstitutional. There can be no automatic category for imposition of the death penalty. The state may not, by statute, limit the mitigating factors; all relevant mitigating evidence must be admissible or the statute is unconstitutional.
- 15) Double jeopardy
  - a) Attachment
    - i) Jeopardy attaches when the jury is sworn
    - ii) In a judge trial when the first witness is sworn
    - iii) Doesn't generally attach when the proceedings are civil
  - b) Exceptions
    - i) Dismissal by appeals court not on the merits
    - ii) If the jury is unable to agree on a verdict – even though there is no federally protected constitutional right to a jury trial
      - (1) This means that a 9-3 allows for retrial on the same offense
    - iii) Mistrials for manifest necessity
    - iv) Retrial after successful appeal is not double jeopardy
    - v) Breach of an agreed upon plea bargain by the defendant
      - (1) When a defendant breaches a plea bargain agreement (at any time) his plea and sentence can be vacated and the original charges reinstated
        - (a) This happened when someone would testify as second time
  - c) Definition of same offense for double jeopardy purposes
    - i) Two crimes do not constitute the same offense, if each crime requires proof of an additional element, then it is not double jeopardy
  - d) If they put someone in jeopardy for the greater offense bars retrial for the lesser included offense
    - i) Being put in jeopardy for the lesser offense bars retrial for the greater offense, except in the case of battery where the victim later dies
  - e) **NY distinction – all crimes arising from a single criminal transaction must be tried together in NY**
  - f) Separate sovereigns: doesn't bar retrial by a different sovereign (different states or state v. federal government)
    - i) But state and locality are the same sovereign
  - g) Consecutive sentences
    - i) Absent a statute, it is required that sentences for lesser included crimes (of which there are no elements that are not included within the greater crime) be served concurrently
- 16) 5<sup>th</sup> amendment privilege against compelled testimony
  - a) anyone can assert the 5<sup>th</sup> amendment privilege – in any kind of case (criminal, civil, administrative)
    - i) privilege has to be claimed the first time they are asked under oath unless it is waived
    - ii) one has to assert the privilege
  - b) scope of the protection

- i) 5<sup>th</sup> amendment doesn't protect someone from giving hair and urine samples
- ii) state can't make people testify
- iii) can't make people undergo police interrogation
- iv) can't make people take a polygraph
- c) unconstitutional for prosecutor to make a negative comment on the defendant's failure to testify on the defendant's remaining silent or his remaining silent on hearing the *Miranda* warnings
- d) 5<sup>th</sup> amendment privilege can be extinguished in three ways
  - i) grant of immunity
    - (1) "use and derivative use immunity" is defined as we will not use your immunized testimony or anything derived from it to prosecute it, but they can use based on evidence that they can show that they had before that immunity grant
    - (2) **NY distinction – NY grants transactional immunity** – it immunizes the witness from being prosecuted about which he has testified
  - ii) No possibility of incrimination
    - (1) For example statutes of limitations has run on the underlying crime that they are concerned about
  - iii) Waiver – criminal defendant by taking the stand waives his 5<sup>th</sup> amendment privilege as to all legitimate subjects of cross-examination
- 17) Informants can be withheld by the government unless the informant is the accuser

Privileges: there were be a development of a federal common law or privilege

A long break requires Miranda warning, but a short one does not

## Domestic Relations

3

- 1) Status of couples
  - a) Agreements between unmarried couples
    - i) agreement "in return for managing the household X will pay Y"
      - (1) express agreement between unmarried couples is enforceable, provided that the sole consideration is something other than sexual relations (against public policy)
      - (2) NY will not imply an agreement. No quasi-contractual relief
    - ii) Prenuptial agreement: Agreement between parties who are engaged. Contract in contemplation of marriage
      - (1) Can address any issues the couple wishes to address: including division of chores and money
      - (2) Three conditions of validity of prenuptial agreement
        - (a) Freely made (no duress)
        - (b) Has to be in writing. (statute of frauds)
        - (c) Cannot unconscionably limit support

3

- *Bar examiners phone number*
- 800-342-3335
- 518-452-8700
- *need ss# -- need to be of same sex*

- (i) Can't fix the level of support so low that the economically weaker party would become a public charge
  - (3) Against public policy to arrange to get a divorce
  - (4) Contract is conditional on a subsequent marriage – it disappears and it is of no legal force and effect
  - (5) Once the couple does get married, the agreement is binding, even if they subsequently get divorced
- iii) Children born to women: **non-marital children**
  - (1) A child who is conceived before marriage is a marital child
  - (2) Children whose Parents who marry after the birth are marital
  - (3) For purpose of suit, Marital children are presumed to be the children of the mother's husband
  - (4) *Filiation proceeding* : paternity suit
    - (a) Jurisdiction: Brought in family court
    - (b) Time: Have until their 21<sup>st</sup> birthday
    - (c) Standard of proof: clear and convincing
    - (d) Evidence
      - (i) DNA evidence is admissible when offered by either party
        - 1. In NY, if DNA evidence demonstrates a 95% probability, it shifts the burden of proof on to the defendant
      - (ii) Blood evidence is only admissible when offered by defendant to disprove paternity
        - 1. Mother can't offer evidence that they have the same blood type
      - (iii) Mother's testimony that she had sex with the defendant need not be corroborated
      - (iv) The father's evidence of sexual access by other men must be corroborated
    - (5) Result: Same position as marital child as discrimination against non-marital child is suspect
  - iv) Gifts given in contemplation may be recovered back if the marriage doesn't occur
    - (1) *Cf.* Gifts that are not linked to marriage are not recoverable
  - v) Heart balm actions (supposed to soothe broken hearts) abolished 60 years ago, but on bar. Cases are dismissed, and it is a felony to file a complaint file these
    - (1) **Breach of promise** to marry (there was a cause of action against them)
    - (2) **Seduction** of an unmarried female (cause of action belonged to the father)
    - (3) **Alienation of affections** (action brought by married person against a defendant who turned one's spouse against the Plaintiff). Convincing wife to be mean.
    - (4) **Criminal conversation**: civil cause of action for adultery. If one spouse was having adulterous relationships, the innocent spouse can sue the other person.
    - (5) **jactitation of marriage** : boasting of a nonexistent marriage
  - vi) only surviving heart-balm action is that NY continues to recognize a claim for deceit, for enticing someone into cohabitation (Two people living together and they are having sex)

- (1) This involves usually staging a false marriage
- b) Converting from being a single person to marriage
  - i) Marriage
    - (1) Need marital capacity:
    - (2) If you have marital capacity, you must get a license (this is certification of license)
      - (a) NY doesn't require a blood test
      - (b) African Americans have to get blood test for sickle cell anemia (results don't matter)
      - (c) Have to wait 24 hours
      - (d) License good for 60 days.
      - (e) If one doesn't get a marriage or provides false information, it doesn't effect the validity of the marriage
    - (3) Ceremonial marriage (after waiting period) is defined as a solemn declaration before an officiant and a witness
      - (a) Any spiritual leader or clergy or anyone who can administer an oath (judge, mayor, etc.)
      - (b) Must at some point make a commitment or a promise
      - (c) Only need one witness – custom is to have two
    - (4) Contractual marriage: non-presence
      - (a) The two spouses are not in the same place at the same time
      - (b) They are in different places, and each one goes in front of a judge or a witness and executes a document
    - (5) Marriages at sea recognized
  - ii) NY doesn't recognize common law marriage, but a common law marriage from another state will be recognized
- 2) Incidents of marital relationships: Within the couple: reciprocal duty owed to each spouse to economically take care of each other
  - a) Support obligation is defined as fair and reasonable support
  - b) What is fair and reasonable depends on the means of the parties, and their resources, and wealth
  - c) If you are not being supported, and want the help of a court (without divorce) can file a claim for *separate maintenance* : order to pay money to spouse
  - d) Parties retain their separate legal identities (most marital immunities and associations abolished)
- 3) Ending marriages: five different matrimonial actions
  - a) **Declaration of nullity** is defined as the appropriate cause of action for parties that are in a void marriage
    - i) Incest: if you marry a close blood relative, your relationship is void
      - (1) Ancestors, descendants, lineal relatives within one generation (sibling, aunt, niece)
      - (2) Permissible to marry lineal relatives more than one generation away
        - (a) First cousins may get married
        - (b) Step-siblings may marry each other
        - (c) Adoptive siblings may marry each other
    - ii) Bigamous marriage

- (1) This is also a capacity problem, which prevents people from getting married
- (2) If you have previously married someone and you have never terminated that relationship your subsequent marriages are legally void
- (3) The subsequent spouses can get declarations of nullity – the later marriage is void, and one can but doesn't have to get a declaration of nullity
- b) Annulment: annulment is of voidable marriages (so waiver is possible)
  - i) Grounds
    - (1) Parties are too young: question of capacity, and a license shouldn't issue
      - (a) 16-17 requires consent of one parent
      - (b) 14-15 requires consent of a parents and a judge
      - (c) under 14 marriage forbidden
      - (d) an annulment claim based on being underage is discretionary with the court – for example if the court considered someone to be mature, the court has the power to deny the annulment
      - (e) waived if one continues to cohabit after your 18<sup>th</sup> birthday
    - (2) mental incompetence at the time of the marriage
    - (3) five years of **incurable insanity** after the marriage is underway
    - (4) duress: if you get married under threat of physical violence (shotgun marriage), you have grounds for an annulment
    - (5) fraud: if you lie to your fiancé during the engagement about something that goes to a vital aspect of the marriage, your spouse has grounds for an annulment when he or she discovers to the truth (“the essence”) of the marriage
      - (a) misrepresentations that count as fraud: Nazi, strictness of faith, way of raising children ,
      - (b) misrepresentation concerning sex or appropriation (waivable by victim): willingness to have children, paternity of baby, views about sex, ability to have children
      - (c) misrepresentation concerning money, wealth, or social status don't count
    - (6) **lack of physical capacity** is defined as an incurable physical condition that prevents safe sexual intercourse
      - (a) deemed waived if they tried to sleep with each other before marriage
      - (b) condition has to be incurable
      - (c) only focuses on **permanent ability to have vaginal intercourse** – no procreation
  - ii) procedure
    - (1) grounds for annulment must always be corroborated
    - (2) statutes of limitations:
      - (a) 3 years: fraud, concealment, or lying about religion, sex, nazism, etc.  
the statutes of limitations is three year rule
      - (b) physical incapacity: 5 years from the date of the marriage
      - (c) incurable insanity has no statutes of limitations
      - (d) default statutes of limitations is six years
- c) divorce – five grounds (divorce and separation have 5 similar grounds)

- i) cruel and inhuman treatment is defined as in NY as physical <sup>and/or</sup> mental abuse – this is the ground asserted against a husband who is being physically abusive
  - (1) the standard is that the behavior in question must endanger the well-being of the Plaintiff spouse
  - (2) mental cruelty is defined as can be made out by a continuing course of verbal abuse (humiliating and insulting comments, made all the time, especially in the presence of third persons)
    - (a) could be made by repeated demands for unusual sex practices
    - (b) waived if there is if there is cohabitation after cruelty
- ii) abandonment (a.k.a. desertion)
  - (1) have to show the three withouts
    - (a) defendant spouse must abandon the marriage
      - (i) without **justification** (for example if one is being abused, it isn't abandonment)
      - (ii) without **consent**
      - (iii) without an **intent to return**
    - (b) to have a cause of action for divorce, the abandonment must consist for one year
    - (c) to have a cause of action for a separation, any period of abandonment is sufficient
  - (2) constructive abandonment is defined as a psychological walking away from the marriage
    - (a) by refusing to interact with spouse
    - (b) giving the partner the silent treatment
    - (c) by refusing to be sexual intimate (without justification, consent, or intent to resume) but justified if uncomfortable with unconventional sexual intercourse
  - (3) no statutes of limitations because continuous
- iii) adultery: “an act of sex or deviant sex with another person who is not your spouse during marriage”
  - (1) deviant sex is defined as any sex (with any sex) other than intercourse with a person
  - (2) defenses to adultery
    - (a) recrimination: dirty hands
      - (i) the defendant shows that the Plaintiff is guilty of offsetting misconduct
      - (ii) one spouse sues the other for divorce or separation adultery, and if the other shows similar, it is an affirmative defense
    - (b) condonation (waiver): the Plaintiff spouses after learning of the adultery forgives the defendant and resumes cohabitation
    - (c) connivance: defendant demonstrates that he was tricked into committing adultery
    - (d) 5 year statutes of limitations for adultery
  - (3) procedure: while most pleading in matrimonial action has to be verified, the answer doesn't have to be verified



- (4) spouses may only testify to three things
  - (a) to prove the marriage (for example when)
  - (b) the defendant can testify to deny the adultery
  - (c) Plaintiff spouse can testify to disprove a defense
  - (d) Proof of the act of adultery and any affirmative defense must come from someplace else
  - (e) Circumstantial evidence includes evidence of opportunity and disposition
  - (f) 1899 case (good law) holds that there must be corroboration of the testimony of any **prostitute or private detective**
- iv) 3 year consecutive imprisonment
- v) conversion divorce: **NY doesn't have true, no fault divorce** – the way it works is as follows: If you have gotten a legal separation under any of the five separation grounds, and you have a decree or if you have signed a separation agreement with your spouse, and then live apart for one year, you can go to court and **convert a separation into a divorce**
- d) legal separation: five grounds (divorce and separation have 5 similar grounds): an action for a court order authorizing you to live apart from other and adjudicating matters about child support, and money.
  - i) failure to support is a ground for separation only – may seek a legal separation, and as part of the separation order, the court will issue a support order
    - (1) in NY: if one party doesn't want to go along with the idea of divorce, we won't have divorce unless we have fault grounds
  - ii) separation agreement
    - (1) must be in writing
    - (2) freely made
    - (3) can't be unconscionable
    - (4) has to be acknowledged (notarized)
    - (5) has to be filed in court in the county where you are seeking a divorce, before you are seeking divorce complaint
      - (a) don't need to be filed for up to the full year
    - (6) have to not engage in sex for serious purposes (little flings for old time's sake okay)
    - (7) have to not have any intent to get back together
- e) dissolution
  - i) when spouse has disappeared without a trace
  - ii) formal requirement is that your spouse has been missing without any tidings for a period of five years
  - iii) effectively a dissolution procedure is one where you are asking to show that your spouse is dead
  - iv) court won't adjudicate property issues – or child issues, because it will be handled in probate
  - v) requirements – must be plead
    - (1) diligent

- (2) publish a request that the spouse return for three consecutive weeks in an English language newspaper (doesn't matter if the spouse doesn't speak English)
  - (3) have to be a NY resident, and have lived in NY for one year at the time one seeks a dissolution order
- 4) jurisdiction
  - a) subject matter jurisdiction to terminate a marriage
    - i) only requirement is that one spouse must be domiciled in NY (indefinite intention to remain). Can be established in a matter of days
  - b) limits on jurisdiction for divorce and other Plaintiffs must make an additional allegation of residency
    - i) residency allegation is not technically jurisdictional
    - ii) NY courts expect you to –
    - iii) Three ways to do satisfy residency
      - (1) If both parties reside in NY and the grounds occurred in NY (in addition to one of them being a domiciliary there is immediate access to NY courts)
      - (2) If only **one party resides there, then you have a one year residency requirement** provided that you can show one of the following three factors
        - (a) Couple got married in NY
        - (b) Or At some point they lived in NY as spouses,
        - (c) Or the grounds occurred here
    - iv) In order to get NY matrimonial subject matter jurisdiction – in order to get collateral orders, such as alimony you must have personal jurisdiction over the defendant spouse
      - (1) Don't need personal jurisdiction in order to dissolve the marriage
        - (a) Voluntary appearance without objection will confer personal jurisdiction and order
        - (b) Waiver is possible
      - (2) Foreigners can come to NY and there will be jurisdiction
      - (3) Can still use long-arm statute
  - c) Pleadings
    - i) All must be verified except the answer in a case alleging adultery
    - ii) Service of process must be personal service unless you get a court order approving some method (can't do the substitute services)
    - iii) Summary judgement can only be granted in favor of a moving party
  - d) Forum
    - i) State Supreme Court
    - ii) Entitled to jury trial
      - (1) Don't get a jury trial for a separation
      - (2) Don't get a jury trial if you are suing for an annulment if it is grounds of physical incapacity
  - e) Domestic relations are confidential by statute for 100 years
  - f) Financial disclosure is a mandatory party of it
- 5) Money
  - a) Financial disclosure is a mandatory party of it

- b) Maintenance (NY word for alimony)
  - i) Couple can address the subject in a separation if they want to, only in the absence of an agreement will the court determine whether there will be any maintenance at all
    - (1) separation agreements are considered to survive as separate contractual agreements, and survive, unless the decree voids it
    - (2) if the decree is silent, then the agreement survives
    - (3) if the agreement survives, it can only be modified for extreme hardship
    - (4) there are 2.5 automatic occasions for terminations
      - (a) death of either party
      - (b) remarriage of the recipient terminates the entitlement to receive maintenance
      - (c) if the recipient openly lives with another person as if they were married, it also terminates the agreement. active sex life doesn't terminate ability to receive maintenance
  - ii) Maintenance is awarded based on the need of any party who will be a party to the maintenance
  - iii) Need includes the notion that as you make a transition from married life back to being single, you don't have to suffer a drop in the standard of living
  - iv) Takes into account equitable consideration
  - v) Takes into account fault
  - vi) Maintenance is a continuing order as it provides for periodic payments
  - vii) because they are continuing they are subject to modification: can come back to court and ask for a change based on **substantial change in circumstances**
- c) property
  - i) every married couple will accumulate stuff
    - (1) tangible
    - (2) intangible
  - ii) property division
    - (1) can address in separation agreement
    - (2) NY courts will divvy up the property under *Equitable Distribution*
      - (a) In an Equitable Distribution essay, go in two steps
        - (i) Go through every asset and determine whether it is **separate property** or marital property
        - (ii) separate
          - 1. property acquired before marriage
          - 2. property acquired individually by gift or inheritance during the marriage
          - 3. compensation for personal injuries
          - 4. property acquired in exchange for or by increase in value of separate property (less contribution from other spouse)
            - a. passive appreciation will count as contribution because it freed up to do other things
          - 5. Final kind of separate property is anything that is acquired after execution of the divorce commitment

6. Inking the divorce agreement closes the books on the marital property
- (iii) Everything else acquired during the course of the marriage is marital property – it includes all earnings, salaries, bonuses, salaries, bonuses, and wages of any kind (including invested)
  1. Includes stock options
  2. Pension rights
  3. In NY it includes professional degrees and licenses:  
Difference between JD and non JD, discounted to present value
    - a. But if you provide for it in the maintenance in the in a separation agreement, in making a maintenance award, it cannot be counted twice.
  4. Separate property is calculated from the date of filing.  
However, if one discontinues a case without the issuance of a complaint, can capture more property.
- iii) Division
  - (1) Based on rational factors
  - (2) Normally we don't consider fault in making property division. there are some exceptions
  - (3) Can order the property distributed in kind, or the assets be sold in order to equalize
- 6) Profession responsibility
  - a) Documents that the client must be presented with
    - i) Statement of client rights and responsibilities
    - ii) Must give the client a written retainer agreement – fee arrangements can't be oral
    - iii) At the end of the representation must give a closing statement itemizing fees and the like
  - b) DR: shall not begin a sexual relationship with a client
- 7) Children
  - a) If you don't want them, you don't have to have them
    - i) There is a constitutional right to contraceptives
    - ii) Qualified constitutional right to abortion
  - b) If you want them, you can have them, and if you have them, you have to take care of them
  - c) Couple who want to have children, but have children
    - i) Artificial insemination is legal in NY
    - ii) Child is considered to be a marital child if the woman is married, and her husband consents to the procedure
    - iii) Sperm doctrine is not considered to be the father of the child
    - iv) Surrogate parenting
      - (1) NY does not recognize surrogate parenting contracts (considered to be babyselling)
      - (2) NY hasn't adopted the baby statute
  - d) Adoption
    - i) capacity

- (1) Any adult can adopt
- (2) In addition, someone who is not yet an adult, can adopt their spouse's children
- ii) Must seek to create a bona-fide parent-child relationship
- iii) Important to make sure that necessary parties have consented
  - (1) Adoptive child if over age 14
  - (2) And the biological parents of the kid is under 18
  - (3) When can the parent's consent be dispensed with
    - (a) They surrender the child
    - (b) If they abandon the child – don't get six month or more without any contact or support
      - (i) Parent (father) of a non-marital child
    - (c) Neglect or abuse
      - (i) If you are failing to provide necessary care in the form of food, clothing or medical attention, the state can come in and declare you unfair
- iv) Once there are the consents, we will investigate the fitness of the prospective adoptive parents
- v) Once there is adopting everything that is relevant applies to adoptive kids
- vi) NY attempts in making adoptive placements to engage in religion matching
- e) If you have them, you have to take care of them
  - i) Child support
  - ii) Both parents must support their children through age 21
  - iii) Support obligation can be extended past 21 to encompass the time in college, if the court finds that the parents have the financial ability, and the child has academic
  - iv) Actual amount of child support in an intact family isn't the business of the state
  - v) Two cases where there is an adjudication
    - (1) Divorce, etc.
    - (2) Filiation proceedings
    - (3) In arriving at the support the court need not use discretion because there are statutorily specific support guidelines
    - (4) Support orders are subject to modification for change in circumstances
- f) Child custody
  - i) In any situation where you have something other than an intact family, we may need to decide who is going to get custody
  - ii) The termination of custody is made based on the **best interests of the child** – must appear in the answer
    - (1) Influence by the desires of the parties: for example if a parent doesn't want them
    - (2) If the kids say something, that is a factor bearing on the best interests of the child
    - (3) If one parent has a disability and couldn't supervise
    - (4) Behavioral patterns of parents (drugs, alcohol, crime, sex)
    - (5) Is a placement with the mother more likely to sustain connections –

- (6) Is there a history of battery
- iii) There is no presumption that the best interests of the child is served by living with one parent
  - (1) In the event of a custody dispute, there is a pretty strong presumption that the best interests will be served by keeping the child with the marital parent
  - (2) Presumption that the best interests will be served by the best interests of the child
- g) Once we decide, we determine Visitation
  - i) In any close case, we would rather order supervised visitation than deny it entirely
  - ii) Even if you don't pay your child support you do not forfeit your visitation
  - iii) Visitation by parties other than the biological parents
    - (1) Most states have statutes providing that the grandparents can petition – but the SC has decided in *Troxel* that held that biological parents have a substantive due process right to raise children as they see fit
      - (a) They pointed out that a parent's views on third party visitation must be given special weight
  - h) Best interests of the child standard is not merely the rule in child custody – it is the rule involving a child – “the petition will be determined by the best interests of the child”
- 8) Federalism issues and conflict of laws
  - a) Out of state marriages and out of country marriages are Valid in NY unless they violate a strong public policy of the state
  - b) Out of state divorce
    - i) Geography
      - (1) Is it from a sister state – it is valid it can't be collaterally attacked
      - (2) Or from a foreign country
        - (a) Bilateral foreign country divorces under the doctrine of comity
        - (b) *Ex parte* foreign divorces are invalid
    - ii) Status
      - (1) Bilateral presumed valid
      - (2) *Ex parte* out of state is prima facie valid, but we will allow collateral attack if the non-participating spouse can show that the Plaintiff was not domiciled in the forum (the other court didn't have valid jurisdiction)
  - c) Support orders: usually a NY court order demanding that one parent pay child support – interstate remedies
    - i) There are three statutes available to assist in getting support
      - (1) the uniform interstate family act
        - (a) If the deadbeat dad has commanded, the AZ court will say “no” because there is no jurisdiction – IT IS THE LAW OF ALL 50 states
        - (b) Permits mailing to the employer out of state and enforced
        - (c) Custodial parent can mail the out of state court – that court will send out officers to drag him into court, and will make him pay
      - (2) Federal: Full Faith and Credit for Child support orders act
        - (a) The FFCCSOA

- (b) Every state must give full faith and credit to the child support order issued by sister states, even if the enforcing state doesn't assert jurisdiction to modify, if they have full faith and credit, they have to give jurisdiction to enforce it
- (3) Child support recovery act – if you fall more than 1 year or 5k behind in child support, and your kid lives out of state, it is a federal crime
- d) Out of state custody orders: all states required to defer to orders entered by the home state court of the child
  - i) Usually resolved by either the Uniform Child Custody Jurisdiction Act (UCCJA)
  - ii) Supplemented by the UCCJEA

## Evidence

Things not covered	
❖	Burdens of Proof
❖	Presumptions
❖	Real Proof

### Choices of Law

- FRE covers on MPRE
  - NY Evidence on NY section. Difference between the federal rules and NY evidence law is only about 10 or 12 differences, which are important enough to be examined by the examiners.
- 1) Judicial notice: civil – will instruct the jury to accept what as conclusive. Criminal, it may, but it is not required to accept as conclusive judicially noticed facts
  - 2) Objections
    - a) Motions to strike are only proper when there was no ability to ask at an earlier point in time
  - 3) Relevance: purpose for which evidence is being offered
    - a) Logical relevance: other event which makes issues more or less relevant
      - i) situations (similar occurrences) where the evidence concerns some other time, event or person and yet it is admissible
        - (1) To prove complicated issues of **causation**
        - (2) Prior false statements of the witness or Plaintiff (common scheme or fraud)
          - (a) Showing other litigation isn't necessary relevant
          - (b) Showing fraudulent litigation is admissible for credibility purposes
        - (3) Other bodily injury (show damages)
        - (4) Similar accidents caused by the same event or condition

- (a) Lack of accidents is admissible to show a lack of knowledge of the condition
- (b) Can be used to show that someone knew or should have known about the existence of the defect
- (5) Intent and state of mind of the party in prior instances may be admissible to show current intent
  - (a) Can't show that someone did something a few years ago and therefore he committed this crime, but the prosecutor can show that a prior act was related somehow to this act
  - (b) Where the intent or state of mind of the accused is an issue – if it is a specific intent crime – the prosecutor must show the specific intent of the defendant
    - (i) The prosecutor must show absence of accident or mistake on the part of the defendant so intent and state of mind evidence based on prior acts can be raised
  - (c) Circumstantial evidence (for example someone saying something) can be used to show state of mind in relation to contributory negligence
- (6) Specific instances of conduct can be admissible as character evidence when 1) character is an essential element of the case and 2) it is used to impeach the credibility of the opposing party's character witness
- (7) Prices of similar property
- (8) Habit: admissible to show that at the relevant time the party acted in conformity with their habit, and whether they were disposed toward doing something (words "always, never, etc.")
  - (a) Note: this is different than general behavior patterns (for example propensity towards speeding)
  - (b) Child abuse exceptions
    - (i) FRE: **in a civil or criminal case, charging the defendant with sexual assault or child molestation the prior acts of sexual assault or molestation in the sexual assault case may be shown by the prosecution or the Plaintiff**
  - (c) A **specific act** must have **occurred often** enough to be habitual
    - (i) generalized disposition evidence is not admissible to show conduct – must have happened more than a few times
    - (ii) for admission purpose determining what constitutes a habit is at the discretion of the judge
      1. how many times enough –discretionary
      2. on an essay question: 3 times raises the issue
      3. it is up to the judge to decide whether or not to hear it in front of the jury
  - (d) MBE: "defendant in the past has always" or "the party has instinctively done it" or "invariably"
    - (i) Cf. prior act evidence: evidence **that a person acted in a certain way** on a prior occasion is generally not admissible to show that that person acted the same way at the time of the litigated event
  - (e) New York (unclear) New York is more suspicious of habit evidence



- (i) part # 1: evidence of habit in a professional or **business context** is **admissible** (for example practice of warning people)
  - (ii) part #2: generally habit is not admissible when it is offered to show that a party used care in a negligence situation (New York sees that there are too many other parties involved)
  - (iii) part #3: habit will be admitted if it is relevant to show that the Plaintiff is a products liability case either used the product in issue properly. In the area of product use or misuse, he has complete control of the circumstances, and habit in the ordinary negligence context (under the FRE it would be admissible)
- (9) Industrial or business routine
- (10) Industrial or reasonable standard of care
  - (a) Industrial or business routine: the normal business routine of the entity is admissible to infer that at the time of the litigated event this business acted in conformity
  - (b) industrial custom as evidence of the standard of care – the custom of the trade as non-conclusive evidence of the standard of care as it could be that a lot of companies are being negligent
- (11) Can show similar events (similar torts) – for example other accidents involving the same instrumentality are admissible
  - (a) It tends to show notice
  - (b) Admissible to prove that certain things are dangerous or admissible
- b) Legal relevance: probative value outweighed by auxiliary considerations
  - i) The evidence may have some possibility of being relevant
    - (1) Liability insurance: liability insurance is not admissible to prove any kind of fault or the ability to pay, nor would the absence of liability insurance be admissible to prove the contrary
      - (a) To prove **ownership and control** when ownership or control is disputed
      - (b) Where it is relevant to impeach the credibility of a witness by showing interest or **bias** or motive to misrepresent or to exaggerate
        - (i) Must confront witness first with motive for bias, and then can bring in evidence of the bias. However, it cannot violate the collateral evidence rule
        - (ii) A prior consistent statement can be offered to rebut a charge of fabrication or bias. However, the charge has to be made first. However, collateral evidence (apart from convictions) can't be brought in,
        - (iii) Bias may be a way to admit pending criminal actions by a co-felon
      - (c) Subsequent remedial measures are not admissible to **show negligence or culpable conduct**, to encourage the defendant to make things safer
    - (2) Subsequent remedial measures
      - (a) Can be admitted to show ownership and control
      - (b) To rebut or to impeach the defendant which is to show the **feasibility of a precautionary measure** when feasibility is disputed
      - (c) Show destruction of evidence

- (d) Strict liability cases: some jurisdictions take the position that if it is a strict liability case negligence isn't an issue and therefore a subsequent remedial measure could be admitted
  - (i) The federal rule now says that subsequent remedial measures are not admissible to show negligence, culpable conduct, a defect or a product's design, or a need for a warning or an instruction
  - (ii) Federal rule, subsequent remedial measures are not admissible to show negligence, culpability or any kinds of strict liability
  - (iii) New York: in strict liability cases, admission of subsequent remedial measures depend on the kind of strict liability cases
    - 1. Manufacturing: subsequent remedial measures are admissible to show defective produce when made
    - 2. Design defect or failure to warn: subsequent remedial measures only admissible to rebut claim that precautions were not feasible
- (3) Subsequent remedial measures by a nonparty: Can show a relevant and
- (4) subsequent remedial measure that was made by a nonparty, which is admissible if it is logically relevant to the case
- (5) Settlement: Law favors settlements
  - (a) Settlements are not admissible to show any kind of fault, liability, or damage
    - (i) Subsequent bad acts may be admissible to show consciousness of guilt
  - (b) Applies not only to the actual settlement, but to an offer to settle a claim which is disputed. However, there must be a real issue in dispute and **one party must have a claim against the other.**
    - (i) Offers, not in the course of negotiations to fully settle a claim are admissible
      - 1. There must be a disputed claim
    - (ii) The actual settlement not admissible
    - (iii) To settle not admissible
    - (iv) Offer to plead guilty (note: can be waived)
    - (v) Withdrawn pleas of guilty
    - (vi) Plea of *nolo contendere* not admissible
  - (c) Cf. Admission of fact or liability made by a party as part of a settlement discussion is not admissible either:
  - (d) If things are not said within the context of negotiations then they can be admissions
    - (i) Must be some disputed notion – liability or amount
- (6) Different rule for offers to pay medical expenses: generally not admissible
  - (a) Want to encourage humanitarianism – however will only suppress the offer
    - (i) it isn't admissible because the law says that it isn't really relevant
- (7) Use of character as substantive evidence to prove a material element
  - (a) For what purpose do you want to prove character evidence (3 ways)

- (i) If there is a **specific act of misconduct**
- (ii) Where there **character** of a party itself is one of the **material** evidence in the case (direct)
  - 1. All forms of evidence are admissible – reputation, opinion, and specific instances of conduct
  - 2. However, opinion evidence must be relevant (for example no platitudinal evidence about the person)
- (iii) Character as **circumstantial evidence to infer** how the party probably acted: character that would **impeach** the character of the witness
- (b) What method do you want to use to prove character evidence
  - (i) Concerns what technique it is to use character
  - (ii) Proof of character is proven in 3 ways
    - 1. Specific acts of conduct - By the conduct of a person you can infer something
      - a. Note: assault charges are not probative of truthfulness
    - 2. Opinion
    - 3. Reputation
      - a. Note: this is different than general behavior patterns (for example propensity towards speeding)
  - (iii) Traditional common law way to show character by reputation evidence
- (c) What kind of a case is it – civil or criminal – the rules differ
  - (i) Civil: character evidence isn't admissible except when character is at issue
  - (ii) Criminal: accused can open the door
    - 1. No bad character evidence at the initiative of the prosecution in any form until the defense opens the door by showing good character
    - 2. In criminal cases there is an exception.
      - a. The accused can take the initiative to show good character or a lack of propensity
      - b. He can only be attacked on truthfulness until character is brought up.
    - 3. If someone wants to call a witness to testify to good character (for example in assault case, a witness can be called for peacefulness)
      - a. Can't use specific acts of conduct
      - b. NY: reputation only! When it comes to character.
      - c. FRE: reputation or opinion
        - i. Note: this is different than general behavior patterns (for example propensity towards speeding)
    - 4. If the defense opens the door by having character evidence come in, the prosecution can counter with other evidence
    - 5. Responses by the prosecutor

- a. FRE: Can ask about reliability of reputation such as “did you know the accused was arrested for X?” – even though this is hearsay and it violates presumption of innocence. However bring in collateral evidence to rebut a lack of knowledge.
    - i. Note: this is different than general behavior patterns (for example propensity towards speeding)
  - b. In general, the “have you heard” is acceptable to cross-examine a witness for his knowledge of defendant’s reputation
  - c. The prosecutor can call his or her bad opinion witness, and in federal court the witness
  - d. In NY: witness could only testify as to reputation, as to what he had heard. The prosecutor can only ask about specific acts in the form of ‘have you heard’ -- in NY you can’t ask ‘do you know’ – can’t bring in extrinsic evidence of bad character
  - e. In New York, **the prosecutor can show any prior convictions of the accused, and which convictions involve the trait that are substantively in issue**
- (iii) Victim character – Defendant can show his own good character or the victim’s bad character (to support a defense of self-defense)
- 1. In NY: character of victim can only go to violence, not to the idea that maybe the victim “deserved to be killed”
  - 2. However, an attack on the victim’s character doesn’t leave the door open to an attack on the defendant’s character
  - 3. Can put in previous habits to show knowledge of the victim’s character by the defendant (for example habit of hitting people for no reason that the defendant knew about)
- (iv) Rape shield: defendant can’t attack the character of the victim
- 1. Criminal: seaman or other physical injury resulted from someone else
  - 2. Civil: if the sexual disposition is placed in controversy by the victim, it can be rebutted
- (8) Independent relevance
- (a) When identity is an issue, and someone claims that identity isn’t an issue prior acts can be raised
    - (i) Obviously anything that can connect the defendant to the crime charged might be an act of misconduct. – for example that someone burglarized a house, and might have something in possession
  - (b) Facts that connect crimes together
    - (i) *modus operandi* (signature crime)
      - 1. When the defendant is distinctive and unusual shows that this particular defendant did it before in the same distinctive and unusual way

2. Common plan and scheme
- (ii) Mnemonic device MIMIC (civil and criminal) – and subject to the trial judge finding it to be too prejudicial
  1. **M**otive
  2. **I**ntent
  3. **M**istake, absence of
  4. **I**ntity
  5. **C**ommon plan or scheme
- (iii) Trial judge can still exclude as being too prejudicial
- ii) Discretionary (6 issues) FRE 403
  - (1) Unfair prejudice
  - (2) Misleading the jury
  - (3) Cumulative evidence
  - (4) Waste of time
  - (5) Undue delay
  - (6) {?}
- iii) Unfair surprise is not in this list (not in FRE)
- 4) Writings. sufficient evidence must be presented so that a rational jury could find that a document is genuine dispute will come into convince because a rational jury justify a jury finding is all that is admissible . It is necessary to establish authenticity **in addition to relevance**
  - a) Judge decides if admissible. It is in judge's discretion as to whether or not it should be in the presence of the jury.
  - b) To show that a non-self-authenticating writing is authentic, one must have a testimonial foundation about the genuineness of the writing
    - i) Acceptable ways of authenticating a document
      - (1) Admission by signee
      - (2) Eyewitness of signing
      - (3) Lay witness who knew the handwriting makes a comparison
        - (a) it is up to the judge to decide whether or not to hear it in front of the jury
      - (4) lay witnesses cannot compare with another letter written and presented to them at trial
      - (5) Expert witness comparison with a "genuine specimen"
      - (6) Jury comparison; Jury is entitled to see the disputed signature, and they can make the comparison itself with a genuine specimen signature which is in evidence
    - ii) unacceptable to prove signature: lay witness can't request to look at the genuine specimen
  - c) self-authentication methods
    - i) ancient documents
      - (1) must be old
        - (a) 20 years on MBE
        - (b) 30 years in NY
      - (2) Has to be regular on its face – no erasures
      - (3) Found in a place where an ancient document would be found

- ii) **Solicited reply doctrine:** Where the disputed document comes in response to a prior communication. (for example unlikely that someone might intercept a prior offer and change the name)
  - iii) certified copies of a public or business record – no foundation needed
  - iv) official publications, books, papers, etc. purporting to be from a public authority
  - v) newspapers or periodicals are self-authenticating (doesn't come in to prove the truth of its content)
  - vi) trade inscriptions or labels
  - vii) acknowledged documents: where someone signs not just once, but someone later attaches a certificate of acknowledgement (later notarization)
  - viii) the uniform commercial code says that signatures on certain commercial documents are *prima facie* authentic
- 5) photographs
- a) manned camera: A proper foundation for a photo requires only that a witness, look at the photograph and state that it is a fair and accurate representation.
    - i) Don't need photographer
  - b) Unmanned camera: have to show how the camera and the film was handled
- 6) Chain of custody
- a) Chain of custody evidence is only required when original evidence from crime being offered
  - b) Only required when evidence is of a type likely to be confused
- 7) best evidence rule requires that the original (or duplicate) be used as evidence in court **to prove the contents of the writing**. Applies to writings films, photographs, and x-rays
- a) **only matters when the contents of the writing is at issue** (not when it is stipulated to, or it is a question of who has possession of it at the time)
  - b) the party seeking to admit must either **produce the original** or **account for its absence** before submitting a copy.
    - i) steps
      - (1) has the writing been authenticated
      - (2) if the testimony is about it – is it the best evidence
      - (3) is it hearsay
        - (a) exceptions to hearsay
          - (i) admissions if a party
            - 1. do not have to be true
            - 2. do not have to be to anyone else (for example president saying “darn, negligent again”
          - (ii) with reference specially to writings is recorded recollections.
        - (b) Hearsay statement can be impeached in the same way that nonhearsay statements can be
  - ii) In the case of conflicting originals and duplicates, it is the jury's role to determine what weight to give to the evidence, and whether to believe witnesses and what inferences to derive from the evidence that they do believe.

