INTRODUCTION TO THE ADVERSARY SYSTEM

- FRCP – governing in federal district courts only, not appellate
- In Re BGC (Additional materials) – example of the adversary system
  - Lawyers as active advocates for their clients
  - Judges have a more passive role (contract w/inquisitorial system)
  - Two partisan lawyers are more likely to uncover more facts
  - Your case is only as good as the lawyer representing you
- Adversary system only works if your client actually suffers the consequences of having a bad lawyer

PLEADING

- Common law pleading (writ system)
  - Each different form of writ began to have its own special language and procedure, its own remedies
  - Easy to lose on a technicality, i.e. choosing the wrong writ
  - Purpose – narrow case down to a single issue at question
- Code pleading (Field Code 1848)
  - Same procedure for all causes of action
  - Remains in CA and NY
- Notice pleading (FRCP 1938)
  - Difference from code pleading is laid out in the first three rules:
    - Rule 1 – one set of rules for all civil suits; want just, speedy, and inexpensive actions
    - Rule 2 – only one form of action; ‘civil action’
    - Rule 3 – action is started by filing a complaint
- Purpose of pleading – provide notice to the other party of the action and the nature of the contentions to facilitate informed preparation for discovery, settlement, or disposition
- Outline of pleading
  - Validity of Claim – Access Now v. Southwest Airlines (pg 556)
    - Complaint set out a legal assertion which allowed D to move for 12b6 dismissal
      - Motion to dismiss for failure to state a cause of action
      - Appropriate when ‘it is clear that no relief could be granted under any set of facts that could be proved consistent w/the allegations’
      - Device for cutting edge legal issues in order to get a quick ruling
        - Purpose of this complaint was to establish whether or not a website was a place of public accommodation
        - Incentive for complaint to be short and vague
        - Motions to dispose of case based on merits, not procedural reasons
          - 12b6 – failure to state a claim for which relief can be granted (general demurrer in state courts)
Want to survive 12b6 motion in order to get to discovery
  • 56 – summary judgment
  • 50a – directed verdict (judgment as a matter of law)
  • 50b – jnov (judgment as a matter of law)
  • 59 – new trial

Allocation – Gomez (pg 586)
  ▪ Elements of a 1983 cause of action
    • P must allege that someone deprived him of a federal right
    • P must allege that the person who deprived him of a right acted under color of state or territorial law
  ▪ Burden of pleading is generally followed by burden of proof
    • Evidentiary standards for burden of persuasion:
      o Preponderance of the evidence – almost all civil cases
      o Beyond a reasonable doubt – criminal cases
      o Clear and convincing evidence – used for things we want to be especially hard to prove
  ▪ Affirmative defenses – allocated to D to plead and prove
  ▪ Element of the cause of action – allocated to P to plead and prove
  ▪ Issue of whether or not D acted in bad faith is an element of the cause of action or an affirmative defense and therefore whom the burden of pleading fell upon
    • Held – acting in good faith should be an affirmative defense b/c D is in a better position to know their own state of mind

Specificity & Consistency – McCormick (pg 601)
  ▪ Almost no federal rule on how specific pleadings must be
    • Rule 9 – fraud and mistake must be pleaded w/particularity but malice or intent can be stated generally
  ▪ Consistency
    • Inconsistency in pleadings are permitted when you are unsure which version of the facts is true
    • Trying to prove one claim to the jury is not allowed as evidence tending to disprove the other claim
    • As long as there is a reasonable basis for pleading each alternative, it is okay to plead alternative allegations

What happens after a complaint is filed?
  ▪ Complaint may not be served properly (Rule 4 → dismissed)
  ▪ Complaint is served but not answered (Rule 55 → default judgment)
  ▪ Complaint is answered and answer is filed (proceed w/litigation)
  ▪ Motion under Rule 12 is filed (i.e. 12b6, if granted → P can appeal, if denied → answer w/in 10 days)

