

MA CIVIL PROCEDURE
27 & 28 January 1998

Organization of Material

- I. Choosing a Court**
- II. Starting the Lawsuit**
- III. Joinder of Claims & Parties**
- IV. Discovery**
- V. Trial & Post Trial Motions**

I: CHOOSING A COURT

A. SUBJECT MATTER JURISDICTION

1. The 3 Level System

- Appeals Court: Hears most of the Appeals from the Trial Courts (intermediate)
- Supreme Judicial Court: has a right of **discretionary review** (may take directly from the trial court if it so chooses)
- Trial Court Department
 - 1. Superior
 - 2. District
 - 3. Probate & Family
 - 4. Land
 - 5. Housing
- Note: in most instances, Federal Jurisdictional Principles are **IRRELEVANT**, however, Most Cases within the Federal Subject Matter Jurisdiction may also be brought in Massachusetts under **Concurrent Jurisdiction** (either Arising Under or Diversity Claims may be brought in Massachusetts courts. However, there is **NO Concurrent Jurisdiction for Patent or Copyrights**)

2. Jurisdiction in the Trial Court Department

<u>COURT</u>	<u>JURISDICTION</u>
Superior	The MA trial court of General Subject Matter Jurisdiction. Can also hear federal claims under concurrent jurisdiction. However, it may not hear cases exclusively delegated to other MA specialized courts. Authorized to hear Actions at Law, Actions for Equitable Remedies, and to Review Administrative & Zoning Board Decisions
District & Boston Municipal	Judicial Districts are parts of counties. Their Subject Matter Jurisdiction is over Actions for MONETARY Damages without any LIMIT. Also has Concurrent Jurisdiction with the Superior Court over Appeals of Administrative & Zoning Boards. NO Equity & NO Class Actions. Also, there is NO jury trials at the District Courts.
Small Claims (w/n the District Court)	May Hear CONTRACT & TORT Claims under \$2,000. Also, may hear any claim, regardless of limit, in action involving an automobile collision . If the recovery allows for 2X or 3X, may still hear if the underlying damages are under \$2,000. However, Plaintiff WAIVES his right to a Jury Trial here. The Defendant can still demand a Jury trial Post-verdict and get one.
Probate & Family	Has Exclusive jurisdiction over Divorce & Annulments . Also has Concurrent Jurisdiction with the Superior Court to hear claims involving the Probate of Wills, the Administration of Trusts & Estates, Actions involving Guardians & Alimony Conservatories. Has limited equity jurisdiction over Family matters.
Land	Has Exclusive Jurisdiction over the Discharge of Mortgages, Registered Land, & Tax Foreclosures. Other Land Claims, such as Actions to Remove Cloud of Title, are Concurrent with the Superior Court
Housing	Jurisdiction over matters regarding housing, evictions, enforcement of sanitary code. This jurisdiction is Concurrent with the Superior Court

3. Remand & Removal

- In Claims for MONEY DAMAGES < \$25,000 (as a Maximum Likely recovery), if tried in District Court, may have it re-tried in Superior Court
- 4 Key Points to Remember
 1. In the Case with NO Reasonable Likelihood of Recovery Over \$25,000 which is Filed in the SUPERIOR COURT, the Superior court will immediately remand it to the District Court for Trial.
 2. If the case is remanded to and tried in the DISTRICT COURT, whoever loses may claim a 2nd **de novo** trial in the SUPERIOR COURT
 3. If the Case is RETRIED in the SUPERIOR Court, the DISTRICT COURT finding of Liability & Damages will be **admissible** as *prima facie* evidence of Liability & Damages
 4. But, the CASE with NO REASONABLE LIKELIHOOD of Recovery of greater than \$25,000 which is FILED in the DISTRICT COURT, either party may Claim a De Novo Trial in the Superior Court
 5. IF the case with a Reasonable Likelihood of Recover is MORE than \$25,000 is FILED in the DISTRICT Court, the DEFENDANT MUST Remove it RIGHT AWAY or WAIVE his right to a trial in the Superior Court

4. Final Points on SMJ

- a.) *The Procedural Device to Challenge the Subject Matter Jurisdiction of a Court is a MOTION to DISMISS for lack of Subject Matter Jurisdiction*
- b.) *Subject Matter Jurisdiction CANNOT be WAIVED*

B. VENUE

- One of the Three Requirements for a proper court selection: SMJ, PJ, & Venue
- LOCAL v. TRANSITORY ACTIONS
 - Local Actions - Actions involving TITLE to or Possession of Land; MUST be brought in the COUNTY where the land lies
 - Transitory Actions – All other Actions; governed by the General Venue Statutes
- VENUE IN SUPERIOR COURT (for Transitory Actions)
 - In the County where ONE of the Parties **lives** or **usual place of business** (a business establishment, not where one is a mere employee)
 - If NEITHER party lives in MA, then in ANY County
- VENUE IN DISTRICT COURT (for Transitory Actions)
 - Proper in a Judicial District where:
 - 1 party Lives
 - 1 party's Usual Place of business
 - District Adjoining a District where 1 party lives OR has a usual place of business
- VENUE FOR CORPORATIONS
 - Proper in County (or District) where the Corporation:
 - Has a Usual Place of Business
 - Held Its Last Annual Meeting
 - Its Usual Annual Meeting

If only **1** party is a Corporation; same rules, but Also WHERE the individual lives or has a usual place of business

- **VENUE (in Superior Court) FOR TRUSTEE PROCESS**
Proper ONLY in the County where the TRUSTEE:
 - Resides, or
 - Usual Place of Business
- **VENUE: FORUM SELECTION CLAUSES**
 - MA, like Fed., generally will HONOR Forum Selection Clauses to which the party's agree in the contract (**unless**) there is fraud or overreaching
- **VENUE: FORUM NON CONVENIENS**
 - Even if the Venue is PROPER, the court may dismiss for *Forum Non Conveniens* if JUSTICE & CONVENIENCE indicate the case SHOULD have been brought in another state.
 - Factors Include: Convenience of the Parties, Location of the Witnesses, Other practical Considerations
- **PROCEDURAL MOTION TO RAISE VENUE: Motion to Dismiss for Improper Venue, OR Motion to Transfer**
- **VENUE is WAIVABLE** (unlike Subject Matter Jurisdiction)

C. **PERSONAL JURISDICTION**

- If FACTS show an **out-of-state** party, think: PERSONAL JURISDICTION problem.
- PJ is the Power of the Court to Compel the Defendant to Appear in a MA court
- **Two-Step Analysis**
 1. *Has the State **Long-arm Statute** authorized the State to COMPEL the Defendant's Appearance?*
 2. *Would DUE PROCESS be Violated? Is LAS Constitutional?*
 - Note: Analyzed PJ over the Defendant ONLY

Step 1: Long Arm Statute

The MA Long Arm Statute Reaches someone for PJ under the following Bases

1. ***Transacting ANY Business in MA***
2. ***Contracting to Supply Services or Goods***
3. ***Causing Tortious Injury within MA***
4. ***Interest in Real Property***
5. ***Contracts to Insure any Person, Property, or Risk in MA***
6. ***Party to a Marriage or Relationship in MA which Gives Rise to a Claim of Divorce, Support or Custody***