- (1) However, if there is a question about the authenticity of the original, and ONLY the duplicate is offered for admission, the duplicate would not be admitted.
- iii) Best evidence rule require the production of, or the accounting of the original
  - (1) Note: testimony of nonwritten transactions don't require production of an original
  - (2) Faxes, carbons, Xeroxes are considered to be originals (or duplicates)
    - (a) Duplicate is defined as any technique of making copies that avoid casual error
    - (b) All copies are duplicates except one are duplicates, except for hand-copied letter
    - (c) Duplicates are accepted like original unless
      - (i) Genuine question is raised about the authenticity of the original
      - (ii) Unless it would be unfair – for example when the contract is taken out of context
  - (3) NY: if you have photocopies, if made, kept, or recorded in the ordinary course of business
- c) when it applies
  - i) when there is a writing that creates a legal relationship which is in issue in the case
  - ii) where the witness lacks personal knowledge:
  - iii) where there witness's sole knowledge comes from the writing
- d) when rules does not
  - i) By its existence: Where the fact to be proven has an existence independent of the writing
  - ii) note: relevance only depend on why it is being offered – so it might not matter that people authenticate the signature
    - (1) The best evidence rule only applies when you are seeking to prove the content of the writing
    - (2) whether or not the content is true doesn't matter
  - iii) Collateral documents exception – best evidence rule doesn't apply to writings of minor importance to the controversy
  - iv) Public record modification. Public records are allowed if there is a certified copy of the public record.
  - v) Voluminous document modification – when the original documents are so big, that they can't be produced, they can be proven by a chart a calculation
    - (1) If the voluminous originals are pure hearsay – a chart of them can't be admitted
    - (2) The voluminous originals have to be made admissible
- 8) Witnesses (testimonial evidence)
  - a) Competency of the witness – is this person qualified to be on the stand at all
    - i) The witness must have observed something
      - (1) Witness must have communicable personal knowledge
      - (2) people can refresh their recollections on their own
    - ii) The witness must remember at least some of what was observed

- iii) Must be able to relate and communicate at least some of what was observed and remembered
  - (1) Witness must demonstrate and manifest some appreciation for the obligation to tell the truth (oath)
- iv) There is no automatic disqualification for a witness because of their age
- v) No automatic disqualification for incompetent people
- vi) Age
  - (1) FRE: no limits
  - (2) NY: there is no rule where a child witness is automatically disqualified
    - (a) In a civil case: a child who is not sworn (or doesn't understand the meaning of the oath) cannot testify in a civil case
    - (b) In a criminal case: a child under 12 or any person who has a mental defect and therefore does not understand the meaning of the oath can still testify without being sworn or there was sufficient perception to justify reception of the evidence)
      - (i) unsworn testimony cannot be the basis of conviction
      - (ii) A child under 12, or anyone who has a mental defect can testify without being sworn if that child under 12 or that person with a mental defect has sufficient intelligence to justify reception of the evidence
- vii) No automatic disqualification for conviction of crime
- viii) Interest: obsolete Common law assumption that anyone interested in a controversy interested in a controversy would lie
  - (1) Dead-man statutes – remnant of the interest disqualification
    - (a) There is no FRE dead-man's statute, on the multistate examination, they like to raise the dead-man's statute. However, in a **diversity case**, where state substantive law apply, the FRE says that that state's laws regarding competency of witnesses applies, it is a state claim – the state law of contract which applies
    - (b) New York: An interested survivor cannot testify for his or her interest against the decedent or the decedent's representatives about communications or transactions with the decedent in a civil case unless there is a waiver
      - (i) Witness must **really be interested**
        - 1. Must have a direct stake in the outcome of the litigation
      - (ii) **Witness must be testifying for** his or her interest because in this case, we wouldn't worry about perjury
      - (iii) Must be testifying against the **decedent or a representative**
      - (iv) Must be really testifying against the decedent.
        - 1. Even though this statute is a rule regarding the competency of the witness – because the deadman's statute doesn't bar the survivor from testifying to everything
        - 2. Transactions or communications with the decedent: this includes every method that they could derive impressions about the decedent (can testify to non-communicative facts, though)



3. they can't testify about communications or transactions with the decedent, you can forget the dead-man's statute
- (v) dead-man's statute is **civil only** not criminal
- (vi) Even if you have all the other requirements, there can be a waiver of the dead-man's statute
  - a. The most common waiver is when the decedent's testimony gets before the court
- (vii) NY exception where the deadman's statute doesn't apply
  1. The interested survivor may testify about the facts of negligence or contributory negligence in an accident arising out of the operation of an automobile or a boat
  2. The surviving Plaintiff can only testify the accident, not what happened after it
- (viii) Note, on MBE, there is no reason to apply the dead-man's statute, because there is no FRE dead-man's statute, where the FRE are supposed to govern
- b) Form for the examination of witnesses is largely a matter of discretion
  - i) Witness, and not the lawyer is testifying. Must be interrogative and not leading. Not leading is defined as a questions which suggests the answer to the witness who is likely to use the suggestion
    - (1) Four situations where leading questions are permitted
      - (a) **Cross-examination**
      - (b) Even on direct examination, you may lead as to **preliminary non-crucial matter**
      - (c) May also lead when the witness is having difficulty (old, feeble, immature, dumb, etc.)
      - (d) May always lead when examining the adverse party or someone under control of the adverse party
    - ii) Misleading and compound question – it is the kind of question which assumes as true something which is still in dispute, where you are demanding yes-no question (for example stopped beating spouse?)
      - (1) On cross-examination where someone shows a prior inconsistent statement
      - (2) “were you lying then or lying now” is not permissible
    - iii) when can a witness use a writing in aid of oral testimony
      - (1) witnesses are not supposed to read in court, because a witness in court reading a statement is hearsay
      - (2) there are two situations where the witness may use a writing in aid of oral testimony
        - (a) refreshing recollection – can only be used when the witness says “I don't recall”
          - (i) might be able to lead
          - (ii) can use non-evidence a jog to the witness
        - (iii) in federal court anything that you use to refresh the recollection of the witness must be shown (not take), so that they can use it in

cross-examination of the witness, and if opposing counsel wants to put into evidence they can

(iv) people can refresh their recollections on their own

(b) recorded recollection – where the witness doesn't remember and the witness can't be made to remember

(i) the writing itself is going to come into evidence, and this means that we are going to have to lay a foundation – including that this writing is reliable.

(ii) Recorded recollection requires a five part foundation -- may be read to the jury, but not offered into evidence

1. At one **time the witness had personal knowledge**

2. **Writing was made by the witness** or at least under the supervision of the witness, or if it was made by someone else at least that it was adopted by the witness

3. Writing must have been **timely made** -- when the matter was fresh in their member

4. Must establish the **reliability of the writing**. “were you careful”

5. witness must be unable to **remember all or** part of the details of the transaction

(iii) the rule says that gets read to the jury – they don't get to handle it like other evidence

(iv) this is hearsay because recorded recollection is an exception

c) opinion testimony

i) lay witness: is admissible if the observed something that is now being described

(1) opinion must be helpful to the trial of fact

(a) legal opinions are not helpful to the trier of fact

ii) expert witness is a more powerful witness – not necessarily based on perception – can give opinions on matters that would allow a layperson to do – four requirements

(1) questions of fact that can be proved objectively (for example tolling of statutes of limitations) do not require an expert

(2) subject matter must be appropriate

(a) for example helpfulness must be on a subject matter that is of assistance to the trier of fact – two requirements

(i) **methodology** underlying the opinion must be reliable

(ii) opinion must be **relevant**, and it must fit the facts

1. have to convince the judge that it counts by a preponderance

(iii) NY difference: if it is a scientific opinion expertise that you want to get in, then you must show that the methodology has achieved general acceptance in the appropriate scientific community

(b) must be qualified to give expert testimony

(i) on voir dire the witness's credibility can be inquired into in the same way that any other witness's credibility would be

(ii) need not be qualified, but just based on expertise

- (iii) reasonable certainty or probability regarding the opinion
- (iv) opinion must be supported by a proper factual basis
  - 1. opinion must be supported by a proper factual basis, but not necessary personal knowledge
  - 2. three possibilities
    - a. facts within the personal knowledge of the expert may be an appropriate basis for the opinion
    - b. facts not within personal knowledge but fact that are in evidence in the case, and which are supplied to the expert in court, usually within the **hypothetical question**
    - c. can give hypothetical facts -- **note: the hypothetical facts have to already be in evidence**
    - d. FRE and NY – may base an opinion on facts which are not within person knowledge in the case, **experts in that field would reasonably rely** upon in making out of court professional decisions – for example based on the radiologists report
- (c) If the expert relies on inadmissible evidence, that evidence, even if used properly by the expert is not admissible
  - (i) If he uses completely experimental methods, than an opinion can't be unsubstantiated
- (d) Treatise (problem is dealing with hearsay problem)
  - (i) NY rule: have to call the author of the learned treatise – unless one is using it to impeach since one trying to show that the documents are not all the same way
    - 1. Have to establish that something really is a learned text.
      - a. If someone mentions something in his or her direct examination, than it is automatically a learned text.
      - b. On cross-examination, one can elicit an admission that a treatise is an admission that it is admitted
      - c. One can call their own expert witness in rebuttal, and one's own expert witness can testify that the text is reliable
    - 2. Judge can take judicial notice of whether something is a learned text
  - (ii) MBE/FRE – more liberal -- can use the learned in support of one's own expert witness. Content will come in for its truth. Under the FRE, the learned text is an exception to the rule against hearsay.
    - 1. There must be an expert on the stand – this information must be filtered though an expert witness
    - 2. Reliability of the treatise can be established by either the direct or cross-examination testimony
  - (iii) Like recorded recollection, that text doesn't actually go to the treaty – the content comes in solely by being read to the jury
- d) Cross-examination – bridge to credibility and impeachment
  - i) Judge has discretion to limit duration of cross-examination until a meaningful opportunity has been provided

- ii) Parties have an absolute right to cross-examine any witness – the extent of cross-examination may be for the trial judge
  - (1) Can only cross examine about the scope of the direct
    - (a) issues that were raised directly or impliedly on direct
    - (b) (for example agency, liability, etc.)
  - (2) collateral matters doctrine –law everywhere
    - (a) a witness on cross examination cannot be contradicted by extrinsic evidence as to a collateral matter
  - (3) can always ask witness about his character for truthfulness
  - (4) impeachment by contradiction of a witness
    - (a) one can't bolster the credibility of the witness by trying to show a prior consistent statement (usually because it is hearsay)
      - (i) *cf.* one kind of statement is admissible for its truth because it is excluded from hearsay – a prior statement of identification made by a witness where However, the party must be subject to cross-examination
      - (ii) a witness can testify to their own prior consistent statement of identification under the FRE and NY
      - (iii) A prior consistent statement can be offered to rebut a charge of fabrication or bias. However, the charge has to be made first. However, collateral evidence (apart from convictions) can't be brought in,
      - (iv) third party testimony to prior consistent statement of ID. **FRE: yes: NY: NO**
        - 1. FRE: any prior statement made by the witness it can be admitted.
      - (v) NY rule “normally a 3<sup>rd</sup> party can't testify to the prior statement of ID, it has to be the victim witness himself, except if the victim witness on the stand can not recollect” but if the witness is unable to state on the basis of present recollection whether or not the defendant is the person, the Police officer can testify to the prior statement of ID
        - 1. NY when the witness on the stand can't make the identification because of present recollection, it isn't good enough to allow the 3<sup>rd</sup> party to testify under NY laws
    - (b) If someone isn't available as a witness, a 3<sup>rd</sup> party can it is not admissible because it is pure hearsay
    - (c) Impeachment of one's own witnesses
      - (i) FRE: may freely impeach one's own witness
      - (ii) In NY if it is your own witness, it says that you may impeach your own witness only with a prior inconsistent statement which is either in writing **and signed** or which was given under oath
    - (d) five impeachment techniques
      - (i) use of the **prior inconsistent statement**
        - 1. may be used to impeach the credibility of the witness.
        - 2. inconsistent statement comes in only to impeach

3. the way in which we get around the hearsay rule, we get around it to show that this witness, at one time in the past said something different
    - a. the prior inconsistent statement is cannot be used to help a party
    - b. it is not to be used to help a party meet its burden
    - c. the prior inconsistent statement only comes in to destroy
  4. exception: if you have a prior inconsistent statement which was given under oath, as part of a formal, hearing, trial, proceeding or deposition, than that kind of inconsistent statement comes in not only to impeach, but for its truth (hearsay exclusion)
    - a. FRE: prior inconsistent grand jury statements of a witness are deemed to have been given under oath or as part of a formal proceeding. Can be used as substance or to impeach!
    - b. NY law: prior inconsistent statement a grand jury doesn't come in.
  5. Target witness given an opportunity to admit or deny
    - a. NY requires a foundation and opportunity to admit or deny the inconsistent statement.
    - b. FRE: is not quite as clear as the NY rule, the target witness must have an opportunity to the making of the statement, but that opportunity doesn't have to come first
      - i. so under the federal rule extrinsic evidence can be used , even if you never asked the target witness about it
      - ii. Only problem is when the FRE isn't asked about it, then you retort to target evidence, and then the target witness is no longer available
- (ii) showing of bias, interest, or motive to misrepresent or to exaggerate
- (iii) direct character attacks: prior conviction of crime
1. can be proved by admission or record of conviction – not arrest or indictment
  2. can always impeach based on any crime involving dishonesty
  3. FRE:
    - a. Criminal: FRE allows impeachment of witnesses in civil cases with felony convictions at the court's discretion
    - b. Not misdemeanor convictions
  4. NY: any crime is usable to impeach the credibility of a witness, but the judge has discretion. If the accused is going to take the stand, he is entitled to know how his prior convictions will be used. He also gets to know how the judge's conviction will come in
  5. A witness other than the accused can have any felony admitted against them

6. Can't be over 10 years old
7. Pending appeal doesn't affect admissible
8. Specific acts of deceit or lying may be inquired into on cross-examination of the target witness (subject to collateral evidence rule)
  - a. Have to ask "did you do it" or "were you indicted for it"
    - i. Must have a reasonable basis for asking the question the question must be asked in good faith with a reasonable basis for believing the act was done by the witness
  - b. Subject to the discretionary control of the trial judge, one can ask (in good faith) whether or not someone has done something
  - c. In NY the rule is that the bad-act impeachment includes any immoral, vicious, or criminal act which may affect the character of the witness, and show the witness to be unworthy of belief may be inquired into in cross examination of the witness

(iv) bad reputation or opinion for truth and veracity

1. one has to be able to use extrinsic evidence (for example use community mouth): "I know the target witness's reputation for truth and veracity and it is terrible" – and they can give opinion about whether or not they can be believed
2. NY: opinion must be based on reputation
  - a. In NY, the witness must testify to reputation, and then the witness is asked, whether, based on that reputation whether there is an opinion that the target witness can be believed
  - b. Can testify under the FRE as to reputation – any opinion can be based on personal knowledge, either in the FRE or NY
    - i. It is not permissible to ask about specific times of lying (specific acts of deceit or lying can't be proved by extrinsic evidence)
3. Rehabilitation
  - a. Can't bolster the credibility of your witness unless and until there has been an impeachment attack
  - b. Can't really rehabilitate an inconsistent statement charge with a showing of an inconsistent statement
  - c. One could bolster someone who has been accused of a recent fabrication by showing a prior consistent statement
4. A prior consistent statement is admissible to rebut a charge of **recent fabrication or improper influence or motive** (these are excluded from the definition of hearsay)

(e) Sensory deficiencies

- 9) Hearsay: *an out of court statement which if offered for the purpose of establishing the truth of the matter contained in the statement*

- a) Three categories of statements that can be admitted into evidence by a 3<sup>rd</sup> party for their “truth” – however, it doesn’t matter whether or not the declarant believed them. Their operative significance is what matters
- i) Verbal acts or **legally operative facts**- this is where the substantive law of the case breaths legal significance into the case
    - (1) Untrue statements made to show misrepresentation are always admissible (they are legally operative misrepresentation) -- also for effect on listener
    - (2) Contractual matters (for example “I accept your offer” – it doesn’t really matter whether or not it is subjectively true, since the substantive law will interpret what he said as accepting the offer)
      - (a) Other examples of operative statements: defamation, conspiracy, bribers, cancellation, misrepresentation, waiver
  - ii) An out of court statement which is offered not for its truth, but for the purpose of showing the **effect on the third party**
    - (1) What a police officers knows and acts on is an effect upon him
    - (2) Being on notice is an effect – so words that put someone on notice are considered to be an effect
    - (3) Businesses of personal reasoning (for example course evaluations)
    - (4) Business meetings – effect based on speech
  - iii) Exclusion from the definition of hearsay It is offered to show what is **going on in the mind of the declarant** (for example insanity)
    - (1) Prior inconsistent statements (one that was given **under oath** as part of a formal trial or deposition) is admissible only to impeach
    - (2) Prior consistent statement which is offered to rebut a charge of fabrication or improper motive – comes in for truth
    - (3) A prior statement of identification that was made by a witness. Do not have to be made at formal proceedings
      - (a) However, the party must be subject to cross-examination
- b) Exceptions to the rule against hearsay based on the way that a record or a document is preserved
- i) recording
  - ii) Learned treatise
  - iii) **Admissions** by a party opponent is non hearsay because it amounts to a state of mind of acknowledgement of what they have done in the past
    - (1) These can be vicarious admissions as well
    - (2) Declaration of party offered against the party that is inconsistent with the party’s present position at the time of the trial. This is considered to be truthful because it comes in for its truth
      - (a) admission doesn’t have to be inconsistent when it is made – it can be dripping with motive, -- but there really isn’t any special reliability about an admission
      - (b) doesn’t have to be in the same matter (for example exaggerating for loan can be used in tax case)
      - (c) personal knowledge isn’t required for an admission (can explain why personal knowledge isn’t present)
        - (i) legal conclusions in the form of admissions are admissible

- (d) vicarious admissions: post-action admission of the employee
  - (i) under the traditional rule, and under the NY rule still it all depends on agency
  - (ii) conspirator vicarious liability: must be made in furtherance of the conspiracy
  - (iii) different rules about whether or not an employee was authorized to make the admission.
    - 1. Under NY law, someone's post action admissions are not admissible unless they are made in the scope of the agency relationship between the parties
    - 2. FRE: Statement made by an employee concerning the matter within the scope of the employee, if made during the employment relationship
- (e) Doesn't need to be under oath
- (f) Conviction and plea of guilty to traffic offenses, but the plea of guilty can come in as an admission (there is an opportunity to cross-examine)
- (3) Former testimony in a hearing
  - (a) There must have been a meaningful opportunity to cross-examine when the witness testified live in the first proceeding (issue must be the same in both proceedings)
    - (i) You must have had the same opportunity to cross-examine on the same issue.
    - (ii) Witness who testified live must be unavailable – for any of the exceptions that require unavailability, the standard grounds will suffice: death, absence from the jurisdiction, physical or mental illness
  - (b) Former witness must be unavailable
  - (c) Can be offered against a party who was not a party to the case if the party is a predecessor in interest
    - (i) Prosecutors are not predecessors in interest to civil Plaintiffs
- (4) The statement against interest requires unavailability. Cf. admission of a party
  - (a) **statement of a person, now unavailable, against their pecuniary, monetary, or penal interest or the kind of statement which would defeat a civil claim or which would expose the claim to a civil claim**
  - (b) declarant must be unavailable
  - (c) must have been against interest when made
  - (d) declarant must have had personal knowledge
  - (e) must be aware that statement is against interest
  - (f) must have no motive to misrepresent
  - (g) there needs to be corroboration of the content of the statement
  - (h) in a wrongful death situation, an admission can't come in because the admission isn't being made by the party, but it can come in as a statement against interest (because it would expose him to liability and he is unavailable as a witness)
- iv) Dying declaration – unavailability required (even if they survive)



- (1) Declarant must be unavailable
- (2) Statement must **involve the source of the death** (for example can't be about will or contract matters)
- (3) Can be used in non-homicide cases
- (4) It is, in general admissible only in criminal homicide or similar matters
- (5) Statement made under a sense of impending death
  - (a) State of mind required – statement must be made under a sense of impending death
  - (b) Must be a hopeless expectation of death – has to be some indication that the victim thought this
  - (c) Must give the state of mind requirement in the fact pattern
    - (i) Declarant need not die as long as the declarant is unavailable at the time of trial
  - (d) Must be either a homicide case or a homicide-related civil case
- (6) In NY, the declarant must die
  - (a) At common law and NY, the dying declaration was admissible only in homicide cases. MBE: dying declaration is admissible in a homicide case or in any civil case
    - (i) Criminal cases that aren't homicide cases, it isn't admissible
  - (b) There is a content limitation in the dying declaration – the subject matter limitation is important – the dying declaration must concern the cause or circumstances of the impending death
    - (i) Under the federal rule, the declarant need not actually die, it has to be unavailable
    - (ii) MBE: homicide cases or in death civil cases, and NY: only homicide
    - (iii) In NY must die
      1. Subject matter must concern the cause or circumstances of the impending death
- v) Declaration of present state of mind. Witness may be available or not
  - (1) If someone says "I believe I am the pope" it fits under the exception for the declaration of the then-existing state of mind, then it is not hearsay and it is inadmissible, provided the state of mind is at issue
  - (2) Declaration of intent to do something in the future is admissible to infer that the intended future act was done
- vi) Excited utterance
  - (1) Startling event required
  - (2) Declaration must be under the stress of excitement
  - (3) There must be no time for reflection
  - (4) Things that happen in the course of events can be considered to be true
- vii) Present sense impression – New York recognizes as well. This requires "precise contemporaneousness"
  - (1) Statement must describe or explain an event or foundation and
  - (2) The statement must be made while the declarant was perceiving the event or condition or immediately thereafter

- (3) The NY portion – in NY they recognize the presence sense impression and it says that **there must be corroboration of the present sense impression**
    - (a) But in the NY courts of appeals it is a tempting subject for an essay question
    - (b) This will involve cellphones – for example 911 calls from anonymous people who are watching things
  - (4) Declaration of present physical condition
    - (a) A declaration must be a natural or spontaneous expression of bodily condition
  - viii) Business record exception -- it is admissible provided that the record was kept in the ordinary course of business
    - (1) judge decides admissibility
    - (2) Two foundational matters that are important about the business record exception
      - (a) If there are business reasons for keeping the records they are presumed to be accurate. However, if the source of the record, is itself subject to the perils of hearsay it fails
        - (i) They all have an incentive to be accurate in observing, reporting and recording business facts
      - (b) Once there is an exception, it allows the record to substitute for the live, in court testimony of the employees within the unit
        - (i) not germane to the business – we won't take the record in place of live testimony about witnesses, etc.
        - (ii) we won't assume that the recorded recorded thing that they were under no duty to record
        - (iii) where there is an entry in the record that is germane to the business.
      - (c) As a police recording, the police officer goes to the scene (has to be decided entry by entry) – the record would be allowed because the he would be able to testify to it live
        - (i) Police reports can come in as business records or normal records
        - (ii) However, the source of the information I the report has to be either
          - 1. Based on personal knowledge of the cop (for example measuring skidmarks)
          - 2. An admission or other exception to hearsay
  - c) Hearsay statement can be impeached in the same way that nonhearsay statements can be
  - d) Statements made over telephone require verification of exactly who the speaker was
- 10) Privileges:
- a) Sources of law
    - i) State law for state substantive matters (for example burdens of proof and presumption)
    - ii) In common law, there will be a federal common law of privilege developed
    - iii) State law will determine competency issues

- b) Atty.-client:
  - i) a confidential (not shouted in an elevator)
  - ii) communication (objects not privileged)
  - iii) between atty. and client
  - iv) made during professional legal consultation
    - (1) there must be an intent on the part of the client to establish a professional, legal relationship
    - (2) advice you give to one's next door neighbor while they are moving the lawn, it isn't privileged, whether it is successful or not
    - (3) retainer negotiations are part of it
    - (4) must be predominantly legal advice
  - v) unless waived by the client or the representative of the deceased client
    - (1) this survives the death of the client
  - vi) joint crime exception
    - (1) if two or more parties communicate together about a matter of common interest, then there is no privilege between or among those joint consultants, but the privilege would still exist as to third parties
    - (2) if we are sued by a third party, we would be entitled to claim the privilege
- c) 5<sup>th</sup> amendment privilege against self-incrimination
  - i) can't be used as a shield in civil trials – can instruct the jury that they may draw an adverse inference.
- d) physician/psychiatrist-patient (for federal substantive offenses there is privilege for doctor-patient to the common law of evidence)
  - i) Patient has a privilege against the disclosure of confidential information acquired by the physician in a professional relationship entered into for the purpose of obtaining treatment
  - ii) Key elements are
    - (1) Patient must be **seeking treatment**
    - (2) If the doctor is an expert witness who is examining solely for the purpose of giving testimony, then there is no privilege
    - (3) The information which is acquired by the doctor or the patient must be confidential and at least arguable necessary to facilitate the treatment
    - (4) Physical conditions observed by doctor don't count
    - (5) Unrelated ramblings are not covered by the privilege
    - (6) Doctor must be a real doctor – or at least the patient must reasonably think so
  - iii) Enormous scope of the patient-litigant exception
    - (1) Doesn't apply in personal injury cases, where the patient sues by putting physical or mental condition in issue
    - (2) On MBE: the presumption is overwhelming that it won't be applicable, because we don't know if there is an ordinary physician-patient privilege
      - (a) FRE is silent – we leave it to the courts of the US
      - (b) On the MBE it would be quite tricky to be asked a question when you had to actually apply it in the circumstances

- (i) – it won't apply for some other reason because we don't know the law (two must common reasons 1) patient is not seeking treatment and 2) patient-litigant exception)
  - (ii) if it is a psychiatrist privilege, it does exist in federal court
- e) Spousal: -- two of them – doesn't apply to an intra-family injury case (where one spouse is charged with a crime against the other or against the children of the marriage)
  - i) Marital privilege (**confidential marital communications**) -- either spouse can prevent the other from disclosing confidential communications between the two.
    - (1) Husband or a wife shall not be required, or without the consent of the other shall not be allowed – the traditional instrumentalist rational was that society wants to encourage information between spouses
    - (2) Things told in privacy in the marriage remain confidential
    - (3) There is a zone of privacy which neither the government, nor private litigants should invade
      - (a) Witness must be married not necessarily at the time of trial, but they must be married at the time of the protected communication
      - (b) This privilege applies only to confidences **not to all testimony**
    - (4) The spouse must take the stand. However, the other spouse can suppress certain answers.
    - (5) Other spouse can't keep them off the stand, but the party spouse is the holder of the privilege
      - (a) Both spouses are holders of the privilege -- both spouses must agree before this privilege is waived
  - ii) **Spousal immunity privilege**: protects one spouse from being forced to testify against the other about anything in a criminal case. **one spouse can't be forced to give adverse testimony against the other in a criminal case**
    - (1) NY: none
    - (2) MBE
      - (a) Must be involved by the witness spouse
      - (b) Benefit
        - (i) May not be called as a witness by prosecution
        - (ii) FRE: in federal courts, one spouse may testify against the other in criminal cases, with or without the consent of the party-spouse.
        - (iii) Applies in grand jury proceedings as well
      - (c) Requirements
        - (i) Parties must be married
          - 1. Applies only in criminal cases
        - (ii) Valid marriage at the time of privilege -- makes no difference whether the information sought concerns pre-marriage events
        - (iii) But the spouse on the stand has to invoke it – this privilege belongs to the witness spouse, not the party spouse
        - (iv) If one spouse wants to testify against the other in a criminal case, then *the marriage might as well be over*
      - (d) Confidential marital communications privilege

- (e) This is narrower in that it only protects against the disclosure of confidential communications made during the marriage
- f) Three situations will destroy all professional privileges
  - i) Future crime or fraud
  - ii) “at issue” exception – if the client, or the patient affirmatively puts in issue the communication as part of their case, this destroys the privilege
    - (1) where there is a dispute among the parties to the privilege, then the parties must yield
    - (a) suits about fees will waive the privilege

## Federal Jurisdiction

- 4) Personal jurisdiction – *Pennoyer*
  - a) Question of geography: can a Plaintiff sue the defendant in NY
  - b) Federal trial court (district court) must have some jurisdiction in the same way that the state trial court does. So the federal court uses state law to determine its jurisdiction
    - i) Exceptions
      - (1) Bulge Rule
      - (2) Interpleader
- 5) Subject matter jurisdiction
  - a) Diversity of citizenship, including something called alienage, and federal question jurisdiction
    - i) Diversity of citizenship: amount in controversy must be greater than \$75,000
      - (1) Diversity: Action must be between citizens of different states or between an alien and a citizen
        - (a) There is no diversity jurisdiction if any Plaintiff is a citizen of the same state as any defendant
          - (i) Can have the same state on the same side of the “v”
        - (b) DC treated as a state
        - (c) Definition of state citizenship
          - (i) Domicile
            - 1. Presence in the state at some point
            - 2. Subjective intent to make the state your permanent fixed home
              - a. Will look to evidence.
              - b. No single factor is determinative
          - (ii) Diversity is determined when the case is filed
        - (d) For corporations
          - (i) Citizenship is all states where it is incorporated
          - (ii) And the one state where that company has its principal place of business
          - (iii) No matter how big the corporation is it only has one principal place of business
            - 1. Two tests for principal place of business
              - a. Where the *hq* or *nerve center* is

- b. Other courts look to where there major production or service activity is
      - i. Even though there are two tests, there is only one principal place of business
      - ii. Complete diversity rules works the same way here
    - (e) For partnerships and unincorporated associations (for example unions)
      - (i) The citizenship of all of the members
    - (f) For decedents, minors, and incompetents, you look to their citizenship and not the citizenship of the resident
  - (2) Alienage jurisdiction : Between a citizen of a state and an alien
    - (a) Suits between two aliens do not qualify for diversity jurisdiction
    - (b) Alien who is admitted as a permanent resident, then they are treated as a citizen of the state in which they are domiciled
    - (c) If there is an American domiciled abroad they are not a citizen of a state, because she isn't a citizenship
  - ii) Amount of controversy for diversity
    - (1) A good faith allegation that the claim in the complaint alone EXCEEDS 75,000 – not counting interest or costs. It costs whatever the Plaintiff claims is okay, unless it is clear to a legal certainty that the Plaintiff can recover that much
      - (a) If it is clear to a “legal certainty” that the amount doesn't exceeds 75k, then it doesn't count
      - (b) Aggregation: where the Plaintiff must add two or more claims to meet the amount in controversy requirement—this is an aggregation problem
        - (i) Can't aggregate claims between multiple defendants – can only aggregate if one defendant
        - (ii) Can sue joint tortfeasors if the total value is over 75k
    - (2) If the Plaintiff recovers less than 75,000 – jurisdiction is okay, but the winner may be liable for costs, even though he won
    - (3) In an equitable setting: -- two settings
      - (a) Majority: does the encroachment hurt the Plaintiff more than 75k
      - (b) Minority: would it cost the defendant more than 75k
    - (4) No subject matter jurisdiction if a parties collude or conspire to create diversity: There is no diversity of citizenship jurisdiction if someone is a “mere collection agent” with no real interest anyway – the assignment is still good
- b) Federal question jurisdiction
  - i) Enforcing a federal right
    - (1) Amount and citizenship doesn't matter
    - (2) Some federal question jurisdiction have exclusive federal question jurisdiction
      - (a) Patent infringement, federal antitrust
      - (b) Most federal question can be brought in either
  - ii) Well-pleaded complaint rule

- (1) “if the complaint were well-pleaded, that is no extraneous material, would be a federal right”
- (2) however, mentioning the law (for example if one is merely mentioning, but not enforcing, a federal right
  - (a) one’s claim has to arise under the law
- c) Exclusions
  - i) Federal courts Won’t hear, divorce, child custody, alimony
  - ii) Federal courts Don’t probate estates
- d) Supplemental jurisdiction: Plaintiff had to have at least one claim that satisfied diversity, alienage or federal question jurisdiction to get the case into federal court
  - i) Supplemental jurisdiction based on common nucleus of operative fact
    - (1) Two subtypes of supplemental jurisdiction
      - (a) Pendant jurisdiction: the Plaintiff’s claims
        - (i) **Pendant parties jurisdiction**: so long as federal question jurisdiction and transactional related
      - (b) Ancillary: the Defendant’s claims
        - (i) Must arise from same transaction
        - (ii) Applies in many joinder cases
    - (2) Court has discretion not to hear that supplemental claim
      - (a) If the federal question jurisdiction is dismissed early
      - (b) If the state law question is complex
      - (c) Or state law questions would dominate
- 6) Removal
  - a) Removal possible if it meets federal question jurisdiction test
    - i) Must be removed to federal court embracing the state court
    - ii) General test: removable if the case could have been filed in federal court
    - iii) All defendants must agree to removal
      - (1) *Cf.* whenever a separate and independent federal question jurisdiction cause of action is joined with one more nonremovable claims, the entire case may be removed and the district court may determine all issues, or may remand the state issues back
    - iv) Counterclaims are not grounds for removal – only defendant can remove
  - b) **no removal if any defendant is a citizen of the forum** -- For diversity (not federal question jurisdiction) – there is no removal if any defendant is a citizen of the forum (doesn’t apply to federal question jurisdiction)
  - c) timing
    - i) diversity: 1 year max
    - ii) everything else 30 days after defendant receives a copy or 30 days from the time a change in diversity makes a case removeable
    - iii) can only remove based on diversity within 1 year of the start of the action
  - d) procedure: no permission required.
    - i) if the removal was improper, the Plaintiff moves to remand to state court: must do so within 30 days if it is based on a defect of other than subject matter jurisdiction
    - ii) the court was remand any time there is no federal question jurisdiction if it turns out that there is no federal jurisdiction

- e) a defendant who files a permissive counterclaim probably waives the right to remove (not true with compulsory counterclaims)
- 7) venue is different from subject matter jurisdiction
  - a) laying venue
    - i) removed case: remove only to a court where it is sitting initially
    - ii) in any case, federal question jurisdiction or diversity, the Plaintiff may lay venue in either
      - (1) in a federal question jurisdiction case, it is where any defendant is found – if there is a diversity issue federal question jurisdiction criteria govern
      - (2) solely on diversity
        - (a) district where any defendants reside
        - (b) district where a substantial part of the claim arose
        - (c) if there is no district anywhere in the US which (no district where the parties arose), or a district where a substantial part of the claim arose (for example overseas)
      - (3) Local action: Ownership, possession, or injury to land – they must be filed in the district where the land lies
      - (4) corporation : any district in which it is subject to personal jurisdiction
      - (5) if any defendant reside in different districts of the same state, then venue is proper in any place where any one of the defendant's reside
      - (6) aliens can be sued in any district
    - iii) Venue is based on where the Plaintiff resides
      - (1) Individuals; residence usually equals domicile
      - (2) But, a corporation resides in any district in any district it does business in, or is located or is registered
    - iv) Waiver of defects
      - (1) District court can dismiss or transfer
      - (2) Defects are not jurisdictional, no failure to object is waived
  - b) Forum non: Center of gravity tests: If venue in the original forum is proper, if can be transferred based on Witnesses, convenience, interest of justice
  - c) Choice of law: Court to which the case is transferred applies the choice of law rules to which it is transferred
- 8) *Eerie Doctrine*: Concerns the choice of law between federal and state law. In diversity cases, a federal court must apply state substantive law, and federal procedural law
  - a) Elements of a cause of action are substantive
  - b) If it isn't that easy depends on the source of the federal law
    - i) Is there a FRCP or an FRE that is on point that conflicts with state law that is on point the FRCE or FRE will trump – as long as it is constitutional.
    - ii) If there is no FRCP or FRE on point, then
      - (1) Outcome determinative test
      - (2) Or Balance of the interest: does either the federal or the state system have a strong interest in having its law apply (for example the federal question likes juries deciding facts)
      - (3) Avoiding forum shopping; will it cause litigants to flock to federal court – if so we should apply state law