Answers – Fuentes (Additional materials pg 90)
Amended answer to admit certain things – if no dispute, then P cannot provide evidence to prove those allegations

Strategy in amending answer the day before the trial

Answers must address every issue brought up in the complaint – can either admit, deny, or say you don’t have enough information to admit or deny the allegation

- Whatever is not denied or addressed will be deemed to be admitted

- Amendments – Zuk (pg 611)
  - Generally, amendments are freely allowed
  - Abuse of discretion not to allow at least one amendment

- Rule 15a – when can a party amend a pleading?
  - Before responsive pleading is filed (or if no response is required then w/in 20 days of serving the original pleading)
  - By leave of court – granted freely when justice requires
  - By written consent of the adverse party

- Sanctions – Zuk (pg 611)
  - Rule 11 – no longer permits sanctioning in cases where there is no bad faith on the part of the lawyer or the client
  - Requires signatures on certain pleadings filed, certifies that the pleadings are true to the best of your knowledge, process of imposing and limited sanctions
  - Separate sections for court imposed sanctions and when D motions for sanctions
  - Claim must rest on existing law or a non-frivolous argument for some extension or modification of existing law

REMEDIES

- Complaint must set out a prayer for relief (Rule 8)
- Plenary – available at time of judgment
  - Damages (jury)
    - Preferred remedy is US – takes remedy out of the court; it is up to the parties to enforce the judgment
  - Injunctions (judge → discretion)
    - Court has the power to hold D in contempt if they do not abide by the injunction
    - Overturned by appeals only if there is clear abuse of discretion
    - Standards for granting an injunction
      - Irreparable injury
      - Inadequate legal remedy
      - Balance of hardships
      - Public interest
      - Discretion
  - Declaratory judgment
Weinberger v. Romero-Barcelo (Additional Materials pg 78) – court wants the discretion of whether or not to order the injunction b/c it involves the gov’t
- Very few statutes which take away the court’s discretion of granting injunctions
- No real injuries, water is actually cleaner b/c of Navy
- Balance hardships b/t public interest (national safety) and residents
- Elements of a FWCPA cause of action
  - Discharge, pollutant, point source, did not have a permit

- Provisional – available before judgment
  - Rule 64 – all remedies available for seizing person or property in the state will be available in the federal court located w/in that state
  - Standards – same as plenary injunction w/likelihood of success on merits
  - Attachment/garnishment, etc.
    - Attachment – seize articles and assets in D’s possession (but are not the subject of the lawsuit)
    - Garnishment – seize assets of D in hands of a 3rd party
    - Replevin – seizing property wrongfully in the possession of another
  - Rule 65: Preliminary injunction/temporary restraining order
    - Have a trial on the merits right away
    - TRO can be obtained w/o notifying the other side
      - Typically expires in 10 days and may be extended only another 10 days before a hearing is held
    - Preliminary injunctions last longer than TROs
      - Same standards as granting a plenary injunction AND likelihood of success on the merits
    - Both require some bond – insurance policy purchased by party seeking injunction against the risk that the injunction will be wrongly issued and harm the other party

- Costs of litigation
  - Three elements of total cost of litigation
    - Costs – filing fees
    - Attorneys fees – bulk of total expenses
    - Litigation expenses – expert witness fees, paralegal fees, copy costs, etc.
  - Possible fee rules
    - Each side pays own regardless of who wins (American rule for attorney’s fees and litigation expenses; AKA American rule)
    - Loser pays winner (American rule for costs; AKA English rule)
    - Losing D pays winning P (otherwise each side pays own)
    - Losing P pays winning D (otherwise each side pays own)
    - P always pays both
    - D always pays both
    - Gov’t always pays both
Each side pays own, but by contract P’s attorney gets nothing except a percentage of recovery from D