Note: Specific Jurisdiction, not General for Long Arm Statute

Step 2: 6 Constitutional Bases for Personal Jurisdiction (Due Process OK)

1. *Defendant is Domiciled in Massachusetts*
 2. *Defendant Consents to Personal Jurisdiction* (via a Forum Selection Clause or Appointment of Agent of Process)
 3. *Defendant Waives Objection to Personal Jurisdiction*
 4. *In-State Service of Process* (Note: Applies ONLY to Individuals, & not Corp)
 5. *Minimum Contacts* (Limitation: If PJ is based on Minimum Contacts, the CLAIM Must arise out of those Minimum Contacts)
 - Minimum Contacts M-A-n-t-R-a
 - Minimum Contacts**: Deliberately Engage in Some Activity in MA
 - Arising Out of**: claims arose out of those minimum contacts
 - Reasonableness**:
 6. *Substantial & Continuous in-state Activity* (note, this is GENERAL in personum jurisdiction, an example is a Place of Business)
MNEMONIC: Most Students Can't Watch Sinatra Dance
Minimum Contacts, Substantial & Continuous, Consent, Waiver, Service, Domiciled
- Procedural Device to Raise Issue of PJ: Motion to Dismiss for Lack of PJ

II: STARTING THE LAWSUIT

A. FILING: The Magic Date

- A **suit** is COMMENCED by **filing** the complaint + the **entry fee** with the court
- The **filing date** DETERMINES **statute of limitations satisfaction**
- Suit is Deemed Filed when:
 - if filed in hand delivery to clerk deemed filed UPON **DELIVERY**
 - if filed by registered (certified) mail deemed filed UPON **MAILING**
 - if filed by Ordinary Mail deemed filed UPON **RECEIPT**

B. METHODS OF SERVING PROCESS (tagging the defendant)

What gets Served: BOTH the **Complaint + Summons** is served upon the Defendant

Requirements for a Valid Summons

- Signed by Clerk
- Includes NAME and Seal of Court + Name of Parties
- Includes Name & Address of Plaintiff's Attorney
- States the time to Answer by
- Warns of Default if No Answer filed

Who Serves the Papers: Unlike Fed. Which allow service by any person not a party over the age of 18, MA **requires** an **Official Process Server**. Can be:

- Sheriff or Deputy Sheriff
- Constable
- Court Appointed Server
- If by Mail: Party or Party's Attorney

How to Serve the Papers:

Individual: May serve either:

- PERSONALLY
- Leave a Copy at the LAST or USUAL ABODE (MA District Court, may also do a Mailing to the Last or Usual Abode)
- On an Authorized AGENT (note; a general agency to act for the Defendant is NOT an agent for service of process purposes. Must be specifically appointed to receive complaints)

Corporation: May serve either:

- PERSONAL Service to an OFFICER of the Corporation
- On the MANAGING or GENERAL Agent of the Corporation
- On PERSON in CHARGE of Corporate Business at the Corporation's Principal Place of Business in MA
- If all above fail: COURT Appointed other means

Partnership: Must Serve:

- Each Partner INDIVIDUALLY

- **Service Outside of the State:** A Defendant may be SERVED outside the state by:
 1. *Same Method as In-state MA Service*
 2. *Any Method Available in the State Served*
 3. *Any Form of Mail which requires a **signed receipt***
- **Time Limits on Service:**
 - MUST Serve within **90 Days** of **filing the complaint**, or show *good cause* for the delay.
 - Otherwise, the Court will Dismiss WITHOUT prejudice
- **Service of Other Court Papers AFTER the Complaint**
 - Subsequent Court Documents: ALL pleadings, motions, and other papers must be served on ALL other parties, but may be served BY **personal delivery** OR **ordinary mail** on the other party's **attorney**
- **Procedural Motion to Challenge Service:** Motion to DISMISS for Improper Service of Process

C. PLEADINGS: The COMPLAINT

- A Complaint is a SHORT & PLAIN Statement showing that the Plaintiff is Entitled to Relief
- **Various Testable Pleading Rules:**
 1. *NO Dollar Demand for **Unliquidated Damages*** (MA bars putting a Dollar Demand for Unliquidated Damages on the Complaint)
 2. *May Plead in the **Alternative** or **Inconsistently*** (Plaintiff MAY plead as many complaints as he has, i.e., he can throw in the Kitchen Sink)
 3. *Rule 9 Technical Matters*
 - The Capacity to Sue or Be Sued need NOT be specifically pleaded
 - Fraud, Duress, Mistake, Undue Influence MUST Be Pleaded with **particularity**
 - States of Mind may be Alleged *Generally*
 - Special Damages Should be pleaded with **particularity**
 - Compliance with Conditions Precedent may be pleaded **generally**

4. *Rule 11 Ethical Constraints*

- Under MA Rule 11, pleading must be **signed by counsel**, with his address and phone number (≠ Federal Rule 11)
- By **signing**, Counsel **CERTIFIES**
 - He has *Read* the pleading
 - There are *Good Grounds to Support* the pleading (to the best of knowledge)
 - The Pleading is NOT **interposed for delay**
 - MA: has sanctions ONLY for **Willful Violations** or **scandalous/indecent material**
 - FED ≠ MA; Fed Requires things that MA doesn't: MA has
 - NO Safe Harbor Provisions (tell other side, give 21 days to withdraw)
 - No Separate Specific Standards for Fact & Law Allegations
 - Only Willful Violations are sanctioned

D. PLEDINGS: ANSWERS & COUNTER-CLAIMS

- After being **Served**, the Defendant has two choices: *Answer* or file a *Motion to Dismiss*
- **Answer**: Must be **filed** within **20** days: The Answer should do **4** things:
 1. *Respond Specifically to the Allegations in the Complaint*
 - If answer 'not specific facts to answer' = denial; a failure to respond is deemed an admission)
 2. *Raise Procedural Objections to the Suit* (Deny + MTD for lack of PJ is OK)
 3. *Plead All Affirmative Defenses*
 4. *May Assert A Counter-claim*
- **Counter-claim**: Seeks relief Against the Plaintiff: there are **2** Types
 1. *Permissive Counter-claim*. Any non-compulsory counter-claim
 2. *Compulsory Counter-claim*: The Claim of the Defendant Arises Out of the Same Transaction or Occurrence as contained in the Plaintiff's Complaint
 - Usually, a Compulsory Counter-claim must be brought IMMEDIATELY, otherwise it will be BARRED. But there are **3 Exceptions**
 1. Defendant is Already Sued in another Court
 2. Require the Joining of Parties OUTSIDE of the court's jurisdiction
 3. Property Damage OR Claims for Personal Injury or Death
- Note: If a counter-claim is Filed, the Plaintiff must file a REPLY (= an answer)