- c) Decided issues
  - i) Statutes of limitations and tolling statutes of limitations are substantive
  - ii) State law will govern about choice of law rules
  - iii) *Gaspirini* case: standard for granting the new trial is substantive, but exactly which court will decide the issue is procedural
- 9) Summons
  - a) Procedure
    - i) File then serve (with 120 days or can be dismissed without prejudice)
    - ii) Service:
      - (1) Can be served by any-non-party over 18
      - (2) Federal district court may use any method as permitted by any of these
        - (a) FRCP
        - (b) Law of the state in which it sits
        - (c) Law of the state in which service is affected
      - (3) Methods of service
        - (a) Personal service: can be done anywhere you find the defendant in the forum state
        - (b) Substituted service:
          - (i) Can leave where it is someone's usual home (for example service in the summer is okay at a summer home)
          - (ii) Must serve someone at suitable age and discretion who resides there
            - 1. Must be people who reside there (check check there)
        - (c) Waiver of service: Defendant must return a waiver forum within 30 days and then has 20 days to serve response
          - (i) The defendant waives service, but nothing else
        - (d) Process is delivered to defendant in another state if the local state law allows (for example long-arm statute).
          - (i) A federal court can exercise personal jurisdiction over an out of state defendant only if the state would be able to
          - (ii) Process can be delivered to the defendant's agent who is authorized to receive service
            - 1. Can designate the secretary of state as an agent for service of process
            - 2. An agent will be an agent for service of process
- 10) Joinder: there can always be a federal jurisdiction angle: FRCP is liberal with joinder, but they can split things
  - a) Proper defendants and Plaintiffs
    - i) Tests as to whether they can sue together: Arise from the same transaction or occurrence and Raise at least one common question
    - ii) Subject matter jurisdiction -- complete diversity rule
      - (1) In joinder of additional parties, complete diversity must be maintained
      - (2) The court can force a necessary person to be joined
        - (a) Who is a necessary defendant

- (i) One who without him complete relief can't be granted or the absentees interest will be harmed or subject to multiple obligations if she is not joined
  - (ii) Joint tortfeasors are not necessary parties
- (b) If joinder isn't feasible (for example it would destroy diversity)
  - (i) In such a case, the court must either proceed without joining, or dismiss the pending case
  - (ii) If the court decides to dismiss rather than proceed
  - (iii) Balances factors
    - 1. Is there an alternative forum where everyone can be joined
    - 2. What is the real likelihood of harm (will they lose anyway)
    - 3. Can the court do something to shape the relief to shape any such harm
- 11) Claims by the defendant – here the defendant is suing someone
  - a) Counterclaim is an offensive claim against an opposing party
    - i) Compulsory counterclaim: this is what arises from the same transaction or occurrence from the Plaintiff's claim. It must be filed in the pending case, or it is waived
    - ii) Permissive counterclaims are one that doesn't arise from the same transaction in the pending case – defendant may assert this in the pending case
    - iii) Supplemental jurisdiction of the ancillary forum can be used to get a compulsory counterclaim (not a permissive counterclaim) into a federal court because compulsory counterclaims meet the test for ancillary Go in order as to why the various things modes of jurisdiction (FEDERAL QUESTION JURISDICTION, diversity, etc.) may or may not
  - b) Cf. cross-claims: offensive claim against a party on the same side of the V
    - i) May be filed if it arises from the same transaction or occurrence.
      - (1) A cross-claim is against a co-party, but it isn't compulsory
      - (2) Is there subject matter jurisdiction over the compulsory counterclaim – there is diversity of citizenship jurisdiction over this claim
      - (3) If there is a claim that has diversity jurisdiction, then supplemental jurisdiction is irrelevant
- 12) impleader – cf. cross-claim
  - a) covered under ancillary jurisdiction
  - b) usually third-party defendant in a vicarious liability defendant – the claim must be derivative – must be for indemnity or contribution on the underlying suit
  - c) timing
    - i) as of right: no more than 10 days after serving
  - d) after the third-party defendant is joined, the Plaintiff can assert a claim against a third-party defendant if it arises from the same transaction or occurrence in the case
  - e) after the third-party defendant is joined, he can assert a claim against the defendant, so long as it arises from the same transaction or occurrence
    - i) all this tells us is that there are three claims here
  - f) basis for ancillary jurisdiction

- i) claim by anyone but the defendant and 2) it is transactional related to the underlying case
  - ii) **cannot get ancillary jurisdiction over a claim by the Plaintiff against a third-party defendant**
- g) bulge-rule – not for bringing in original defendant
  - i) necessary parties on impleader
  - ii) absentees who are joined as necessary parties or under impleader, may be served out of state and regardless of state law, so long as it is within 100 miles of the courthouse
- 13) intervention (since it starts with I it is someone new)
  - a) as of right
    - i) absentee wants to join in the pending suit – she chooses whether to intervene in as a Plaintiff or a defendant
    - ii) the court can re-align her to the real correct side of V
    - iii) intervention as of right: have to show that the absentee's interest may be harmed, and her interest is not adequate now (there is a lot like test #2 for necessary parties)
    - iv) jurisdiction
      - (1) if Plaintiff: no ancillary jurisdiction
      - (2) if Defendant: maybe – law isn't that clear
  - b) permissive: only have to show common question – generally no ancillary jurisdiction
- 14) interpleader: one holding money or property wants to force all potential claimants into a single lawsuit.
  - a) Person holding the property is the stakeholder. The people who want the property are the claimants.
  - b) rule interpleader:
    - i) complete diversity between all of the claimant and the stakeholder, or federal question jurisdiction
    - ii) 75k required
  - c) statutory interpleader
    - i) to determine diversity of citizenship, the stakeholders must be diverse from any two claimants
    - ii) Under the rule is must exceed more than 500 or more
    - iii) **nationwide service of process**
    - iv) Same venue; lay venue in a district where any claimant resides
- 15) Class actions
  - a) Where a representative sues on behalf of a group – must demonstrate all of these
    - i) Too numerous for practicable joinder – too many folks for them to be joined practically as co-Plaintiff's
    - ii) **Some questions of law or fact are common to the class**
    - iii) Representatives claims or defenses have to be typical
    - iv) Representative and **her lawyer** will fairly and accurately represent the class
  - b) Must fit the case within one of three types of class-action
    - i) Risk of inconsistent results:
      - (1) no notice required

- (2) no right to opt out
    - ii) Equitable injunctions (for example civil rights)
      - (1) No notice requirement
      - (2) No right to opt out
    - iii) Common questions of law or fact:
      - (1) notice required
      - (2) must give right to opt out
  - c) still need subject matter jurisdiction
    - i) class might invoke federal question jurisdiction by asserting a claim that arises under federal law
    - ii) if the class seeks to invoke diversity of citizenship, you look to the citizenship of the representative only
    - iii) there is a split on how to handle the amount in controversy in diversity
      - (1) Zahn: the standard answer is that every member of the class must claim more than 75k – (not jus the rep) – most district courts (no 2<sup>nd</sup> circuit or SC) authority
      - (2) Cf. some courts say only the representative need exceed 75
    - d) Settlement or dismissal must be approved by the court
- 16) Trial in federal court
- a) Jury trial: written demand no later than 10 days after the service of the last pleading raising a jury triable issue
  - b) Right to a jury trial in federal court (not incorporated)
    - i) Preserves the right of a jury trial in actions at law, and suits at equity
    - ii) Get a jury in the law issues but not equity issues
    - iii) Every issue that underlies law like a claim for damages
    - iv) One tries the jury issues first
  - c) Selection of jury
    - i) Voir dire: each side has unlimited strikes for cause
    - ii) Each side has three preemptory strikes. Must be used in a race and gender-neutral way
      - (1) Can't use to discriminate on the basis of race or gender
  - d) "motion for judgements as a matter of law" (formerly directed verdicts)
    - i) timing: brought once the other side has been heard
      - (1) can move at the close of Plaintiff's evidence and again at the close of all of the evidence
    - ii) standard is that "reasonable people could not disagree on the results"
    - iii) in ruling on the motion for judgement, the court will review in the light most favorable to the moving the party.
  - e) "renewed motion for a judgement as a matter of law" is made after a verdict and an entry of judgement. Claims that jury reached a conclusion that reasonable people wouldn't reach
    - i) Must move not later than 10 days after entry of the judgement
    - ii) The standard is exactly the same as a motion for judgement as a matter of law
    - iii) Motion for jmol at the the **close of all evidence is a pre-requisite for bringing this renewed motion**
      - (1) The defendants usually screws it up

- iv) No timing issues about renewed motion – (10 days)
- 17) Motions for new trial
  - a) Error makes it unfair
  - b) New evidence
  - c) Prejudicial misconduct of a party, or a juror
  - d) Judgement is against the weight of the evidence
- 18) Pleadings
  - a) Defenses responses
    - i) To motions: Under Federal Rule 12, a defending party may respond – by motion or by answer not later than 20 days after service of process
    - (1) An answer is a pleading, and in it the Defendant has to do two things
      - (a) Respond to the allegation of the complaint
        - (i) Admit
        - (ii) Deny
        - (iii) Lack sufficient information to admit or deny
      - (b) Raises affirmative defenses (can be raised at other times)
        - (i) Lack of subject matter jurisdiction – can be raised anytime
        - (ii) Lack of personal jurisdiction
          - 1. Must be put in the first rule 12 response (waivable)
        - (iii) Improper venue
          - 1. Must be put in the first rule 12 response (waivable)
        - (iv) Insufficient process
          - 1. Must be put in the first rule 12 response (waivable)
        - (v) Insufficient services
          - 1. Must be put in the first rule 12 response (waivable)
        - (vi) 12(b)(6) – can be raised any time through trial
          - 1. failure to join an indispensable party – can be raised any time through trial
      - (c) Motions are not pleadings – they are not technically pleadings: They ask the court to order something. Or ordering that the pleading or a portion of it be stricken under 12f.
        - (i) These are the classic defensive action that might come up under motion
    - (2) notice pleading
      - (a) the complaint must contain three things
        - (i) statement of subject matter jurisdiction
        - (ii) short and plain statement of the claim showing that you are entitled to relief
        - (iii) must make a demand for judgement – demand for judgement doesn't limit what can be recovered, except in default cases
      - (b) with a pro se litigant, the court is more lenient, but it has to be there
    - (3) exceptions to notice pleading – where you have to give special facts
      - (a) fraud
      - (b) mistake
      - (c) special damages is defined as damages that do not normally flow from an event:

## New York Practice

Hot topics

Topic Frequency in New York Practice in essays

<i>Motions to dismiss and summary judgement</i>	24
<i>Statutes of limitations</i>	23
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<i>Arbitration</i>	8
<i>Service of Process</i>	6
<i>Matrimonial</i>	6

Things that won't be covered in lectures

### ❖ Verification of pleadings

- ❖ Bills of particulars
- ❖ Default judgements and neglect to prosecute
- ❖ Pretrial discovery
- ❖ Appeals
- ❖ Judgements

- 1) subject matter jurisdiction
  - a) trial courts
    - i) SUPREME COURT can hear any type of action not against the state of NY (except for article 78 proceedings), or not exclusively granted to the federal courts
      - (1) There is one branch of the supreme court in every country. Choice of county is a question of venue, which is not jurisdictional.
      - (2) Residency of parties doesn't matter in terms for subject matter jurisdiction purposes
      - (3) Supreme Court can hear cases in law and equity
        - (a) Matrimonial: Divorce, Annulment, verification
        - (b) Article 78: judicial review of administrative action
        - (c) Declaratory judgement: judicial declaration of rights and obligations of the parties to an actual controversy
      - (4) Reasons why the SC can dismiss
        - (a) If there is no substantial nexus to NY, the trial court has the discretion to dismiss on the basis of forum non conveniens (ie Shah)
        - (b) Sovereign issues
          - (i) Counties and cities can be sued in supreme court
          - (ii) There is no way that the state can be joined as a party (cf. mandamus)
      - ii) Lower courts have courts have limited monetary jurisdictions and can't issues equitable decrees
    - b) Appellate jurisdiction
  - 2) Statutes of limitations: affirmative defense
    - a) As a rule Statutes of limitations begins to run when the cause of action accrues (actual injury happened), so the statutes of limitations may be running, and people might not know
      - i) Personal injury or property damage actions accrue when the impact occurs (not discovery)
        - (1) When an infant is injured in utero, the statutes of limitations runs from the time the infant is born alive
      - ii) breach of contract statutes of limitations accrues at the breach (not discovery)

- iii) computation
    - (1) runs from day after the triggering event occurs
    - (2) If the last date for doing a procedural act turns out to be a Saturday, Sunday or Public holiday, the defendant is allowed until the next day to commence an action
- b) exceptions to statutes of limitations beginning at injury
  - i) Medical malpractice: 2.5 years (date of discovery is irrelevant to the computation) . Applies to Doctors, nurses, podiatrists, and hospital (however, can bring a negligent hiring action against hospital)
    - (1) Exceptions: continuous treatment rule: 2.5 years from the termination of the treatment (idea is not to have the patient sue his own doctor)
    - (2) Foreign object rule: Plaintiff has the option of suing one year from date of discovery 1 year from the date of discovery of the presence of the object whichever is longer. Foreign object are things that the doctor didn't intend to leave behind. Constructive notice counts as discovery
      - (a) failure to detect a pre-existing object doesn't convert it into a foreign object
  - ii) Non-medical professionals: 3-year statutes of limitations which runs from the termination of the particular services in which the services occurred. The uses the theory that the economic injury accrued when the service was rendered.
    - (1) statutory rule explicitly provides that for professional malpractice, the statutes of limitations is three years, **regardless of whether the underlying theory is based on contract or tort** (dates of collapses of buildings are irrelevant). However, this assumes that no one has been injured
  - iii) Personal injury and property damage: 3 years from the date of injury
    - (1) If someone is hurt in a building, the statutes of limitations starts to run from the time of injury
    - (2) Exceptions for architectural malpractice: Plaintiff has to serve a notice of claim 90 days before commencing the lawsuit
      - (a) 90 day period when Plaintiff is entitled to obtain discovery from the architect
      - (b) Defendant-Architect gets to make a motion, in which the burden will be on the Plaintiff to make an immediate showing that there is a reason to believe that the negligence was the cause of the injuries
  - iv) Products liability: three potential claims, all of which could be asserted in the same complaint
    - (1) **Negligence**: 3 years from the date of injury. This applies to all of the defendants in the chain of distribution
    - (2) **Strict products liability**: 3 year statute of limitations against all of the defendants in the chain of distribution
    - (3) **Breach of warranty**: whether it is a warranty of fitness or warranty of merchantability under the uniform commercial code: 4 year statutes of limitations. This begins to run from the date when the particular defendant against whom the warranty claim is **asserted made its sale of the product**. Hence this Expires at different times against different people in the chain of production
    - (4) **indemnity and contribution**: post-lawsuit collection from parties who should have been sued, or agreed to indemnify. Date of original occurrence is irrelevant.
      - (a) It is necessary for each tortfeasor to have breached some duty
      - (b) Since indemnity arises as a matter of law, a tortfeasor who has been released by settlement can still be asked for damages, in contradistinction to contribution
    - (5) Exception for **toxic substances** (exposure, or implementation) but not medical malpractice
      - (a) Statutes of limitations for toxic substances begins to run at the date when the injury is discovered by the Plaintiff, or when the injury should have been discovered with reasonable diligence
      - (b) If the Plaintiff could not have discovered it earlier, the action is against the manufacture of the substances, the discovery rule about toxic substances is not applicable to claims of medical malpractice
- c) Generally applicable tolls and extensions

- i) **Absence:** If the Plaintiff has a basis of personal jurisdiction over the absent defendant such that process could be validly served on the defendant outside NY then the toll for absence is not available
  - (1) If the defendant is not in NY when the cause of action accrues, the statutes of limitations doesn't run until the defendant comes to NY (however, long-arm jurisdiction may be a basis of jurisdiction)
  - (2) Where the defendant is in NY, where the cause of action accrues, but thereafter leaves the state, and if he is continuously absent for four months then a toll will apply to the entire period of absence unless some other basis for jurisdiction is possible
    - (a) There is a basis for personal jurisdiction. Long-arm jurisdiction says that we don't get the toll for absence.
- ii) Infancy or insanity or disability: tolled (except infants can only be tolled in medical malpractice for 10 years)
  - (1) Types of disability
    - (a) Infant = 18 years
    - (b) Insanity = any mental disorder which causes an inability to function in society (no adjudication required)
  - (2) Limits
    - (a) Rule 1: if the original statutes of limitations was three years or more, the Plaintiff gets three years from the date that the disability ends (breach of contract claims accrues against a 12 year old, she has until she is 21)
    - (b) Rule 2: If the original statutes of limitations was less than 3 years, the Plaintiff will get the period specified by the original statutes of limitations
    - (c) Rule 3: medical malpractice: outside time limit of 10 years for commencing the action
  - (3) Death tolls: distinguish survival claims from wrongful death claims
    - (a) **Survival claim** is defined as any cause of action that the Plaintiff could have brought if she were still alive
      - (i) If on the date of death the underlying claim would still be timely, either the **time remaining or one year from the date of death whichever is longer**
    - (b) A **wrongful death** cause of action is strictly a tort claim for the pecuniary damages incurred by the decedent's statutory distributees. surviving family members can only recover for their economic loss
      - (i) Statutes of limitations for claims are two years from the date of death. It must also be shown that at the time of death, the decedent's underlying personal injury claim would still be timely
      - (ii) The statutes of limitations for wrongful death runs from the date of death, not from the appointment of a representative
    - (c) If a potential defendant dies at any time before the potential statutes of limitations expires, 18 months will be added to the statutes of limitations period regardless of whether or not he needs it.
  - (4) Mistake toll: 6 months after dismissal not on the merits
    - (a) If action is dismissed before a trial, the Plaintiff gets 6 months from the date of dismissal to refile the action and serve process on the same defendant
      - (i) within 6 months of that dismissal, the action can be brought within the 6 months.
    - (b) Exceptions (4) – doesn't matter what court dismisses
      - (i) dismissal was on the merits, can't sue again within 6 months
      - (ii) Voluntary discontinuance by the Plaintiff (dropped the lawsuit)
      - (iii) Neglect to prosecute the Plaintiff
      - (iv) Dismissal for lack of personal jurisdiction.
        1. Cf. dismissal for lack of subject matter jurisdiction which does get the six month grace period (includes subject matter jurisdiction in federal ct)
        2. But if it was for something where there was a lack of long-arm jurisdiction, it is a defect in personal jurisdiction
- iii) Borrowing statute: apply shorter of NY or foreign statutes of limitations If the Plaintiff was a non-resident of NY when the out of state action arose,



- 3) Interposition: must commence no later than the last date
  - a) In the SC and the county court, process (summons and complain or summons with notice) must be filed on or before the last day of the statutes of limitations
  - b) In the other courts process must be served
- 4) Elements of personal jurisdiction so that NY's judgements can be enforced elsewhere (basis + notice)
  - a) Proper commencement of the action
    - i) Method of commencement depends on a court
      - (1) Lower courts (Civil Court, other city courts, district courts, and justice courts): action is commenced by **serving process on the defendant**
      - (2) SC and Country Courts: commencement by filing (date of service only changes date to respond)
        - (a) Action is commenced by filing process with the court clerk and paying a fee for the index number
        - (b) The filing is then followed by service. process must be served within 120 days from the filing with the court
          - (i) the court may extend the 120 day time limit to give the Plaintiff extra time if the Defendant makes it hard
      - ii) If the defendant wants to challenge the timeliness of the service of process, the defendant must make a motion to dismiss for untimely service
        - (1) However, the court can still grant an extension of time for the Plaintiff
    - b) Proper service of process on the defendant
      - i) Process is defined as initiatory papers by which the court's jurisdiction is invoked
        - (1) Two possible forms
          - (a) Summons and complaint:
            - (i) Summons is advise that one is being sued in another court
            - (ii) Complaint may be a rather lengthy documents
          - (b) Summons with notice
            - (i) When the summons is not accompanied by a complaint, it must have sufficient notice which consists of an abbreviated complaint
            - (ii) Must include the nature of the action
            - (iii) Must include the nature of the relief sought
              1. Damage amount issues
                - a. Rules: must specify damages sought
                - b. Exception: medical malpractice action the Plaintiff is not allowed the amount of damages being sought by the doctor
          - (c) If a Plaintiff serves a summons without a complaint – this is a defect in personal jurisdiction and the action is subject to dismissal for that reason alone.
        - ii) Who can serve
          - (1) May be served by any person at least 18 years old – but not the the Plaintiff itself
        - iii) Can't serve on Sundays. Can serve on Weekends. Can't maliciously serve a Sabatarian
        - iv) Unauthorized service, even if there is notice is grounds for suit
          - (1) Service in an unauthorized manner, but the defendant has notice of the action, it is still grounds for dismissal
        - v) Methods of service: must be strictly followed
          - (1) Natural persons (five traditional method)
            - (a) Personal delivery: It is "complete" when the process has been tendered to the defendant (and defendant response time begins to run from the date that service is complete)
              - (i) Redelivery by a go-between is not, personal delivery from the process server to the defendant -- and action is subject to dismissal
            - (b) Leave and mail -- leave with person of suitable age, and within 20 days mail (service is complete 10 days after proof of service (from the process server is filed)
              1. If there is a guard, the guard is deemed to be the outer boundary of the dwelling
              2. Can mail to a different place

3. When there are joint tortfeasors, the person to whom delivery is made, the person to whom delivery is made must be given multiple copies
- (c) Affix and mail (old nail and mail) (service is complete 10 days after proof of service (from the process server is filed)
  - (i) Process server must attempt to serve the defendant directly, or at least attempt to serve with due diligence
  - (ii) Mailing must be done within 20 days after affixing
  - (iii) Response time begins to run 10 days from proof of service begins to run
    1. Failure to file proof of service is not a jurisdictional defect. Not a grounds for dismissal. Only consequence is that it postpones the time for the defendant to answer.
- (d) Service to an agent where the defendant has designated an agent to accept process.
  - (i) Sometimes comes up in written commercial contract, for action based on service
  - (ii) Service on infants and the mentally incapacitated
    1. Put the kid's name, but you have to serve process on an adult.
      - a. The eligible adult could be one of the following: parent, guardian, any person having legal custody
      - b. if the infant is married, can serve an adult spouse with whom the infant resides
      - c. If the infant is 14 or over, process has to be served on the adult and the infant
    2. Process can be served on the guardian of an adjudicated mentally and the incapacitated person and the person itself
    3. If a person is a mental incompetent, but no one has been appointed. Can serve someone without a guardian the way anyone else is served. Thereafter the court will appoint a guardian ad litem
- (e) Outside NY
  - (i) Use the same **methods** that are used in NY
  - (ii) However, NY requires that services in foreign jurisdictions be made by whoever is eligible there or by a foreign attorney,
    1. Three possibilities for service in other states can be by: 1) anyone authorized under NY law 2) anyone authorized to serve process by the laws of the jurisdiction where service is made 3) any attorney licensed in the jurisdiction is made
- (f) Expedient service – if the other methods we have looked at are not practicable
  1. Court can authorized service by publication, but there must be a court order
- (2) Corporations – 2 methods
  - (a) **Personal delivery** to any one of the following provided that there is a basis for personal jurisdiction (can serve anywhere in the US) (note: no leave and mail)
    - (i) Officer of the corporation
    - (ii) Director of the corporation
    - (iii) Designated agent or a managing agent: a corporate employee who has supervisory responsibility
  - (b) **NY Secretary of State** as an agent of the corporation: if the corporation is a domestic corporation, or if it is a foreign corporation that has become authorized (licensed) to do business in NY, you can deliver two copies to the NY secretary of state
    - (i) NY Secretary of state is considered to be the designated agent.
    - (ii) If it is an unlicensed foreign corporation. In this situation the secretary of state will be an implied agent.
      1. Plaintiff delivers one copy to the NY agent as secretary of state.
  - (c) Service by first class mail plus acknowledgement
    - (i) Plaintiff mails process to the defendant by first class mail, and includes a “statutory acknowledgement form” which is postage prepaid to the sender
      1. Such service will be effective, but only if the defendant signs and returns the acknowledgement form within 30 days

2. Service is complete upon the defendant's posting of the signed form – it words if the defendant cooperates
  - a. If the defendant doesn't send back the acknowledgement form, service by mail is not effective. Defendant would pay for Plaintiff would have to serve process all over again using one of the traditional methods
  - (ii) Can use this method for all types of defendants – except for infants and mentally incapacitated persons, for whom guardians have been appointed
- c) The must be a proper **basis of jurisdiction** over the person or the property involved in the action (sometimes this is called territorial jurisdiction) – there can be basis for some things and not for others.
  - i) in persona jurisdiction (required for enforcement of judgements) (applies to everyone, acts of agent attributed to principal, acts of agent subject agent to liability, where the defendant dies before the action is brought. Can serve process on the estate)
    - (1) Presence in NY, or doing business in NY: SC holds that personal delivery is still a valid basis of jurisdiction
      - (a) Requires personal delivery in NY.
      - (b) Corporations
        - (i) Licensed Corporations (foreign and domestic) are subject to *in personam jurisdiction* on any claim whatsoever no matter where the claim arose
        - (ii) Unlicensed foreign corporation may be said to do business in NY if it is doing business in NY and the claim arose outside of NY
          1. Satisfaction of the “doing business standard” is only necessary if the cause of action arose outside NY because if the claim arose inside NY, one could use long-arm jurisdiction
          2. Test in NY for doing business: *at the time the action is commenced, the corporation's (or person's) employees or agents are in NY, engaging in Commercial activity for the corporation on a regular, systematic basis and ongoing basis* (Ring Starr/Lennon)
          3. If the corporations activities are **continuous, regular and systematic**, There is no need therefore to show any relationship between the claim and the state of NY – this is an analogy to presence in NY
          4. Mere sales of a corporation's products in NY does not qualify
          5. Advertising and sales (or both) does not qualify
          6. Transient process of the corporate president isn't enough, even if she was served with process while in NY
          7. Could probably use the “doing business” to go after individuals and partnerships as well as corporations
    - (c) Domicile in NY is a basis for jurisdiction. A defendant who is a NY domiciliary at the time the action is commenced can be served with process anywhere in the US. This will give the Plaintiff a basis of personal jurisdiction for any cause of action regardless of where it arose
      - (i) Domicile is defined as the one residence where one lives all of the time, which is stronger connection to the state than mere residence
      - (ii) Cf. Residence is defined as a place where a person lives for a fair amount of time with a fair degree of regularity (can have multiple residences)
  - (d) Long arm jurisdiction: **note: long-arm jurisdiction requires adherence to constitutional due process limitations**
    - (i) Illustration
      1. Basic concept of how CPLR 302 works
        - a. select statute
        - b. due process is satisfied by Plaintiff's claim arises out of conduct by the defendant that is so purposely directed to NY that the defendant reasonably should and anticipated being sued in a NY court
      - (ii) This is based on the minimum contacts standard of jurisdiction based on *International Shoe* if the defendant performs certain acts in NY, it may be enough to assert personal jurisdiction

- (iii) There must be some injury in NY (except for defamation)
  - 1. The impact must have occurred in NY
  - 2. Business: the Plaintiff must suffer a direct financial effect in NY, in that the Plaintiff has lost NY customers
  - 3. Defamation: claims are excused from long-arm categories
- (iv) The big difference between long-arm jurisdiction and the other basis, (physical presence, etc.) is that the others it doesn't matter where the claim arose. The facts of the Plaintiff's case, must come out of at least one of five possible NY-related activities
  - 1. Transaction of business in NY by the defendant
    - a. One single business transaction in NY is sufficient (for example interview)
    - b. Must distinguish the term "transaction of business under the long arm statute" – if you find that this one transaction is based on this transaction.
  - 2. Where the Plaintiff's claim arises from a contract made outside NY to supply goods or services in NY
    - a. This has to be an economically significant contract – it has to be sending sizable quantities of merchandise to NY
      - i. A one-shot telephone order, or a mail order, an email or internet order, does not qualify as a transaction of business in NY by the buyer (NY seller can't sue buyer in NY if the buyer is a telephone buyer out of state)
      - ii. Sending a check to NY is not sending goods or services to NY, so the second category doesn't work
  - 3. Tortious act that occurred outside NY, but caused injury in New York. There must be some additional link. Additional linkage doesn't have to rise to the level of *doing business in NY*. If it did, long-arm jurisdiction would be redundant (check)
    - a. Tortious act provisions exclude defamation
    - b. Defamation claims are excused from long-arm categories
  - 4. If the defendant is regularly soliciting business in NY
    - a. Defendant is deriving substantial revenue from goods used or services rendered in NY (7% is enough)
    - b. If the defendant could expect the tortious act to have consequences in NY **and** the defendant is deriving substantial revenue from interstate commerce (constitutional due process requires that the interstate commerce in which the defendant is engaged must purposely be directed toward New York)
      - i. Physician's medical services are inherently local in nature, even of a Physician tries to operate throughout the country
    - c. Cf. other states allow long arm jurisdiction *the full extent of the constitution*
      - i. Plaintiff's claim arises out of a transaction of business in NY
  - 5. A claim that arises out of ownership of real property in NY (even a contract matter) can be interposed based on the long-arm statute
- (e) Non-resident motorist statute which confers jurisdiction based on an implied grant of agency to the secretary of state to get **jurisdiction over driver and owner who gave permission to drive car**
  - (i) Arises from the non-domiciliary's use of a NY roadway
  - (ii) Service: one copy on the New York Secretary of State, and another copy by certified mail to the out of state residence
  - (iii) Can get jurisdiction over driver
  - (iv) This is a form of indemnification, not contribution – so a tortfeasor who is released can be still asked for damages
- (f) Consent: forum selection clauses are enforced, provided that there is no fraud, etc.

- (2) Marital jurisdiction
  - (a) Service: Can't use leave and mail or nail and mail without first getting a court order
  - (b) Proper court is the SC, which is the only court with subject matter jurisdiction to hear a marital action
  - (c) Basis for jurisdiction – these are not subject matter jurisdiction claims, but a failure to plead proper jurisdiction results in a dismissal for failure to state a claim
    - (i) Basis for divorce claim: Personal jurisdiction is not required, all that is required as a basis for jurisdiction is that the Plaintiff spouse is a domiciliary of NY based on *in rem* jurisdiction based on the idea that the status of the marriage is in New York
    - (ii) Matrimonial long-arm statute: If the Plaintiff spouse is a resident of NY, can get long-arm jurisdiction over the Defendant spouse if (four categories)
      1. NY was the **matrimonial domicile** of the couple prior to their separation
      2. If the defendant **abandoned** the Plaintiff in NY
      3. If the Defendant's **monetary obligation** accrued in NY (Contract in NY)
      4. If the **monetary obligation accrued based on a NY obligation** (catch-all)
    - (iii) if one can get jurisdiction over the other, can the action be dismissed based on durational residency requirements
      1. Dates the substance of the case – the merits, not jurisdiction
      2. Their purpose is to make sure that NY has a sufficient connection to the marriage to make NY to get involved
      3. Plaintiff must allege, in the complaint that he or she satisfies any one of three duration residency categories
        - a. If **both of the parties are residents of New York** at the time the action is commenced and the grounds for the action arose in NY, than no period of prior residence is required
        - b. **One year period of prior residence.** Plus any one of these three links
          - i. If either party has been a NY resident of at **least one year** and NY has a link to the marriage
          - ii. or if NY was the **matrimonial domicile at some point**
          - iii. or if the **grounds for the action arose** in New York
- 5) Venue – rules of venue regulate the proper county in NY for a SC action
  - a) In an action in which the judgement will effect title for possession for judgement of real property – proper venue will be the county in NY in which the property is located
  - b) For money judgements, Proper venue is any county in NY in which any one of the parties resides at the time the action is commenced
    - i) Residency is the key to venue for any one of the parties
    - ii) If none of the parties reside in New York, than any county is proper venue
  - c) Enforcement of venue
    - i) Improper venue is not a basis for dismissal as it is not jurisdictional
    - ii) Defendant must serve a demand on the Plaintiff for a change of venue to a proper county designated by the defendant
      - (1) The defendant serves this demand with or before service of the answer
      - (2) Defendant serves this demand with or before service of the answer
      - (3) If the Plaintiff concedes, than change of venue to the proper county is automatic
      - (4) If the Plaintiff objects or does not respond at all defendant must make a motion for a change of venue
        - (a) **The motion will be granted as a matter of right of the Plaintiff chose an improper county and the defendant has designated a proper county**
    - iii) Discretionary grounds for a change of venue based on the convenience of material witnesses
- 6) Response. Service of interlocutory papers is on the attorneys. Not the court and it doesn't need to be personal service. Deemed filed on mailing.
  - a) Where the **Plaintiff initiated the action with a summons and complaint**, Defendant can respond, and avoid a default by either serving an answer or making a motion to motion to dismiss under CPLR 3211
    - i) Answer

- (1) limits for the service of the answer that the defendant needs to comply with the time limit in order to avoid being held in default
    - (a) Three time limits for answer
      - (i) If the defendant was served with process by personal delivery within the state of NY, **defendant must serve the answer within 20 days from delivery.**  
Defendant must serve the answer within 20 days from the delivery
      - (ii) If defendant was served within any other circumstances, defendant must serve within 30 days after service is complete
      - (iii) After **acknowledgement, defendant can serve the answer within 20 days from returning or posting the acknowledgement**
  - (2) Defendant can, instead make no 3211 motion at all, and on any grounds and instead include lack of personal jurisdiction as affirmative defense in the answer
    - (a) **Warning: one of the three potential defects is improper service of process**
    - (b) Can be an affirmative defense, but the objection will be waived if the defendant doesn't make a follow-up motion for summary judgement within 60 days after serving the answer
  - (3) Content of answer
    - (a) Defendant puts in /denies/ -- can deny most of them
    - (b) Affirmative defenses
    - (c) Statutes of limitations or lack of jurisdiction
    - (d) Plaintiff's contributory negligence
    - (e) Affirmative defenses that are not waived in the answer are waived
    - (f) a counterclaim against P
      - (i) If there is a counterclaim, then the Plaintiff has to serve a reply
      - (ii) The reply would consist of denials and affirmative defenses to the counterclaim
        1. Can assert cross-claims against the defendant
        2. Cross-claims can be based on any cause of action that one defendant has against the other (*cf.* federal practice where the cross-claims have to be must be transactional related)
    - (g) Once you serve a copy of the pleading, you have to serve a copy on all other parties to the action
  - (4) Can amend the answer once as of right
- b) Defendant can make a CPLR 3211 motion to dismiss. on or before the time limit for serving the answer (20 days or 30 days depending on where and how the defendant was served). If the motion is denied, the defendant would have to serve answer within 10 days.
- i) There is no waiver of defenses when one fails to make them in a motion to dismiss. They can still be made in the answer. **Except for personal jurisdiction. If a Plaintiff fails to raise personal jurisdiction, it is deemed to be waived**
    - (1) Defendant can, instead make no 3211 motion at all, and on any grounds and instead include lack of personal jurisdiction as affirmative defense in the answer
      - (a) **Warning: one of the three potential defects is improper service of process**
      - (b) Can be an affirmative defense, but the objection will be waived if the defendant doesn't make a follow-up motion for summary judgement within 60 days after serving the answer
      - (c) If you raise lack of a basis for service of process, the 60 day time limit comes up as well
  - ii) Only one 3211 motion allowed
  - iii) Grounds for motion to dismiss
    - (1) There are eight potential grounds to dismiss a cause of action before service of the answer (DOWNFALL)
      - (a) **D**: Documentary evidence as the grounds for the defendant (Mortgage, deed, written contract)
      - (b) **O**: other action pending between the same parties on the same co a
      - (c) **W**: want of capacity
        - (i) For example minor, or capacity
      - (d) **N**: nonjoinder of unnecessary party

- (i) if you have two co-makers of a promissory note, and the Plaintiff has sued only one of them
- (e) **F:** failure to state a claim – based on assumption that *Plaintiff is entitled to every favorable inference that can be drawn from the allegations in the complaint, and should be denied if there is any credible cause of action that can be drawn from the allegations under the substantive law*
- (f) **A:** Affirmative defenses (9 separate ones) SPARERIBS – general rule on pleadings, is that an affirmative defense that is not waived in the answer is waived. If you didn't put release into the answer, that defense has been waived. (unless there is an amendment)
  - 1. S: Statutes of limitations
  - 2. P: Payment
  - 3. A: Arbitration award in private forum
    - a. **THE PUBLIC POLICY OF NY FOLLOWS ARBITRATION**
    - b. Grounds rules
      - i. Arbitrators are not bound by the substantive law
      - ii. Not bound by the rules of evidence
      - iii. Scope of judicial review is extremely narrow
    - c. This is where there is “judicial gatekeeping” where the judge decides either whether it should go to jury or various threshold issues
      - i. Did the parties agree to arbitrate – questions of contract law
      - ii. Doctrine of severability – the validity of the arbitration clause, as distinct from the contract in which it appears is severable from the question of the validity of the overall contract. (for example court can decide only the fraudulent inducement)
      - iii. Party seeking to avoid arbitration must show that the arbitration clause invalid
    - d. In a pending action the defendant can compel the Plaintiff to arbitrate
      - i. If it is the proponent of arbitration who serves a notice of intention to arbitrate
    - e. Can commence a special proceeding for a stay of **arbitration**
      - i. The burden would be on the opponent to commence a special proceeding by a stay of arbitration
    - f. Prerequisites for arbitration
      - i. Agreement to arbitrate must be in writing – doesn't have to be signed. But there must be a writing
      - ii. particular dispute within the scope of the arbitration clause, but most clauses are **arbitration clauses are broadly worded**. When there is a broad clause there very few issue that a court would decide. However, there doctrine of severability may allow only certain clauses to be decided by court.
      - iii. Does the arbitration clause fail for fraud or dures
    - g. There may be an express condition precedent to arbitration that hasn't been complied with (for example first the dispute must be submitted to the architect)
    - h. **Statutes of limitations will be decided by the court**
    - i. Review of arbitration awards
      - i. Corruption, fraud, or misconduct in the arbitration proceeding
      - ii. Partiality or bias of an arbitrator who was chosen to be neutral
      - iii. If the arbitrator has exceeded his powers (always a loser) except if the arbitrator awarded punitive damages
  - 4. R: Release – we settled the case (release doesn't apply to indemnity)
    - a. Since indemnity arises as a matter of law, a tortfeasor who has been released by settlement can still be asked for damages, in contradistinction to contribution