- General rules have exceptions – statutes can provide for fee shifting
  - Evans v. Jeff D. (pg 112) – if a statute provides for the award of reasonable attorney’s fees, is the court obligated to invalidate a term of a settlement agreement which waives award of attorney’s fees?
    - §1988 – in civil rights actions, losing D pays winning P’s attorney’s fees, otherwise each side pays own costs and but parties can contract around that rule
  - Lassiter v. Dept of Social Services (pg 124) – constitution does not require an indigent person whose parental rights are being terminated to be represented by counsel
    - Presumption of right to counsel only where person could be deprived of personal liberty (i.e. criminal cases)
    - Eldridge factors: private interests at stake, gov’t interest, risk that procedures will lead to an erroneous decision
      - Have to show that these factors outweigh that presumption
    - Supreme Court has been extremely restrictive in saying that Due Process requires granted an attorney for indigent litigants

**JURISDICTION**

- Must have two types of jurisdiction: subject matter and personal
- Must have Constitutional and statutory grant of jurisdiction
- Subject matter jurisdiction
  - Federal jurisdiction – diversity of citizenship and questions of federal law
  - Federal courts are of limited jurisdiction
  - What cases can federal courts here
    - Federal law (appellate jurisdiction granted by §1331)
      - Federal question must arise in complaint
    - Cases involving ambassadors (SCt has original jurisdiction)
    - Admiralty and maritime cases
    - Cases where US is a party
    - b/t 2 or more states (SCt has original jurisdiction)
    - b/t state and a citizen of another state
    - b/t citizens of different states (appellate jurisdiction granted by §1332)
      - dispute must have more than $75K in controversy
        - doesn’t matter what is awarded, just what is asked for in the complaint in good faith
      - purposes – prevent bias of state courts against out of staters, difference b/t state and federal procedure, allows 2 court systems to speak on the same laws
        - (both state and federal courts will apply the same state substantive law)
corporation is a citizen where it is incorporated and where its principle place of business

- land grant disputes
- b/t state or citizen and a foreign state or citizen

- State court – generally one that is capable of hearing all types of cases
- *Mas v. Perry* (pg 364) – need complete diversity of all parties involved to get subject matter jurisdiction based on diversity of citizenship
  - Getting diversity jurisdiction based on amount in controversy – based on amount claimed in complaint in good faith, not amount actually awarded
  - Can aggregate individual claims, but not claims of multiple Ps
  - Citizenship is measured at the time the complaint is filed
    - Must be a citizen of the state and domiciled there
    - Domicile = physical presence and intent to return

- Personal jurisdiction
  - How to establish personal jurisdiction
    - Citizenship
    - Service w/in state – transient jurisdiction
      - Exception – fraudulently induced presence
    - Need some type of presence and service of process
    - Consent
      - Waiver
      - Contract
    - Property
    - Appearance
      - Non appearance results in default judgment
      - General – consent to jurisdiction
      - Special appearance – appear solely to challenge jurisdiction
  - Notice – adequate when notice is reasonably calculated to apprise interested parties in the action
    - Actual notice
    - Publication is suspect – favored only when alternatives fail
  - *Pennoyer v. Neff* (pg 147) – D was a nonresident and was not served properly
    - D’s property was attached but not at the beginning of trial
    - Must attempt to give notice in a way that is actually intended to reach D
    - Rule – jurisdiction over absent D is permitted under circumstances of consent, presence, and ‘status’

- Constitutional limits on personal jurisdiction over absent D
  - *Int’l Shoe Co. v. Washington* (pg 163) – issue: whether the Due Process clause allows a Delaware corporation to be sued for contributions to state unemployment in Washington courts
    - Washington could exert personal jurisdiction b/c Int’l Shoe had sufficient minimum contacts w/forum state
    - D enjoyed benefits and protections of Washington law
• Contact must be relevant to the subject of the dispute
• Continuous and systematic contact that was related to dispute – sufficient minimum contact

- **WWW v. Woodson** (pg 176) – did WWW have sufficient minimum contacts in OK where accident occurred to justify personal jurisdiction
  • Only contact was that a car they sold in NY was involved in an accident in OK, did not have any business in OK
  • Other relevant factors: forum state’s interest in case, P’s interest, judicial system’s interest, shared interest of states