- **Of Time & the Rules**

- If an ACT must be done within a Certain number of days (e.g., answer within **20** days of service of complaint & summons), **omitted** from the calculation are
 - Days on which the period **begins to run**; or
 - LAST Day (if Saturday, Sunday, or Legal Holiday)
 - If the Act must be done within **7** days, do not count Saturday, Sunday, or Holidays + If served by Mail, you get an EXTRA **3** days to respond
 - If **unable** to respond within the allotted time, should make a **motion to enlarge the time** (which will be granted for **Cause Shown** if made before the expiration of time). If make the Motion to Enlarge the Time After the due date, it will be granted ONLY for EXCUSABLE NEGLECT

E. AMENDMENTS TO PLEADINGS: Changing your mind

Amendments as of Right (in a matter of course) without leave of court

- Plaintiff may AMEND **once** as a matter of course, BEFORE the answer is filed
- Defendant may AMEND **once** as a matter of course, WITHIN **20** days after Serving the Answer

Amendments to Change Legal Theories or Factual Allegations

- Once the time for Amendment as of right has passed, MUST obtain either **consent of other parties OR leave of court**
- STANDARD for granting of motion: LEAVE should be FREELY granted when JUSTICE so Requires.
- Most likely to be Granted **unless**
 1. *Undue Delay or Bad Faith*
 2. *Prejudicial to the Other Side*
 3. *Futility of Amendment*

Relation Back:

- If allowed, the Amendment **relates back** (that is, it is treated as though it had been part of the original complaint, thus satisfying the statute of limitations) as long as the AMENDMENT asserts a claim/defense arising out of the **same transaction/occurrence**

Amendments to ADD a NEW PARTY

- In MA, may amend the complaint to add a NEW PARTY as long as the plaintiff seeks recovery against the new party from an event arising under the SAME Transaction or Occurrence (even if the statute has run on the New Party... relates back for him)
- This is \neq Fed. Where a party may not amend to Add a NEW PARTY after the statute of limitations has run against the purported new party **unless** that party was aware of the pending litigation

Theories which were NOT pleaded, but were Clearly LITIGATED (tried)

- If the Parties FAIL to plead an ISSUE, but ACTUALLY LITIGATE that issue, the court may treat it as though that issue was pleaded, even though it is not in the complaint

Distinguishing between a Supplemental Pleading & an Amendment

- Amendment; Changes the THEORY or DEFENDANT from the original complaint
- Supplemental Pleading: Adds a NEW Claim that has arisen SINCE the Original complaint

F. PRE-ANSWER MOTIONS TO DISMISS

- If the **Defendant** wishes to Raise the Following Defenses, she may File a **pre-answer motion** instead of Answering the Complaint (though she may answer the complaint as well)
 1. Subject Matter Jurisdiction
 2. Personal Jurisdiction
 - if fail to file a motion to dismiss or raise the defense in the answer, this defense is Waived
 3. Improper Venue
 - if fail to file a motion to dismiss or raise the defense in the answer, this defense is Waived
 4. Insufficiency of Process (bad on face)
 - if fail to file a motion to dismiss or raise the defense in the answer, this defense is Waived
 5. Insufficiency of Service of Process
 - if fail to file a motion to dismiss or raise the defense in the answer, this defense is Waived
 6. Failure to State A Claim on which Relief could be granted
 7. Failure to Join an Indispensable Party
 8. Misnomer of a Party
 - if fail to file a motion to dismiss or raise the defense in the answer, this defense is Waived
 9. Other Action Pending
 - if fail to file a motion to dismiss or raise the defense in the answer, this defense is Waived
- There is NO requirement that a Defendant MUST answer by a Pre-trial motion rather than answering the complaint. Can put ALL defenses in the Answer if you wish
- If the Defendant files a Pre-trial Motion, and case is NOT dismissed, then the ANSWER must be Answered within **10** days of the Decision
- **Waiver of Preliminary Objections (WATCH OUT)**
 - Of the **9** objections which may be raised by motion, **6** are WAIVED if **Omitted** from the **1st response to the complaint**
 - Only **SMJ, Failure to State a Claim on which Relief can be Granted, and Failure to Join an Indispensable Party** are NOT-Waivable

G. STATUTE OF LIMITATIONS

- **3 Years**: Tort, Contract for Personal Injury, Breach of Warranty, Civil Rights Claims, Wrongful Death
- **4 Years**: Consumer Protection Act, Breach of Sales Contract (UCC Article 2)
- **6 Years**: Non-personal Injury Contracts
- **20 Years**: Contracts under Seal, Actions on a Judgment, Adverse Possession
- **Clock Starts Ticking**
 - The Limitations Period Usually Starts to RUN on the **date** when the Claim **Accrues** (all elements, including the final one, occur)
 - **Exception; Discovery Rule**: In *Negligence, Wrongful Death, & Products Liability (negligence)* the Statute of Limitations period does NOT accrue **until** the Plaintiff **discovers** or **should have discovered** in the exercise of due diligence, the FACTS which entitle the Plaintiff to sue
 - The *Discovery Rule* Does NOT Apply to CONTRACT cases, as the date of accrual for contracts cases is the DATE of the Breach
- **Clock Stops Running**
 - The Plaintiff Satisfies the Limitations Period if she either **files suit** in court within the applicable period, or seeks leave of the court to relate back?
- **Events Which Toll the Running of the Statute of Limitations Period**
 1. *Fraudulent Concealment* suspends the running of the period **until** the Plaintiff learns that she has a claim.
 2. *Claims by MINORS or Persons under a MENTAL DISABILITY or PRISONERS* are tolled until the disability is Removed.
 - **Note medical malpractice**. A CHILD under Age **6** has until age **9** to sue, but he must sue within **7** years of the negligent act
 3. *Legal Malpractice: "Continuing Representation Doctrine"*: A Claim against Plaintiff's Lawyer for Malpractice does NOT begin to run until the representation ceases.
 4. *Filing in Wrong Court*: will **extend** the limitations period. If the plaintiff files a case within the limitations period, but that case is Dismissed for 'A matter of form', the plaintiff may file **within 1 year** in a proper court. Called the **MA Saving Statute**
- **When a Party DIES**
 - If a **plaintiff** dies, the Executor or Administrator has **2 years from giving bond** in which to sue on behalf of the plaintiff **or the remainder of the applicable limitations period**, whichever is longer

III: JOINDER OF CLAIMS & PARTIES

- **Joinder of Claims: The Kitchen Sink Rule**

- Fed. = MA Except for Class Actions
- (*1 Plaintiff 1 Defendant*)
- When a Plaintiff Sues the Defendant, the plaintiff may assert *as many claims as she has* against the Defendant

- **Joinder of Parties by the Plaintiff in the Initial Action**

- (*1 Plaintiff, Multiple Defendants*) or (*Multiple Plaintiffs, 1 Defendant*)
- If the Plaintiff sues **2 parties**, the plaintiff's claims against them must:
 1. *Arise out of the Same Transaction or Occurrence; and*
 2. *Involve Some Common Question of Law or Fact*