5. E: collateral estoppel. Collateral estoppel or issue preclusion. Issue preclusion allow one from avoiding and preventing the relitigation of specific fact issues, if a specific showing is made (3 part)
  - a. Issue in the former and the current proceeding is identical
  - b. Issue was actually litigated and decided in the former proceeding
  - c. The party against whom issue preclusion is asserted had a full and fair opportunity to litigate the issue in the former proceeding
6. R; Res judicata. to avoid relitigation of the same claim
  - a. Each transaction can be litigated only once because NY uses the 'transactional approach' to claim preclusion
  - b. When a claim against a particular defendant is brought to a final judgement on the merits, all other claims by the **Plaintiff against that defendant are barred, if they arise out of the same transaction** – it doesn't matter that the other claims are based on different theories
7. I: infancy of the defendant
8. B: Bankruptcy discharge
9. S: statute of frauds
- (g) L: lack of personal jurisdiction
  - (i) Lack of a basis
  - (ii) Improper service of process
  - (iii) Defective form of the summons
- (h) **L: lack of subject matter jurisdiction**
- c) Where the Plaintiff initiated the action **with a summons with notice**
  - i) Defendant responds to a summons with notice, the defendant would do one of two possible things
    - (1) He would serve either a demand for the complaint
    - (2) Or serve a notice of appearance
  - ii) Time limit – same as the initial response time to a summons and complaint – either 20 days or 30 days after service is complete in all other circumstances
    - (1) When the defendant serves either a demand for complaint or a notice of appearance, they have the effect of making them serve the complaint within 20 days.
    - (2) Defendant can
      - (a) Serve an answer
      - (b) Make 3211 motion to dismiss if the Plaintiff doesn't serve the complaint within 20 days
    - (c) If the Plaintiff fails to meet the time limit, Defendant can make a motion to dismiss the action within 20 days – this is a form of neglect to prosecute
      - (i) Plaintiff is given one more chance, and the Plaintiff can avoid a dismissal if the Plaintiff shows a reasonable excuse for the delay and make an evidentiary showing that there is merit to her cause of action
        1. Showing of the reasonable cause for the delay requires An affidavit of merit, is a written statement (under oath) that there are good grounds for the underlying cause of action
    - (d) The defendant may still object to the defendant's lack of personal jurisdiction. Neither a demand for the complaint, nor a notice of appearance is a waiver of personal jurisdiction objections
      - (i) Defendant can still raise lack of personal jurisdiction in the answer, or put it into a pre-answer motion to dismiss
- 7) Amendment of pleadings: Each party can amend once as a matter of right
  - a) The Plaintiff or defendant can put anything into the pleading that could have been there in the original
    - i) Time periods to make the one free amendment
      - (1) The Plaintiff can amend at any time up to 20 days after the defendant serves the answer
      - (2) The Defendant can amend the answer up to 20 days after the defendant serves the answer
      - (3) If the periods have expired, you will have to go to court and make a motion for leave to amend, which is at the court's discretion



- (a) The standard that the courts use is an important standard – in general, an **amendment will be allowed so long as the opponent suffers no incurable prejudice**
  - (4) The opponent really has the burden of proof in order to establish prejudice
  - (5) The opponent would have the burden of proving that they have suffered a detrimental change of position as a result of the delay in amending the complaint
    - (a) If key witnesses have disappeared or have died
    - (b) Or documentary evidence has been lost
    - (c) Of something that makes it more difficult to prove case
- 8) Third party practice (impleader)
  - a) Impleader is a procedural device used by the defendant to join another party to the action who is alleged to be liable in whole or in part who is alleged to be liable to the defendant
    - i) The defendant himself is called a third party Plaintiff
      - (1) To implede a third party defendant – don't need to get a court order, and don't need to make a motion
    - ii) Steps for joining a 3<sup>rd</sup> party defendant
      - (1) Can implede at any time after the defendant has served his answer
      - (2) Defendant files a summons and 3<sup>rd</sup> party complaint
      - (3) Serve within 120 days of the filing – a copy of the summons and complaint and all prior pleadings on the 3<sup>rd</sup> party defendant (to bring him up to date)
        - (a) Need to have a jurisdictional basis over the third-party defendant – and the defendant would have to do this so they know what is happening
          - (i) The third-party defendant has to serve an answer on the defendant and the Plaintiff and anyone else who has appeared in the action
          - (ii) The third-party's time-limit is the same that would apply for an ordinary defendant (for example 20 days or 30 days after service is complete in all other circumstances)
      - (4) Amendments as of right that follow impleader of the 3<sup>rd</sup> party defendant
        - (a) After the 3<sup>rd</sup> party that is brought in, the Plaintiff can amend complaint to include the third party defendant – can make it without the need for judicial permission if they do so within 20 days after having been served with the answer
        - (b) After the 3<sup>rd</sup> party that is brought in, the Plaintiff can amend complaint to include the third party defendant – can make it without the need for judicial permission if they do so within 20 days after having been served with the answer
          - (i) If the Plaintiff waits beyond that 20 day period the Plaintiff would have to make a motion and get the court's permission
          - (ii) Relation back: for statutes of limitations purposes the Plaintiff's original claim will be deemed to be imposed on the date that the defendant filed the impleader papers provided that the Plaintiff's claim is based on the same facts as the impleader claim.
    - iii) Other ways that a tortfeasor or an indemnified can seek contribution (3 ways)
      - (1) If the Plaintiff originally joined the tortfeasors as codefendants, they can assert **cross-claims against each other**
      - (2) If Plaintiff has omitted a tortfeasor, the outsider can be **implead**
      - (3) Tortfeasor **can sue the 3<sup>rd</sup> party defendant in a** separate action for contribution in indemnity, but in a separate action, the findings of fact, and the percentages of fault in the first action are not binding on the other tortfeasor in the other action
  - b) Indemnification: MBE and NY -- 100% reimbursement (can be implied in law (respondeat superior, products liability) or by contract)
    - i) Allows one party to shift 100% of responsibility to another
    - ii) Can be created by contract
    - iii) For example a subcontractor agrees to indemnify the general for any losses incurred
  - c) Contribution: MBE and NY: mitigates the harshness of joint and several liability
    - i) Elements
      - (1) sharing of the loss
      - (2) an apportionment amount

- (3) multiple tortfeasors
- (4) all of whom have been actual participants in the tort
- ii) General rule and MBE: if there are multiple parties, each one is liable for all of the damages
  - (1) Each tortfeasor is liable to the Plaintiff for the full amount of the Plaintiff's damages regardless of the individual tortfeasors percentage of fault
  - (2) 100% liability against each tortfeasor and total judgement will be entered against each defendant
    - (a) each defendant is entitled to collect only a maximum of 100,000 – and he can seek to collect from any one of the defendants
    - (b) contribution is about seeking partial contribution from the other tortfeasors
  - (3) differences between intentional and unintentional wrongdoing and contribution
    - (a) MBE: contribution is not available when the nature of the liability involves intentional wrongdoing!
    - (b) NY: in NY, we don't care – NY allows contribution in all tort cases including intentional torts
- iii) New York Tort reform article 16 tort reform for non-economic damages
  - (1) Rule if **a joint tortfeasor is fault is found to be less than 50%, cannot be required to pay the Plaintiff more than his own equitable share of the Plaintiff's non-economic damages**
  - (2) Inclusions
    - (a) Pain and suffering
  - (3) Exclusions
    - (a) Personal injury
    - (b) Property damages
    - (c) Wrongful death
    - (d) tortfeasors who acted with intent or reckless disregard
    - (e) drivers and owners of vehicles that aren't police cars, but manufacture of a car and drivers do
- iv) Percentages of contribution for joint and several liability
  - (1) Majority rule (same as NY rule): comparative degrees of fault
    - (a) Amount of contribution to which a tortfeasor is entitled is the excess actually paid by him over and above his own equitable share
    - (b) Each tortfeasor under the comparative formula is liable for contribution in accordance with his or her individual percentage of fault
  - (2) Minority approach: everyone liable for "equal shares" of fault
- v) If there is an impecunious defendant: a Defendant whom contribution is sought against cannot be compelled to pay more than his own equitable share.
  - (1) Contribution affects only the rights amount the defendants – as this means that after an earlier one settles, there is no way that one could pay their equitable share
  - (2) Settlement – MBE and NY rule the same
    - (a) Pretrial release of one tortfeasor in partial satisfaction of the claim does not discharge the liability of the other tortfeasors
      - (i) Can still go after other tortfeasors for unpaid balance
      - (ii) Include indemnity
      - (iii) Since indemnity arises as a matter of law, a tortfeasor who has been released by settlement can still be asked for damages, in contradistinction to contribution. For example right of indemnity does not include release.
    - (b) Law prohibits excess recovery. Any judgement against a non-settling tortfeasor will have to be reduced in order to take account for the settlement
    - (c) **Statutory formula: any judgement against a non-settling tortfeasor must be reduced by either the amount of the settling, or the settling tortfeasors' share of the default, which is larger**
  - (3) Contribution after settlement between the parties
    - (a) One can't get contribution because a pretrial settlement extinguishes contribution claims by and against the settling party
    - (b) When a party settles he buys total peace

- (i) Part of the idea is to encourage settlement
  - (c) Once you have settled out, there are no more contribution claims
- (4) Indemnity is another matter: A settling defendant who indemnified, is not barred because a settlement doesn't cut off claims for indemnity by or against a settling tortfeasor. Statute distinguishes between contribution and indemnity
- d) Right to contribution exists when the third-party defendant breaches a duty in tort which contributed to, or aggravated the damages for which the defendant is liable to the Plaintiff
  - i) Can have liability in contribution, even if there is a stipulation meaning that there is no damages
  - ii) Contribution, with its six year statutes of limitations will allow collection from a negligent doctor from a tortfeasor six years later
- e) Workers compensation cases exceptions (in New York) – requires grave injury for the third party to seek contribution from the employer
  - i) If there is an employee who is injured on the job, by statute you are not allowed to sue your employer, however, the employee is allowed to sue a third person who is partially at fault for the accident, such as a manufacture who made the product that the Plaintiff was using
    - (1) Now the third person will try to sue the employer for contribution. However, by statute they can't do that, based on grave injury. Has to be loss of limbs, disfigurement, death, deafness, brain damage, Disability
  - ii) MBE: third person never has a right to contribution from a Plaintiff's employer
    - (1) NY: third person does have a right to contribution from a Plaintiff's employer if the injuries are grave
- 9) Motion practice motions are "application to the court for an order" -- can be made on notice or "order to show cause"
  - a) Motions on notice give the opportunity the adversary the opportunity to be heard
    - i) To make this motion, you serve a **notice of motion**:
      - (1) Notice of motion must include
        - (a) type of motion
        - (b) time at which the motion will be heard by the court "return date" or "hearing date"
        - (c) supporting affidavits which show why the motion should be granted
      - (2) timing for motions: moving party must serve eight days before return date
        - (a) motions are made when the motion papers are served on the other party
        - (b) Most papers are served by mail. When someone puts them into a mailbox, the motion has been made.
      - (3) After service, motion papers must be filed with the court on the return date
    - ii) **Order to show cause**: preliminary order signed by the judge directs an adversary to show cause as to why the motion should not be granted.
      - (1) reasons to move by order to show cause
        - (a) Statute may require that the motion be made by order to show cause
        - (b) Orders to show cause accelerate the return date
        - (c) In signing the order to show cause, the judge has the power to grant a TRO or an immediate stay of the action
      - (2) Procedure for order to show cause
        - (a) wording of proposed order: *let the defendant show cause why an order should not be granted compelling her to...*
        - (b) moving party must draft the order to show cause
        - (c) must include supporting affidavits
        - (d) judge selects return date
        - (e) judge specify the method of service
        - (f) judge gives the papers back to the moving party
        - (g) opponent is given an opportunity to submit opposition papers on the return date
      - (3) court's decision must be in a written order signed by the court
        - (a) the prevailing party serves a copy of the order on the losing party
        - (b) the order becomes effective when the copy of the order is served – and order can be appealed for 30 days

- (i) New York allows an immediate appeal to the appellate division as a matter of right. *Cf.* most other states have a final judgement rule, but New York allows for interlocutory appeals (permissive)
    - (ii) one can wait and appeal from the final judgement
  - (4) *ex parte* motion: no advance notice: can only be with express statutory authorization
    - (a) aggrieved by the *ex parte* order, can you take an appeal from the *ex parte* order, there is no appeal from an *ex parte* order
    - (b) the remedy is a motion on notice to vacate the *ex parte* order, if the motion to vacate is denied, then the aggrieved party can appeal the denial
  - b) Motion for summary judgement in lieu of a complaint: can only done at the time of service of process – can only do on two types of actions. Return date is no sooner than the defendant would have had to respond the actions
    - i) An action on an instrument for the payment of money only is defined as Instrument must contain an unconditional promise to pay money
      - (1) Promissory note
      - (2) Negotiable instrument
    - ii) Action on an out of state judgement
    - iii) Instead of a complaint, you are serving the summary judgement motion papers with the summons – one is initiating an action and making a motion for summary judgement
  - c) Pre-answer motions for summary judgement: Where the pre-answer motion to dismiss for failure to state a cause of action can be converted by the court into a motion for summary judgement
    - i) The parties must have submitted factual affidavits in connection with the motion to dismiss
    - ii) Court must give notice to the parties of the conversion, so that the parties can submit additional evidence
  - d) normal motion for summary judgement (after defendant's answer has been served)
    - i) made after answer and before trial
    - ii) a motion for summary judgement claims that the pleading are sufficient on their face, and there is are no genuine issue of material fact, meaning that the moving party is entitled to a judgement as a matter of law.
      - (1) For exam purposes, must specify elements of claim that need to be plead and (if disputed) proven
    - iii) either party can make a motion with **respect to any claim or any defense raised in the pleadings**
    - iv) Moving party must submit evidence in the form of affidavits or documents or discovery materials – parties must “lay bare their proofs” and “make no bald conclusion statements”
      - (1) Affidavits must be from persons who have actual knowledge of the facts (parties themselves or other eyewitnesses) – not the lawyers
        - (a) Affidavits must include evidence – can't point to the pleadings.
          - (i) Want to see affidavits and statements under oath, from people who have personal knowledge of the facts
          - (ii) If Opponent might not be able to produce the evidence, Court can grant the motion or grant a continuance
      - (2) The opponent must submit evidence, and the opponent's evidence must show that a triable issue of fact *does* exist
    - v) In a motion for summary judgement the court can “search the record.” The court court can look at all of the evidence regardless of which side presented it. Court can grant summary judgement for the opponent, even if the opponent didn't request it
    - vi) If the motion for summary judgement is denied, it means that a triable issue of fact exists, and the case will resume its normal progression to trial
  - e) Damage hearings: If the only fact issue concerns the amount of damages the court can grant the Plaintiff summary judgement on the issue of liability, and order an immediate trial on the issue of damages
- 10) Provisional remedies. Purpose: To give Plaintiff a measure of security. All provisional remedies require a court order except the notice of pendency
  - a) Attachment
    - i) Requires a court order (motion procedure)

- ii) Attachment is only available when the Plaintiff is seeking money damages or on marital actions
  - (1) Parties whose assets can be attached
    - (a) If the defendant is an unlicensed foreign corporation or a non-domiciliary of New York
    - (b) Defendant is about to remove assets of the state with the intent of defrauding creditors or frustrating the enforcement of a judgment
    - (c) Defendant is a non-domiciliary who can't be served personally
  - (2) Things that can be attached
    - (a) Debts that can be assigned
    - (b) Property
- iii) Procedure for attachment: must show 1) claim and 2) that there is a security risk
  - (1) Can get an order of attachment against a non-domiciliary party for a New York obligation
  - (2) Plaintiff has to make a motion – that are three required showings
    - (a) Affidavits must show some grounds for attachment
    - (b) Affidavits must show a probability of success on the merits of the Plaintiff's underlying cause of action
    - (c) Plaintiff must post a bond to indemnify the defendant for any damages or expenses caused by the attachment. Defendant is entitled to damages if either the attachment was wrongful, or if the defendant wins the case on the merits, defendant gets damages caused by the attachment
  - (3) Motion can be on notice or ex parte
  - (4) Due process considerations
    - (a) Must be a **hearing promptly** after the seizure of the defendant's property to give the defendant an opportunity to contest the attachment
    - (b) Confirmation requirement: After the Sheriff levies on the property, Plaintiff must make a motion on notice to confirm the ex parte order of attachment
      - (i) Attachment becomes void without an motion to confirm (which is appealable)
    - (c) Time limits for confirmation
      - (i) If the defendant was an unlicensed foreign corporation or a non-domiciliary of New York no later than ten days after the levy
      - (ii) For security risks motion to confirm must be made no later than five days after the levy
- iv) Effect of attachment.
  - (1) Order of attachment goes to the sheriff and the sheriff places a lien on the property
  - (2) Give the Plaintiff a security interest in the property that is superior to that of any subsequent lienholder. Sheriff records
    - (a) Real property: Getting a priority on the defendant's property.
    - (b) Personal property: Tangible or intangible: might be the defendant's car or debts that are owed, including **bank accounts**
      - (i) This delivery by the sheriff **automatically imposes a lien on the person's property** which give you the security interest and it serves as an injunction against transfer of the personal property
  - (3) When the property is in the hands of a 3<sup>rd</sup> person, we call this third person a garnishee
- b) Preliminary injunction for equitable (for example rescission or *in rem* actions) actions– must be made on notice (from summons to final judgment)
  - i) Requires a court order (motion procedure)
  - ii) Purpose of the preliminary injunction is to maintain the status quo while the action is pending
    - (1) If the Plaintiff is seeking a permanent injunction, or the defendant threatens to harm the Plaintiff's interest in the subject matter of the action
      - (a) If the action seeks **solely money damages you cannot get a preliminary injunction** – if the Plaintiff is suing the Plaintiff for nonpayment of a debt
  - iii) Three requirements that must be shown for preliminary injunctions
    - (1) Grounds for equitable relief, which must show a **threat of irreparable injury**
    - (2) Plaintiff must show a **probability of success** on the merits of her cause of action

- (3) Plaintiff must post a bond to indemnify for damages if it is later determined that the preliminary injunction should not have been granted
- c) Temporary restraining orders – if someone is threatening to do something immediately (for example tomorrow)
- i) Preliminary injunctions must be made after commencing an action, and the service has to be accompanied with the notice for injunction
- (1) times
- (a) Usual minimum advance notice for a motion on notice is eight days
- (b) In a case involving an immediate threat of injury, the Plaintiff may request a TRO *ex parte*
- (c) To get the TRO so that one can get the immediate relief, one needs to make the motion for preliminary injunction by the order to show cause. This doesn't require the usual eight day notice of motion
- (i) In the order to show cause, the judge can accelerate the return date for the preliminary injunction motion, and sign a TRO
- (2) Purpose: The purpose of the TRO is to maintain the status quo while the motion for the preliminary injunction is pending
- (a) When the order to show cause is served on the defendant, he will be immediately enjoined by the TRO and that injunction will last until resolution of the motion for the preliminary injunction
- (b) The TRO will immediately go into effect, and it will enjoin the defendant until we get a resolution of the motion for the preliminary injunction
- d) Temporary receivership is defined as a person appointed by the court to manage property in the defendant's possession (not for solely monetary damages)
- i) Requires a court order (motion procedure)
- ii) The Plaintiff must be asserting an equity claim, in which specific property is the subject matter of the action, and there is a danger that the defendant will injure or destroy the value of the action while the action is pending
- iii) Temporary receivership is quite drastic, and there is rarely a need to oust the ownership of a company
- e) Order to seize chattel in an action to recover the chattel -- *replevin*
- i) Requires a court order (motion procedure)
- ii) In a prejudgment replevin the judgement will be limited to the value of the chattel
- (1) Good: things with sentimental can be returned
- (2) Bad: no additional damages
- iii) Requirements for Plaintiff's affidavits
- (1) Must show probability of success on the merits
- (2) Plaintiff must post an undertaking (bond) to indemnify the defendant
- iv) Motion for the order of seizure can be made on notice or ex parte must include the Threat of immediate loss of the chattel
- v) Have to satisfy due process, so if the ex parte order of seizure was granted
- vi) Plaintiff must make a follow-up motion on notice within five days of the seizure to confirm the ex parte order
- f) Notice of pendency is defined as in an action in which the judgement will have a direct effect on real property, the filing of a notice of pendency gives record notice to any potential buyers or mortgagees that any interest that they acquire will be subordinate to that of the Plaintiff -- must have a direct effect on the real property
- i) No court order required
- (1) No requirement of a bond when you file a notice of a pendency
- ii) Actions available in
- (1) Must be an equity action in which the judgement will have **a direct effect on title, possession or use of real property** -- for specific performance, for ejectment, etc.
- (2) In a mortgage foreclosure, the filing of a notice of pendency is required by statute
- (3) Gives the Plaintiff a lien
- iii) If the notice is improperly filed, the remedy is a motion to cancel the notice of pendency
- (1) The burden is on the defendant to cancel the notice of pendency

- iv) Suit must be commenced within 30 days after the suit is filed or the notice of pendency is void (RPL)
- g) The court has discretion to make the Plaintiff elect between the provisional remedies that are more important
- 11) Trial of an action
  - a) Once the case is ready for trial, one files a note of issue – then serves it
  - b) Moving party must make demand for jury trial, or it is waived. Nonmoving party must file separate demand
    - i) Right to trial by jury
      - (1) Action seeking solely **money damages**
      - (2) **tort actions** breach of contract
      - (3) **replevin**
      - (4) claims to **real estate**
      - (5) **annulment** of a marriage
      - (6) in a divorce action, a party is entitled to a jury with respect to the grounds for the divorce
        - (a) don't get it for the monetary relief
        - (b) don't get it for child custody
    - ii) civil jury is 6 jurors, and 5/6 will sustain jury verdict in a civil action
- 12) Special proceedings: like motion procedure. A speedy way and a streamlined procedure, and the purpose is to obtain a speedy result in a dispute
  - a) Subject matters for special proceedings require explicit statutory action. A common law action that is made via a special proceeding is converted into a normal action.
    - i) Elections
    - ii) Dissolution
    - iii) Habeas corpus
    - iv) Landlord-tenant
    - v) Enforcement of arbitration agreements (or avoid arbitration)
    - vi) Article 78: obtaining judicial review of a governmental or quasi-governmental agency of any kind.
      - (1) The respondent will be a government official.
      - (2) Court: only the Supreme Court (not the court of claims)
        - (a) Parties: state can be a party
      - (3) Four grounds
        - (a) **Mandamus to compel**: To compel the performance of an act required by law, in which no discretion is involved. Can be against Corporate officer since corporations exist as creatures of the state.
        - (b) **Prohibition**: to stop a judicial officer from **exercising power that is in excess of the officer's lawful jurisdiction**
          - (i) This has to be gross exercises of jurisdiction. The normal remedy for routine judicial error on a question of jurisdiction is simply to **appeal within the same action in which the error occurs**
          - (ii) For example a violation of double jeopardy
        - (c) **Certiorari**: a judicial proceeding to challenge the results of a trial-type hearing conducted by an administrative agency (ALJ decision)
          - (i) People have a vested property right in their licenses or jobs
          - (ii) The court should uphold the results if the determination was supported by substantial evidence
        - (d) **Mandamus to review** of other administrative actions
          - (i) Standard: The court should uphold the agency's determination unless it was arbitrary and capricious and there is no rational reason.
          - (ii) Usually for non-vested rights
    - (4) Statutes of limitations for article 78 proceedings is 4 months
    - (5) Relief
      - (a) Declaratory or injunctive relief
      - (b) Damages are recoverable if incidental (way to get around court of claims)
  - b) Petitioner (not the Plaintiff) files two documents with the court: return date is eight days

- i) **Petition** (analogous to a complaint)
  - ii) **Notice of petition**
  - iii) Unlike normal claims answers are submitted to the court **so that the petition and the answer are all submitted to the court on the return date for the judge's consideration of the matters**
- 13) Conditions precedent to suit in NY
  - a) Suits against political subdivisions
    - i) Notice of bad condition of roads must be in writing for a town to be on notice of the bad condition of the road
- 14) Depositions
  - a) Negligence (in part) actions: no court order to depose
  - b) In all cases can serve interrogatories and a bill of particulars
  - c) Non-parties can be deposed within 20 days

## Partnership

### Summary

- 1) partnership
  - a) no general partner formalities, but any time there is limited formalities
  - b) partnership is defined as association of two or more persons who are carrying on as co-owners of a business for profit (*prima facie*)
  - c) relations with third parties
    - i) agency law applies
    - ii) general, not limited partners, are personally liable for partnership obligations.
    - iii) Estoppel – one who represents that they are a partner will be liable as if they are
  - d) Relationship between partners
    - i) Fiduciary/action for accounting
    - ii) Only the share of profits is personal property
  - e) Default rules: Absent an agreement equal control, no salary, equal profits, losses like profits
  - f) Dissolution is defined as any material change followed by winding up
    - i) Priority schedule
      - (1) Outside creditors
      - (2) Inside creditors
      - (3) Capital contributions
      - (4) Profits, if any
    - ii) Each partner must be repaid their loans and their capital contributions, plus their share of the profits (if any), but also minus their share of losses.

## Property

- 1) Holders rights
  - a) Right to be free from trespass (invasion of the land by tangible object)
    - i) Nuisance is defined as substantial, unreasonable, and intentional interference but doesn't require tangibility. Sensitive Plaintiff's lose
  - b) Co-tenants can't object to others co-tenants violating terms of leases
- 2) Boundary line agreements: Oral boundary line agreements will be considered valid, provided that the parties were not informed as to the true boundary line
- 3) Freehold estates (give possession to property under some legal title)
  - a) Fee simple (most extensive estate that a person can own in property)
    - i) **Fee simple** absolute



- (1) Maximum of legal ownership
- (2) Infinite duration
- (3) Words had to say “to grantee **and his heirs**”
  - (a) Common law (“and his heirs” construed as limitation)
    - (i) Words of purchases indicate the grantee or persons who take the property
  - (b) Modern
    - (i) Only have to convey to one person
- ii) Fee simple defeasible
  - (1) **Fee simple determinable** (or possibility of reverter). FSD a.k.a. POR when the property “pops” back
    - (a) Created to continue until the happening or non-happening of a stated event
      - (i) When that events occurs, the estate terminates automatically
    - (b) For example “X, owner in A conveys Blackacre to B so long as the property is used as a store” – if it isn’t used as a store it reverts<sup>4</sup> -- the interest isn’t subject to the Rule against perpetuities. However, the executory interest is.
    - (c) Wordings: So long as, During, Until, While
      - (i) Note “for the purpose of” this is an illusory statement of motive
    - (d) Since the grantee’s estate may end, there is always a possibility of reverter
      - (i) If the event does occur, there is an automatic reversion to the grantor upon the happening or non-happening of that stated event
  - (2) **Fee simple subject to conditions subsequent** in New York it is called **Fee On Condition with right of reacquisition** (Fee simple, that *may* be terminated upon the happening or non-happening of a stated event or contingency).
    - (a) This creates the option of reentry
    - (b) Wording (Condition that, Subject to the condition, But if)
    - (c) For example X owner in fee conveys Blackacre to A and his heirs, *but if* the land is not owned as a farm, X *may* reenter the land
    - (d) Have the right of reentry for broken conditions: When the event occurs, if the land is no longer used as a store, there is not an automatic reversion – but rather than grantor and his heirs have the *option* of reentering
    - (e) Necessary preparations to change between acceptable uses do not trigger one of the conditions
    - (f) Alienation: On MBE, not alienable
      - (i) In New York these are Fee On Condition with right of reacquisition, the holder must record a declaring of intent to preserve the interest between 27-30 years afterwards every 9-10 years.
  - (3) Fee simple **subject to executory interest** is defined as where upon the happening or nonhappening of a stated event it passes from one **grantee to another grantee**. This estate **cuts short** another’s estate (a contingent remainder can never follow a fee simple interest of any kind – any interest which follows a fee and is held by a 3<sup>rd</sup> person must be an executory interest)
    - (a) There is no reversion back to the grantor or a right of reentry
      - (i) If X (owner in fee) conveys to A and his heirs as long as the land is used as a farm, and if it isn’t used as a farm, then to B and his heir
      - (ii) For example X conveys to A and his heirs., but if A dies without issue at death, then to B and his heirs
    - (b) Types of executory interests:
      - (i) Characteristics of springing and shifting executory interests
        1. where upon the happening of a named event, ownership passes from one grantee to another grantee
        2. **A contingent remainder can never follow a fee simple interest of any kind**
        3. Any interest which follows a fee and is held by a 3<sup>rd</sup> person must be an executory interest.

<sup>4</sup> FSD POR = Fee Simple Determinable = Frank Sinatra Didn’t prefer Orville Redenbokker

4. New York: Executory interests and contingent interests are called **remainders subject to a condition precedent**
    - (ii) **Shifting** executory interests cuts short a defeasible fee (O to A, but if B returns from Canada than to B)
    - (iii) **Springing** executory interests (cuts short grantor's estate). From O to A when A becomes a lawyer. (a.k.a. from O to O but when A becomes a lawyer to A)
  - b) **Fee tail**: at common law a Fee tail was created: "to Grantee and the heirs of his body"
    - i) Inheritance was limited to the lineal descendants of the grantee
    - ii) Permissible for the grantor to restrict the inheritance to a particular group of lineal descendants by proper words of limitation (for example grant to a male and the male heirs of his body created a *fee tail male*)
    - iii) Lineal heirs are sons, daughters, grandchildren, and great grandchildren
      - (1) Collateral heirs are cousins, nieces, uncles, and aunts
  - c) **Life estates** (can either be called a "life estate" or something that is only for their life)
    - i) Freehold estate where the duration is measured by the lives of one or more human beings
      - (1) X conveys Blackacre to A for life
        - (a) Variation: Life estate *per autre vie* – where the duration is measured by the life of someone other than the grantee
      - (2) Must be measured in terms of a person's life (not a term of years)
    - ii) Those who are in present position need to maintain and pay taxes
    - iii) Rights of the life tenant
      - (1) Can sell their interest, but can't sell more
      - (2) Life tenant cannot commit **waste** or anything that would harm future interest holders
        - (a) See 5b)ii)(3)(a) below on page 136 for list of types of waste
        - (b) Types of waste that a life tenant can commit (PURGE)
          - (i) **PU**: Prior uses of the land
          - (ii) **Reasonable repairs**: tenant may use the resources of the land to create reasonable repairs
          - (iii) **G**: by **Grant**, the life tenant may have been given the rights expressly to do something
          - (iv) **Exploitation**: the land may only be suitable for exploitation
      - (c) Remedy for waste will usually be injunction because damages are probably inadequate (would require repeated damage actions)
    - iv) If a life estate is conveyed to someone, with an interest that shifts to someone else, the shifting occurs at the end of the life estate – not when it becomes impossible for that condition to be fulfilled
  - d) **Dower**: widow is entitled to, upon the death of her husband entitled to 1/3 of the lands of her husband was seized of (in Fee Simple or Fee tail) at any time during the marriage
    - i) Can be defeated if the widow
      - (1) Jointly conveys the property
      - (2) Releases dower
  - e) **Tenancy by courtesy**: life estate was entitled to **all** of his wife's lands – in the lands that his wife was seized in during their marriage
    - i) Husband and wife had to be legally married
    - ii) Wife must be seized of land in either fee simple or fee tail during the marriage
    - iii) Wife must have issue born alive by the husband
    - iv) Wife must pre-deceased the husband
- 4) **Future interests**
  - a) **Reversions**: Estate remaining in the grantor who has conveyed a lesser than that owned by the grantor (for example X, owner in fee, conveys Blackacre to B for life – B has as a life estate, which at the end, there is a reversion to the grantor)
  - b) **possibility of reverter**: interest retained by the grantor of a determinable estate which ripens into a possessory estate upon the occurrence of that stated event – then you have an automatic reversion back to the grantor
  - c) **power of termination**: a.k.a. **right of re-entry for broken condition**
    - i) created in the grantor subject to a condition subsequent

- ii) there is not an automatic reversion back to the grantor upon the happening or not happening of that stated event
  - (1) they have the option of reentering
- d) **reversions, possibility of reverter, and right of reentry** are created when the grantor conveys an expirable or lessor estate, at the expiration of that life estate we have a reversion back to the grantor – this is where they convey a lessor of a life estate mainly a fee tail or a life estate
- e) **possibility of reverter** is where the grantor conveys a fee simple determinable
- f) **remainders** (contingent remainders, vested remainders, executory interests). These are future interest created a third person which is intended to take effect at the natural termination of the preceding estate.
  - i) Remainder follows a estate
    - (1) Requires elements
      - (a) Must be in favor of a transferee who is one other than the grantor (otherwise would be a life estate)
      - (b) Created at same time and in the same instrument as the prior particular estate which supports or creates
      - (c) Preceding estate much be of lesser duration than the interests of the conveyer, so that there is going to be an interest to pass on to the remainderman
    - (2) at common law remainders were inalienable, today they are alienable
    - (3) Creditors
      - (a) Vested – can go to creditors
      - (b) Contingent – not to creditors
    - (4) Timing
      - (a) Cannot take effect to cut short the prior estate
      - (b) Rule against perpetuities: contingent remainders come within the rule, but not vested remainder
    - (5) Vested v. contingent remainders
      - (a) **Vested is defined as remainder created in a ascertained and existing person which is not subject to any conditions precedent except for the termination of the estate**
        - (i) Has a right to compel the prior estate owner to pay taxes and interest on encumbrances
        - (ii) Not subject to Rule against perpetuities
        - (iii) Subject to the claims of creditors
        - (iv) Has a right against the prior estate holder for waste
      - (v) Types of vested remainder
        - 1. Absolutely vested: Ascertained or identifiable person(s) without words of condition and it is not subject to divestment (a to B for life, then to C and her heirs)
          - a. No divestment
        - 2. Subject to partial divestment a.k.a. Remainder vested subject to open
          - a. This is usually a type of class gift where there is partial divestment (remainderman is in existence and ascertained and the amount of her estate is subject to being diminished in favor of other members of her class)
            - i. At least one of the class must be qualified to take possession
            - ii. A class closes when maximum membership has been set, so that person born afterwards can't take
            - iii. Womb rule: children in the room are included in classes
          - b. Common law: if seized can pass immediately on death, but it will open up to after-born children born of D, which is where A devises land to B, at the time of D's death, C's remainder is vested, but here we know that because it is subject to open because of after-born children of B are let in
        - 3. Remainders subject to complete divestment (New York: remainder vested subject to complete divestment)

- a. Note: applying the “comma rule”. If the language is “from O to A , subject to remainder” it is a condition precedent. If the clause comes before, it is a contingent remainder.
  - b. When the remainderman is in existence and ascertained – and interest is **not subject to condition precedent**, and the right to possession or enjoyment is subject to termination by reason of an executory interest, power of appointment or a right of entry
- (b) **Contingent remainders** (not vested) is defined as any remainder which is created in favor of an ascertained person but is subject to a condition precedent, or is created in favor of an unborn or unascertained person
  - (i) Example of a condition precedent can be one party surviving another
  - (ii) Note: applying the “comma rule”. If the language is “from O to A , subject to remainder” it is a condition precedent. If the clause comes before, it is a contingent remainder.
  - (iii) Has no a right to compel the prior estate owner to pay taxes and interest on encumbrances
  - (iv) **Subject to Rule against perpetuities (example—check this)**
  - (v) Has no right against the prior estate holder for waste
  - (vi) Not Subject to the claims of creditors
- ii) **executory interests** (cuts short a life estate) – future contingent interest, created in favor of a transferee, in the form of a springing or shifting use, which on the happening of the contingency described, will be executed into a legal estate which cannot be construed as a remainder.
  - (1) Characteristics
    - (a) Always in favor of a transfer other than the transferee or a transferor (this is different than a reversion or a possibility of reverter)
    - (b) Always contingent and can never become vested – when it vests, it ceases to become an executory interest
    - (c) Different than a remainder, because it cuts short a prior estate upon the happening or non-happening of a stated event or contingency, not after the natural termination of a preceding estate
  - (2) Types of executory interests
    - (a) **shifting** is defined as cutting short or terminates a preceding estate in favor of another grantee
      - (i) A (owner in fee) conveys to B and his heirs, but if B marries Z then to C and his heirs (B has a shifting executory interest)
    - (b) **springing** is defined as A conveys to B for life, but if B becomes bankrupt, then to C and his heirs (later) -- **there needs to be a gap in time**
      - (i) the state of title is a life estate in B subject to an executory interest in C with a reversion in A
      - (ii) C’s interest is not a remainder, because it doesn’t await the natural expiration of B’s life estate
      - (iii) With respect to a Springing executory interest – A, owner in fee conveys to B, but if B marries Z, then **one year later** the right to possession passes to C and his heirs
    - (c) Note: executory devises are created by will, whereas an executory interest is created by deed or grant *inter vivos*
- g) Power of appointment
  - i) A general power of appointment: equivalent of property. One can exercise such power and alienate or transfer property
  - ii) If one can alienate property, the rule against perpetuities is not offended, it must be exercisable, as long as the power of appointment may be exercisable, during the period allowed within the rule (life in being plus 21 years)
- h) Restraints on alienation are provisions in deeds, wills, and mortgages which restrict the grantee’s power to convey property to others
  - i) courts disfavor absolute restraints on alienation