- **Burger King v. Rudzewicz** (pg 196) – long arm statute did not violate the Constitution in granting personal jurisdiction over D
  • D had purposefully availed himself to the benefits and protections of state law b/c he entered a long term agreement, was aware that all negotiations were subject to FL headquarters approval, K was entered into in FL
  • Minimum contacts has become one of many factors instead of a threshold issue (burden on D, forum state’s interest, P’s interest, judicial systems’ interest, shared interest of state)

- **Asahi Metal v. Superior Court** (pg 212) – whether CA had personal jurisdiction over a dispute b/t two foreign companies
  • Factors in decision – burden on D, interests of forum state, interest of P, several states interest
  • Neither party was from US, transaction did not occur in US

  o Framework for Analysis
    • Is there a traditional basis for jurisdiction under Pennoyer?
    • Contact – must be relevant contact b/t D and forum
      • Purposeful availment
      • Foreseeable that D could be sued in that forum
    • Fairness – does it offend traditional notions of air play and substantial justice
      • Relatedness – does P’s claim arise from D’s contact w/forum
      • 5 fairness factors
        o Inconvenience to D is so grave that D will be at a severe disadvantage
        o State’s interest in providing a forum
        o P’s interest
        o Legal system’s interest in efficiency
        o Interstate interest in shared substantive policies

  • Venue – among the courts that have jurisdiction, which court should you sue in
  • Forum non conveniens – court have jurisdiction and venue over a case but the court decides that there is a more convenient forum
    o Trial just can transfer a case to another court, but this is not favorable
• Removal – only D can remove a case from state to federal court if the case could have been brought in federal court originally
• Generally an issue of getting jurisdiction over an absent D
  o P consents to jurisdiction by filing the complaint in the court
  o D can consent by appearing in court

PRETRIAL PROCEDURE
DISCOVERY
• FRCP Rules about Discovery
  o Rule 26 – required disclosures (initial, expert testimony, pretrial), scope/limits, protective orders, timing, supplementation, conference, signature
  o Rule 37 – procedure for compelling discovery and sanctions for failing to abide by discovery rules
• Purposes of discovery
  o Enable more accurate outcomes
  o Promotes settlement
  o Allows parties to know whether summary judgment may be available
  o Inflict costs or harass an opponent (unethical to conduct discovery solely for this reason)
  o Facilitate ‘reconstruction’ of evidence in anticipation of opponent’s proof at trial
• Scope of discovery – any matter, not privileged, that is relevant to a claim or defense of any party
• Tools of Discovery
  o Initial disclosures – Rule 26; required in federal court
    ▪ Contact info of people having information the disclosing party is likely to use
    ▪ Copies or descriptions of documents the disclosing party may use
    ▪ Computation of damages
    ▪ Insurances agreement that judgment may be paid from
  o Depositions – Rule 30 (oral); Rule 31 (written)
  o Interrogatories – Rule (33); not available against non-parties
  o Document production/inspection of tangible things – Rule 34
  o Physical and mental examinations – Rule 35
    ▪ Available only when physical or mental state of a party is at issue
    ▪ Only method that requires a court order
  o Requests for admissions – Rule 36 - having opponent admit certain facts are true
  o Motions for protective orders and motions to compel - Rule 37
  o Sanctions – Rule 37
• Zubulake v. UBS Warburg (pg 828)– party generally may obtain relevant information at the disclosing party’s expense but that rule is limited if information is obtainable in an easier or less costly way, if it could have been gotten elsewhere through discovery, or if the burden outweighs the benefit
Cost shifting is considered when the cost would impose an undue burden or expense to the responsive party – revised 7 factor test
  - Extent to which request is specifically tailored to discover relevant information
  - Availability of such information from other sources
  - Total cost of production compared to amount in controversy
  - Total cost of production compared to resources available to each party
  - Relative ability of each party to control costs and its incentive to do so
  - Importance of issue at stake in litigation
  - Relative benefits to the parties of obtaining the information