Note: Rule is the same for multiple plaintiffs joining in a single suit

- **Crossclaims**

- Cross-claim: A cross-claim by **1 party** against a **co-party** (Plaintiff_A v. Plaintiff_B or Defendant_A v. Defendant_B)
 - A Cross Claim may be asserted if it **ARISES** out of the same transaction or occurrence as the main claim

- **Third Party Claims: (Impleader)**

- A Defending Party may **Implead** a stranger to the lawsuit under **Rule 14** if the Impleaded Party **Is or May be Liable** to the **Defendant** for ALL or PART of the Plaintiff's Claims
 - Limit on Impleader: A Defending Party CANNOT implead a 3rd Party just because she may be directly liable to the **plaintiff** (and not to the Defendant)
 - Impleader for Indemnification: Permissible, since the indemnifier may be liable to the defendant for all or part of the claim (like an insurance company)

- **Rule 19: Joinder of Indispensable Parties**

Step 1. Rule 19(a) – A missing party should be joined if feasible

- A person is to be **joined if feasible IF**:
 1. *Where Complete Relief Cannot be Granted without the Missing Party*
 2. *The Missing Party's Interest COULD be affected if the suit is resolved without him*
 3. *Litigation without the Absent Party could make him SUBJECT TO Inconsistent Obligations*

Step 2. Rule 19(b) – If a person OUGHT to be made a party under **Rule 19(a)**, but cannot be (*due to lack of PJ or something*), the court must make a **discretionary** decision as to whether to proceed without that party. Factors the court will look to include:

1. *Potential Prejudice to the Absentee Party if the trial proceeds without him*
2. *Limit Relief to Avoid Prejudice?*
3. *Adequate Remedy without Absentee?*
4. *Party(s) Present can obtain Some other Remedy if the case is dismissed*

If the Party is Indispensable, the suit must be **dismissed**

Procedural Motion: ***Motion to Dismiss due to absence of an Indispensable Party***

- **Class Actions**
 - Fed ≠ MA Rules
 - A Class Action is a Lawsuit in which **1** or more **representative plaintiffs** sue (or are sued, as defendants) on **behalf of a class of similarly situated persons**
 - **Rule 23 Pre-requisites** (All Must be Satisfied to get Class Certification)
 1. **Numerosity** (no magic number, but too many to make individual suits practicable)
 2. **Common Questions of Law / Fact**
 3. **Class Representative's Claim is Typical of the Entire Class**
 4. **Class Representative Fairly & Accurately represents the class** (Plaintiff Rep. Must have Incentive to litigate and have an adequate lawyer to litigate)
If satisfy the 4 pre-requisites, then the court also considers 2 further aspects
 5. **Common Questions of the Class must Predominate** (May not be met in a Mass torts case where lots of individual damages issues)
 6. **Class Action is Superior to other methods of Adjudication**
 - Differences between MA & Fed Class Actions
 - **NOTICE**: MA do not need individual notice, whereas Fed requires individual notice
 - **OPT OUT**: MA there is no opt-out provision, Fed has an opt-out provision
 - When a suit is **certified** as a Class Action, it cannot be **settled** or **dismissed** without **Court Approval**
 - Other Forms of **Representative Action**: Shareholder Derivatives Suits on Behalf of Corporation, Representative Actions by or Against un-incorporated associations

- **Interpleader**
 - Let the Claimants Fight it out (it is not the same thing as Impleading)
 - **Interpleader** is a Device which ALLOWS a **party holding funds** or otherwise *potentially liable to multiple parties* to pay the funds to the court and allow the individual plaintiffs to litigate for their own shares.

- **Intervention**
 - **Intervention** is a procedure by which a **stranger** to a case may seek to **become** a party to the action. Either Intervention as of Right or Permissive Intervention
 - **Intervention as of Right**
 - A party may intervene as of right **if** the statute permits it, OR:
 - 1.) the plaintiff claims an *interest* in the *property* or the *transaction* at issue in the case; **and**
 - 2.) *disposition* of the action in the *absence* of the party seeking intervention may, as a practical matter, *impede* the party's ability to **protect that interest**

note: in state court, intervention does NOT pose a subject matter jurisdiction problem, however, in a federal diversity suit it may exception: Intervention may be **DENIED** if the Intervenor's Interest is **adequately represented by 1 of the parties**
 - **Permissive Intervention**
 - A party may be permitted to intervene when his *claim* or *defense* and the *main action* have a **common question of law or fact**. Court looks to Prejudice & Delay in its decision

IV: PRE-TRIAL SECURITY & PERSONAL MOTIONS

- **TEMPORARY RESTRAINING ORDERS (TRO's)**
 - A Temporary Restraining Order is an Order entered at the **outset** of litigation to **maintain the status quo** pending further action by the court
 - To Obtain a TRO, a Plaintiff must (note: may be issued ex parte, unlike a preliminary injunction)
 1. *File Suit and Motion for TRO*
 2. *Establish the Relevant facts via VERIFICATION of the Complaint or have AFFIDAVITs swearing to the necessary facts*
 3. *Allege the **specific facts** to show that the Plaintiff will **suffer irreparable & immediate harm** unless the TRO is granted*
 - TRO's only may enter for **10 days**, a Defendant may move to dissolve upon **2 day's** notice (to Plaintiff)
 - Plaintiff must **post bond** to cover Defendant's cost if the TRO is unjustified

- **PRELIMINARY INJUNCTIONS**
 - Preliminary Injunctions **freeze the status quo pending trial on the merits**
 - **Requirements for Preliminary Injunction:**
 1. *Plaintiff must show **Substantial Likelihood of Prevailing on the Merits at trial***
 2. *Plaintiff must show **Irreparable Harm** absent the granting of PI (a mere showing of damages is not sufficient)*
 3. *Plaintiff must show **Equity favors Injunction***
 4. *COURT: **weights harm to Plaintiff absent the Preliminary Injunction v. Harm to Defendant plus the Harm to Public with the granting or absent the PI***
 - An Injunction **MUST** be **specific** and **detailed** enough to apprise the enjoined party of the prohibited conduct
 - There is also a **bond** requirement for the Plaintiff
 - An **order** Granting or Denying a Preliminary Injunction is **Immediately Appealable**
 - A **Mandatory Injunction** forces a party to **continue** doing something until **final resolution** (exhaust ALL appeals)

- **ATTACHMENT**
 - An Attachment is a **court order** for a **lien** on **real property** used to **prevent** its disposition while litigation is pending
 - **Property** which may be Attached under a Writ of Attachment includes; Real or Personal **property in POSSESSION of the Defendant**
 - Some types of Property are **exempt** from Attachment: These include:
 1. *Shares of Stock*
 2. *Mortgaged Personal Property* (unless the Attaching Party pays off the Mortgage)
 3. *Partnership Assets*
 4. *Necessaries* Includes: Real Property protected by a Homestead Exemption, Tools of Trade, Household Furniture, Part Value of a Car