- ii) Whether a particular restraint is valid depends on many consideration
  - (1) The kind of restraint
    - (a) Disabling restraints
    - (b) Forfeiture restraints
  - (2) The estate that is restrained
    - (a) Fee simple: any restraint imposed upon a Fee simple is invalid
    - (b) Restraints on alienation of non-freehold estates are commonly held
    - (c) Non-assignment clauses are valid
    - (d) if someone conveys to A “so long as she never attempts to sell” the restraint is voided.
    - (e) Restraints against selling to a specific person are permissible
  - (3) The extent of the restraint – can either be total or partial
    - (a) Restraint may only limit the grantee for a limited period of time
    - (b) Can be restraints on persons, which are invalid (For example racial, religious, etc. restraints are invalid under the 14<sup>th</sup> amendment)
    - (c) A restraint against alienation of an inheritable future interest is void where the restraint may continue in effect after the future interest ends is void
  - (4) Inheritable future interests can’t be restrained after the future interest becomes possessory
- iii) **Preemptive rights** (or rights of first refusal) are a partial restraints on alienation are upheld, unless they violate the Rule against perpetuities
- i) caveats
  - i) Rule in *Shelly’s Case* is if in a conveyance or a will, a freehold estate, (usually a life estate) is given to a person and in the same conveyance or will, a remainder is limited to the heirs of that person, the grantee takes **both** the freehold estate, and the remainder.
    - (1) For example
      - (a) Where X (owner in fee) conveys Blackacre to B for life, with remainder to B’s heirs.
      - (b) B takes the fee simple
      - (c) The remainder to B’s heirs is cut off
      - (d) The remainder has merged with the life estate creating a Fee simple absolute!
  - ii) Doctrine of Worthier Title (a.k.a. *rule against remainders in grantor’s heirs*)
    - (1) In New York, this was abolished with regards to transfers after 1967.
    - (2) Remainder in grantor’s heirs is invalid and the grantor retains a reversion in the property
      - (a) Must be actually “all of the heirs” and not “children” people who would have been heirs only
  - iii) Rule against perpetuities is defined as *no interest is valid unless it vests, if at all, not later than 21 years after some life in being at the time of its creation (or at the creation of the interest). Or an interest is void if there is any possibility, however remote, that the interest may vest more than 21 years after some life in being at the creation of the interest*
    - (1) The sole test is that the interest “must vest” in an identified person
    - (2) Only the interest which is improper is stricken
    - (3) Intellectually dishonest Barbri process
      - (a) The last person mentioned by proper name, and all prior parties take
      - (b) The next person not mentioned by a proper name takes
      - (c) All additional parties
    - (4) Period of time begins
      - (a) Deeds: at death
      - (b) Wills: date of death
      - (c) Revocable trusts: when the trust becomes Revocable
    - (5) To determine a life in being: Have to assume that if a hypothetical baby was born tomorrow (babies in the womb could be born tomorrow)
      - (a) New York: people are presumed to be able to have kids from 12-55
      - (b) In New York: where an estate would be invalid because it depends on a person attaining or failing to attain an age in excess of 21 years, the age contingency is reduced to 21 years
      - (c) New York; second look – redetermine whether the Rule against perpetuities is violated at the conclusion of the measuring life

- (i) Uniform statutory rule against perpetuities (says whether or not something wouldn't vest 90 years after the Rule against perpetuities)
- (6) Interests under the Rule against perpetuities
  - (a) Only contingent interests come under the Rule against perpetuities
    - (i) Vested since they will vests don't come under the Rule against perpetuities
  - (b) Class gifts – remainder subject to open (since we don't know whose interest is vested and to what extent)
    - (i) A remainder is deemed to be closed, and all conditions precedent for every member of the class have been satisfied
    - (ii) A class is closed when no one born after the date can share in the gift
    - (iii) A class can close either physiologically, or under the rule of convenience
      - 1. Physiological closing: gift to A's children closes at A's death
      - 2. Convenience: a class can close earlier, whenever any member of the class is entitled to demand possession of his or her share, this is the rule of convenience
  - (c) Contingent remainders and class gifts
  - (d) Option to purchase that are not incident to a lease, but options contained in a deed instrument
    - (i) Options in a lease don't come within the rule
    - (ii) Rights of refusal are subject to the Rule against perpetuities
      - 1. If something is given to the grantee "or her heirs" – and we don't know who they are, until then die
    - (iii) Of a right of first refusal is based on the grantor's life, then it is a valid interest – subject to Rule against perpetuities and STATUTE OF FRAUDS
    - (iv) On option that could be exercised more than 21 years after a life in being is void
  - (e) Power of appointment
  - (f) Executory interests
  - (g) Exceptions
    - (i) Charities are not included in the Rule against perpetuities (can devise from charity to charity)
    - (ii) New York uses the *cy pres* doctrine to determine intentions when dealing with charities
- 5) Land-lord tenant a.k.a. non-freehold estates (mere possession but legal title isn't conveyed)
  - a) Lease is defined as conveyance and a contractual relationship. Must satisfy statute of frauds
    - i) Must contain the following elements to satisfy the statute of frauds (which is an affirmative defense). Can't just be a check with a word like "earnest money" on it
      - (1) Must identify the lessor and the lessee
      - (2) describe the leased land
      - (3) Describe the term
        - (a) Tenancy for years (or a term): Fixed duration – must have a definite beginning and end
        - (b) Tenancy from period to period (periodic)
          - (i) Can arise from implication based on the time that rent is due
          - (ii) This is a continuing type of tenancy, and not the inception of a new type of tenancy at the beginning of each period
          - (iii) It is automatically renewed – doesn't terminate at the end of every period.
            - 1. If there is failure to give proper notice, it is ineffective
            - 2. Usually statutory provisions for notice requirements - -these can protect lots of people
          - (iv) A full period is required as notice
          - (v) May be terminated by notice of termination at least 30 days in NY or at least one month outside NYC
            - 1. Outside NYC there is no notice requirement if a definite term has been set forth
    - (c) Tenancy at will is defined as estate that is terminable at the will of either party
    - (d) **Tenancy at sufferance** is defined as holdover

- (i) Where a tenant wrongfully remains in possession after the expiration of the lawful tenancy
    - (ii) Once the tenant is removed from the premises, she is liable from the time that she began to holdover, is liable for the period for which she is a trespasser (doctrine of relationship back)
    - (iii) **note: in NY, acceptance of rent creates a month to month periodic tenancy**
  - (4) Set fourth the amount of rent
  - ii) Leases that fail the statute of frauds may still be valid, because it only effects the duration of the lease, not the covenants in the lease, provided that a landlord-tenant relationship exists
  - iii) Estoppel may be used as a defense to the statute of frauds by the Plaintiff, if the statute of frauds were invoked. (For example if the Defendant makes improvements)
  - iv) Leases do not contain general warranty provisions (*cf.* deeds) therefore there is no claim against lawful claims of the original grantor
- b) Duties
  - i) Landlord
    - (1) Duty to deliver possession of premises
      - (a) American rule: a landlord doesn't have an obligation to actually deliver possession to the tenant. Tennant has remedy against trespasser or a holdover tenant
      - (b) English (common law): landlord impliedly warrants that the tenant will have a legal right to possession at the beginning of the leasehold term
    - (2) Implied covenant of quiet enjoyment. Breach of this covenant is eviction
      - (a) **Actual eviction:** when the landlord or *paramount title holder* excludes the tenant from possession
      - (b) **Constructive eviction:** results from conduct which renders the premises uninhabitable
        - (i) The tenant must, in the face of chronic or constant interference, give notice by the landlord to the tenant and quitting the premises
    - (3) Tenant can never be punished for reporting violation of housing codes
    - (4) Premises suitable for particular purpose
      - (a) General rule: A landlord doesn't impliedly warrant that leased premises are suitable for any particular purposes. General rule of law is *caveat emptor*
      - (b) Hidden defects – landlord may be liable in torts to the tenant, if at the commencement of the lease there is a hidden defect that the landlord knows about or should know about, that the tenant would not likely discover (trap)
      - (c) Where the is a completely furnished dwelling for a short period of time impliedly warrants fitness of the premises of the dwellings
    - (5) Duty to repair: In general, no duty to repair (common law)
      - (a) Tenant is under a duty to repair, but there may be a statue or covenant
      - (b) If a landlord undertakes to make certain repairs on the premises and does so in a negligent fashion then the landlord may be liable in tort for the resulting injuries
      - (c) In NY there is a duty to repair
      - (d) In New York, the duty to pay rent and to repair is terminated if the premises is destroyed.
    - (6) Landlord tort liability: usually none, with exceptions (CLAPS)
      - (a) Common areas
      - (b) Latent defects (duty to warn)
      - (c) Assumed repairs
      - (d) Public use (conventional halls, museums)
        - (i) A lessor is liable for damage done to 3<sup>rd</sup> parties in a public building, where that conditions existed at the time of the leasing
      - (e) Short term leases
  - ii) Tenant
    - (1) Duty to pay rent: Today it is viewed as the **consideration** paid by the tenant for the **use and enjoyment** of the land

- (a) When rent accrues, at common law rent is not apportionable as to time – then the landlord can collect to rent for any portion of the year, so rent doesn't accrue from day to day
- (b) Destruction
  - (i) Where there is destruction of premises, because of fire, floods, or storms, this doesn't relieve the tenant from his or her obligation to pay rent.
  - (ii) However, in NY, destruction of the premises does not obligate the tenant to rebuild
- (c) Remedies of landlord for failure to pay rent
  - (i) Surrender: accept surrender of abandoned property
  - (ii) Ignore the abandonment and hold T responsible
  - (iii) Relet the premises on the wrongdoer's behalf and hold them liable for any deficiencies
    - 1. In NY there is no such mitigation requirement
- (2) Tenant has to make ordinary repairs
- (3) Tenant can't waste – types of waste (owner of a possessory estate in land has a duty to use his in a reasonable manner *cf.* owners in fee simple)
  - (a) **Voluntary waste**: Injury to the premises or land caused by an affirmative act of the tenant
  - (b) **Ameliorating waste**
    - (i) Change in the physical characteristics by an unauthorized act of the tenant which increases the value of the land
    - (ii) Tenants are normally not liable for ameliorating waste
      - 1. In NY, ameliorating waste can include a violation of any agreement
      - 2. In NY, estates that are over 5 years in length are not subject to as strict limitations
  - (c) **Permissive**: Injury to the property caused by a failure to act when it is their duty to act (e.g. failing to fix roof)
  - (d) **Equitable waste** – injury to the reversionary interest in land which is inconsistent with good husbandry – recognized only by the equity courts and doesn't include legal waste
    - (i) Where there tenant is about to constitute an act which constitutes equitable rights, and injunction can be issued – where you see “without impeachment of waste” then there is a situation dealing with equitable estate
- (4) Extinguishment of tenant's duties
  - (a) **Release by the landlord**
  - (b) **Merger**
  - (c) **Expiration** of the lease
  - (d) **Eminent domain** which takes both the leasehold the reversion
    - (i) If the entire leasehold is taken by eminent domain
    - (ii) Where the entire leasehold is taken by eminent domain, if all of the leased land is condemned, the tenant's liability to pay rent is extinguished
    - (iii) Where there is a partial, or a temporary taking, then the tenant is not discharged from her obligation to pay rent, but rather can seek damages for the diminution in value to their leasehold
  - (e) **Constructive eviction** will extinguish a tenant's obligation to pay rent
    - (i) Material breach by the landlord which violates the tenant's implied covenant of quiet enjoyment and renders premise uninhabitable
    - (ii) Tenant must quit the premises in a timely fashion
  - (f) **Frustration** of purpose: under the modern rule: frustration of purpose would relieve the tenant of their obligation to pay rent
  - (g) **Surrender** : Where the landlord surrenders the premises, and the tenant gives the tenant permission to surrender
- c) Assignments and subleases: Absent an express provision in a lease prohibiting transfers, a tenant may transfer her leasehold interest in whole or in part.
  - i) Authorization is usually required, but construed narrowly against the landlord



- (1) Non-assignment clauses are valid: **Rule in Dumpor's case** If landlord consents to one sublease or an assignment, he consents to them all, unless the right is reserved
- (2) Non-assignment clauses are strictly construed. So a clause prohibiting assignment doesn't prohibit a sublease.
- (3) Waiver of sublease clauses is possible.
- (4) New York doctrines of consent
  - (a) Less than four units: consent can be unreasonably withheld
  - (b) More than four units: consent cannot be unreasonably withheld
- ii) If she transfers her entire remaining estate, that is an **assignment**
  - (1) If there is a tenant assignor, that tenant is still in privity of contract
    - (a) If the landlord fails to make the rental payments, the **landlord can still recover against the original tenant for the due rent**
  - (2) Between the assignee and the landlord, after there has been an assignment there is both privity of estate and privity of contract. The assignees are bound to perform the original covenants in the lease, since the covenants run with the land in general.
    - (a) Rule in Spenser's case: an assignee of a reversion or a leasehold interest can't be held liable for breach of covenant if the covenant is of a type that does not touch and concern the land
  - (3) Second assignments:
    - (a) There is no privity of estate between the second tenant, there is no privity of estate and no privity of contract (unless the 2<sup>nd</sup> tenant assumed the covenants under the lease)
    - (b) There may be privity of contract (if there is an expression assumption of the duty to pay rent)
      - (i) If there is no assumption of the mortgage, then default will wipe out injury
- iii) Where the tenant retains any part, then the transfer is a **sublease** (for example subset of the tenancy)
  - (1) Tenant sublessor remain in both privity of estate and privity of contract with the landlord
    - (a) The tenant, who is subleasing, there is no privity of estate and no privity of contract between the landlord and the sublessee.
    - (b) However, the original tenant remains in privity of contract with the landlord
      - (i) No legal relationship is created between the landlord and the subtenant
  - iv) Assignments by landlord: Recognition of the new landlord by the tenant is called attornment
- 6) Concurrent estates is defined as ownership or possession by two or more persons at the same time
  - a) **Joint tenancy** is defined as form of co-ownership where each tenant owns an undivided interest in the whole estate. There is a right of survivorship for the tenants who don't die first.
    - i) Each tenant has the right to possess and enjoy the whole of the property
      - (1) Majority: tenant in possession has the right to retain profits gained by the use of the property, without sharing. unless there has been an ouster
    - ii) Tenants can compel payment of taxes if there is a tax lien against the property
    - iii) Repairs and improvements – a tenant has no right of contribution against the other tenants for repairs. If there is a partition by the court, and the court can make an equitable division of the proceeds
    - iv) There is a right of survivorship – upon the death of one tenant, title passes to the surviving joint tenant
    - v) Creation of a joint tenancy: common law: a conveyance to two people resulted in the creation of a joint tenancy. Modernly it results in the creation of Tenants in Common
      - (1) Common law required four unities
        - (a) **Time** – interest must vest at the time
        - (b) Unity of **title** – interest must be acquired by the same instrument
        - (c) **Interest** of the same type and duration
        - (d) Unity of **possession**: each of the joint tenants are given identical rights
      - (2) Always created by a deed or a will, never by dissent
      - (3) New York allows creation of a joint tenancy with less than the four unities
  - vi) Termination of joint tenancy (SPAM: sale, partition, and mortgage)
    - (1) Severance occurs if one joint tenant conveys

- (2) Suit for partition, which can be brought by either of the joint tenants – if the parties can't get along
  - (3) Mortgages
    - (a) Mortgages: majority rule and NY: mortgage is only regarded as a lien, and doesn't result in a severance
      - (i) in a minority of states, a mortgage is regarded as a transfer of title, which destroys or severs the joint tenancy in a title theory jurisdiction
      - (ii) Physical possession of a mortgage does not change ownership of the mortgage
    - (b) The actual severance occurs on law day – or the day of default
  - (4) Voluntary agreement
  - (5) Leases doesn't sever the JT (majority)
  - (6) Equitable conversion: In most states a contract to convey results in a severance of a joint tenancy, even if it isn't conveyed, as it could be enforced in equity
  - (7) Any severance results in a Tenancy by the entirety
  - (8) When one co-tenant causes an increase in the value of the property resulting in improvements, they are entitled to a credit, if the property is sold to satisfy the party's interests. This money does not have to be in the form of an offset
    - (a) But if one co-tenant received rents from 3<sup>rd</sup> parties, they must make an accounting to them
- b) **Tenancy by the entirety** is defined as co-ownership or ownership by husband and wife
- i) Each tenant has the right to possess and enjoy the whole of the property
    - (1) Majority: tenant in possession has the right to retain profits gained by the use of the property, and need not share with a cotenant out of possession, unless there has been an ouster
  - ii) Tenants can compel payment of taxes if there is a tax lien against the property
  - iii) Repairs and improvements – a tenant has no right of contribution against the other tenants for repairs. If there is a partition by the court, and the court can make an equitable division of the proceeds
  - iv) Form of co-ownership similar to joint tenancy, but this is based upon the Common Law concept of unity of spouses
    - (1) Doctrine of survivorship applies, so where one spouse predeceases, ownership passes to the survivor
  - v) Creation requires five unities – in New York a grant to husband and wife is presumed
    - (1) **Time**
    - (2) **Title**
    - (3) **Interest**
    - (4) **Possession**
    - (5) **Person** (husband and wife were deemed to be the single unity of a person)
      - (a) At common law a conveyance to the husband and wife by will created a Tenancy by the entirety
  - vi) Severance of a Tenancy by the entirety -- neither the husband or wife, acting alone can defeat the right of survivorship, nor can they transfer it
    - (1) In most states neither spouse could dispose, but both spouses had to join in the conveyance
    - (2) Death of either spouse
    - (3) Divorce ends Tenancy by the entirety – and they become Tenants in Common
      - (a) In NY, divorce by a 5 year absence doesn't count as divorce
    - (4) Execution by a joint creditor on both Husband wife would constitute a severance
      - (a) But a creditor of one spouse cannot levy on the whole spouse
    - (5) Partition – neither spouse has the right to partition the property
- c) **Tenancy in Common** – no rights of survivorship
- i) Each tenant has the right to possess and enjoy the whole of the property
    - (1) Majority: tenant in possession has the right to retain profits gained by the use of the property, and need not share with a cotenant out of possession, unless there has been an ouster

- (2) A Tenants in Common does not own the whole property as in the case of a JT – each tenant can dispose of their undivided fractional part
- ii) Co-tenants have a right to contribution for reasonable repairs. Co-tenants may not repair in a way that is unreasonable. (one tenant's improvement could be another's waste)
- iii) Tenants can compel payment of taxes if there is a tax lien against the property
- iv) Repairs and improvements – a tenant has no right of contribution against the other tenants for repairs. If there is a partition by the court, and the court can make an equitable division of the proceeds
- v) Creation
  - (1) Unity of possession
    - (a) Each tenant is entitled to possession of their estate
- vi) Adverse possession in a Tenants in Common
  - (1) Generally, it is impossible for one Tenants in Common to adversely possess against the others
  - (2) However, New York has recently adopted a doctrine of *implied ouster* wherein after 20 years one can dispossess another
- vii) No right of survivorship
  - (1) Upon the intestate death –
  - (2) Destruction
    - (a) By partition
    - (b) Merger – when the entire title vests in one person by purchase or otherwise
    - (c) Ouster: when one tenant ousts the other – one tenant has a cause of action against the other one
    - (d) Conveyance doesn't destroy a Tenants in Common
- viii) no fiduciary duty between or among Tenants in Common
- ix) tenants can oust one another, but the ouster must be actual (except in New York)
- 7) Non-possessory interests in land a.k.a. *incorporeal interests*
  - a) **Profits** are defined as the right of one person to go onto the land of another to extract or remove or extract the something (sand, timber, or vegetables)
    - i) **Condemnation or eminent domain** is defined as where there is condemnation of the servient estate, under the modern view, where there is termination of an easement by condemnation or eminent domain, the holder of the profit is entitled to compensation for value lost
  - b) **Easements** are defined as right to go to the land of one person and make limited use of the property
    - i) Types of easements
      - (1) Number of tracts of land involved
        - (a) Appurtenant (easement in one property in favor of another). **runs with the land.**
          - (i) Dominant tenement – he or she has the right to enter onto the servient tenement and to make use of that tenement for ingress and egress
          - (ii) Adjoining servient tenement – land that is burdened with the easement
        - (b) Easements in gross – one tract of land where there is a servient tenement that is subject to the easement
          - (i) For example where the city installs a sewer line, or telephone poles
            - 1. Easements in gross are considered to be personal, because it is intended to benefit the holder personally rather than in connection with any land that holder may own.
      - (2) duties
        - (a) Affirmative easements – allows the easement holder to make a use of the servient tenement. They entitle the easement holder to make some affirmative use of the servient tenement
        - (b) Negative easement prevents the servient tenement holder from doing some act or form making a particular use of their land. **Negative easements must be in writing**
        - (c) A thus has a negative easement on Blackacre which bears the burden of the easement
        - (d) In this situation B is promising to refrain from building on B's property
- ii) Creation of easement

- (1) An easement comes within the **statute of frauds** and it usually must be created in writing in order to be enforceable. However, if an easement doesn't specify in writing where exactly on the servient tenement the land will be, the courts will allow the easement to be created by use and acquiesce
- (2) Easements that are not in writing (PING: prescription, implication, necessity, easements in gross that must comply with the statute of frauds)
  - (a) **Prescriptive easements**: Similar to gaining title to the property by adverse possession
    - (i) Statutory period (NY: 10 years)
    - (ii) Open: open in the way that the property would be normally used for
    - (iii) Continuous
    - (iv) Adverse use: must be non-permissive
    - (v) Notorious
  - (b) **Easements by implication** (quasi-easement created by operation of law): Usually arises where there is a sub divisional scheme (or walkway between two buildings). Where someone must go across someone else's property
    - (i) **Quasi-easement by implication (implied grant)**
      1. prior to the time that a tract is divided, a use exists on the servient part that is **reasonable necessary** for the enjoyment of the dominant part
      2. **apparent, obvious, and continuous**
  - (c) **easement by necessity** (Grant and Reservation)
    - (i) when the owner of a tract of land sells a part of the tract and by this division deprives one lot of access to a public road, a right of way by **absolute necessity** – terminates when the necessity ceases
    - (ii) **Grant**: if the grantee is to be benefited – if grantor is to be benefit it is an **implied reservation**
      1. Where the grantor conveys to someone, and the conveyee is to be benefitted, the grantee then there an easement by grant.
      2. In order for an easement by easement by implication to arise, it must be shown that the easement was only reasonably necessary
- (3) Conveyance
  - (a) Easements appurtenant pass with the servient estate, unless the new owner is a bona fide purchaser without notice
  - (b) Easements in gross for commercial purposes can't be transferred
- (4) Termination or extinguishments of easements
  - (a) **Prescription**: where the servient tenement owner has used her land continuously and uninterrupted in a way that is inconsistent with, and adverse to the easement, and without the consent of the dominant tenement owner
  - (b) **Abandonment** is defined as a clear showing that the dominant tenement owner won't use it.
    - (i) Non-use couple with an intent to abandon will suffice to terminate the easement
      1. for example ripping up tracks but not discontinuing the trains will suffice
      2. mere non-use won't terminate by abandonment
    - (ii) excessive use will not forfeit the easement: the servient tenement owner can enjoin the excessive use or the nonconforming use from being made
  - (c) **Written release** is defined as where the holder of the benefit of the easement (dominant tenement older) executes a release terminating the easement
  - (d) **Estoppel** is defined as someone sayings that there is no intention of using a right of way, and doesn't use it for several years.
    - (i) Must be no use in fact
    - (ii) Must be some representations
    - (iii) Servient owner must have knowledge
  - (e) **Destruction of the servient tenement** is defined as If someone has the right to use a part of a building (for example staircase, hallway) and there is an involuntary destruction of the structure, than this will extinguish the easement

- (f) **Merger** is defined as where the servient and dominant tenements come into possession of a single person
  - (g) **Condemnation or eminent domain** is defined as where there is condemnation of the servient estate, under the modern view, where there is termination of an easement by condemnation or eminent domain, the holder of the easement is entitled to compensation for value lost
    - (i) This also goes for profits
- iii) Use of easements
  - (1) reasonable use is presumed with an easement. The owner of the servient tenement is deemed to have consented to the use, and any reasonable damage
    - (a) repairs to easements are reasonable use
    - (b) any new uses for the easement are considered reasonable use (such as widening a road for new types of cars)
  - (2) Easement holder is liable for unreasonable use
- c) Exactions are defined as; amenities the government seeks in exchange for permission to build something. These must be reasonably related to the government's purpose.
- d) Covenants and equitable servitudes (hybrid between contract and easement). They only differ on the basis of what relief is sought
  - i) Types of covenants
    - (1) Positive covenants: covenants to do things, such as pay rent
    - (2) Negative covenants: covenants not to do things, such as build multi-family houses
  - ii) **covenants** running with the land are enforceable for damages
    - (1) to run with the land they must comply with statute of frauds
    - (2) for the burden to run with the land of a covenant – CATNIPP
      - (a) **Concern and Touch** (Touch and concern)
      - (b) **Notice** (can be constructive notice)
      - (c) **Intent** to run with the land
      - (d) **Horizontal privity** (one of the contracting parties succeeds to an interest in the land of the other)
      - (e) **Vertical privity**
    - (3) For benefit to run with land -- **TACI**
      - (a) **Touch and Concern**
      - (b) **Intent** to run with the land
    - (4) termination – terminated in the same way as an easement or profit
      - (a) merger
      - (b) abandonment
      - (c) estoppel
      - (d) release
      - (e) zoning changes will not extinguish a covenant
  - iii) **equitable servitudes** is defined as restriction on the use of land that is enforceable in equity (can be a covenant)
    - (1) must be a writing that complies with the statute of frauds
      - (a) implied reciprocal servitudes: where there is a common plan or scheme of development which indicates that the restriction was intended to apply uniformly to all property within the development and where grantees of the new lots take with notice of the restriction the court will imply that the equitable restriction applies to all parcels
      - (b) indenture is defined as a deed that contains reciprocal rights and covenants
    - (2) to get injunctive relief must have (no privity of estate required)
      - (a) **writing**
      - (b) **intent** that it would be enforceable against later assignees (can be constructive notice)
      - (c) **touches and concerns**
      - (d) **n**: later assignees had **notice** of the promises
        - (i) Can be actual, inquiry, or record notice.
        - (ii) In NY, subsequent buyers are deemed not to have record notice of prior deed transferred by the common grantor

- (e) **ES**: this is an **equitable servitude**
  - (3) enforcement – any lot owner can enforce against any other lot owner
  - (4) reasons not to enforce an equitable servitude
    - (a) if it is contrary to public policy
    - (b) if it would do more harm than good
    - (c) when the grant of the relief prayed for would be futile
    - (d) Plaintiff is guilty of laches or unclean hands
  - (5) extinguishment of equitable servitudes
    - (a) can be extinguished by release, merger, abandonment, etc.
    - (b) **changed neighborhood conditions** can also terminate an equitable servitude where the purpose of the servitude becomes meaningless then it will also result in a terminations of a servitude
    - (c) **zoning changes will not** extinguish or change an equitable servitude
- e) **licenses** permit one person to come on to the land of another without being a trespasser
  - i) simply is mere permission to enter the land of another without being viewed as a trespasser
  - ii) this is not an interest in land – it is merely a *revocable* privilege.
    - (1) Non-revocable if the license is couple with an interest it is irrevocable (for example interest in personal property on property that requires access to remove)
    - (2) Examples of license
      - (a) Mere permission (for example to park) is revocable license
      - (b) Paid parking then, arguable there is a contract, or there is a license couple with an interest that couple make it irrevocable
      - (c) Tickets at sporting events
  - iii) Licenses are different than leases, since licensees never have possession of the land
  - iv) Licenses are different than easements, because easements are substantial incorporeal nonpossessory interest in the land of another.
- 8) rights incident to possession
  - a) **fixtures** are defined as chattel's that have become a part of the real property
    - i) three requirements
      - (1) it must be the **intention of the annexer** that the chattel become a fixture
        - (a) in order to determine whether it is the intent of the annexer
          - (i) nature of the article
          - (ii) manner of the annexation
          - (iii) injury to the land
          - (iv) completeness with which the chattel is integrated to the use that the chattel is being put
          - (v) the relationship that the annexer has with the land
      - (2) must be **annexed** to the realty either actually or constructively
      - (3) the chattel must be **appropriated for the purpose for which the land** is used
    - ii) consent to remove changes all this
    - iii) if a tenant removes a fixture wrongfully, they are committing waste
    - iv) trade fixtures are defined as annexed to the land for pecuniary gain during the tenancy (might be called “beneficial purposes”)
      - (1) removable by the tenant whether she is a tenant for life, for years, or at will
      - (2) trade fixtures must be removed by the end of the lease otherwise they are forfeited
      - (3) factors to determine whether or not something is a fixture -- **FADS**
        - (a) firmly embedded
        - (b) adapted
        - (c) would removal destroy the premises
        - (d) person who embedded have a substantial interest in the land
  - b) lateral and subjacent support
    - i) lateral support (from the sides)
      - (1) right of a landowner to have their land supported laterally or subjacent by the neighboring land is an absolute, inherent right
        - (a) right of lateral only applies to support in the absence of buildings

- (b) strict liability for removal of lateral or subjacent support from property without structures
  - (2) **majority view**: where there are structures, recovery in strict liability to the damage caused the land in its natural condition, and doesn't include damage to the artificial structures. If there is negligent excavation, under both the English and American rules, if there is negligence, then the defendant is liable for the damage **which naturally and proximately flowed from the negligence**.
- ii) ungrounded waters: if one excavates on their land, and such excavation releases semi-fluid or semi-solid waters there is liability
- c) water rights
  - i) **lakes and streams** on the surface
    - (1) water rights
      - (a) all tracts of land which abut or touch the lakes or streams is riparian
      - (b) to be a riparian one's needs only to be the owner of riparian land
    - (2) three theories
      - (a) **absolute ownership**: overlying owner can as much as he can for whatever he wants
      - (b) **natural flow**
        - (i) each proprietor of land has a fundamental right to have the natural lake or stream remain in its natural state, free from any reasonable diminishment, or quantity
        - (ii) each riparian can use only for either natural or riparian uses
      - (c) **reasonable use** is defined as each riparian owners has a fundamental right to make maximum use of the water provided that such use doesn't interfere with the use from other riparians) – basically anything that is not malicious
        - (i) each riparian may use the water for any beneficial use so long as they don't interfere with the use of other riparians
    - (3) uses of water (majority rule is that natural purposes will always take precedence over artificial use) (minority rule is that the prior beneficial use will be protected)
      - (a) natural is defined as necessities
        - (i) consumption
        - (ii) household
      - (b) artificial
        - (i) industrial
        - (ii) irrigation
        - (iii) power
        - (iv) mining
  - ii) **underground** or percolating waters not contained in a channel are subject to the absolute control of the owner
    - (1) majority: surface owner can withdraw and make reasonable use
    - (2) common law: *if withdrawal of percolating waters damages neighboring waters, it is too bad*
  - iii) **surface waters**: common law (**common enemy rule**): in a majority of states, a landowner has unlimited discretion as to what to do with surface water, regardless of what it does to others
- d) crops– crops above and below the surface: surface rights includes natural vegetation, growing crops, fixtures
  - i) *fructus naturales* is defined as trees, grasses, shrubs (things that grow without the aid of man)
    - (1) considered to be part of the land – real property
      - (a) if the trunks or root of the trees are located on the property line of adjoining landowners the landowners own it as Tenants in Common
    - (2) **will pass with a conveyance of land**
  - ii) *fructus industrialies* – (emblems) -- come primarily from man's industry
    - (1) These are usually annual crops, but perennials are viewed as emblems
    - (2) *fructus industrialies* these are considered to be real property until they are severed from the land
    - (3) *fructus industrialies* are viewed as personal property
  - iii) rights to remove crops

- (1) if a tenancy is an estate for years, having a date for beginning and end, the tenant's right to remove growing crops or elements is terminated when the tenancy comes to a close
    - (a) if the tenant has **severed** the crops, it is personal property – and it belongs to the tenant, even if it is still on the land
  - (2) Tenancy at will: if the tenancy is for uncertain duration, then the tenant has a reasonable time after termination to remove crops.
- 9) Conveyances: deeds pass if they are lawfully executed and delivered
  - a) A forged deed is a nullity and no one can claim any interest on it as such
  - b) Statute of frauds (Oral agreement between adjoining property owners doesn't have to come within the statute of frauds – there may be rare instances of estoppel )
    - i) Identification of the parties must be in writing
    - ii) The closing date is either as agreed upon. If nothing is agreed upon in the records, a later writing may establish when the closing is (even something by one party)
    - iii) Must state to whom it is to be conveyed to with reasonable certainty
    - iv) Must be sufficient description of the land conveyed
      - (1) A sufficient description is sufficient if it provides a *good lead* as to the identify of the property sought to be conveyed
        - (a) "all of my land" is good
        - (b) "some of my land is bad"
        - (c) "enough land so that..." is usually bad
        - (d) Blank deeds may be allowed if there is a power of attorney created. Powers of attorney may be made irrevocable by consideration.
      - (2) Parol evidence can be brought in to clarify ambiguity (whether latent or patent)
        - (a) *Patent ambiguity* is defined as ambiguity appearing on the face
        - (b) *Latent ambiguity* is defined as where it doesn't appear on the face
      - (3) Court can order reformation of contract
      - (4) Price
      - (5) Promises on both sides
        - (a) For example where there is a conveyances and a promise for payment
      - (6) Must be signed by the person sought to be charged, or the grantor
    - v) dedications is defined as transfer of an interest in land from a private owner to a public generally or to a public agency
      - (1) doesn't need to be done by deed
      - (2) can be done by acts that wouldn't normally satisfy the statute of frauds
  - c) Part performance as alternative to statute of frauds
    - i) Oral real estate sales contract may be enforceable where there is the doctrine of substantial performance, in order for the purchasers to convey it, the purchaser can enforce an oral contract where two requirements are met
      - (1) Part or all of the purchase price paid, and the buyer takes possession
      - (2) Part or all of the purchase price paid, and buyer makes improvements
  - d) Deeds are not effective unless they are delivered.
    - i) Delivered is defined as the grantor's intent. Can be satisfied by words or conduct showing that the grantor's intent is that the deed have some operative effect
      - (1) Handing a deed to someone for safekeeping doesn't constitute a valid delivery unless it was the grantor's intent to make a present transfer of the land
      - (2) Presumptions
        - (a) Fact that the deed is in the presumption of the named grantee raises a rebuttable presumption that there has been an effective delivery
        - (b) If the grantor has retained physical possession of the deed that there hasn't been a valid delivery
        - (c) The fact that a deed is recorded there is a presumption that a valid delivery has been made
    - ii) Parol evidence is admissible to prove the grantor's intent – before or after delivery
    - iii) **Conditional delivery** is defined as where a deed is given to a third party
      - (1) Permissible