LIMITS ON DISCOVERY
- 4 categories of information
  - Information protected by both A/C privilege and W/P doctrine
  - Information protected by neither
  - Information protected only by A/C privilege
  - Information protected only by W/P doctrine
- Attorney-Client Privilege
  - Covers communications b/t attorney and client in confidence for purpose of obtaining legal advice and not waived
    - Communication is not protected if not induced by the ‘in confidence’ requirement
    - Easy to waive – if client speaks publicly about what he told his attorney
  - Privilege is absolute – cannot be overcome by showing that the information is unavailable from any other source
  - Exceptions: if lawyer is contact to help commit a crime or plan what the client knew or should know was a crime, or if there is claim of breach of duty to client by lawyer or breach to lawyer by client
  - Upjohn Co. v. United States (pg 845) – IRS sought to obtain questionnaires that were sent to Upjohn’s managers, but this communication would not have occurred but for the attorney-client privilege, therefore it is protected
    - Extended beyond precedent ‘control group test’ to protect communications with lower level employees in a corporation who have no party in acting on the attorney’s privilege
- Work Product Doctrine
  - Documents and tangible things prepared in anticipation of litigation/trial by or for a party or the party’s attorney
  - Must be a substantial need, inability to obtain elsewhere w/o undue hardship in order to compel discovery
  - Theoretical absolute protection for mental impressions, opinions
  - Does not have to be prepared by a lawyer – can be prepared by a party or any representative of the party
Hickman v. Taylor (pg 856) – can only get at attorney files which are protected upon a showing of substantial need but can not get information which contains the attorney’s mental impressions
  - Witness statements secured by the adverse party’s counsel may be discoverable only where relevant and non-privileged facts remain hidden in such files and the facts are essential to the case
Upjohn Co. v. United States (pg 865) – disclosure of documents protected by the work product doctrine requires a higher showing than substantial need and undue hardship
  - 3 categories
    - Material that is not protected by w/p
    - Material that is protected by w/p – obtainable upon showing of substantial need and undue hardship
    - Material including atty’s mental impressions – only obtainable upon a higher standard than substantial need but is not specifically laid out yet

Expert Testimony
Ager v. Jane C Stormon Hospital (pg 873) – (1) experts informally consulted and not retained or specially employed: no discovery as to their identity or opinions (2) experts retained or specially employed but not expected to testify at trial: requesting party bears the burden of proving that there are exceptional circumstances which justify disclosure of their identity, opinions, or other information
  - 4 categories
    - Retained and testifying – Rule 26a2b; mandatory initial disclosure
    - Retained but not testifying – only discoverable in exceptional circumstances; normally not discoverable
    - Consulted by not retained – identities are not discoverable
    - Treating physicians – freely discoverable
  - Courts have the ability to appoint experts, but this is rarely done
  - Experts are NOT neutral parties

Confidentiality, Privacy and Prevention of Harassment
Vinson v. Superior Court (pg 886) – party may only request physical or mental examination if a party’s physical or mental state is at issue – once it is determined to be at issue then the discovering party must have good cause for requesting the exam
  - P did bring her mental state into question by alleging ongoing mental problems resulting from sexual harassment but did not waive her privacy right as to her sexual practices and history

SUMMARY JUDGMENT
  - Summary judgment is appropriate when there is no genuine issue of material fact and moving party is entitled to judgment as a matter of law
  - Submitting an appropriately supported motion for summary judgment
Adickes v. SH Kress & Co. (pg 923)– summary judgment should have been denied b/c Kress did not file an adequate motion which required Adickes to respond
  - Did not dispute that there was an officer in the restaurant prior to the arrest
  - Deals w/adequacy of summary judgment motions