- **Procedure for Attachment:** With, or After, **Filing** suit, Plaintiff must:
 1. *Make a Motion for Attachment*
 2. *Include AFFIDAVITS which Allege, on information & belief, that:*
 - Plaintiff is Likely to prevail on the merits
 - Estimated Amount of Damages Likely to be Recovered > Available Insurance Coverage (Damages – Insurance = Attachment Amount)
 3. *Serve the Motion on the Defendant WHEN the Complaint & Summons is SERVED (in same manner & including Notice of the time of hearing on the motion)*
 - If the Motion for Attachment is GRANTED, the Attachment is **effected** by issuing the writ which the sheriff must serve within 30 days to attach the property, and the Property is then Recorded in the Registration of Deeds. For **personal property** the attachment is **effected** by either *physical seizure* by the Sheriff **or** a Writ of Attachment is filed with the town clerk to give NOTICE of the prior lien.
- **Ex Parte Attachment:** the Court may grant attachment **ex parte** (without notice to the defendant) if the basic requirements of an attachment are met + one of the following is shown:
 4. *Defendant is NOT Subject to PJ in forum; or*
 5. *If the Defendant were to receive NOTICE, he would Convey, Conceal, or Remove the Property from the forum; or*
 6. *The Danger of the Defendant DAMAGING or DESTROYING the property is greater than the probability that he would submit to the attachment*
 - If the Attachment is Ex Parte, the Defendant may move for **dissolution** on **2** days notice
- If the Plaintiff wins at Trial, the plaintiff must **start collecting** the judgment **within 30 days** by **recording** the judgment or else the attachment will expire
- **TRUSTEE PROCESS**
 - Trustee Process is a Procedure for **freezing** the Assets of the **defendant** which are in the hands of a **3rd Party**
 - Assets Subject to Trustee Process: “Goods, Effects, or Credits of the Defendant in the hands of a trustee” (includes things like Bank Accounts)
 - Exempted Assets: Money in a **payroll account**, the 1st **\$500** in a bank account, **pensions & annuities**, and **wages** (usually exempt from a pre-judgment attachment)
 - Exempt Claims: Certain Actions, Trustee Process may NOT be used (S-L-A-M)
 - **Specific Recovery of Goods & Chattel**
 - **Libel & Slander**
 - **Assault & Battery**
 - **Malicious Prosecution**

- Method of Obtaining Trustee Process
 1. *File **Suit** with a **Motion** for Attachment on Trustee Process*
 2. *Submit **Affidavits** to Establish the **Facts Necessary** for the Court:*
 - Reasonable Likelihood of Recovery on the Merits
 - Amount Likely to Recover > Available Insurance
 3. *When the Court Finds the Necessary Facts, it will **Issue a Trustee Summons***
 - Upon receipt of the Trustee Summons, the Trustee **MUST** Answer in the action stating which ‘goods, effects, credits’ of the Defendant that
 4. *If the Plaintiff recovers, she can move to **charge the trustee** to the extent of the attached assets*
 - Often, if see an Insurer & Bank in the facts, it will be a hint that the question is about JOINDER & TRUSTEE PROCESS issues
- Ex Parte Attachment on Trustee Process: Same Showing as for an Ex Parte Attachment
- Procedure for Defendant: File a Motion to Dissolve the Attachment, **2 Days Notice**
- **OTHER SECURITY DEVICES**
 - Reach & Apply**: An Equitable Device wherein the Plaintiff Asks the court to reach assets which cannot be attached and are not subject to trustee process. **includes**
 - Future Payment from a Trust
 - Requests under a Will
 - Partnership interest
 - Corporate Stock
 - Property which was Fraudulently Conveyed
 - Procedure: Plaintiff seeks a Preliminary Injunction to Prevent the Transfer of the Asset. If she wins at trial, then moves the court to Apply it toward the judgment
 - Lis Pendens**: A statutory device to notify the World that litigation is pending. It is a means of providing notice that Title, Use, or Occupation of REAL PROPERTY is in dispute. It **DOES NOT** create a Lien or Establish Priority of Claims.
 - Suit must be PENDING; lis pendens must be issued by the judge After a Hearing. However, there is **NO** need for Plaintiff to Show the likelihood of Recovery on the merits.
- **MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM: Rule 12(b)(6)**
 - The motion to dismiss for failure to state a claim Challenges the **legal sufficiency** of the **complaint** (assuming all the facts as alleged are true, there is no claim upon which relief may be granted)
 - In Deciding the Motion, the court **ONLY** looks at the **Complaint**, and **Assumes the truth of the allegations**
 - The Motion may be made to challenge the sufficiency either by:
 1. *Pre-Answer Motion to Dismiss*
 2. *In the Answer itself*
 3. *Post-Answer Motion for Judgment on the Pleadings*
 - If the motion is GRANTED, the plaintiff will very likely be given a chance to amend his complaint to state a claim. (If the complaint was simply missing a necessary allegation, Plaintiff should not be prejudiced by her lawyer’s failure to properly plead)

- **SUMMARY JUDGEMENT**

- The Motion for Summary Judgment Challenges the Opposing Party's Ability to **produce credible proof** of **1** or more of the Allegations in the Complaint or Answer
- The **Standard** for Granting Summary judgment: Motion should be granted *where there is NO genuine issue as to any material fact and the moving party is Entitled to Judgment as a Matter of Law*
- **Procedure**: Moving Party should (1) **move for summary judgment** and (2) **support the motion with ADMISSIBLE evidence**
 - Non-moving party must **respond** with **factual evidence** to show a **dispute of fact**
 - The party opposing the motion CANNOT rest on the allegations or denials in the pleadings
 - *Admissible Evidence*: includes Discovery Materials, such as Answers to Interrogatories, Authenticated Documents, Depositions, Admissions, & Affidavits
 - If Plaintiff makes the *Required Showing* that there is a *genuine issue of Material Fact*, then Summary Judgement will be **denied**
 - If Plaintiff CANNOT make the requisite showing, Summary Judgment will be granted
 - If Plaintiff BELIEVES that she can establish the challenged facts, but has yet to develop the necessary evidence (i.e., discovery not completed) she should **Seek a continuance under Rule 56(f) to develop relevant testimony**
 - The **Kourovacilis Motion**: The party who does NOT bear the burden of PROOF may Move for Summary Judgment, simply claiming that there is Nothing in the record to support the challenged elements of the claim
 - The PLAINTIFF may make a motion for summary judgment on **1 element** of the claim: if the court grants summary judgment on 1 element, Case is NOT over, but there is a **partial summary judgment**

- **VOLUNTARY DISMISSAL**

- Plaintiff may take a Voluntary Dismissal, under **Rule 41, without leave of court** if
 1. *No Responsive Pleading or Summary Judgment Motion has been Filed, OR*
 2. *All Parties Consent*
- If the Plaintiff takes a Voluntary Dismissal BEFORE the answer, the Dismissal is WITHOUT PREJUDICE; i.e., it has NO **res judicata** effect, so long as the Plaintiff commits no fraud or fails to comply with any court orders.
- However, the **2nd Voluntary Dismissal with prejudice** (the **2 Dismissal Rule**)
- But, if the Defendant has **Answered** or Moved for Summary Judgment, the Court has **discretion** and may or may not grant the voluntary dismissal, and/or the court may impose conditions (such as payment of Defendant's costs)
- The court may **Involuntarily Dismiss** an Action for Failure to Prosecute or Comply with Court Rules (usually, it is dismissed WITH Prejudice)
- **Except**: Involuntary Dismissals for a Lack of Jurisdiction, Improper Venue, or Failure to Join an Indispensable Party are Without Prejudice