- (2) Giving a deed to a third party to give it to someone else, is, in the majority rule considered to be delivery
- (3) Escrow: Transfer to a 3<sup>rd</sup> party with conditions
  - (a) The deed has a present operative in that transfer automatically upon the occurrence of the condition
  - (b) The escrow holder retain title only if the conditions have not been met, and they do not occur
- e) Equitable conversion is defined as risk of loss is on the buyer if there is an enforceable obligation to sell land
  - i) NY: so long as the buyer is without fault, the risk of loss remains with seller, until buyer takes title or goes into possession
  - ii) Legal title still remains in the seller
    - (1) The buyer is deemed to be the equitable owner of the property, because the risk of loss is on the buyer.
    - (2) New York: If a fire or a flood destroys the property, then the risk of loss is on the buyer.
  - iii) The vendor's death does not negate the enforceability of the real estate sales contract. When the purchasers dies during the existence of the contract, the right to receive the land goes to the land, but the duty to pay is imposed on the personal representative. There is no right to unilaterally rescind.
  - iv) Note: as an equitable doctrine, if the intention of the parties was otherwise, equity will not tilt convey the property
- f) **Covenants** in the contract
  - i) Marketable title is defined as where there is an implied duty to convey good and marketable title to the vendee (at the time of the conveyance)
    - (1) **The deed supercedes the real estate sales contract** so if the vendee goes through with the sales and accepts a deed without any warranties of title, the if the vendee decides to go through the sale, he will have to bear the risk
    - (2) Vendor is only obligated to deliver good and marketable title on the date of closing
    - (3) A purchaser may not rescind a land sale contract before the closing date
    - (4) Defects that render unmarketable
      - (a) Outstanding mortgages
      - (b) Restrictive covenants
      - (c) Outstanding reverter rights
      - (d) Encumbrances which the vendor can't or won't remove by application of the purchase price
        - (i) Vendor can use purchase price to cure defects
      - (e) Easements
      - (f) Variations in the names of the grantors and grantees
        - (i) Outstanding dower interests
      - (g) Unreasonable risk of litigation
        - (i) However, some things may be sufficiently *de minimis*
  - ii) The vendor has until the closing date in which to cure any and all title defects
- g) **recording statutes is defined** as means for determining constructive notice of title – only protect subsequent bona fide purchaser or mortgagees . Race notice does not affect the original parties to the transaction. **Recording acts protect subsequent purchasers from the first in time, first in right rule**
  - i) types of recording statutes
    - (1) pure race is defined as whoever records first prevails (rare)
    - (2) **race notice -- and New York!** is defined as the subsequent bona fide purchaser who paid value without notice of prior conveyance and **who records first prevails** over an unrecorded tenant. The one who wins is the first to record without notice. If no one recorded, go back to first in time, first in right
      - (a) mortgagees are considered to have paid value
    - (3) **notice** is defined as subsequent bona fide purchasers who pays value without notice of prior conveyances prevails regardless of **whether or not he or she records first**

- (a) a conveyance of an estate in land shall not be valid against any subsequent purchaser for value except such persons having actual notice unless the conveyance is recorded
    - ii) recording statutes don't will not protect donees.
    - iii) under all recording acts apply to mortgages as well as deeds
    - iv) **shelter rule** (for both conveyances of property and mortgages): a person who takes from a bona fide purchaser will prevail against any interest that the transferor-bona fide purchaser has actual or record notice of
  - h) deeds
    - i) types of deeds
      - (1) usual covenants is defined as **general warranty deed**.
        - (a) Includes every covenant except for covenant for future assurances
        - (2) Special warranty contains fewer
        - (3) Quitclaim contains no assurances and no warranties
    - ii) **At the time of the closing all of the covenants in the land sale contract merge into the deed** – all of the covenants in the contract are deemed fulfilled, and are replaced by the covenants in the deed.
    - iii) covenants in deeds – usually contracts of indemnity and damage must be shown (SCEEW so called elephants eat wheat)
      - (1) breached when deed is delivered
        - (a) **seisen**
          - (i) guarantee to the grantee that the grantor owns the estate
        - (b) covenant of right to **convey**
          - (i) guarantee to the grantee that the grantor owns the estate which the deed purports to convey
        - (c) covenant against **encumbrances**
          - (i) covenant that it is not subject to any outstanding mortgages, liens, or restrictions
        - (d) NY: statutory warranty deed – the *bargain and sale deed*
          - (i) Grantors promises that he **hasn't conveyed to someone else**
          - (ii) Grantor promises that it is free from promises made by the conveyor
      - (2) breached after deed is delivered – these run with the land!
        - (a) quiet **enjoyment** – undertake the grantee covenanting against all lawful claims of the grantor, himself, or 3<sup>rd</sup> parties who would evict either actually or constructively
        - (b) general **warranty** – undertake the grantee covenanting against all lawful claims of the grantor, himself, or 3<sup>rd</sup> parties who would evict either actually or constructively
        - (c) future assurances (not used in the US) is defined as to do some further necessary acts to perfect the grantee's title
      - (3) indenture is defined as a deed that contains reciprocal rights and covenants
    - iv) **estoppel by deed** a.k.a. after acquired title doctrine. is defined as where a person conveys an estate in land which he doesn't own (or a larger estate) and then the grantor acquires after acquired title, the estate then passes to the grantee. Title, in this case inurs to the benefit by B.
      - (1) where there are later bona fide purchaser, of a property which the conveyor didn't have title to the later in time (provided that they paid value without notice), the majority rule is that the later bona fide purchaser takes over the prior grantee
- 10) other ways to give and take land
  - a) eminent domain
    - i) explicit: government condemnation
    - ii) regulatory taking
      - (1) government can either compensate the owner or change the regulation
    - iii) zoning
      - (1) variances granted by administrative actions
        - (a) requires
          - (i) hardship
          - (ii) non-diminution of property values
    - iv) Exactions are defined as; amenities the government seeks in exchange for permission to build something. These must be reasonably related to the government's purpose.
  - b) adverse possession

- i) limitation of adverse possessor's claims
    - (1) can't acquire a larger estate than is claimed (for example if they only claim a life estate, than they can't claim a fee simple)
    - (2) can't claim title to less than a freehold estate.
      - (a) Must claim a life estate, a Fee Simple, or a Fee tail
    - (3) Recording statutes have nothing to do with adverse possessor
  - ii) elements required – all elements must coexist
    - (1) **adverse** is defined as without permission
    - (2) **actual** and exclusive is defined as sole physical occupancy
    - (3) **hostile and adverse** is defined as without permission (requires a mental element where someone occupies in derogation of the owners rights)
    - (4) **open and notorious** is defined as not secret
      - (a) adverse possessor must represent to the world that they are the owner of the property
    - (5) **continuous** and without interruption
    - (6) **for the statutory period**
      - (a) statutory period begins to run when a cause of action begins to accrues against the adverse possessor (when the possession begins)
      - (b) tacking: need not be owned by one individual. The period of adverse possession can be combined between two parties who adversely possess and are in privity. (They must pass on by dissent, deed, will, written contract, oral contract, oral gift, or mere permission)
      - (c) disability: minority, imprisonment, insanity
        - (i) *"an action for the recovery of land shall be commenced within x years after the right of action **first occurred**, but if a person entitled to bring an action is under a disability, such person shall have from the time the disability is removed"*
        - (ii) most states permit a person who is under a disability to toll the running until the disability is removed
        - (iii) however, this only counts for the beginning of the adverse possession
  - iii) title acquired by adverse possession can be a sword or shield – the recording statutes have no application to a title acquired by adverse possession
  - c) honest mistake: when someone is under the mistaken belief that they are the rightful owner
    - i) majority: if there is an honest mistake that one owns the property, they can still acquire title by adverse possession.
      - (1) If one is not the rightful owner they can still acquire title by adverse possession
      - (2) It is the visible adverse possession with the intent to possession that constitutes the adverse possessor
    - ii) minority: takes the possession that the possessor doesn't hold title adversely, unless he or she intends to hold the title against the whole world (because there needs to be some subjective intent for the statutes of limitations to run)
- 11) mortgages is defined as an interest in land created by a written instrument for performance of a duty or a payment of a debt
- a) naming of mortgages
    - i) mortgages can be called, mortgage deeds, notes, security interest, or sale-leasebacks
    - ii) courts put substance over form
      - (1) NY: a deed which includes any other writing instrument that makes it appear as a mortgage will be considered a mortgage
  - b) creation of mortgages
    - i) parties
      - (1) mortgagor is defined as the property owner who takes out the mortgage
      - (2) bank is defined as the mortgagee
    - ii) statute of frauds
    - iii) what can be mortgaged
      - (1) debts
        - (a) can included "dragnet clause"
      - (2) property
        - (a) any transferable interest in real property can be transferred

- (b) **accessions to real property are subject to the lien!**
- iv) two instruments
    - (1) promissory note is defined as debt – if there is a conflict, not will prevail
    - (2) mortgage is defined as the security interest (can be made for advances in the future)
      - (a) mortgages don't imply a covenant for payment of the sum that they secure (so if the sum isn't mentioned in the document, the remedy is limited to the value of the property)
      - (b) NY: a deed which includes any other writing instrument that makes it appear as a mortgage will be considered a mortgage
      - (c) Priority
        - (i) "Dragnet clauses" – can only be up to the original amount of the dragnet clause (even a foreclosure can't be more than that)
  - v) New York usury laws (available to borrowers as affirmative relief, and subsequent holders as a defense)
    - (1) Exclusions from NY usury laws
      - (a) Purchase money mortgages are not subject to usury as a defense
    - (2) Substance
      - (a) If the mortgagor is **not a corporation (or a corporation whose principal asset is a small house)** then a usurious mortgage can be completely removed
      - (b) If the lender is a bank, then only the interest can be removed
  - c) Due on sale clauses are enforceable
  - d) Transferring mortgage: failure to record a mortgage may make it possible to convey to a bona fide purchaser free from any mortgage under the recording act
    - i) In general, an assignee of a mortgage takes subject to the assignor's equities
      - (1) A party who takes subject to a mortgage and pays consideration for any "problem" (e.g. usurious) waives that defense
      - (2) Mortgagor can issue an estoppel certificate which certifies that there are no offsets
    - ii) Property transferred "subject to mortgage" -- the property becomes the primary source for the payment of the debt and the original mortgage continues to be liable on the note
    - iii) Property transferred where the "transferee assumes mortgage" -- the original mortgagor is secondarily liable in personam. **Party assuming the mortgage, in New York must state explicitly in writing or in deed that it is assumed**
  - e) Due on sale clauses are enforceable
  - f) Priority of mortgages (in a race-notice state such as NY)
    - i) Purchase money mortgages are superior
    - ii) Mortgages for later debts are not considered purchasers for value so they are junior to later mortgages
      - (1) An extension of time does not count as a new mortgage
    - iii) Liens
      - (1) Mortgage provisions can set up a trust fund to pay the liens. If they do, then liens are junior to the mortgage but take from the trust fund.
  - g) Extinguishing mortgages
    - i) "merger" – can be full or partial payment if transferred to the mortgagee
    - ii) NY methods of foreclosure
      - (1) Suit on the debt – can only foreclose on the mortgage once there is a judgment on the debt. If he chooses to foreclose first, it must be with leave of the court.
      - (2) **judicial foreclosure** – ends whatever right the mortgagor has to redeem the mortgage (can still redeem prior to sale but not after)
        - (a) default on mortgage (no auxiliary obligations such as taxes required)
        - (b) required parties
          - (i) all the subordinate interests to the mortgage are necessary parties, including remaindermen and future interests. A failure to include them preserves their interest. Once the parties are included, their future interests will be foreclosed.
            - 1. Junior forecloser can pay off senior foreclosers
          - (ii) tenants and foreclosures can agree to non-disturbance, but this doesn't happen automatically. Tenants do not have privity of contract with the foreclosure

- (c) sale proceeds go to satisfying the debt: foreclosing party takes to satisfy their judgement. If any money is left over, the creditors to the right of the foreclosure party take in order. We never give foreclosing party takes to satisfy the judgement. IF any money is left over the parties the junior parties take in order. We never give moneies to the parties to the left.
  - (i) lawyers first
  - (ii) purchase money mortgages will have superpriority
  - (iii) senior liens first
  - (iv) junior later
  - (v) junior mortgages prior to the one being foreclosed are terminated
- (d) if there is not enough money to satisfy, there can be a deficiency judgment – but demand must be within 90 days of the sale
- (e) redemption of foreclosed mortgages (new york only allows before sale)
  - (i) equity of redemption is defined as Where the mortgagor default – after the default and before the mortgagee brings a foreclosure action, the common law permits the mortgagor to pay off the mortgage debt and to reacquire title to the property
  - (ii) statutory redemption (not equitable) is defined as where the mortgagor defaults, and then the mortgagee institutes a foreclosure action, there is a foreclosure sale, and the bank sells to a buyer, the mortgagor can attempt to repay the bank the mortgage indebtedness the mortgagor is entitled, to either redemption against the mortgagee for either the value of the land, or the proceed or his election
- (3) **Strict foreclosure:** telling the parties entitled to a right of redemption to pay up
- (4) **By advertisement:** mortgagee can extinguish the equity of redemption by a sale of land without judicial proceedings or a court decree
  - (a) **Requires advertisment at least once each week for 12 weeks, notice on the courthouse 84 days before sale, and notice to the mortgagor**
- iii) after foreclosure, the new owner takes subject to all liens and mortgages to the left of the foreclosure party
  - (1) the new owner takes subject to any liens and mortgages junior to the foreclosure party if those creditors had not been included as a foreclosure party
  - (2) if someone isn't included in the foreclosure action, their debt carries with the land, and will be vested in the new owner
- h) statute of limitations on mortgages is six years after demand – interest continues to accrue

## Secured Transactions

- 1) Requirements for attachment
  - a) Must be consensual. Does not apply to mechanics liens or statutory liens.
  - b) For Article 9 to apply must be personalty or fixtures. Mortgages are outside the scope of Article 9
- 2) Attachment is the creation of an enforceable security interest. Requires “VCR”
  - a) **V:** value
  - b) **C:** contract: Must be signed by debtor unless the secured party has possession
  - c) **R:** rights in the collateral
    - i) Debtor must itself have rights in the collateral itself
    - ii) After acquired collateral clauses are enforceable
      - (1) Can take an interest either now held or after acquired collateral clause – it is enforceable
- 3) Once attached, the creditor must **perfect** by placing the world on notice by either **recording** or **taking possession** (without a writing) of the creditor's existence.
  - a) Can perfect by possession: automatically perfects
  - b) Automatic perfection by an PMSI -- a purchase money security interest. Usually consumer goods which are financed by the same merchant who sold them.

- c) Perfection by filing which puts the world on notice that there might be a security interest lurking below.
- i) Can either file notice, or more commonly, a *financing statement* which only serves to put interested parties – so that they can make follow-up inquiries.
    - (1) New article 9 allows for electronic filing is permissible and encouraged. Need only contain the names of the debtor and the secured party.
    - (2) New article 9 – financing statement is even simpler – it need only contain the names of debtor, and secured party and a description of the collateral. Debtor's signature is not required
  - ii) Location of filing = Done centrally with the secretary of state in which the debtor is "located"
    - (1) Individual: principal residence
    - (2) Register organization: where it is organized
- 4) Priorities
- a) BIOCOP with knowledge
  - b) Hold in due course
  - c) Possessory lienholder
  - d) PMSI (consumer purchases from consumers are automatically perfected). Other PMSI have a 20 day grace period for non-inventory PMSI (for example they are set back 20 days)
    - i) Inventory PMSIs must file and notify the other interests before the sale, so as to get a priority over the other interests
    - ii) If the creditor sells, there is perfection over the proceeds for 10 days or until filed
  - e) Perfected security interest and liens that have attached to the collateral (including trustees in bankruptcy as of the date the petition is filed)
    - i) First to perfect wins
    - ii) Between a security interest and an attached lien, first to perfect wins
  - f) Unperfected security interest
  - g) debtor
- 5) Upon default, the person with the highest priority wins to the full extent of his interest. If there is a tie between the two, the one who filed first in the same class wins.
- a) Rights: self up is available so long as there is not a breach of the peace (however minor)
  - b) Replevin; Repossession by judicial action – he or she may go to court to obtain a judicial writ
  - c) Collection from third parties, secured party can have third parties make payments directly
  - d) Strict foreclosure: when the secured party retains the collateral in full satisfaction of the outstanding debt
    - i) Notice
      - (1) Consumer goods: sent to the debtor and any secondary obligor
      - (2) Not consumer goods: to the debtor, and other secured parties who have told the foreclosing party of their interest
    - ii) The creditor lawfully retains the collateral, and it is discharged.
    - iii) Secured party must make a proposal
      - (1) when the collateral is not consumer goods, the notice is sent to the debtor and other secured parties who told them of their interest in their collateral and perfected secured parties and secondary obligors. under the new article 9 – we also need notice sent to perfected secured parties
    - iv) if any of the notified parties objects within 21 days the new code would make it 20 days after the notice is sent, strict foreclosure would not be allowed
    - v) if the collateral is consumer goods, and the debtor has paid back 60% of it – strict foreclosure isn't possible, the secured party must sell it within 90 days or be liable in conversion. There cannot be strict foreclosure if someone has paid more than 60% of the price.
    - vi) sale: secured party may sell the collateral and seek a deficiency judgement
      - (1) every aspect of the sale must be commercially reasonable
        - a) prior to the sale, reasonable notice must be sent
        - b) new article 9 provides standard notice forms in the text of the statute
      - (2) if the collateral is consumer goods, **notice must be sent to the debtor** and any secondary obligors

- (3) Notice
  - (a) Consumer goods: sent to the debtor and any secondary obligor
    - (i) Have to provide details about how it can be redeemed
  - (b) Not consumer goods: to the debtor, and other secured parties who have told the foreclosing party of their interest
- (4) content of the notice depends on the type of sale
  - (a) if it is by public sale must state the time and place of sale
  - (b) if it is by private sale, must state the time after which the sale will be made
    - (i) under the new article 9 – additional consumer protective provisions will be mandatory
    - (ii) this would say how the debtor could redeem the collateral
- (5) advance notice; standard is one of commercial reasonableness – fact sensitive
  - (a) new article 9 – in a non-consumer transaction notice is sent within a reasonable time if sent ten 10 days or more before the time of sale. new article 9 endeavors to impose a bright line for non-consumer obligations
- (6) In general, the secured party can't buy at a private sale, but at a public sale. However, if it is a commodity it can be bought at a private sale by the debtor.
- vii) judicial deficiency judgement
  - (1) if secured party sells collateral at the low price to an insider buyer the price than an **independent third party would have paid rather than the actual amount paid is the price that will be used in calculating any deficiency**
- viii) debtors right to redeem
  - (1) debtor's right to redeem is cut off once it is sold, or completed a strict foreclosure
  - (2) to redeem must pay everything plus the secured party's reasonable expenses including reasonable attorney's fees

## Torts

- 1) Standing
  - a) Actual victim
  - b) Wrongful death is a procedural device, not a substantive tort cause of action – it is a claim on behalf of family members
    - i) As a derivative concept, any defenses that can be asserted against decedent can be asserted against the next of kin
      - (1) For example in wrongful death action for battery the defendant can raise the defense of self-defense
    - ii) In NY, a wrongful death's Plaintiff's recovery is limited to pecuniary items (such as lifetime earning expectancy)
      - (1) Loss of consortium is not compensable in wrongful death
      - (2) Punitive damages are recoverable by the personal representative the of the decedent.
  - c) Concerted action imputes liability
- 2) Procedural crosses
  - a) Motion to dismiss
  - b) Summary judgement
    - i) Whether or not a genuine issues of material fact exists
  - c) Directed verdict – non-moving party's case clearly reveals (in the light most favorable to the nonmoving party) that the moving party should prevail
- 3) Intentional torts
  - a) Characteristics of Plaintiff and Defendant
    - i) **Hypersensitivity** of a Plaintiff is **never taken into account** in satisfied elements. (cf. factors in intentional infliction of emotional distress)
    - ii) Defendant: no such things as incapacity defenses. Even if a Defendant is incapacitated in another branch of the law (young, inane, drunk) can still commit intentional tort)

- b) The tort of **battery** (two elements)
- i) **Harmful or offensive contact** (Offensive really means *unpermitted*)
    - (1) Action must somehow be intentional
      - (a) Unintentional acts (for example vomiting) don't count
    - (2) A touching is unpermitted if normal people would not permit it. So things that are a social conventions are acceptable. (for example stroking hair, sexual harassment)
      - (a) Offence to the dignity involved in the unpermitted and intentional invasion of the inviolability of his person
      - (b) There can be transferred intent – if one person intends to batter person A, and ends up battering person B, there is a battery
  - ii) **Contract with Plaintiff's person** or anything connected to it (dogs, clothes, etc.)
- c) Assault (Plaintiff in **apprehension of immediate battery**)
- i) Defendant must place defendant in apprehension
    - (1) Apprehension (not the same as fear) has to be reasonable
    - (2) Apprehension is knowledge – not fear.
    - (3) To determine knowledge, analyze from the perspective of Plaintiff (a gun usually loaded)
  - ii) And the apprehension must be of an immediate battery
    - (1) Mere words lack immediacy – naked verbal threats are not actionable as assaults
    - (2) Words can negate apprehension “I won't hit you” while shaking fist is not battery
    - (3) Must be immediate “I will hit you tomorrow” is not battery
- d) False imprisonment: with **intent**, the Defendant **confines or restrains** the Plaintiff to the **bounded area** (without a privilege or defense)
- i) Plaintiff must know of the confinement or suffer a harm
  - ii) Elements
    - (1) Act or omission that confines Plaintiff to a bounded area
    - (2) Intent on the part of the defendant to confine or restrain
    - (3) causation
  - iii) Defendant must commit an act of restraint
    - (1) Threats can be the necessary act of restraint: Can be threats “if you leave the room, I will shoot your son”
    - (2) An omission can be an act of restraint (a jailer who refuses to release an prisoner when the term expires)
  - iv) Bounded area requirement
    - (1) In order to recover, Plaintiff's movements must be limited in all directions – and the confinement area must be intended
    - (2) Keeping someone out of a place is not false imprisonment
    - (3) Doesn't matter how long (question of recovery)
  - v) Duration doesn't matter.
  - vi) Shopkeeper's privilege in NY : an immunity which allows shopkeepers to reasonably detain suspected shoplifters
    - (1) Reasonable suspicion that the person is a thief
    - (2) Reasonable amount of time – 30 minutes may be took long!
    - (3) Reasonable means of detention
  - vii) Defense
    - (1) Citizen's arrest
      - (a) Felonies: a private person may arrest someone if they have reasonable grounds to suspect that the man whom she arrests committed the crime.
      - (b) Non-felonies: must have witnessed the crime
- e) Intentional infliction of emotional distress: **extreme and outrageous conduct** that the defendant **intends** to **cause** severe emotional distress to Plaintiff
- i) **Extreme and outrageous conduct**: “exceeds all bounds of decency, tolerated in a civilized society” (NY: Court of appeals: nothing is outrageous in this state)
    - (1) Mere insults are never outrageous – unless there is some sort of a plus factor
    - (2) Criteria
      - (a) Does it exceed all bounds of decency tolerated in polite society?



- (b) Aggravating factors
  - (i) Public
  - (ii) Continuous
  - (iii) Common carrier/innkeeper (still owe reasonable duty)
  - (iv) Member of a fragile class
    - 1. Young child
    - 2. Elderly
    - 3. Pregnant women
- (c) Defendant's knowledge of a phobia can make their conduct outrageous: If behavior was targeted toward emotional Achilles heel, but it is self-explanatory
- (3) Major outrage is essential to the tort – the mere fact that the actor knows the other will regard it as insulting is not enough
- (4) Extreme and outrageous conduct is the basis for tortious infliction of mental distress of merely offensive conduct which is battery
- ii) Must cause **Severe distress**
- iii) Extreme conduct can be a failure to remedy a situation (whether the initial situation was tortious or not). For example failure to inform police that a larceny by trick was no longer a larceny by trick
- iv) Note in NY: there is a separate cause of action associated with the intentional mishandling of a corpse
- f) Trespass to land: **intentional physical invasion** of Plaintiff's real property by defendant
  - i) Intent
    - (1) Generally very low: all that is required is a voluntary act
    - (2) Sleepwalking is not considered volitional
    - (3) Defendant doesn't need to know that he is on someone else's land
    - (4) However, accidental trespass (bad golfers) don't count
    - (5) If someone enters the land through recklessness or negligence, there must be actual damage**
  - ii) Physical invasion
    - (1) Defendant can enter the Plaintiff's premise on foot or by vehicle
    - (2) Defendant propels objects on to the land (even by accident, so long as they intended the action)
    - (3) Non-physical invasions are not trespasses such as Odors are not trespasses (they are nuisance)
      - (a) Heavy smoke is a physical invasion
      - (b) Wispy smoke isn't an invasion
  - iii) Land: Includes surface, air above (only up to a reasonable distance), and soil below
  - iv) No damage requirement
- g) Trespass to chattels: Conversion (private remedy for theft) and trespass to chattel (private remedies for vandalism). Requires **an act** interfering with causation, intent, and causation.
  - i) **Trespass to chattel**
    - (1) Small mangling or damage of property
    - (2) Any more fact bump something up to conversion
  - ii) Conversion -- special remedy (you break it, you bought it)
    - (1) In the case of conversion, Plaintiff can recover costs of repair or rental **or** full value (like a forced sale)
    - (2) Determining whether or not someone has possession of chattels
      - (a) Lost and found property
        - (i) Abandoned v. lost
          - 1. Abandoned: Property that the owner gave up possession with an accompanying intent to give up title. This is free for the taking
            - a. Abandoned property is free for the taking
          - 2. Lost property : Property where there is a temporary and accidental loss of possession (taking without determining <sup>and/or</sup> quieting title is conversion). The true owner has a right to recover property

3. If under \$20, the finder must make an effort find the true owner. After a year the finder gets title. Other property the finder must turn it into the police who will look for it before the owner gets title
- (b) Gifts
- (i) *Inter vivos* – three requirements
    1. Owner must have actual intent to pass title
    2. acceptance by the donee, but silence is generally good enough
    3. valid delivery
      - a. Delivery is defined as either the actual piece of personal property, itself, or something represented of it must be handed over
      - b. checks
        - i. 1<sup>st</sup> party checks: handing over the check isn't delivery, because payment can be stopped, it is only complete when the check is cashed
        - ii. third party check: delivery is complete when physical transfer takes place
      - c. stock certificates: gifts of stock certificates are complete when a certificate is handed over – don't have to wait for registration of the owner's name
  - (ii) gift *causa mortis*: contingent gifts given in contemplation of death
    1. must be imminent risk of death that is likely to occur
    2. must be real death
    3. if the recipient dies before the donee, there is no gift.
- (c) liens are a very primitive security device when a person can retain personal property to enforce payment of a debt (usually for enhancing the value of the property)
- (i) things that must exist for a lien
    1. debt between two parties
    2. creditor has possession
    3. debtor has lawful title to the item
  - (ii) types of liens
    1. general is defined as a right to retain all of the property of another person as security for a general balance due
    2. special: right to retain specific property of another to secure some particular claim or charge which attach to the property retained. Giving up possession terminates lien.
- (d) bailments is defined as a physical change of possession, for safekeeping or performance of a purpose. The owner is the bailor, and the person holding it is the bailee
- (i) requirements
    1. intent by a bailee to take on the status of bailment of the object.
    2. Intent to take possession of things that are inside the other thing is imputed
    3. Bailee required held to reasonable person standard in determining whether or not the bailor has good title to it – does not have to do rigorous investigation
  - (ii) Exceptions
    1. safe deposit *box* – bailee doesn't have to know the contents
    2. *parking lot* – turns on whether you give them the keys or you keep the keys
      - a. when one leaves the key with a parking garage, it is a bailment because there is a symbolic exchange of possession.
  - (iii) modern rule is that the bailee must take reasonable care to ensure that nothing happens
    1. generally, bailees can't demand, in advance, exculpatory clauses
    2. can limit liability – if there is effective notice
      - a. statutory liability for coatchecks
  - (iv) *proximate causes*

1. an event that later causes a loss (for example failure to return a car, in a gratuitous bailment) creates liability in tort
- 4) affirmative defenses to intentional torts
  - a) **consent** is a defense to all intentional torts
    - i) need to have **competence** to consent (for example incompetents, underage)
    - ii) two kinds of consent
      - (1) express: giving defendant permission to behave a certain way so long as it is not obtained under **fraud** or **duress**
      - (2) implied based on 1) custom and usage or objective interpretation of defendant's conduct
        - (a) custom and usage
          - (i) when Plaintiff goes to a place where certain types of conduct are necessary (for example shoved in subway or Hockey game)
          - (b) we can find implied consent based on **objective interpretation** of Defendant's conduct. Based on a reasonable assessment on the reasonable behavior
          - (c) implied assumption of the risk doesn't exist in NY, but the same behavior can reduce recovery by the jury
      - iii) all consent has the scope
        - (1) for example can't trespass when invited into one part of the house
        - (2) can't do more medical treatment than consent to
    - b) other defenses – protective privilege
      - i) protective privileges
        - (1) self-defense
          - (a) timing: must be immediate: **NO REVENGE** : the conduct that the defendant is responding to must be in progress or imminent
          - (b) accuracy of the threat or the reality of the threat: based on a “were you reasonable in your perception”
            - (i) for self-defense and defense of your own property, the accuracy rule is the **reasonableness standard, and the reasonable belief standard**
        - (2) defense of others: **DON'T BUTT IN UNLESS YOU ARE SURE**
          - (a) traditional rule for defense of 3<sup>rd</sup> persons is that you are held to a strict accuracy standard
            - (i) there is a modern trend away from this
          - (b) the defendant must confine himself to the appropriate degree or level of force
            - (i) it must be whatever degree of force is necessary under the circumstances
          - (c) deadly force may be used in defense of human life where necessary
            - (i) this is what is necessary under the circumstances and human life is at stake
            - (ii) in NY there is a duty to retreat before resorting to deadly force
              1. MBE: can shoot someone threatening (with deadly force) people
              2. NY: run away
                - a. No duty to retreat if you are in your own home
                - b. Cops don't have duty to retreat before resorting to deadly force
        - (3) defense of property
          - (a) deadly force is never allowed
          - (b) can do anything but stab or shoot
          - (c) because you can't use deadly force to protect property, **You can't use deadly traps**
          - (d) it is okay to bluff in connection with property protection
        - ii) necessity: only a defense to property torts (trespass to land, chattels or conversion)
          - (1) two kinds of necessity
            - (a) public necessity
              - (i) when defendant interferes with Plaintiff's property in an emergency to protect the community as a whole, or some significant group of people
                1. the legal consequence is that this is an absolute defense
              - (ii) for example killing a rabid dog is conversion – but public necessity is an absolute defense (saved children and community as a whole)
            - (b) private necessity: when defendant interferes with Plaintiff's property in an emergency to protect an interest of his own (only real damages)

- (i) private necessity is not an absolute defense
    - 1. three consequences
      - a. defendant must pay for actual harm
      - b. defendant not liable for nominal or punitive damages
      - c. while the emergency continues, Plaintiff must tolerate defendant's presence on the land – must allow the defendant to take sanctuary on the land
  - (ii) this is the defense when people enter someone else's land in an emergency.
    - Similar to a mini eminent domain,
      - 1. small airplane that emergency lands on farm: no moral problem, but pay the man for the damaged corn
        - a. similar to eminent domain (a mini power of eminent domain in an emergency)
- 5) defamation – three elements (untrue public statements that (may) cause damages) -- defamatory matter to some 3<sup>rd</sup> person who reasonably understands that the Plaintiff's reputation is lowered in at least a substantial minority of the community
  - a) defendant must make a defamatory statement about the Plaintiff
    - i) statement that adversely affects reputation
      - (1) defamation is not about hurt feelings – it is about what other people think of them
      - (2) mere insults and name-calling are not defamatory
      - (3) need an alleged or purported statement of fact (for example facts)
        - (a) statements of opinion can be defamatory **if a listener would assume that the speaker has facts to back it up**
    - ii) can include sponsorship if there is an erroneous story (but this is also appropriation)
  - b) publication of the statement
    - i) the defendant must reveal the defamatory material other than Plaintiff himself
    - ii) careless or negligent or inadvertent publication also counts
    - iii) **colloquium**: after the introduction of extrinsic facts, a statement can be deemed to have been published because it would have led a reasonable reader to perceive the defamatory statement as referring to the Plaintiff
  - c) damages, maybe: some defamation claims do not have to prove damages (the *per se* claims)
    - i) libel is defined as any kind of defamation that is permanent (written)
      - (1) do not have to prove damages, because they get the benefit of a presumption of damages (only two elements)
    - ii) slander *per se*
      - (1) slander is defined as oral defamation.
      - (2) slander *per se* is oral defamation that falls in a closed list of four types is defined as (one more in NY). In these categories there is no need to prove damages
        - (a) statement about **Plaintiff's business or profession** (for example disparagement of credentials)
        - (b) statement that the Plaintiff has committed a **crime of moral turpitude** (embezzlement, crime, etc.)
        - (c) unchastity
        - (d) statement that the Plaintiff has a **loathsome disease** – only two diseases
          - (i) leprosy
          - (ii) venereal disease
        - (e) NY: also slander *per se* to accuse someone of homosexuality
      - iii) In all other types of defamation one has to plead and prove damages
    - d) Affirmative Defenses to defamation (3)
      - i) **Consent**: Express and implied
      - ii) **Truth**: A defamation defendant can show that the material is correct
      - iii) **Privilege**: (Absolute and Qualified)
        - (1) **Absolute** – based on the identity of speaker
          - (a) Communication between spouses: is privileged, spouses can't defame third parties to each other
          - (b) Government officers engaged in official duties

- (i) Includes judges and lawyer in court
  - (ii) Includes legislatures
- (2) **Qualified** -- requires three circumstances to encourage candor
  - (a) Must be dealing with a **socially useful occasion** for the speech
  - (b) Speech must be **relevant** to that socially useful occasion
  - (c) If the statement is made when the recipient has an interest in the information and it is reasonable for the defendant to make the publication of the statement
  - (d) Defendant must speak in **good faith**
  - (e) Examples:
    - (i) Letters of recommendations
    - (ii) Statements of credit worthiness
    - (iii) Statements made to police to encourage reporting of crime
- e) Pure opinions are not actionable if 3<sup>rd</sup> persons regard it as a statement of fact
- f) 1<sup>st</sup> amendment defamation tort when dealing with **public concern**
  - i) use: material is something that the general public would have an in
  - ii) elements
    - (1) Plaintiff has burden of showing falsity must show falsity *cf.* other defamation
    - (2) Plaintiff must show fault
      - (a) If it is a **public figure** must show that the Defendant engaged in a **deliberate falsehood or recklessness** or knowledge of falsity
      - (b) A private figure in a **public concern** Plaintiff can proceed on a theory of **negligence**
  - iii) New York damages for defamation litigation
    - (1) Libel: Requires showing of special damages when the libel cannot be shown by extrinsic fact and it is not slander *per se*
    - (2) Slander: Always requires showing of special damages except when statement is defamatory on its face
- 6) privacy torts
  - a) **appropriation**: “when a defendant uses Plaintiff’s name or picture for a commercial purpose”
    - i) exception: newsworthiness exception (if a newspaper puts a picture on a page, even though it does serve their commercial interest, it is not actionable) – interpreted very broadly
    - ii) appropriation is the only privacy tort recognized in NY
  - b) **intrusion**: invasion by a defendant of Plaintiff’s seclusion in a way objectionable to an average person (not a tort in NY)
    - i) examples: wiretapping, secret cameras, eavesdropping, peeping Toms
    - ii) in order to win an intrusion claim, the Plaintiff must be in a place where there is an expectation of privacy
      - (1) for example there is no expectation of privacy on a public street
      - (2) if it is constant, and repetitive, it might be intentional infliction of emotional distress
      - (3) there is **no requirement of trespass** to commit the tort of intrusion
  - c) false light (not recognized in NY) – compensates for the harm to one’s dignity *cf.* defamation which is based on economic injury – requires publication
    - i) widespread dissemination of a material falsehood about the Plaintiff that would be objectionable to the average person
    - ii) two elements
      - (1) view which the Plaintiff did not hold
      - (2) actions which the Plaintiff did not take
    - iii) misrepresenting Plaintiff’s beliefs is false light as well (for example wrong religion)
    - iv) can be material that is defamatory, but it doesn’t have to be
    - v) intent: none required. negligence will make out false light – for example a newspaper who misplaces caption
  - d) disclosure – requires publication (unlike libel or slander)
    - i) widespread dissemination of confidential information about Plaintiff that would be objectionable to the average person
      - (1) cannot be newsworthy
    - ii) two cautions
      - (1) newsworthiness exception – for celebrities quite wide

- (a) it is a tort for the NY times to publish a private figure's medical records
  - (b) but it is okay for public figures
- (2) dual life fact-patterns
  - (a) the Plaintiff operates in two separate spheres of activity – both are relatively public, but the Plaintiff wants to keep them separate
  - (b) no cause of action because the facts are not private facts (for example it is not a private fact because it is at a public event)
- e) defenses to privacy torts
  - i) consent
  - ii) absolute and qualified defamation privileges are defenses to disclosure and false light
- 7) economic torts
  - a) **fraud** – five elements, but no affirmative defenses FRAMID -- FAIRD
    - i) must be an **affirmative misrepresentation**, silence is not enough
    - ii) must be **fault** – or scientar (defendant must know what he is saying isn't a lie)
    - iii) defendant must intend to **induce reliance**
      - (1) must be the goal of this deliberate lie to trick the Plaintiff into entering into a transaction
      - (2) little irrelevant stories aren't fraud
    - iv) must be **reliance**
      - (1) a statement of opinion – it is acceptable to rely on an opinion if the speaker had superior skill or knowledge about the subject matter
  - v) **damages**
  - b) **misrepresentation**
    - i) false representation
    - ii) knowing by defendant to be false
    - iii) intended to induce justifiable reliance
    - iv) monetary losses
  - c) NY Only: **Prima facie tort**
    - i) Catch-all category for the intentional infliction of economic harm without any justification
      - (1) There has to be an intent to do harm
      - (2) The Plaintiff has to get wounded and has to suffer economic loss
    - ii) Anti-trust cases (deliberately not listing competitors sales);
    - iii) predatory pricing
  - d) **inducing a breach of contract** - in the equity outline
    - i) must be a **valid contract** between Plaintiff and some third party (can be relief for some refusals to deal)
    - ii) contract between 3<sup>rd</sup> party and Plaintiff cannot be **terminable at will**
    - iii) defendant must **know** of the contract between Plaintiff and Tom
    - iv) must persuade the third party to **abandon the contract**, usually it will be for offer of a better bargain
    - v) the **persuasion must be effective**
    - vi) privilege for inducing a breach of contract
      - (1) when there is a special relationship (for example confidante) between Defendant and the contracting party. for example parent, lawyer, clergy
      - (2) if advise was requested can claim a privilege
  - e) **theft of trade secrets**
    - i) must be valid trade secret
      - (1) information that provides a **business advantage** to the owner
      - (2) information that is **not generally known** in the industry
      - (3) something that the owner takes pains to keep secret
    - ii) examples: blueprints, software, various kinds of production processes, formula for Coke
    - iii) defendant who takes the secret by improper means (two types)
      - (1) **traitorous insider** – defendant will be someone who originally learned a secret because he was in a position of confidence
      - (2) the **devious outsider** – the industrial spy
  - f) intellectual property torts
    - i) **trademark infringement** – confusing use of another company's brand name