Celotex Corp v. Catrett (pg 935)– (1) if moving party bears the burden of proof, they must demonstrate evidence proving their claim so that judgment may be entered as a matter of law when moving for summary judgment; (2) if non-moving party bears the burden of proof, then the moving party may simply point to the absence of evidence and do NOT have to come up w/evidence proving a negative

Other ways to dispose of a suit based on the merits of the claim
  - Rule 12b6 – motion for failure to state a claim upon which relief can be granted
  - Rule 56 – summary judgment
  - Rule 50a – directed verdict
  - Rule 50b – jnov
  - Rule 59 – new trial

If there is conflicting live testimony → up to the jury to decide which set of facts to believe; summary judgment is inappropriate

If there may be conflicting inferences → up to the judge to decide which inferences are reasonable

Responding to a properly supported motion for summary judgment
  - Arnstein v. Porter (pg 945)– judge gets to decide which inferences are reasonable, did not grant summary judgment since it would be possible to draw reasonable inferences in favor of the non-moving party – when a live witness is offered to raise an issue of material fact, summary judgment is not appropriate

Process for deciding if SJ is appropriate
  - Who is the moving party
  - What is the issue the motion for SJ is based on
  - Who has the burden of proof for that issue
  - What evidence is provided on that issue
    - If direct conflicting testimony → SJ is not appropriate
    - If inferences → must decide what those exact inferences are and it is up to a judge to decide if those inference are reasonable enough to go to a jury

SETTLEMENT AND PRETRIAL CONFERENCE
  - Settlement can happen any time in litigation after the complaint is filed
    - Generally not subject to court approval (exception: minors, insane)
    - Rule 16 – purpose of pretrial conference is to facilitate settlement
      - Conference also provides a ‘script’ for the trial (witnesses, objections, defenses, jury instructions)
      - Conference only occurs when parties and judge are certain the case will go all the way to trial
- Number of bench trials dropped w/adoption of Rule 16 – why want a bench trial if you already refused the settlement amount suggested by the judge
- **Kothe v. Smith** (pg 968) – judge cannot effect settlements through coercion; judge cannot sanction D for reaching settlement after trial had started for an amount the judge had previously suggested
  - Trial judge can encourage settlement but cannot coerce it through Rule 16 sanctions
- **Rule 68 – offer of judgment**
  - Only D can make an offer of judgment
  - Contrast to settlement (claim is dismissed) – here judgment is entered on merits of claim against D
  - How to figure out costs in P v. D
    - 5 types of expenses
      - Verdict
      - P’s costs
      - P’s attorney’s fees
      - D’s costs
      - D’s attorney’s fees
    - If D wins → judgment is P has to pay D’s costs (Rule 68 never applies when D wins)
    - If P wins → judgment is D has to pay verdict and all of P’s costs (plus own costs, but not really part of official judgment)
    - Rule 68 applies when judgment obtained by P is not more favorable than the offer made by D
      - D pays verdict and P’s pre-offer costs and P’s pre-offer attorney’s fees (if underlying statute provides that costs includes fees)
        - P pays D’s post offer costs (issue of whether this could include D’s post offer attorney’s fees if underlying statute provided for fee shifting)
      - Marek v. Chesny (Additional materials pg 92) – when underlying statute provides for fee shifting, ‘costs’ under Rule 68 would include attorney’s fees

**TRIAL**

**RIGHT TO JURY TRIAL**
- 7th Amendment – at common law in suits for $20 the right to jury trial is preserved
  - But at this time different courts of law and courts of equity
- **American Life Insurance v. Stewart** (pg 998) – equitable jurisdiction is not destroyed by a counterclaim bringing an action at law
  - When there are common factual issues to both equitable and legal claims, matter of judicial discretion which to claim to try first - **OVERTURNED**
  - Federal judges usually decide to try equitable claims first
Fraud was a common issue – if judge decided there was fraud in the equity issue, then the legal issue would be disposed of since fraud is a complete defense for breach of contract