V. DISCOVERY

• **4 Major Issues**

1. *Scope of Discovery Under the Rules*
2. *Limits on the Broad PRESUMPTIVE scope of Discovery (such as Privilege or Work Product)*
3. *Specific Discovery Tools*
4. *Sanctions & Protective Orders*

- note: **MA** does NOT have Mandatory Disclosure (≠ Fed). But, mostly **MA** = **Fed**

• **SCOPE OF DISCOVERY**

- **Rule 26(b)(1) Standard**: Any Material Relevant to the Subject Matter of the Action (includes procedural issues like Personal Jurisdiction)
 - Information need **not** be admissible to be discoverable, so long as the information is Reasonably calculated to lead to the discovery of Admissible Evidence
 - **Insurance Agreements**: These are discoverable. May discover Agreements which may provide coverage for the claims in suit.
- **Special Rules re: Scope of Discovery**:
 - **Experts**: Must be able to distinguish between Testifying & Non-testifying Experts
 - **Testifying Experts**: Parties may, through *interrogatories*, obtain the NAME of the expert, the SUBJECT MATTER to which the expert will testify, the FACTS & OPINIONS to which the expert will testify, and a SUMMARY of the GROUNDS for the opinion. **Discovery of testifying expert beyond the interrogatory** requires either AGREEMENT or LEAVE of COURT
 - **Non-Testifying Experts**: In General, there is NO Discovery for non-testifying experts (there is Work Product Doctrine protection). However, a Non-testifying expert may be subject to discovery **in exceptional circumstances** under which it is IMPRACTICABLE for the party seeking discovery to obtain the facts or opinions on the same subject by any other means.

• **LIMITS ON THE PRESUMPTIVE SCOPE OF DISCOVERY**

- **Privilege**:
 - Such as Attorney/Client, Fifth Amendment, Therapist/Patient
 - CAVEAT: Attorney/Client Privilege Does NOT protect the UNDERLYING FACTS (only the communication relating the underlying facts)
- **Work Product**:
 - Documents or other TANGIBLE things '*prepared in anticipation of litigation OR for another party or that party's representative*' are GENERALLY NOT Discoverable
 - Includes Lawyers, Investigators, et. al. who were working on the case
 - **Exception**: Work Product MAY be DISCOVERABLE if the moving party can show:
 1. *Substantial Need for the Information contained in the work product*
 2. *That information is NOT otherwise available without undue hardship*
 - If the court orders production under this exception, the Attorney's MENTAL impressions, opinions, or legal theories MUST STILL be Protected

Note: a party always has the right to discover a statement that he may have made to another attorney (that is not privileged work product)

- **BASIC DISCOVERY TOOLS**

- **Interrogatories (Rule 33)**

- Written Questions to a Party, to be Answered, under oath, Subject to the penalties of Perjury
- Limits:
 - May send interrogatories **only to PARTIES** (not to non-party witnesses)
 - Limit of **30** interrogatories to Any Party (including Sub-parts)
- Responses:
 - Must be Served within **45** days
 - Must either Answer each interrogatory, or Raise a **legal objection** to it
 - The Responding Party signs as to answers; counsel signs as to legal objections
 - IF no response is filed, the REQUESTING party may Apply for **Judgement** in its favor and **Serve Application** on the Non-respondent
 - Clerk will then **notify** the offender that judgment will enter against her if Responses are NOT filed within **30** days

- **Requests for Production or Documents and/or Inspection of Tangible Things (Rule 34)**

- Apply ONLY to **parties** (not non-party witnesses)
- May Request Production of:
 - **Documents** for *Inspection* or *Copying*: The Request MUST describe the Documents or Categories of Documents with “REASONABLE PARTICULARITY
 - **Tangible things** for *inspection* or *testing*
 - **Entry upon Property** for *Inspection, Testing, Sampling, Measuring, etc.*
- Responses:
 - Party must Respond within **30 days** if Requested by Motion; however, a defendant has at least **45 days** from the date of the filing of the complaint (if requested by Complaint)
 - Responding Party should **specify** for each item that Inspection will (1) be permitted, or (2) raise an Objection and explain
 - The Producing Party MUST produce the Documents either;
 1. *As it is Kept in the Ordinary Course of Business; or*
 2. *Organized and Labeled to Correspond to the Categories in the Requests*
- 3rd Party Documents & Tangible Items
 - Documents or Tangible Items in the hands of 3rd Parties may not be REQUESTED, rather, they must be **subpoenaed**.

- **Depositions**
 - Similar to Interrogatories & Requests for Inspection, Depositions ORDINARILY may be taken **without leave of court**
 - However, **leave required if**
 - *The Likely Recovery is < \$5,000*
 - *The Case has Already been Tried in the District (i.e., in Superior Court due to Remand & Removal)*
 - *Plaintiff Seeks Deposition WITHIN 30 days of Filing*
 - For a **Party**, Deposing Counsel May simply send NOTICE of the Deposition (giving at least **7 days** notice) to the opposing counsel
 - For a **Non-party Witness**, must be **subpoenaed** and have **7 days notice** of the deposition
 - If the Witness is **required to bring documents** to the deposition for inspection, and if the witness is **subpoenaed**, he must have the **same 30 days** notice as **Rule 34 Requires for Requests for Inspection**
 - At the Deposition, the PARTY generally must ANSWER the question even if she has an OBJECTION, except for **privileged communications**
 - Depositions of **Corporate Parties** where the person with the relevant information is **NOT KNOWN**
 - The NOTICE of Deposition should **name** the corporation (or entity) as the *deponent* and **specify with reasonable particularity** the matters to be examined (then the Corporation will designate the person with the relevant knowledge)
 - Audio-Visual Depositions
 - To take an Audio-Visual Deposition, Must have Either:
 1. *Court Order; or*
 2. *Agreement of Parties*
 - This is done when fear that a there will be a death before the trial
 - Limit: An A-V Deposition may **NOT** be taken until **6 months after the commencement of the action**; unless by Court Order after notice and an opportunity to be heard in opposition (why? To allow a Meaningful Cross-examination)
 - Exception: A-V Depositions of **treating physicians & experts**
 - May be taken **without leave of court**
 - But still cannot do it until **6 months after commencement**
 - **Require 30 days** after the Deponent's written expert report is **given** to the other party's counsel
 - May be **used at trial**, *regardless of deponent's availability*
 - Use of Depositions at Trial:
 - Generally, the law favors live testimony; however, **deposition testimony MAY be used at trial**
 - *To IMPEACH a Witness*
 - *Any Purposed (for an adverse Party's deposition)*
 - *If a Witness is DEAD or UNAVAILABLE*
 - *An AV Expert Deposition may be used at trial regardless of Expert Availability*