- ii) **artists** – people can't use their work without permission (can always use the idea, but can't use the words or images)
  - iii) **patent law** – once there is a patent, it is a tort to use it
- 8) negligence (17 on the multistate exam) – four elements (DBDC) – Dumb Bitches Cause Death
  - a) **Duty** – always a question of how much care is owed and the whom it is owed
    - i) General rule: Duty is owed to all foreseeable Plaintiff's and all rescuers regardless of whether foreseeable or not
      - (1) If someone couldn't reasonably foresee their position it is an intervening cause
      - (2) Emergency situation creates a duty to rescuers – so long as the rescuers don't act wantonly. Must actually start rescuing
    - ii) Everyone owes the degree or amount of care that would be given by a hypothetical, **reasonably prudent person under similar circumstances**
      - (1) This objective test is quite harsh
        - (a) Compare the behavior of the defendant with a reasonably prudent person
        - (b) No allowances for defendant's mental shortcomings
        - (c) There is allowance made for physical shortcomings or differences
        - (d) Superior knowledge of the defendant will be implied to the hypothetical reasonably prudent person
          - (i) Education
          - (ii) Or specific knowledge about the situation
      - (2) Exceptions
        - (a) Children under 4 incapable of negligence: note dangerous children can subject parents to liability
        - (b) Children are judged by a reasonably prudent child of like **age and experience**, and intelligence – unless the child is engaged in an adult activity (usually something with a motor)
        - (c) Professionals – people who provide special services to the public based on special training and skill
          - (i) The case that a physician normally owes is the care that an average member of the profession owes – is that of an average member of a profession in a **similar community** (for example big city v. small town)
            - 1. This standard applies the defendant to other real world colleagues – it is empirical
            - 2. If the average doctor would normally give the test, than the average doctor is negligent for omitting it
            - 3. The custom of the profession sets the standard of care -- the law says “do that which is customary”
          - (ii) Doctors always must explain the risks of medical procedures to the patients under the informed consent doctrine – even though the care that was give was careful, that Plaintiff has a cause of action. But there must be actual damages. (for example DBCD)
            - 1. Misdiagnosis is an actual damage
    - (d) Reasonably prudent person owed to people not on premises
    - (e) Possessors of land – duty that possessors of land owe to entrants (based on whether it was an activity or condition that caused the harm)
      - (i) NY: everyone under reasonably prudent person standard
      - (ii) MBE
        - 1. if you have an entrant on the land, and the entrant is a trespassing child – the child of care is **always reasonable prudence under the circumstances**
          - a. **attractive nuisance doctrine** is defined as landowner owes a higher duty of care to a child trespasser than to an adult trespasser
            - i. there is a dangerous manmade condition on the land of which the owner is or should be aware (for example charged with constructive notice if it is there for awhile)
            - ii. the owner knows or should know that young person frequent the vicinity of this dangerous condition

- iii. the conditions is dangerous because the child trespasser is unable to appreciate the risk –this is not fulfilled if the individual child did appreciate the risk
  - iv. the expense of remedying the situation is slight compared with the magnitude of the risk
- 2. **Undiscovered Trespassers:** people who come on land without permission who the possessor doesn't know that they are there. These are the classic surprise victim. **No duty owed.**
  - a. Activities: Possessor owes an undiscovered trespasser no duty
  - b. Conditions: possessor owes undiscovered trespasser no duty
- 3. **Discovered trespassers:** known or anticipated trespasser. The landowner owes a duty to **protect from known manmade deathtraps**
  - a. Activities: owes the standard of **reasonable prudence** (default standard) – now it isn't a special case
  - b. Conditions: possessor owes the discovered trespasser a duty to protect only from conditions that meet a four part test. **duty to protect only from known manmade deathtraps)**
    - i. In order to trigger a duty, the conditions must be **artificial** (manmade or created by man). No duty with respect to natural conditions on land.
    - ii. Conditions must be highly **dangerous** -- Capable of inflicting severe bodily injury or death – (there is no duty to protect from minor things)
    - iii. Conditions must be **concealed** from the trespasser – do duty to protect from apparent dangers
    - iv. Must be a conditions that the possessor **knows about in advance**
- 4. **Licensees:** social guests – all known traps (natural or artificial)
  - a. Activities: Possessors owe licensees a duty of **reasonable prudence** under the circumstances
  - b. Conditions: Possessors must protect licenses from any conditions that meet a two-party test
    - i. **Hidden:** conditions concealed from the licensee
    - ii. **Conditions:** is one that the possessor knows about in advance. Must protected from **all known traps on the property**
  - c. As a general rule, a lessor of land is not liable to his lessee or to others on the land for physical harm caused by any dangerous condition whether natural or artificial which existed when he took possession – except
    - i. When the lessor contracts to repair
    - ii. Undisclosed dangerous conditions
    - iii. Land leased for public purposes
    - iv. Parts of land retained in lessor's control
    - v. Negligent repairs
- 5. Invitee – someone who enters land that is held open – duty to protect from all **reasonably knowable traps on the property**
  - a. Activities: **reasonable prudence**
  - b. Conditions – two part test
    - i. Conditions is concealed
    - ii. Either possessor knew about or should have know about (know all things that a reasonable person should or would know). everything that can be known by an inspection (reasonable)<sup>5</sup>

<sup>5</sup> Status	Activity	Condition
Undiscovered trespasser's	No duty	No duty
Discovered trespassers	protect from known manmade deathtraps	Reasonably prudent person



- iii. When a condition appears, the duty arises only after the condition has existed for enough time to discover
  - c. Invitees are usually only invited to do specific things
    - i. One can move from being a licensee to being an invitee when the purpose of their visit changes from being for the mutual benefit or benefit of the business to being for the benefit of the individual
- (iii) Means to fulfil duty:
  - 1. fix condition
  - 2. can give warning – warnings satisfy duties in land possessor problem .
  - 3. an extreme danger requires more than a simple warning
- iii) Statutory standards of care (statutory borrowing)
  - (1) **class of person, class of risk test** – if the defendant 1) violate a statute and 2) the statute was designed to protect a class of people and 3) defendant was a member of that class, there is a duty created that was breached
  - (2) defenses to class of person, class of risk test
    - (a) Where Statutory compliance is more dangerous than statutory violation then it is not negligence *per se* Impossibility of compliance with statute – won't borrow the statute
  - (3) In most states, violation of a statute may create a presumption of negligence, which can act as a shield
  - (4) State statutes, not local laws
- iv) Affirmative duties to act – general rule: no affirmative duty to act
  - (1) There is no duty to rescue 3<sup>rd</sup> person in peril un
    - (a) Exception: if the defendant **is the cause** of Plaintiff's peril
      - (i) If one starts to rescue they have a duty to finish
    - (b) Exception: if there is a pre-existing relationship between the parties
      - (i) Family, common carriers and innkeepers, landowners
  - (2) the duty is always a duty to rescue reasonably – if you don't know how to swim, you don't have to run into the pond
  - (3) once rescue commences, it is a breach of duty to cease the rescue
    - (a) there is a duty to rescue without negligence – and negligence does not need to be aggravated
    - (b) must be actual commencement of rescue
  - (4) must rescue as per the reasonably prudent person standard
  - (5) NY: good Samaritan statute – immunity if a doctor, If a doctor, nurse, or veterinarian helps someone they see in distress
- v) Duty to not negligently inflict emotional distress
  - (1) The emotional damage associated with a physical injury is definitely compensable
  - (2) Plaintiff seeking recovery has to show:
    - (a) That although he was not physically injured, he was **exposed to a** risk of physical injury(near miss)
    - (b) Negligence, but no physical injury – exposure to risk of harm
    - (c) Must also demonstrate **subsequent physical manifestations** of the distress
  - (3) Negligent infliction of Emotional distress without injury is usually not compensable - exception – funeral homes because of universally known sensitivity of a family member to the site of a loved-one's dead body
  - (4) Bystander distress recover
    - (a) A bystander who witnesses a negligent party injuring a close family member, one can recover for distress
      - (i) NY: Plaintiff seeking damages must have been within the zone of danger
    - (b) If there is a physical injury to the bystander (for example miscarriage)
      - (i) The Plaintiff was present and witnessed the event

Licensee	all known traps (natural or artificial)	Reasonably prudent person
Business invitee	reasonably knowable traps on the property (duty to inspect)	Reasonably prudent person

- (ii) For non-family members only there must be bodily harm
- vi) Emergency
  - (1) An actor who is confronted with an emergency is not held to the same standard of conduct normally applied to one who is in no such situation
- b) Breach:
  - i) Normally where the Plaintiff tells specifics what the Plaintiff did wrong
  - ii) *Res ipsa loquitur*: (two elements) In the case where exactly what happened is unknown, court can allow a claim to go to a jury by imputing a breach (still not guaranteed victory). Plaintiff must make two showings. *Res ipsa loquitur* can also be used as a shield by claiming that events were out of Plaintiff's control.
    - (1) The accident which occurred is of a type that does not **ordinarily** occur in the absence of negligence
      - (a) This is a statement of probabilities based working backwards
    - (2) Plaintiff also has to show that the injury causing instrumentality was in the exclusive control of the defendant (modern cases don't require completely exclusive control)
      - (a) There must be physical injury in *Res ipsa loquitur*
- c) Causation (factual cause and legal cause have nothing to do with each other)
  - i) Factual cause (cause in fact): where the Plaintiff demonstrates a cause and effect linkage between the behavior that has been identified in the breach and the injury
    - (1) If there is a doubt, Plaintiff can use a "but for" test to demonstrate the causation. For example: but for the bad behavior one would be alive and well
    - (2) Defendants will make an "even if"
    - (3) Multiple defendants
      - (a) Mingled causes: in a mingled cause case, there are two separate causes that will come together. Use a *substantial factor* test – they both contribute – they will be jointly and severally liable. Each can triumph over a but for test.
      - (b) Multiple defendants (for example *Summers v. Tice*) with unknowable causes (could have been either defendant, but it was one of them)
        - (i) Shifts burden of proof: Will presume that each is at fault, and it is up to the individual one to exonerate himself – if they fail they will be jointly and severally liable
  - ii) Legal cause (legal cause comes second) -- where there are multiple defendants (can be described as "fairness" (or foreseeability))
    - (1) Have to show that liability would be **fair** under the circumstances
    - (2) We think that it is fair to make defendants pay for the foreseeable consequences of carelessness, but not for unforeseeable consequences
    - (3) Two types of questions
      - (a) Defendant acts and Plaintiff suffers immediately (direct cause)
        - (i) Outcomes are almost always foreseeable
        - (ii) The only guidance is to find where it is preposterous
      - (b) Indirect causes: where something else came into motion
        - (i) Defendant is liable for Defendant intervening causes where the defendant's negligence caused a foreseeable risk of something happening
          - 1. **Intervening medical malpractice**: initial defendant is liable for the entire thing. It is foreseeable that in some percentage of cases, people will be thrown into the care of a bad doctor. Dr. is also liable.
            - a. However, gross medical malpractice is considered to be a superceding force
          - 2. **Intervening negligent rescue**: it is foreseeable that sometimes a klutzy rescuer will make things worse
            - a. Such a duty violates the duty of reasonable care
          - 3. **intervening protection or reaction forces**: (for example stampede after a car goes into crosswalk) – initial tortfeasor liable for the whole thing
          - 4. **subsequent disease or accident**: tortfeasor is liable for things that result (for example an accident victim getting injured while walking on curbs)

- (ii) defendant is liable for independent intervening forces where the defendant's negligence increased the risk that the forces would harm Plaintiff
      - 1. negligent acts of others
      - 2. criminal acts of others
    - (iii) defendant is not liable if negligent, but the criminal act of another is the catalyst to the damages if the criminal act is really unforeseeable
    - (iv) defendant not liable for unforeseeable result caused by foreseeable intervening forces
    - (v) unforeseeable intervening forces break the chain of causation and Plaintiff is not liable
  - (c) alternative form of analysis Defendant acts, and there are other events. Four types of fact patterns.: "I am calling this behavior negligent, therefore I anticipate that this behavior won't happen, and I must be fearing something that happened."
- d) **Damage:**
  - i) Eggshell skull (or hemophiliacs) : if a defendant has committed all of the other elements necessary for tort liable, than defendant will have to pay for all damage suffered by Plaintiff no matter how extensive. A.k.a. "you take your Plaintiff as you find your Plaintiff"
    - (1) Eggshell skull doctrine isn't limited to negligence law.
  - ii) Continued bad conditions constitute damages
  - iii) **NY only:** damage awards will be reduced by damages received from other sources (including one's own insurance)
- e) **Affirmative defenses to negligence**
  - i) comparative negligence: if the Plaintiff is guilty of some fault, the jury assigns comparative fault, and Plaintiff's recovery will be reduced in accordance with these numbers
    - (1) pure comparative fault – and NY (except when the Plaintiff's fault is also a crime)
      - (a) this means that Plaintiff always recovers at least a little something – for example when Plaintiff's fault is 95%, he still gets something
    - (2) modified or partial comparative fault, Plaintiff's fault of less than 50% reduces recovery, but Plaintiff fault of over 50% is an absolute bar
  - ii) Classic contributory negligence – "common law of negligence" : only the law in a handful of jurisdictions
    - (1) If the defendant is at fault, he can recover nothing
    - (2) Fault is defined as the failure of a Plaintiff to exercise the relevant degree of care for his or her own safety
    - (3) The relevant degree is usually "reasonable prudence" – if you jaywalk, that is a failure to exercise a relevant degree of care for one's own safety
    - (4) If someone knows if a danger, and they still go ahead with it they can be considered to be contributory negligent
  - iii) "last clear chance" : LCC is Plaintiff's rebuttal against a charge of contributory negligence. Despite one's own contributory negligence, the defendant had the last clear chance to avoid the tort – not followed most places
    - (1) a.k.a. last wrongdoer is viewed as the worst wrongdoer
    - (2) this is also the doctrine of *helpless peril* in that one has the ability to avoid causing peril to another
  - iv) "implied assumption of the risk" – this is also a minority doctrine at the present moment in time (only on the MBE when it says so). Assumption of risk, when available is a complete defense
    - (1) express assumption of the risk: negligence law equivalent of the intentional tort doctrine of consent
      - (a) the paradigm or stereotype of **consent** is a defendant approaching a Plaintiff and the Plaintiff says 'hit me, go ahead and hit me'
      - (b) "that is okay, I will take my chances" – is **assumption of the risk**
    - (2) in implied assumption of the risk, Plaintiff behaves in a way that implies that Plaintiff means to assume some risk
      - (a) there should be evidence that Plaintiff knew of, and appreciated the risk
      - (b) there must be evidence that Plaintiff chose to encounter the risk voluntarily

- (c) duress or emergency negates any assumption of risk
  - (d) by employment (for example firefights)
    - (i) Plaintiff must know of the risk and voluntarily assume it (esp. when the average person would know if such a risk)
  - (3) in a traditional common law state, it would mean that this Plaintiff is absolutely barred from recovery
- v) express assumption of risk (waiver)
  - (1) Plaintiff must assent to terms
  - (2) Terms must not be against public policy
  - (3) Injury that occurs must be within those foreseen or explicitly within the waiver
- 9) strict liability cause of actions (four): note: the fact that a dangerous instrumentality is used in a tort does not subject to user to ultrahazardous activity
  - a) liability for injuries caused by animals
    - i) domesticated animals: no strict liability expect of there is reason to know of vicious propensities (one free bite) than you will be strictly liable
      - (1) could have been trained to be vicious
      - (2) prior biting
      - (3) includes domesticated honeybees
    - ii) strict liability for harm caused by animals likely to roam such as cattle, horses, sheep, chickens, and pigeons
    - iii) wild animals: always strict liability
      - (1) no way to domesticate wild animals
      - (2) no strict liability for activities of animals that are not the danger in the animal (normally dangerous propensity) (for example no strict liability for shark splashing people)
  - b) ultrahazardous activities -- liability without regard to safety precautions
    - i) duty is owed only to foreseeable Plaintiff s
    - ii) defining (from restatement)
      - (1) activity that can't be made safe
      - (2) activity that imposes a risk of severe harm
      - (3) activity that is uncommon in a place where it is being conducted
    - iii) typical ultrahazardous activities
      - (1) blasting or explosives
      - (2) anything involving toxic or dangerous chemicals
      - (3) pumping chlorine gas through pipes
      - (4) transporting sulfuric acid in tanker trucks
      - (5) anything involving nuclear energy or radiation
    - iv) things that are not *per se* ultrahazardous activities
      - (1) guns
  - c) nuisance: standing requires actual possession of land
    - i) public nuisance: act which unreasonably interferes with the health, safety, or property rights of the community
    - ii) private nuisance is defined as offensive, inconvenient, or annoying to the average person in the community
      - (1) "two adjacent landowners, one of whom may be getting on the other's nerves"
      - (2) legal standard is that defendant is **liable if its activities interfere with Plaintiff's use and enjoyment of the land to an unreasonable degree**
      - (3) difference between a public nuisance and private nuisance (look this up in book)
  - d) strict liability for **product related injuries**: will only recover personal property <sup>and/or</sup> property damage
    - i) if someone on the bar exam gets hurt by a consumer product that victim may, indeed almost always will have a variety of causes of action
      - (1) victim may have a warranty claim under the uniform commercial code
      - (2) may have a fraud claim
      - (3) if the product has been booby-trapped, it can be battery
    - ii) note: Under the uniform commercial code, an affirmation creates an express warranty and liability

- iii) if someone put out a product as their own, when it in fact is not their own, then they are liable as if it was
  - iv) three main or principal elements
    - (1) defendant must be a merchant – someone who routinely deals in goods of these types
      - (a) casual sellers and service providers are not merchants
      - (b) **commercial lessors are merchants**, and are strictly liable
    - (2) privity
      - (a) among consumers who resell: there is no privity requirement to assert a strict liability claim in tort:
      - (b) once a good has had a substantial change done to it, there is no longer any privity requirement
    - (3) Plaintiff must demonstrate the product is defective
      - (a) Manufacturing defects exist when the product that injured Plaintiff differs from all of the others that came off the same assembly line in a way that makes it more dangerous than consumers would expect
      - (b) Design defects – must meet three requirements
        - (i) Another way to build the product that would make it safer
        - (ii) Hypothetical alternative design is cost effective
        - (iii) hypothetical Alternative design is also practical
        - (iv) note: information that accompanies the product is part of the design
          - 1. instructions
          - 2. and warnings
            - a. if there is no cost effective way to eliminate a risk by physically redesigning the product, a warning can be effective
            - b. warning won't suffice if there is a physical redesign
            - c. **if a product can be made safer by a warning, the absence of a warning makes it defective**
            - d. warnings need to be a good warning – conspicuous, bilingual
          - 3. note: advertising a product for one use, and not providing all of the safety equipment makes the product unsafe
      - (4) use of the product that lead to the injury must have been a foreseeable use
        - (a) foreseeable uses of products are not limited to the intended uses – include a variety of misuses
  - e) affirmative defenses to strict liability – majority of states use comparative fault concept
    - i) majority of states, including NY use comparative fault concepts
    - ii) if you buy a product, and the product hurts you, one's failure to read the manual creates comparative fault, which may reduce recovery
- 10) vicarious (agent) liability
- a) relationships that trigger vicarious liability
    - i) employers-employees: an employer is liable for the active torts of employees committed within the scope of their employment
      - (1) minor departures are still within the scope of employment
      - (2) intentional torts:
        - (a) unless within the scope of employment
        - (b) exceptions: if the job itself involves physical force (security guard or nightclub bouncer)
          - (i) False imprisonment, battery, losing temper, etc.
          - (ii) job that generates friction: debt collectors, repo man
          - (iii) any time that the intentional tort is done to serve the boss's purpose
    - ii) hiring-party – independent contractor: no vicarious liability, but there is an exception when a land **possessor is vicariously liable for torts committed by independent** contractors that injure invitees
      - (1) since once has a non-delegable duty to take care of invitees, it can't be swapped onto the independent contractor

- iii) automobile owner and **someone driving the car with permission** there is no vicarious liability, but if there is a minor injury, the victim can claim against the owner's no-fault insurance
      - (1) MBE: if someone lends someone a car for the purpose of the lender (errand) – there is vicarious injury.
      - (2) NY: NY always holds the automobile owner liable for the torts of the driver – and this applies to lessors of cars
        - (a) In NY there is a presumption that anyone driving the car has the owner's permission and therefore there is a presumption of permission, so the **owner will be vicariously liable unless he can negate**
    - iv) Parents and children: general rule, no vicarious liability
      - (1) But, in NY there is a statute which provides that there can be vicarious liability up to *modest* dollar amounts (around \$2,500) -- for the torts of their kids
      - (2) But there is a duty to a parent to protect 3<sup>rd</sup> parties from foreseeable harm resulting from an infant child's improvident use of a dangerous instrument when such use is within the parent's control
    - v) It may be easier to claim for negligent entrustment or negligent hiring than vicarious liability
      - (1) Also allowing someone to escape when one should may be a better form of liability than negligent entrustment
    - vi) Vicariously liabilities can always seek indemnification from the actual tortfeasor
  - 11) Multiple defendant issues – reconciliation of rights between co-defendants
    - a) rule in NY and around the country is **comparative contribution**, the jury assigns each codefendant a comparative fault number
    - b) absent a statute, one who settles without judgement **can** recover contribution
    - c) exceptions – where out of pocket party is entitled to **indemnification**, instead of comparative contribution
      - i) If the out of pocket party is a **vicariously liable**, it can **get indemnification** from the active tortfeasor
      - ii) In strict liability for products, **if the out of pocket party** is someone other than the manufacture (such as a wholesaler or a retailer), they can seek indemnification from the manufacture
        - (1) NY: see CPLR for settling defendants and tort reform
  - 12) Tort immunities
    - a) Governmental immunity: when the government behaves in traditional governmental ways involving discretion, the government is immune
      - i) For example can't sue a government agency for making a bad policy
      - ii) But if the government is acting in a routine everyday fashion, it is not immune
        - (1) For example a health inspector driving a car
        - (2) People suffering torts due to failing to wipe floor in building
    - iii) Sovereign immunity doesn't apply to proprietary governmental immunities
    - b) Family immunity: most of the time it is abolished
    - c) Charitable immunity: most of the time it is abolished
    - d) **Worker's compensation**: statutory insurance scheme that provides that insurance will be the exclusive remedy of covered employees injured on the job
      - i) The key aspect of the scheme is that the employer effectively is strictly liable, but the the employer cannot be sued
      - ii) Employees can't bring suits against their bosses for on the job injuries
        - (1) In effect, employers are immune from tort suits brought by their own employees
        - (2) Employee is guaranteed a recovery, and a quick recovery, because he doesn't have to prove the elements of a tort
          - (a) Do not ever recover pain and suffering
          - (b) Do not ever recover punitive damages
      - iii) Everyone but three kinds of employees are covered
        - (1) Teachers and non-manual laborers who work for non-profits – outside the scheme (don't get the benefit but can sue in tort)
        - (2) **Part-time domestic and household help** is not covered

- (3) clergy**
- iv) Injuries
    - (1) All injuries except three
      - (a) Injuries that are due **solely** to the intoxication of the employee
      - (b) Employee **intentionally injured** himself
      - (c) Injury occurs in a voluntary, off-duty, athletic activity – if it arises out of work it is covered (including carpal tunnel syndrome for phone sex operators)
    - v) What benefits – very broad
      - (1) Do not ever recover pain and suffering
      - (2) Do not ever recover punitive damages
  - 13) Loss of consortium – uninjured spouse is death (doesn't matter what the tort is) the non-injured party has a separate recover for 3 items
    - a) Loss of services
    - b) Loss of society (things spouses do with each other than sex)
    - c) Loss of sex
  - 14) Equitable remedies: when money damages won't do. But court can grant both monetary and injunctive relief
    - a) **Negative injunctions** (prohibitory injunction) is defined as “stop” - don't do X.
      - i) Four part test for injunctive relief – **after** proving substantive elements
        - (1) No **adequate remedy** at law
          - (a) Impecunious defendant
          - (b) Difficulty of measuring in monetary terms
          - (c) Repetitive conduct (for example continued trespass)
        - (2) Tort injured a **protectable interest** – this has almost dropped out
          - (a) When we have a narrower conception of property this was more important
          - (b) Now protectable interests include: Dignity, likeness, physical integrity
      - ii) Plaintiff must demonstrate that the injunction would be **enforceable**
        - (1) So long as there is **personal jurisdiction** we can enforce this through the contempt power
        - (2) With mandatory injunctions, things are difficult as Courts won't enforce personal service contracts
        - (3) The more elaborate and complex the conduct may be, the harder the enforcement
          - (a) For example “tear down your fence” is easy
          - (b) “sing” is hard
        - (4) the longer it takes to complete the task, the more enforcement problems we can anticipate, the more reluctant that the court will be to enter the injunction
        - (5) jurisdiction issue: whether the activity will have to be outside the jurisdiction – which makes enforcement difficult
      - iii) Plaintiff must demonstrate that the **balance of hardships** tips in Plaintiff's favor – any harm inflicted on the defendant by entering the injunction is less than the harm that Plaintiff suffers by allowing the Defendant continues
      - iv) Lack of Equitable defenses to prevent an injunction
        - (1) **Unclean hands**: Plaintiff has, in some way, behaved inappropriately (for example in a patent case, the defendant can point out that the Plaintiff has violated antitrust laws)
        - (2) **Laches**: prejudicial delay: kind of like, but independent of the statutes of limitations
          - (a) If the Plaintiff waits too long to seek an injunction, the defendant may change its position in reliance on Plaintiff's non-action
        - (3) **1<sup>st</sup> amendment** : in some of the privacy torts, but in defamation, the court will say that it would be a prior restraint (for example disclosure)
    - b) **Mandatory injunction** is defined as “do an activity”
      - i) Rare, as courts do not like to enforce specific performance
    - c) **Permanent injunction** is defined as the injunction at the conclusion of a full dress trial on the merits
    - d) **Preliminary injunction** to maintain the status quo – two things that a Plaintiff must show at the beginning of the case, to preserve the status quo pending trial
      - i) Must show a strong **likelihood of success** on the merits

- ii) Plaintiff has to demonstrate that he or she or it will suffer **irreparable injury** if the preliminary injunction was not granted
  - iii) NY: if you are seeking a preliminary injunction, the CPLR requires that a Plaintiff post a bond
- 15) No fault insurance: the whole point is to divert small car accident cases from the tort system
- a) One can collect from their own insurance company
  - b) NY no-fault is portable – if someone from NY goes to a foreign state, and injures himself, he can still claim against their own insurance company
  - c) Right to sue can be blocked by the NY no fault statute
    - i) In NY car insurance is mandatory
      - (1) Have to buy two types of insurance –
        - (a) Liability insurance – in tort litigation
        - (b) No fault insurance – small accident
      - (2) Statute prescribes minimum coverage amounts
        - (a) No-fault coverage amount is 50k
    - ii) Who is covered by the no-fault prong of the policy – for example who has a potential claim against the insurance company under the holder's policy
      - (1) Policy holder
      - (2) Any authorized driver of Policy holder's car
      - (3) Any occupant of the car, no matter who is driving
      - (4) Any pedestrians hit by Policy holder's car
    - iii) No inquiry into fault
  - d) However, some people can't claim no-fault
    - i) Drunk-drivers (lose their right to claim under no fault)
    - ii) Drag racers
    - iii) Car thieves or other fleeing felons
  - e) Defining minimal notion
    - i) Can go to court (big potatoes)
      - (1) You either suffer more than basic economic loss
      - (2) **Suffer serious injury and total loss of a bodily organ** – your ticket into court is that
        - (a) You suffered either more than serious economic loss or
      - (3) Basic economic -- if economic loss is over 50,000 – calculated by add together three items – if it exceeds \$50,000 for one year can go to court (this only helps one if you are free from fault – if you are at fault, you will lose)
        - (a) Medical expenses
        - (b) 80% of lost earnings, up to \$2,000 per month
        - (c) misc. expenses at 25/day
      - (4) serious injury
        - (a) death
        - (b) dismemberment
        - (c) significant disfigurement
        - (d) serious fracture
        - (e) permanent loss of a body organ or function
          - (i) court of appeals – requires total permanent loss of the organ in question
      - (5) if you have neither serious injury no damages above economic loss, you go to your insurance company, if you have more than that, you can sue
    - ii) If you make a no-fault claim, and the insurance company refuses to pay you can
      - (1) Go to arbitration
      - (2) Sue for breach of contract
- 16) Review of types of emotional distress
- a) Intentional infliction of emotional distress
    - i) Extreme and outrageous conduct
    - ii) Causal relationship
    - iii) To damages
    - iv) A tortfeasor must be aware of bystanders for the bystanders to have suffered deliberate damages



- b) Negligent infliction of emotional distress
  - i) Physical impact or threat of injury
  - ii) Defendant's conduct must generally cause some physical injury
  - iii) Bystanders: Family members only have standing
  - iv) In New York one must be in the zone of danger

## Trusts

### 19) Terminology

- a) *Inter vivos*: created during the settlor's life
  - i) The court is not involved in setting up the trust or in overseeing their performance
  - ii) Akin in a private contract, in that a court is only involved if there is an action for construction or enforcement
  - iii) If a beneficiary feels that the trustee is so negligent that they are breaching their fiduciary duty, that they aren't paying out the income, they can bring an action to enforce the trust
- b) Testamentary trust is created by a provision in the testator's will
  - i) Court trust: the surrogate's court oversees the creation of a testamentary trust
- c) New York interests in land
  - i) Fee Simple Determinable with Possibility of Reverter in NY is called a *fee on limitation with a possibility of reverter*
  - ii) Fee Simple Subject to conditions subsequent with a right of entry (with words of condition) followed by words of optional re-entry – this is called a *fee on condition with a right of reacquisition*
  - iii) Fee simple subject to an executory limitation (determinable or executory interest) – they won't test, as it isn't in the statute, it can't be called an "executory limitation"

### 20) Express trusts (trusts law applies to private and charitable trusts, but not to constructive trusts, but not gifts to minors, and custodial minors)

- a) Private trusts
  - i) Elements
    - (1) Settlor a.k.a. testator a.k.a. creator
      - (a) Capacity: capacity to contract (18 years old)
      - (b) *Cf.* Reduced capacity required for creation of testamentary trust (similar to will)
    - (2) Trustee
      - (a) Holds legal title
      - (b) **no trust will fail for lack of a trustee** (court will appoint)
      - (c) by statute, the following people can't be appointed by the court to be a testamentary trustee (MIC)
        - (i) **Minors**
        - (ii) **Incompetent**: drunkenness, dishonesty
          - 1. Non-resident alien cannot serve as testamentary trustee, unless she is related to trustee, and a NY resident still serves as trustee
        - (iii) **Convicted felons**

- (d) Since no court is involved in the creation of an *Inter vivos* trust, anyone can serve
- (3) *res* a.k.a. trust property a.k.a. corpus a.k.a. principal
  - (a) must be identifiable and certain in that the court should not have to use its own judgement to discern what is in the trust
  - (b) expectancies can't be a trust – however, under an exoppel theory a transfer to a trust for consideration of an expectancy will be enforced
  - (c) unfunded trusts (pour-over trusts) are valid (used to be a way to avoid leaving money to immediate family): if the trust is there to serve as a receptacle for certain non-probate mechanisms, but the **trust documents are executed before the proceeds are despite to go to them**. They are usually receptacles for: life insurance proceeds, retirement accounts, POD accounts
- (4) beneficiaries
  - (a) merger doctrine: as of 1997 a trust is valid provided that there is at least one other beneficiary in any form (even a contingent remainder)
  - (b) if a testamentary trust fails for lack of identifiable beneficiaries, then the trustee holds the assets in a resulting trust for the benefit of either the testator's residuary legatees, or if the trust was created in the residuary clause to the testator's heirs
- b) Charitable trusts: Rule against perpetuities doesn't apply to charitable trusts
  - i) Beneficiary requirement
    - (1) gift must be for a reasonably large segment of the public – not specific people
    - (2) *And* must have a charitable purpose (Medical purpose, religion)
      - (a) Tilden act: a trust is valid even if the testator fails to name a specific charity. Court will hold a *cy pres* hearing
      - (b) Attorney general enforces the beneficiary's interest in a charitable trust (charities don't have to defend)
  - ii) No honorary trusts: Trust beneficiaries must be charitable or specific people, not in inanimate objects
    - (1) Pets: By a recent statute, trusts to benefit a pet are alright – but the trust may only endure for 21 years
    - (2) Can have a trust for the upkeep of a grave or burial plot are okay – as they are enforceable
- 21) Trust creation
  - a) Requirements
    - i) For all trusts
      - (1) Writing
      - (2) Intent
      - (3) Delivery: must transfer to the trustee
    - ii) Testamentary trust requirements.
      - (1) Always requires a writing with “mandatory” not aspirational words
      - (2) delivery: but once the court determines that the will is valid, there won't be any issues of delivery
    - iii) creation of *Inter vivos* trust

- (1) must be **created by a writing that is signed by the settlor**, and it least one trustee, unless the settlor is the only trustee, and acknowledged before a notary, or in front of two witnesses
- (2) requires **intent**
- (3) delivery
  - (a) to create a valid *Inter vivos* trust, the settlor must transfer property to the property to the trustee
    - (i) in pour-over trusts there is no transfer of assets, as the assets don't exist yet
      - 1. pour-over gifts to an *Inter vivos* trusts are valid only if the settlor executes the trust document prior to, or concurrently with the will
      - 2. life insurance: can name the beneficiary of the *Inter vivos* trust as the beneficiary, or can name "I name the trustee named in my will"
      - 3. if the trustee of an *Inter vivos* trust is the beneficiary of the life insurance policy, the trust document must be executed before the settlor names the beneficiary
      - 4. an *Inter vivos* trust can be recoverable and unfunded
      - 5. a trust is not valid, unless the ownership of the property is changed from "first bank as trustee" – he has to register the stock as belonging to himself
    - (ii) if the will is executed before the beneficiary designation is made – this also applies to POD accounts, and retirement plans
- iv) spend-thrift provisions in a trust prohibits attachment or assignment of a beneficiary's equitable interest
  - (1) in New York spendthrift provisions are automatic
    - (a) remainder interests are not given automatic spendthrift protection but creditor can't execute that interest until the levy becomes possessory
      - (i) remainder interests can still be given spendthrift provisions
    - (b) no self-settled spendthrift trusts allowed (allowing people to transfer to a trust, as a way to get around a creditor) . Alaska, and ND – will allow self-settled spendthrift trusts in ND and Alaska – using local banks
    - (c) in a trust which authorizes transfer of trust income or in a revocable trust, one has an interest in all of the principle, and his creditors can attach all of the principal interest – can a creditor attach the beneficiary's interests – the question is whether it is all that he retained
  - (2) statutory exceptions for creditors to statutory spendthrift provisions
    - (a) automatic 10% levy: automatic attachment – any creditor can take 10% of the income payments
    - (b) if it is a creditor who provides necessities: they are exempt and they may attach the beneficiary's interest notwithstanding
      - (i) necessary medical care included
      - (ii) elective surgery isn't included
    - (c) if the debt is for child support or alimony

- (d) IRS
- (e) Excess income from a trust may be attached despite the statute or provisions in the trust
  - (i) Excess income beyond that which the beneficiary reasonably needs for support and education, anything over that can go to the creditors -- must show that they have used their other options
  - (ii) Reasonable need is a question of fact – the court may take account of the beneficiary's station in fact
  - (iii) Can take into account other sources of income.
  - (iv) Creditor must show that they have exhausted other options for satisfying the debt
- b) restrictions and limitations on trusts
  - i) purpose of trust must be for lawful purpose or policy purpose
    - (1) will fail if it involves commissions or a crime, or a tort
    - (2) trust fails if contrary to public policy
      - (a) can't have a trust which pays the whole amount upon divorce
      - (b) conditions that are a total restraint on marriage: if it is conditioned in remarriage it is okay but can impose a limitation on a right to marriage
      - (c) conditions that discourage procreation
      - (d) provision that requires the destruction of property
  - ii) if the condition is unlawful, the trust beneficiary takes the property outright
- c) Rule against perpetuities
  - i) Private express trusts must not violate the rule against perpetuities
  - ii) Charitable trusts are not subject to the Rule against perpetuities
  - iii) Application of Rule against perpetuities
    - (1) Rule against perpetuities doesn't apply to remainders that are indefeasible vested, or vested subject to complete defeasance a.k.a. vested subject to complete divestment
    - (2) Rule does apply to
      - (a) Remainders that are vested subject to open
      - (b) Contingent
      - (c) Or executory interests
    - (3) NY variations on the rule
      - (a) NY has calls contingent remainders and executory interests: call them *remainders subject to a condition precedent*
      - (b) NY law that will save things
        - (i) Unborn widow problem – when people give a life interest to “spouse”
          - 1. at common law, this remainder is invalid
          - 2. under NY law, the remainder is valid, the statute assumes that even if there is some other widow, it is someone who is alive at the creation of the interest
        - (ii) if NY, where an age contingency would make the gift fail, but reducing the age contingency fails it, the court will reduce to 21
        - (iii) fertile octogenarian problem: statute presumes that women are infertile after the age of 55,