- **Beacon Theatres Inc. v. Westover** (pg 1002) – right to a jury trial when there are common factual issues in equitable and legal claims
  - Right to jury trial for ALL issues bearing on the legal issue regardless of whether they also bear on an equitable issue as well
  - Expansion of the right to jury trial instead of the intended ‘preservation’ of the 7th Amendment

- **Chauffers v. Terry** (pg 1015) – modern historical test to determine whether an action will resolve legal or equitable rights (right to jury trial only when legal rights are at stake)
  - 2 part inquiry: nature of issues involved (compare to 18th century actions in England prior to merger of law and equity) and remedy sought

- **Atlas Roofing Co. v. Occupational Safety and Health Review Comm’n** (pg 1047) – when gov’t sues to enforce public rights created by statutes w/in the power of Congress to enact, the 7th Amendment does not bar Congress from assigning the fact-finding function to an administrative forum w/which a jury would be incompatible
  - 7th Amendment does not require right to jury trial when none was required before – this is a new cause of action
  - Decisions of administrative tribunals are still subject to review by federal courts of appeals

### SELECTION OF THE TRIER OF FACT

- 3 purposes of voir dire
  - Aid challenge for cause
  - Aid peremptory challenge
  - Try to make an opening statement to the jury
- Narrowing the jury pool
  - Source list – commonly voter registration, driver’s license lists
    - Questionnaire is mailed out to list
  - Master list – qualified, eligible jurors (from answered questionnaires)
  - Array – people who show up on summons date
  - Venire – group of people from which the actual jury is chosen
    - Goes through voir dire
  - Panel – group chosen to sit on the jury
- **People v. Currie** (pg 1056) – test for excluding groups of people from early stages of jury selection (source list, master list, array) – excluding groups versus individuals; prima facie violation of fair cross-section requirement
  - Group alleged to be excluded is a distinctive group in the community
  - Not fair and reasonable representation of this group in venire
  - Under-representation is due to systematic exclusion of that group in the jury selection process
Here – process was race-neutral; county is not required to take affirmative actions to ensure fair representation

If prima facie case is established burden shifts to prosecution to provide either more precise statistical showing that no disparity exists or justification for the procedure resulting in the disparity of the venire

Kiernan v. Van Schaik (pg Additional materials pg 106) – abuse of discretion to deny counsel the right to ask certain questions during voir dire which would have aided the right to peremptory challenges and challenges for cause

Peremptory challenges – 4 alternate approaches

- Traditional peremptory challenges – CJ Burger dissent in Batson
  - Eliminates extremes of partiality, harm in articulating reason for challenge as it may be somewhat offensive yet true
- Peremptory ‘light’ – Batson
  - Excuse for any reason except on basis of race
- Eliminate peremptory – Marshall concurrence in Batson
  - Eliminate it altogether since bias cannot be eliminated from the process
- Jury chair choosing rest of jury
  - Jury chair may have biases
  - Parties will never agree on a jury chair, and jurors would tend to defer to the chair’s judgment during deliberations

Strauder – purposefully exclusion of blacks from master list denies black D equal protection

Swain – right to a jury drawn from a cross section of community but no right to a jury of a specific make-up; required a showing of a pattern of systematic exclusion

Batson v. Kentucky (Additional materials pg 114) – prima facie case of being denied equal protection through gov’t use of peremptory challenges to exclude members of D’s race

- D is member of cognizable racial group (no longer required) and prosecutor has used challenge to remove jurors of the same racial group
- D may rely on fact that peremptory challenges constitute a jury selection practice that would allow for discrimination
- D must show that the facts and circumstances raise an inference that the prosecutor used the challenges to exclude jurors on account of race

JEB (Additional materials pg 136) – peremptory challenges based solely on gender violate equal protection

Edmonson v. Leesville Concrete Inc (pg 1072) – race based exclusion violates the equal protection rights of the challenged jurors