- **Requests for Admissions**
 - Request ANOTHER Party to Admit Facts
 - Requests are **deemed admitted UNLESS responded to within 30 days**
 - Responses Must be:
 1. *Signed by the Party, subject to Penalty of Perjury*
 2. *Either Admit, Legally Object, or Explain why won't admit or object*
 3. *Facts ADMITTED are taken as TRUE (for purposes of Trial) unless the Court allows the Admitting Party to WITHDRAW its Admissions)*
 - **Motion for Insufficient Admissions Motion to Compel Further Answers to Requests for Admissions**

- **Requests for Physical/Mental Examination**
 - **Rule 35** permits Discovery for Mental or Physical Exam ONLY under Certain conditions
 1. *Require Court Order*
 2. *Show Good Cause*
 3. *May only Request a Physical/Mental Exam on a Party*
 4. *May Request only if the Physical/Mental Condition is AT Issue*
 - Where an Examination is made under Rule 35, the EXAMINED Party is Entitled to a **copy** of the Examiner's Report; yet, if the Examined Party requests a Copy, she must Produce to the other Party a Report from ANY OTHER examination she has sought for the same condition

- **Supplemental Discovery**
 - **Rule 37:** A Party MUST supplement discovery if:
 1. *the Party Learns that the Initial Response was INCORRECT*
 2. *the Party Learns of NEW INFORMATION which makes the original response no longer true*
 3. *the Party learns of the Identity of a WITNESS having knowledge of Discoverable information*
 4. *the Party learns of Experts which they intend to use at Trial and the Subjects to which they will testify*

- **SANCITONS FOR INSUFFICIENT DISCOVERY**
 - **Rule 37:** Where a Party Fails to Comply with the Discovery Requirements, the Requesting Party should **first Move for Order to Compel Discovery** (including costs)
 - If the Offender still does not respond, after the granting of the Motion, **rule 37** authorizes a Varied of Sanctions for failure to make the discovery. The Court may:
 - *Require Payment of the Opponent's costs*
 - *Hold the Recalcitrant Party in Contempt*
 - *Bar the Miscreant from Introducing Evidence Relevant to the Issue*
 - *Dismiss the action or take the facts as admitted which the discovery would have helped to establish*
 - *Order a Default Judgment against the non-complying party*

- **Protective Orders:** Where **Burdensome** or **Improper** Discovery is sought, the target party should *move for a protective order Pursuant to Rule 26(c)*.
- Standard; A Protective order may be sought against discovery, which would cause *annoyance, embarrassment, oppression, or undue burden/expense*

VI: TRIAL & POST-TRIAL MOTIONS

• **JURY TRIAL**

- Under MA Constitution, the RIGHT to Jury trial TURNS on whether a Jury Trial would have been available at the time of the adoption of the provision (MA Constitution 1780)
- Generally, there is a **Right to Jury Trial** for *Legal Claims for Damages*.
- Generally, there is **NO Right to Jury Trial** for *Equitable Claims, such as Injunctions, Accounting, Specific Performance, or Restitution*
- In **mixed** actions, there will be **jury trials for legal issues**, (held 1st) and then the **bench decides equitable issues**
- To Claim a Jury Trial: MUST be claimed **within 10 days of the CLOSE of Pleadings** (otherwise waive the right to a Jury Trial; ergo, best strategy is to put it in the pleadings)
 - **Either** party may seek a JURY trial of the issues; **demand** may not be **withdrawn without** the CONSENT of All parties
 - In the **Superior Court**, Juries of **12** are used in CIVIL Cases, of them **5/6** must Agree on the verdict; Parties, though, may Stipulate to a smaller number of jurors (but still require the 5/6 margin)
 - Parties are Entitled to **submit requests for jury instructions**: a party may NOT Claim Error in a Jury Instruction unless that party:
 1. *Objected to the Instruction out of the presence of the jury before the jury retired*
 2. *States Specific Grounds for Objection to the Jury Instructions*

• **DIRECTED VERDICT & JNOV**

- Directed Verdict
 - Directed Verdict is PROPER if NO Reasonable Jury could find for the non-moving party based in the Evidence Presented
 - In Considering the Motion, the court:
 - *Views the Evidence in the Light Most Favorable to the Non-Moving Party*
 - *Takes All Inferences in Favor of the Non-moving party*
 - *Assumes that the Jury will credit the non-moving party's witnesses (i.e., court will not assess the credibility of the witness)*
 - **Timing**: The Defendant may Move for a Directed Verdict either:
 - *At the CLOSE of Plaintiff's Opening Statement*
 - *At the CLOSE of Plaintiff's Evidence*
 - *At the CLOSE of All Evidence*
 - Note: In a Case tried by the BENCH, the DEFENDANT does NOT move for a Directed Verdict; instead, the Defendant should seek an **involuntary dismissal** on the ground that the Plaintiff has NOT satisfied her burden of proof

- Judgment notwithstanding the Verdict (JNOV)
 - Standard: Same as Directed Verdict: NO Reasonable Jury could find for the non-moving party based in the Evidence Presented
 - Timing: Motion for JNOV is made *after the jury has deliberated and returned a verdict*
 - Pre-requisites to Moving for JNOV:
 - *Movant Sought a DIRECTED VERDICT at the CLOSE of ALL EVIDENCE*
 - *Movant moved for JNOV within 10 days of Judgment*

Note: a party may seek a JNOV only on a Ground which was RAISED in MOTION for Directed Verdict

If JNOV is granted, judge ENTERS judgment for the Party who lost the verdict
 - New Trial:
 - Timing: Must be Made *within 10 days*
 - Grounds: Legal ERROR at Trial (*evidentiary ruling, incorrect instruction, improper closing argument, outside juror contacts*) which results in an outcome that is AGAINST the CLEAR weight of the evidence
 - Remittitur: “A new trial shall NOT be granted solely on the ground that the **damages are excessive** until the prevailing party has 1st been given an Opportunity to REMIT so much thereof as the court Adjudges EXCESSIVE
 - The Judge OFFERS to enter the Judgement for the Lesser sum; if Plaintiff refuses, then the judge orders a NEW Trial
 - Additur: Judge offers to Enter the Judgment for the Plaintiff for a Larger award, if the Defendant Refuses, the Judge orders a New Trial (according to the Federal Rules, this is unconstitutional)
- ENTRY OF JUDGMENT
 - The JUDGMENT is **separate** from the Verdict. It is a **document** which *records* the result of the trial
 - If the **Judgment** is for the **defendant**, OR for the **plaintiff for a sum certain**, then the **CLERK of the court** may draw up the Judgment
 - If the **Judgment** must be fashioned by *applying legal rules to the proceeding*, then the **JUDGE** draw up the Judgment
 - Entry of Judgment: Starts many time periods Ticking, including:
 - 10 Days for JNOV or New Trial
 - 10 Days to Alter or Amend a Judgment
 - 30 Days to Appeal
 - 1 Year to Move for Relief from Judgment on Certain Grounds
 - ENTRY OF SEPARATE JUDGEMENT
 - The **Court** may enter Separate Judgment AGAINST **1 party** upon a Determination that *There is NO JUST Reason for Delay* (i.e., 2 Defendants, grant Summary Judgment for 1, the other proceeds to trial. Can enter a separate judgment for the Defendant Granted Summary Judgment so as to get the clock ticking for Running the Appeals & Statute of Limitations period)
 - Court has the Same Authority where one of Several **CLAIMS** has been resolved between the parties