1. disregard the possibility of adoption
  2. court can consider evidence as to whether a particular women is fertile
  3. for example
    - a. if T's will creates a trust, which directs them to pay the income to their daughter for life – remainder in great grandchildren, the remainder would be invalid.
    - b. Under NY law, the remainder is valid – the statute presumes that one cannot have more kids
  - d) NY suspension rule: *a present or future interest shall be void if it suspends the absolute power of alienation for a period longer than lives in being plus 21 years*
    - i) To be valid under the suspension rule, there must be person in being who could join together in a conveyance of the full Fee Simple within lives in being plus 21 years.
    - ii) A.k.a. all pieces of the Fee Simple must be held by ascertainable persons within lives in being plus 21 years
    - iii) If there is a life estate in an unborn person, it is subject to the statutory spendthrift rule, and hence, it can't be fully conveyed, therefore it fails.
  - e) Rule against perpetuities and power of appointment (when someone creates a trust, which allows someone to pick the remaindermen right now)
    - i) Creation must be valid. To be valid, a general testamentary power or a special power must be certain to be exercised if at all within a life in being plus 21 years
      - (1) A presently exercised power will always be valid in its creation (**Simple: If a power of appointment is given to someone who is alive when the power of appointment is created, the power of appointment will be valid**)
      - (2) But *cf.* if the power is given to an unborn person (for example “to my children” it is invalid.
    - ii) Exercise must be valid: (read the appointment as though it were part of the original trust document) that created the power of appointment
      - (1) Fill in the creating instrument – put the appointment in the creating instrument
        - (a) Note: under the NY statute, if the interest fails because of the terms of the trust are greater than 21 years, by statute it will be reduced to 21 years
      - (2) Second-look doctrine (this is not the wait and see doctrine) : **Second-look doctrine applies only to the exercise of a power of appointment**, one is allowed to take into account facts existing at the time the power of appointment is exercised
- 22) trust administration
- a) powers
    - i) NY has the *Fiduciary Powers Act* grants broad powers that are akin to what the holder of a Fee simple absolute can do (Can sell, mortgage, lease, etc.)
  - b) Prohibitions
    - i) Expressly prohibited by the *Fiduciary Powers Act*:

- (1) Continue a business – if the business was in trust, the trustee can't keep the business going
- (2) Destroy real property
- (3) Employ agents or delegate duties
- (4) Make extraordinary repairs or improvements
- (5) Keep funds uninvested
- (6) Advance funds to a beneficiary
- (7) Engage in self-dealing
  - (a) Trustee owes an undivided duty of loyalty to the trust and its beneficiaries
  - (b) The trustee can't transact business with the trust in their personal capacity
  - (c) Can't be wearing both hats with respect to any trusts
    - (i) Can't buy or sell assets to itself no matter how fair it seems
    - (ii) Can't borrow trust funds (no matter what interest)
    - (iii) Cannot loan funds to the trust (no matter what interest)
      - 1. Interest has to be secured
      - 2. Security given is invalid
  - (d) Can't profit, except for what is given by statute
  - (e) Can't engage in indirect self-dealing (where a controlled actor is on the other side)
- (8) Cannot commingle trust assets with personal assets
  - (a) Must keep personal assets separate from trust assets
  - (b) If the trustee commingles trust property with her own, the trustee will always lose
  - (c) If some of the property is lost or destroyed, and he uses trust assets and he commingles with his own, the presumption is that the lost or destroyed property is the personal property of the trustee
  - (d) If the trustee makes withdrawals, the court will presume that the amount belongs to the trustee, and the amount remaining is trust property
  - (e) The beneficiary can always claim that if there was commingling, and there was an increase – the beneficiary will be able to take the profits
- ii) The act involves commingling trust assets with the trustee's own assets
- c) Duties: trustee has a duty to exercise reasonable care
  - i) Allocation:
    - (1) Trustee has to know whether the income goes to corpus or to the income beneficiaries
    - (2) NY principal income act: trustee must credit the income generated to the income beneficiary
      - (a) Increases in principal are credited to the remaindermen
      - (b) Capital gains from the sale of stock are attributed to principal
      - (c) Shares of mutual fund – dividend income is attributed to income
      - (d) Capital income is principal
      - (e) **Splits and stock dividends less than 6% -- is income. At a greater rate is attributed to principal**

- (i) **This is an all or nothing rule, not a first 6% rule – if the distribution is based on 10% then the whole 10% is credited to principal**
  - (f) Bonds: interest paid is income
    - (i) On redemption, the bond proceeds are allocated to principal
  - (g) The interest of \$60k per year is attributed to income on redemption is attributed to principal
- ii) Investment: Duty to invest prudently
- (1) Prudent investment is defined as “reasonably prudent investor standard” is defined as a “prudent person of discretion and intelligence seeking reasonable income and preservation of capital”
  - (2) Underproductive property rule
    - (a) value is defined as if the income generated is less than 1% of book value for one year
    - (b) If the property is underproductive, the life beneficiary is entitled to a portion of the sales price
    - (c) Rule of thumb: the amount of delayed income is approximately 5% of net proceeds when the property is sold for each year it was underproductive
    - (d) Doesn't apply to OTC or exchange things, or if the trust instrument authorizes investments without regard to income
  - (3) Prudence an investing is applied to the entire portfolio
  - (4) Whether the fiduciary has complied, is determined at the time the investment was made – no hindsight, don't second-guess
  - (5) The trustee used to not be able to invest in mutual funds – now in 1995, the trustees can now invest in mutual funds
  - (6) Any trustee with special skills (such as a bank) is held to higher standards
- iii) For a breach of trust by a trustee
- (1) Upon an improper action, the beneficiaries can either
    - (a) Ratify the transaction and capture the profits
    - (b) Hold the trustee liable in a surcharge action
      - (i) Measure of damages in a surcharge action is the full amount of trust from an improper act
  - (2) “no further inquiry” rule – when there is a breach of the duty of loyalty, the only thing they have to show that the beneficiary engages in self-dealing – all you have to show is damages. There is no requirement that it was a good deal, or that it was fair.
  - (3) Statutes of limitations for actions against the trustee
    - (a) Starts to run:
      - (i) When the trustee repudiates the trustee by denying the existence of the trust with respect to a particular assets (for example it isn't the trusts assets)
      - (ii) The trustee files an accounting that reveals the breach of the duty
      - (iii) The trustee ceases to be a trustee
      - (iv) Exculpatory clause: a clause that relieves for negligent behavior – in NY an exculpatory clause in a testamentary clause is void. It is

valid in an *Inter vivos* trust because they are not such trusts, but such clauses will be strictly construed against the trustee

(b) Time: ?

23) Trust modification and termination

- a) Judicial modification of private trusts for changed circumstances
  - i) When a trust's primary purpose is frustrated by a specific directive in the trust, the trust will be modified, and the court can modify a trust – one can't effectuate the testator's intent
    - (1) Court will Look at the primary intent (for example if the assets can no longer fulfil the secondary intent)
    - (2) If there is an income beneficiary, and the settlor intended that the income beneficiary will be unable to live off the income, and they don't really provide that the trustee will be able to live off the principle – as a general matter, the trust document usually directs that they will invade for their support
    - (3) How much principle the income beneficiary can get depends on what they say – at common law the life beneficiary was out of luck. In NY the court may exercise its discretion **to allow a principle distribution to income beneficiary, if the income is insufficient for the support and instrument, and distribution is necessary to effectuate the settlor's intent**
  - ii) **the court can compel a distribution as long as the court is convinced that the intent it to cover her comfortable support** even though the remaindermen object
- b) judicial of charitable trusts *cy pres* – in NY it is only applicable to charitable trusts
  - i) court will hold hearings if circumstances for the trust have changed
- c) settlor's modification of their own trust
  - i) settlor can set the terms (if any) for revocation of the trust
  - ii) A settlor who is trying to revoke need not obtain the consent of unborn or unascertainable beneficiaries, but if the living beneficiary is incompetent or a minor, the trust cannot be revoked. Period. Minors or incompetents cannot give consent
- d) the Doctrine of worthier title has been abolished in NY –
  - i) Doctrine of worthier title is defined as a settlor cannot create an *Inter vivos* trust that has a remainder in settlor's heirs
  - ii) **Under NY law, if A consents, S can only terminate the trust but for a different reason – because a NY statute directs that S's heirs have no beneficial interest for revocation purposes**
    - (1) For example S can create a remainder in his heirs, but this creates a problem when the settlor seeks to terminate a revocable trust, because s cannot obtain the consent of the remaindermen, since he doesn't know who his heirs are until his death, so **For purposes of the rule that authorizes that settlor to terminate for all beneficiaries, a disposition in favor of heirs creates no beneficial interest in heirs. This he needs only the consent of the life tenant to terminate the trust**



- e) Revocation of *Inter vivos* trusts – if the trust document specifies that you have to revoke, you have to follow the trust document
    - i) Any amendment or revocation must be
      - (1) In writing
      - (2) Signed by the settlor
      - (3) Acknowledged or witnessed, in the manner required for the creation of a trust
    - ii) Notice must be given to the trustee in a reasonable amount of time
      - (1) Notice must be delivered to the trustee in a reasonable amount of time
      - (2) The settlor can revoke a revocable living trust by specific reference in her will, but the key is that he must revoke the right in the trust document to revoke
  - f) Once the settlor dies, can the beneficiaries terminate the trust?
    - i) *Claffin* doctrine: court may terminate a testamentary trust only if the beneficiary's consent and termination won't **frustrate a material purpose of the trust**
    - ii) **in NY, all income interest in trusts have automatic spend-thrift protection – what income does it have on termination of a trust**
      - (1) in NY, unless the testator opted out, they can never opt out unless the income beneficiary is alive
      - (2) in NY, all income interest in trusts have automatic spendthrift protection because doing so would frustrate a material purpose of the trust, which is to keep the income beneficiaries from dissipating their interest
- 24) Implied or imposed trusts (judicial remedies)
- a) Constructive trust is a judicial remedy to prevent unjust enrichment
    - i) Equitable remedy used to prevent unjust enrichment in cases involving wrongful conduct, including but not limited to abuse of a confidential relationship
      - (1) For example making sure someone doesn't do something wrong and profit from it
    - ii) Proof of facts must be by **clear and convincing evidence**
  - b) Resulting trust is a mechanism imposed by a court when someone tries to create an express trust, but fails
    - i) When there is an attempt to create an express trust that fails
    - ii) The named trustee must distribute to whoever the court directs – the recipient delivers as an outright given unburdened by the trust terms
    - iii) When someone tried to create a trust clearly (for example to X for what I told her) the court will impose as the conditions of the trust what they might have really meant
  - c) **New York doesn't recognize a purchase money resulting trust** – when one person buys real estate in someone else's name, and the 2<sup>nd</sup> person promises to reconvey to the person who actually paid for it, at a later date
  - d) Trusts-like mechanisms (which have the elements of being a trust, but they are not trusts either)
    - i) Joint accounts with right of survivorship is a gift of ½ the amount of the deposit

- (1) Joint account that two people, own, and when one dies the entire account belongs to the survivor
- (2) The depositor must use words of survivorship
- (3) Deposit of funds into the joint account is a gift of  $\frac{1}{2}$  of the amount of the joint tenant
- (4) Withdrawal of more than  $\frac{1}{2}$  without the other's consent destroys the right of survivorship, and allows the non-withdrawing depositors to recover the amount of the withdrawal that exceeds the account's value
- (5)  $\frac{1}{2}$  will be included in the elective share augmented estate
- ii) Totten trusts: bank account with a POD provision
  - (1) Not a real trust because the account holder owes no duties to the beneficiaries
  - (2) Rules
    - (a) If the beneficiary predeceases the depositor, the trust is automatically terminated
    - (b) If the beneficiary survives, the amount is subject to the claims of the creditors
      - (i) By statute a Totten trust can be revoked by will, and a new beneficiary designated, but only if the will makes a reference to the specific bank and the specific account
    - (c) Cf. Can't revoke a joint account by will – the right of survivorship controls
    - (d) Can only revoke a Totten trust by will
- iii) **UTMA:** transfers that lets people give gifts to minors without creating a trust
  - (1) Gift is made by transferring property to or taking title as **custodian** under the UTMA
  - (2) If one names a custodian – have to take title under the custodian's name as custodian
  - (3) Custodian has the power to manage and invest – has the power to make payments to or for the benefit of the minor, and then to the extent that it hasn't already been extended, to pay the property to the minor when she reaches 21, unless they direct that it be made when she reaches 18
  - (4) The custodian is a fiduciary, but he doesn't hold legal title, so he can't mortgage
  - (5) Custodial gift qualifies for the 10k annual gift exclusion
  - (6) Federal estate tax: if the donor is also the **custodian, the amount will be included in the donor's state for federal estate tax purposes**

## Wills

- 1) Intestate distribution (denied probate, invalid will, no will)
  - a) If the decedent is survived by a spouse and one or more of their issues Surviving spouse takes first 50k, plus  $\frac{1}{2}$  of the balance

- b) If a decedent is survived by spouse, but not by any issue, the surviving spouse take the entire estate
    - i) The parents and collateral will not inherit in NY
  - c) Distributions: Per capita at each generation
    - i) Inheritance is only by living issue in intestate inheritance
      - (1) If someone only has an expectancy, which is not an interest in property
    - ii) In NY, is making distributions, we apply per capita at each generation
      - (1) At the first generation we find the living takers
      - (2) Deceased shares in the first generation of living takers are put back in pot
      - (3) Persons in the same degree of kinship will always take equal shares
    - iii) cf. In most states per stirpes
  - d) if there is no spouse or siblings
    - i) first to parents or surviving parent and their issue
    - ii) then to grandparents or their issue (effectively cousin)
    - iii) never beyond great-grandchildren of a grandparent
  - e) defining children
    - i) Issue are children
    - ii) adopted children
      - (1) adopted out children is defined as a child adopted by a new set of parents – completely transplants and cuts off the child from his old family
      - (2) child adopted by spouse of natural parent: child can inherit via either the natural parent or the adopting parent
      - (3) child adopted by family member:
        - (a) if the decedent was the adopting family member, the child inherits under the adoptive family member only
        - (b) if the adopted child is related to the decedent by both natural relationship and adoption, the child inherits under the natural relationship
    - iii) children born out of wedlock: child can inherit from the natural father if one of 5 tests is met
      - (1) if the father marries the mother, the child is legitimated
      - (2) father loses a paternity suit during the father's lifetime
      - (3) acknowledged, witnessed statement of paternity
      - (4) blood genetic market -- to "plus other evidence" but it doesn't say what the other clear and convincing evidence should be
      - (5) acknowledgement with putative registry
  - f) lifetime gifts to an heir
    - i) common law: presumed to be an advancement
    - ii) NY: there is no advancement unless proved by contemporaneous writing
      - (1) Has to be signed either by the donor or the donee
    - iii) If it was an advancement, the amount advanced is added to the net value of the estate, and his share is reduced by the value of the advancement
- 2) Validly executed will
- a) Capacity: testator must be 18 years old
  - b) Signed by the testator – at end.

- i) Everything after the end is deemed not to be a part of the will. If the material after the end is crucial to complete the will, the will is deemed to be void
- ii) Any mark will do
- c) Will contests
  - i) Testamentary capacity – did the testator have sufficient capacity?
    - (1) Did he know what he was doing
    - (2) Did he know what he was doing
    - (3) Did he know that he was married, (bounty) with kids
    - (4) Did he know the value of his property
    - (5) Being legally declared incapacitated doesn't mean that one doesn't have capacity
      - (a) Adjudication of capacity involves different legal tests – this goes to the ability to manage one's affairs and enter contracts
      - (b) If someone had mental problems, but a jury decided that they had met the 4 point test for capacity, during a lucid moment
    - (6) Insane delusion: if the testator is otherwise of sound mind, but he has a constant belief of some delusion – in his perverted imagination (for example thinking that people were cheating)
  - ii) Undue influence
    - (1) This is the existence of a testamentary power – it is subjected to a dominant power
    - (2) Has to show the
      - (a) Existence
      - (b) Effect – to overpower the mind of the testator
      - (c) Product: a gift that would not have been made but for the influence the will reflects the whim of the party exerting the influence
        - (i) Court of appeals says that there needs to be a lot more than just opportunity
        - (ii) Surmised suspicions are not evidence of undue influence
  - iii) Where one makes a gift to one in a confidential relationship (for example atty), and that person was active in procuring the will, then is an inference of undue influence, which if not rebutted satisfies the contestants burden of proof
    - (1) Surrogate uses a *Putnam scrutiny*: even if no objection is filed, the surrogate makes an independent scrutiny
      - (a) If a will names a lawyer as executor, because under a recent statute, he has to give notice to client, than anyone can do it, there are statutory fees, and he is also entitled to legal fees
        - (i) Client has to sign the acknowledgement with two witnesses
        - (ii) Even if the will was written before the statute was enacted, there is no grandfathering – the new statute applies, unless you have the separate signed and witnessed disclosure
          - 1. Can't be buried in the will
          - 2. Has to be separate disclosure
- d) No contest clauses – are valid
  - i) In NY, we don't recognize the probable clause exception – in NY, if you want to contest a will, you have to be right –

- ii) Exceptions to no contest rule
    - (1) Grounds of the contest is that the will was forged, or revoked by a later will (not physical act) – if the surrogate finds physical act
      - (a) One could still try to probate the later will
    - (2) If the contest is filed on behalf of an incapacitated beneficiary
    - (3) A construction suit – a suit to figure out what it means
    - (4) Objection to the jurisdiction of the court
  - e) Proxy signatures
    - i) Must be a volitional act
    - ii) Must be signed in the presence of the testator
    - iii) The proxy must sign their name, and address (address not required)
      - (1) Proxy must not be a witness
  - f) With two witnesses – in the presence. Must actually see signature
    - i) Witnesses don't need to be in each other's presence (or the testator's presence)
    - ii) If someone proffers a will with a signature showing, it is an acknowledgement and therefore acceptable
      - (1) Can be a tacit acknowledgement
      - (2) Contemporaneous requirement: must be completed within 30 days from the date when the first witness signed (doesn't matter who signs first)
        - (a) Logically, the testator must sign first
  - g) Publication requirement: Must communicate to witnesses that it is a will (not the same in every state)
  - h) Attestation clause: if the witnesses are not available, it establishes a prima facie case for probate.
    - i) For example “on the above date Howard Brown declare to use that this instrument was his last will, and he asked us to witness his signature. He then signed the will in our presence, we being present at the same time. At his request, in his presence, and in the presence of each other we now subscribe our names as witnesses, and each of us declares that in his or her opinion this testator is of sound mind and is under no constraint.”
    - ii) Hostile witness : if someone thinks that it is an power of atty. Then the attestation clause is prima facie evidence of what the document really was
  - i) Codicil: must have followed the same requirements as there is for a will
  - j) In NY: New York does not give effect to incorporated documents, because they have not observed the same formalities
- 3) Bad things about being a witness
- a) Interested witness: If a witness is a beneficiary, his interest is voided
    - i) Exceptions
      - (1) Supernumerary: if there were three witnesses, and one was a beneficiary, we don't need the witnesses
      - (2) “whichever is least” -- in this case, he gets whatever would be least – his will or his intestate share
  - b) Executors as an attesting witness: Only beneficial gifts are voided, but compensation of an executor, is not barred

- 4) Probate is defined as surrogate court proceeding where it is determined that the will is valid, or whether or not there should be a testamentary execution
  - a) Terms
    - i) Executor if named in will
    - ii) Administrator if appointed by a court
  - b) to be admitted to probate, one must prove that the will is valid – burden is on the proponent (question of fact)
    - i) self-proving affidavit: can be made any time, but usually just after the execution of the will: shows facts to show that the will was properly executed
    - ii) witness testimony: 2 witnesses must testify
      - (1) if only one is available, one will do
      - (2) witnesses who are hostile can still be overcome if they admit that they signed an attestation clause
- 5) Wills from other jurisdiction: Foreign wills act: in NY a will is admissible if it is NED
  - a) New York Law
    - i) If someone expressly states in a will that the disposition of property is to be governed by NY law, it is subject to the NY elective share
  - b) Law of State where it was executed
  - c) Law of state where the testator was domiciled
  - d) Note: if a will is probated in another state there will be ancillary administration, where a New York Court can claim an elective share
    - i) Elective share is available only to the Estates of NY domiciliaries only
    - ii)
- 6) Holographic will (in handwriting, but with no signature)
  - a) Holographic wills are not valid in NY, except for armed forces (in declared or undeclared war) or mariners at sea
    - i) Armed forces expires one year after discharged
    - ii) 3 year expiration for sailors
  - b) if the instrument is written by hand, but witnessed, it can be handwritten assuming that the six point test is met it is valid
- 7) lawyer liability: no privity between heirs and lawyers – no privity of contract (minority rule)
- 8) personal property included in a will: Increase in the value of the gift
  - a) **acts of independent significance**: a lifetime act with a lifetime motive or purpose, even though it effects the will it is given full effect, and it has independent significance
  - b) vessels can be included in a will, but title documents are not in the vessel, will not be referred to property to pass
- 9) ending a will: note: revocation of a will revokes all of its codicils
  - a) can revoke by a written instrument, if it follows testamentary formalities
  - b) subsequent wills
    - i) if a later will doesn't revoke the former will, the wills are read together – and the later one controls where there are conflicts
  - c) destroying a will:
    - i) “a decisive act of revocation” shows intent to revoke the entire will

- ii) anything you do to the signature shows intent to revoke the entire will (not just writing at the bottom)
  - d) presumptions
    - i) when the will was last seen in the testator's possession, and it is later seen mutilated it is presumed to be intended to be revoked
    - ii) when the will was last seen in the possession of someone who is adverse, it is presumed to still be valid
  - e) changes in the physical face of the will are not given effect – no effect
    - i) words added to a will after it has been signed and witnesses are disregarded as unattested words – and don't count
  - f) partial revocation by physical act is not recognized in NY
    - i) need to read the will as it was originally written – no effect given to interlineations
  - g) during a maker's lifetime a will can revoke an earlier will, unless the earlier revoked will is incorporated by a codicil
    - i) no revival of revoked wills in NY
    - ii) if it was resigned and witnessed by the testator and two witnesses -- unless it comes in by a codicil
  - h) **dependant relative revocation** – a.k.a. second best solution doctrine: court can disregard a revocation, when it is premised on a mistake of law (for example a mistake of law as to whether or not something can be revived) (only at AD)
  - i) proof of lost will statute
    - i) have to prove due execution – including witnesses
    - ii) have to overcome presumption of revocation
    - iii) all provisions of the will must be clearly and distinctively proved by at least two credible witnesses
- 10) interpretation of wills
- a) beneficiaries predeceasing testamentary
    - i) lapsing of gifts: when the beneficiary dies
    - ii) anti-lapses statute: if the predeceasing beneficiary was testator's issue, or brother, or sister **and** that predeceased relative dies, leaving issues who survived testator then the gift is deemed not to have lapsed
      - (1) old rule 9/1/92: deceased beneficiary's issue take per stirpes
      - (2) new rule 9/1/92: predeceased beneficiary's issue take per capita at each generation
    - iii) if the will names the substitute taker, then the anti-lapse statute doesn't apply
      - (1) if the condition to a gift fails according to its terms (for example its conditions are not met) and the anti-lapse statute doesn't apply, and it falls into residuary estate
  - b) **surviving residuary beneficiaries:** by statute if the residuary estate is devised to two or more persons, and one of the interest lapses, the surviving beneficiaries take – one half each
  - c) the anti-lapse statute doesn't apply if they aren't brother, sister or issue
- 11) uniform simultaneous death act: as though the insured survived and the beneficiary predeceased
- a) one need only survive each other for a few minutes, so as not to trigger this rule

- b) both are treated as if they both predeceased each other
- c) Joint Tenancy Problems: in a simultaneous death, since there are no facts to trigger the survivorship, people are treated as having predeceased each other
- 12) Class gifts: read the rule and determine the membership of the class as of the testator's death (and the anti-lapse statute still kicks in)
  - a) Class gift rule: Class members who survive the class member take absent contrary provision
    - i) No benefit will be conferred to the surviving issue of an ancestor who died before the execution of the will
  - b) Class closing rule: class is closed at the time that distribution must be made
    - i) Presumption: But a child in gestation principle is treated as born plus 10 months (rebuttable presumption)
- 13) Changes in family after the will is signed
  - a) Marriage and divorce
    - i) A new Marriage has no effect on the will following the will's execution, since the elective share statute is presumed to protect old and new spouses
    - ii) Final Divorce or annulment (not in progress or separation): if the testator is divorced, then all gifts are revoked by operation of law and the gifts become part of the residue
      - (1) Exception: appointing an old spouse as guardian will be respected
      - (2) The statute only revokes spouse, in favor of the former spouse – not her kids
      - (3) If the couple reconciled or remarried, than all provision in favor of the former spouse are restored
      - (4) Note: Anti-lapse doesn't apply because the person is the spouse – not the issue, brother or sister
    - iii) Divorce doesn't effect named beneficiaries of life insurance policies
  - b) New children: pretermitted children
    - i) No protection to children alive when the will was signed
    - ii) If testator had other children ("pretermitted") if he satisfies the conditions, he takes the same share as his siblings
      - (1) Conditions
        - (a) Born after will
        - (b) unprovided by settlement (including insurance policy)
        - (c) Not in will
      - (2) Afterborn children are implied to take the same share as the other children are, and unvalued properties are imputed to value of the other children's shares
      - (3) If the will makes a limited provision for existing children (for example \$1) then the afterborn or adopted child takes intestate share
    - iii) If the testator had no child when the will was executed, then the afterborn children take nothing
- 14) Ademption: when one attempts to will property that they no longer have
  - a) Statutory Exceptions
    - i) Casualty insurance proceeds: proceeds from the destruction of the property received **after death** go to the donee



- ii) Executory contract proceeds – only to the extent paid after death
  - (1) A long term contract which is still payable, the donee takes the remaining contract payments to the extent paid after death
- iii) Sale by guardian or conservator: in NY, where specifically bequeathed property is sold by the guardian or conservator, the donee takes the remaining sale proceeds, to the extent that they have not been expended for Ted's care
- b) Mortgages
  - i) Beneficiaries will always take that property subject to a mortgage, but cannot be forced to assume the mortgages
  - ii) If property is sold in return for a mortgage, the beneficiaries do not take the mortgage, as the debt becomes a personal debt to the beneficiary
- c) Securities: if there is a general amount from a specific source
  - i) Demonstrative bequests: Ademption doesn't apply to demonstrative gifts (I give \$5k worth of stock).
  - ii) Specific: Ademption does apply to specific request (I give my 5k of stock).
    - (1) With the word "My" – for ademption purposes it should be treated as a general legacy, if the stock is regularly traded. Therefore, the donee gets the date of death value of the stock
  - iii) Changes in form of corporations
    - (1) Splits: it is always treated as a specific bequest – includes any stock produced by a split, but not dividends
    - (2) Merger: change in form, not substance – so ademption does not apply
  - iv) Stock in Closely held corporation: donee takes nothing if the stock has been sold:
- 15) construction
  - a) Mistakes in the will:
    - i) will be looked at under the Plain meaning rule, and extrinsic evidence is not admissible to overturn the plain meaning of the words in the will
    - ii) Absent suspicious circumstances, the law raises a conclusive presumption that one read the will and intended all of its contents
  - b) Ambiguities
    - i) Latent ambiguity: because there is a misdescription (for example a relative's name wrong): will allow extrinsic evidence (circumstances, declarations of intent, what he said to his attorney) , since the court is trying to find the meaning of the words that people used. If the admitted
    - ii) Patent ambiguity (mistake appears on the face, don't need to know anything about the circumstances)
      - (1) Extrinsic evidence is admissible
        - (a) Facts and circumstances evidence is admissible
      - (2) Statement to third parties are not admissible
      - (3) However, statements to attorneys are admissible
- 16) Conditional wills: "If anything happens to me on the trip" : one can argue both ways
  - a) One argument is that it is purely conditional
  - b) *Cf.*, if a will was really conditional, why did the testator keep it
- 17) contractual wills
  - a) can be enforced only by an express statement in the will

- b) a broken contract for a will be analyzed only as a breach of contract and not as a question for the surrogate
- 18) negative bequest: words of disinheritance are given full effect
  - a) We distribute the estate as though the disinherited person predeceased the testator
  - b) Note: only the people disinherited are disinherited. However, their children are not
- 19) Elective share statute: to protect the surviving spouse against disinheritance (available to NY domiciliaries or under NY wills)
  - a) General rule: Amount of the elective share is the greater of \$50,000 or 1/3 of the augmented estate. Plus interest at 6% from 7 months from the beginning of the probate process
    - i) Applies after the payment of all debts, but before payment of estate tax
    - ii) everyone kicks in pro-rata to come up with the assets
  - b) In addition, there is a statutory right to certain property, which passes to the surviving spouse regardless of the size of the augmented estate
    - i) Car up to \$15,000
    - ii) furniture
    - iii) Appliances
    - iv) 15k cash allowance, which is not subject to any creditor's claims (except for funeral expenses)
    - v) Books, videos, software up to \$1,000
  - c) Net estate will include the value of the foreign land
  - d) For estate of dying before September 1, 1994, the rights of decedents to an elective share could be eliminated by an elective share trust, so long as she got at least \$50,000 in ownership
    - i) If someone takes the elective share, the trust is read as through the beneficiary predeceased them, and the remainder is accelerated
  - e) Estate for the purpose of elective share is called the *augmented estate* is defined as testamentary substitutes plus the deceased spouse's probate estate minus outright bequests
    - i) Things that are testamentary substitutes and are included in the augmented estate:
      - TS: Leg Up
      - (1) Totten Trust:
      - (2) Survivorship estates (Tenancy by the entirety, and Joint Tenancy – if created after 9/1/66)
        - (a) With 3<sup>rd</sup> parties, included to the extent of decedent's contributions
        - (b) Before marriage: ½ may be included
        - (c) With surviving spouse ½
      - (3) Lifetime transfers with strings attached
      - (4) Revocable trusts it is a testamentary substitute
      - (5) Employee benefit profit-sharing plan – only ½ of the qualified plan is a testamentary substitute
      - (6) Gifts within one year of death, if over the exclusion – and gifts causa mortis
      - (7) US government bond and POD arrangements

- (8) **POWER OF APPOINTMENT** – when it is presently exercisable, but not excisable at death
  - ii) Things that are not testamentary substitutes
    - (1) Life insurance
    - (2) Other ½ of the qualified pension plans
    - (3) Gifts within the 10k annual exclusion
    - (4) Irrevocable transfers more than 1 year before death
  - f) Procedural rules regarding the elective share
    - i) Must be filed within 6 months from when letters are issued to the administrator reflecting the right to administrate
    - ii) Right of election is personal – heirs can't elect, but if the spouse is incapacitated, then the guardian or committee can make the election but only with the approval of the court
    - iii) Waiver: general waiver of all rights in the spouse's estate waives rights to elective share or intestate share, but does not waive rights to gifts made by the spouse's will, there must be an explicit waiver of such bequests
      - (1) Disqualification of spouse -- DISMAL
        - (a) If the marriage, is DISMAL, statutory rights are disqualified
          - (i) Divorce: valid divorce
          - (ii) Invalid divorce: only the surviving spouse who got the invalid spouse is barred
          - (iii) Separation decree: a final decree of separation rendered against the surviving spouse doesn't bar them
          - (iv) Marriage void: bigamy, incest
          - (v) Abandonment: surviving spouse abandoned or refused to support
        - (2) But as far as wills are concerned, gifts are revoked only if there is a final degree of annulment, but doesn't void any bequests in the deceased spouse's will
- 20) Power Of Appointment:
- a) In NY, a will exercises all power of appointment held by the testator (both special and general) unless the true trust instrument creating the power calls for its exercise by a specific reference to that power (for example the instrument can require that people refer specifically to it). This is the minority rule
    - i) General testamentary power – she can appoint to anyone, including her estate – she is not limited in any way in the class to whom she can appoint
    - ii) Special testamentary power of appointment is defined as when someone is limited in the class to whom she can appoint – ego it is a special testamentary power
  - b) Alienating power of appointment
    - i) A presently exercisable power of appointment can be bequeathed to an heir – it can be exercised by a will – this is somewhat counterintuitive
    - ii) Note, that a presently exercisable power of appointment is a testamentary substitute
  - c) creditors claims
    - i) creditors can reach general power of appointment
    - ii) creditors can't reach specific power of appointment

## 21) estate tax

- a) exemption of 675k – 1m in 2002
- b) Gross estate; interests included – if the insured as any one incidents of ownership<sup>6</sup>
  - i) Insurance; because it is a term policy that provides only term insurance, if there is the right to name and change the beneficiary, it is includible in the gross estate
  - ii) Life insurance policies, of which the decedent had incidents of ownership will be included in the gross estate if they are transferred within 3 years of death
- c) bypass trust are not included if the trust terminates when the person dies (for example life estate)
  - i) life interest with limited power over trust
  - ii) so long as someone with a life estate in a bypass trust cannot appoint themselves beneficiary, or they can only do so as to give themselves an ascertainable amount it can be excluded from their estate
    - (1) ascertainable standard is defined as Health, education, and maintenance
  - iii) disabling statute: prevents Trustee from distributing to herself, unless court approve
  - iv) if someone can chose the remaindermen then the interest is includible
- d) charitable deduction: value of a charitable remainder doesn't qualified for a charitable deduction because for a remainder interest passing to a charity, there is no deduction passing to a charity, unless it takes the value of an annuity trust, or it is a unitrust – under which a stated percentage no less than 5% is paid to the individual
- e) marital deduction: unlimited marital deduction, under gift and estate tax, allows husband and provision to make provision without any diminution – the property has to be left in the form that will expose it to tax at the death (ends up that the children have to pay the taxes, as a practical matter)

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	Includible in gross estate	Testamentary substitute
Revocable trust	Y	Y
Toten trust bank account	Y	Y
Qualified pension plans	Y	½
Life insurance proceeds	Y	n
JT between W and H	½	½
JT between W and 3 <sup>rd</sup> party	Y	Y
Irrevocable trust with retained life estate	Y	Y

- i) qtip trust – qualified terminable interest property – trusts that qualify for the marital deduction – only after 1982
    - (1) to be eligible for a q-tip election
      - (a) income must be payable to spouse annually for life (even if she remarries)
      - (b) no one else shall be a permissible beneficiary
      - (c) not automatic – executor has to make a Q-tip election on the estate tax return
        - (i) must wording in the trust
    - (2) if it is a terminable interest, there is no marital deduction
    - (3) spouse can be given a general power of appointment
  - f) basis at death and income tax consequences
    - i) generally, you pay the tax based on the cost basis
      - (1) for lifetime gifts, donee takes donor's basis for purposes of gain (but not for loss)
    - ii) if someone bequeaths stock they get a new basis at death – at the time of death fair market value, the unrealized gain is wiped out
- 22) non-probate assets
- a) property passing by right of survivorship
    - i) contract
    - ii) insurance
    - iii) trust – including irrevocable trust
    - iv) property in which the decedent held a Power Of Appointment
  - b) priority of assets that go to satisfy creditors
    - i) paid first out of intestacy
    - ii) out of residuary
    - iii) then out of general legacies
    - iv) then out of general and specific gifts – can use real or personal property
    - v) qualification: estate tax – any disposition that qualifies for the marital deduction goes last
  - c) taxes
    - i) estate taxes are apportionable among everyone's interest except those covered by the charitable or marital deduction
    - ii) residuary estate – 2/3 of the estate tax pro rata comes out of the residuary estate (check this)
  - d) specific gifts of encumbered property
    - i) NY: liens on specifically named property are not exonerated (*cf.* common law)
      - (1) Liens must be specifically paid
      - (2) A general indication about the payment of debts is not sufficient indication that liens are to be exonerated
      - (3) Easy way to remember NY rule: takes exactly what T owed
- 23) Disclaimers: No one can be compelled to be an heir or a will beneficiary
- a) In order to be a valid disclaimer it has to be
    - i) Signed and acknowledged by a notary
    - ii) Cannot have consideration – unless consideration is approved by court

- (1) Lack of consideration must be recited in a separate sworn instrument
- (2) Has to state that it is irrevocable
- iii) Has to be filed with surrogates court within 9 months of the decedent's death
- iv) Must be irrevocable
- v) Against public policy to disclaim so as to be eligible for Medicaid
- b) Disclaimers are treated as though the disclaimant predeceased the decedent
  - i) Anti-lapse statute then applies – even though the sister applies, but if they make a disclaimer they are treated as though they predeceased
- c) Reasons to disclaim
  - i) Avoid gift taxes
    - (1) Will go to the grandchildren without estate tax
  - ii) Avoid creditors claims
    - (1) Is not a fraudulent transfer because it is a fraudulent transfer
    - (2) Exception: federal tax lien