- **DEFAULT JUDGMENT**

- Must Distinguish *Entry of Default* from *Default Judgment*
 - Entry of Default: is a NOTATION on the Record that the Defendant has failed to appear or Defend (may be entered by the Clerk in Some cases)
 - Default Judgment: The Entry of a Judgment AFTER an Entry of Default (May be done by the CLERK ONLY if for Sum Certain, otherwise it must be by the Judge)
- Where a Defendant has APPEARED, Plaintiff MUST give NOTICE to the Defendant that there has been an Entry of Default and that a Default Judgment may be against him
- If a Default Judgment is ENTERED, there must still be a Proceeding to ASSESS the Amount of **damages** (where NOT a sum certain); (If plaintiff has appeared before, he may re-appear and argue). However, the Relief MAY NOT Exceed more than the Amount Demanded on the Complaint (sum certain) Or of a Different Kind
- Setting Aside Default: If No Judgment has Entered, the JUDGE may **set aside** a Default for *Good Cause Shown*
 - If the Judgment has Entered, the Default Judgment may be **set aside in accordance with Rule 60(b)** (governing Reasons for Relief from Judgment)

- **RELIEF FROM JUDGMENT (Rule 60(b))**

- A Motion for RELIEF from JUDGMENT seeks to re-open the case after Judgement has been entered
- For the Following Reasons, A Motion for Relief from Judgment MUST be MADE **within 1 Year after Entry of Judgment**
 - Mistake, Inadvertence, Excusable Neglect
 - Newly Discovered Evidence (that could not have been obtained through due diligence)
 - Fraud, Misrepresentation, Misconduct of Opposing Party
- For the Following Reasons, A Motion for Relief from Judgment MUST be MADE **within a Reasonable Time**
 - Judgment is VOID (i.e., there is no PJ)
 - Judgment is Satisfied & Discharged
 - Any Other Good Reason
- These Motions are Discretionary and PROBABLY won't be granted unless Movant can show that the cause that is the basis for the Relief from Judgment would have affected the jury's decision

- **DECLARATORY JUDGMENT**

- A Declaratory Judgment is Judgment which **declares** the Rights of Parties (Advantage: Can bring an action Before the Injury takes place)
- To SEEK a Declaratory Judgment there must be an **immediate & specific dispute** which will likely lead to the violation of a party's rights & resulting litigation
- The Plaintiff must have a DEFINITE & SPECIFIC **interest** which will be vindicated by the declaratory judgment
- A declaratory judgment may be Sought EVEN IF some other remedy is also available
- The Grant of a Declaratory Judgment is Discretionary

- **EXECUTION**
 - Execution is the **process** for Collecting a Money Judgment
 - The CLERK may issue a *Writ of Execution* within **1 year** of entry of judgment
 - After **1 year**, a JUDGE, only, can issue a Writ of Execution
 - An **appeal** does not Automatically STAY execution of the judgment, but the Appealing Party MAY ask for a STAY
 - **Items Exempt from Execution** (Basic Necessaries: including)
 - \$3,000 in Household Furniture
 - \$500 in Tools used in Debtor's Trade
 - Certain Value in Real Estate if the Debtor has Filed a HOMESTEAD Exception)
 - \$75/month for Utilities
 - \$200/month for Rent
 - \$125/month in Cash or Wages
 - 1st \$700 of an Automobile

- **RES JUDICATA**
 - MA = Fed.
 - **3** Pre-requisites:
 1. 2nd Claim is on the **Same Claim** as the 1st
 2. 1st Action had a Judgment on the **Merits**
 3. 2nd Claim has the **Same Parties** as the 1st
 - **Same Claim**; A party is BARRED from Bringing Any Claims which ARISE from the Same Transaction or occurrence which has already been adjudicated on the Merits, Even if different theory, the theory was never before pleaded, and even if for a new form of relief
 - **Exception:** If the 1st Court Lacked SMJ over the claim, then Res Judicata will not bar the 2nd Claim
 - **On the Merits**: Procedural Dismissals, such as Lack of SMJ, lack of PJ, Improper Venue are NOT judged on the Merits
 - However, most other dismissals ARE on the merits, such as Default, Failure to Prosecute, Summary Judgment, Directed Verdict, Dismissals for Failure to State a Claim
 - **Same Parties**; Same Parties if were part of the underlying transaction or occurrence

- **COLLATERAL ESTOPPEL**
 - Collateral Estoppel BARS re-litigation of an **Issue** which was **litigated & decided** in an Earlier Action
 - **Pre-Requisites**: The ISSUE must have been
 - *Actually LITIGATED in the Prior Case*
 - *Actually DECIDED in the Prior Case*
 - *NECESSARY for Judgment in the Prior Case*
 - **Actually Litigated**: An Issues is NOT actually litigated if it was merely STIPULATED to or ADMITTED, or if the Party DEFAULTS in the prior suit. Instead, Actual Litigation means that the issues was TRIED before a True FACT-FINDER

- Actually Decided: a Party seeking Collateral Estoppel MUST show that the FACT-FINDER actually DECIDED the issue. This may Require COMPARING the Pleadings to the Verdict
- Necessary to Judgment: Even if the Jury DECIDES the issue, Estoppel WILL NOT Apply to a later action UNLESS the Decision of that Issue was Necessary to the Judgment of the First Suit
- **Non-mutual Collateral Estoppel**: Applies where a Person (not a party to the 1st Action) invokes estoppel to prevent a re-litigation of the issue in the 2nd action
 - Defensive Non-mutual Collateral Estoppel: If a party loses an issue at a trial, and then tries to re-litigate the same issue against another party, the other party may invoke estoppel to prevent re-litigation of the issue **as long as** the original party has the **opportunity & incentive** to litigate the issue in the 1st case.
 - Offensive Non-mutual Collateral Estoppel: Similar, but the non-party to the original estopps the original from re-litigating an issue he already lost at the 1st trial
 - NOTE & WARNING: ALWAYS be sure, when using non-mutual Collateral Estoppel, that the Party BEING ESTOPPED was a Party in the 1st Action; If not, SHE WILL NOT BE BARRED FROM litigating the issue
- **APPEAL**
 - NOTICE of Appeal MUST be Filed in the TRIAL COURT within **30 Days** after Entry of Judgment
 - The Following Motions SUSPEND the Time for Taking an Appeal:
 - *JNOV*
 - *New Trial*
 - *Motion to Amend the Judgment*
 - Appeals must generally come from a FINAL judgment; however, parties may appeal from the grant or denial of a preliminary injunction **immediately**

Use the Federal Civil Procedure Outline as well and in conjunction with this Note, too, the Appendices in the Handout; make photo-copies