Recusal of Judges

- Liljeberg v. Health Services Acquisition Corp. (pg 1082) – issue of disqualifying judge
  - Any judge shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned
  - Judge shall disqualify himself in the following circumstances
• Has personal bias or prejudice concerning a party or personal knowledge of disputed facts concerning the proceedings
• Served as a lawyer in the matter
• Served in gov’t employment and participated as counsel concerning the proceeding or expressed an opinion concerning the merits of the case
• Knows that he or family member, individually or as a fiduciary, has a financial interest in the subject matter in controversy
• Is a party, known to have an interest that could be affected by the outcome, or is likely to be a material witness
  ▪ Don’t want to give the appearance of impropriety – depends on public perception, not necessarily whether judge was actually aware or was actually affected by the conflict of interest
  ▪ Doesn’t require actual knowledge – if a reasonable person, knowing the circumstances, would expect that the judge would have actual knowledge, then §455 has been violated
    o Duty to not recuse yourself unless there is a valid reason

**CONTROLLING THE JURY**

• Judgment as a matter of law motions
  o Rule 50 – directed verdict/jnov/judgment as a matter of law
    ▪ If 50a motion is granted and then overturned on appeal – have to go back through the whole trial again
    ▪ If 50b motion (jnov) is granted and then overturned on appeal – just have to reinstate the jury verdict
    ▪ Motion test the sufficiency of the non-moving party’s evidence to meet its burden of production
  o **Simblest v. Maynard** (pg 1097) – standard for JNOV motion – whether the evidence is such that w/o weighing the credibility of the witnesses or the weight of the evidence, there can be but one conclusion as to the verdict that reasonable men could have reached – draw all inferences in favor of non-moving party
  o **Sioux City v. Stout** (pg 1106) – directed verdict was not appropriate since reasonable minds could differ on the result

• New trial motions
  o Rule 59 – new trial motion; Standards for new trial
    ▪ When there are external influences on jury
    ▪ When verdict is not supported by the evidence
    ▪ Procedural problem – *Tanner*
    ▪ Evidentiary grounds – *Spurlin*
  o New trial motions are not immediately appealable!
  o **Tanner v. United States** (pg 1116) – jurors may only testify about external prejudices or outside influences (i.e. cannot grant new trial based on juror
testimony on alcohol and drug use by other jurors during the trial and deliberations)

- **Spurlin v. General Motors Corp.** (pg 1125) – standard for new trial – motion should not be granted unless the verdict is against the great weight of the evidence
  - JNOV – if there is direct, conflicting testimony, case must go to jury
  - Conflicting testimony must be on relevant issues!

- **O’Gee v. Dobbs House, Inc.** (pg 1132) – standard for granting a new trial motion when amount of damages is challenged – when amount is so high that it would be a denial of justice to permit it to stand
  - Remittitur – conditional denial of a new trial motion based on sufficiency of the evidence on damages; conditional on P’s acceptance of a lower award amount – ALLOWED
  - Additur – conditional denial of P’s motion for new trial if D agrees to increase damage award to an amount specified by judge – NOT ALLOWED

**BENCH TRIALS**

- 3 standards of review for appellate courts
  - De novo review
    - No deference given on legal conclusions made by lower courts
  - Clearly erroneous
    - Standard to review findings of fact by a judge
      - Based on witness testimony, documents, or inferences derived from testimony or documents
    - Greatest amount of deference
  - Abuse of discretion
    - New trial rulings, injunctions, preliminary injunctions, Rule 60, 1292b certification

- **Anderson v. City of Bessemer City** (pg 1141) – findings of fact shall not be set aside unless they are clearly erroneous; due regard shall be given to the trial court to judge the credibility of witnesses
  - Title VII backpay actions are equitable actions → no right to jury trial

**RELIEF FROM JUDGMENT AND APPEAL**

- Relief from judgment
  - Rule 60 – Relief from Judgment
    - (a) – clerical mistakes
    - (b) – (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that could not have been discovered through due diligence in time to move for a new trial; (3) fraud, misrepresentation or misconduct of an adverse party; (4) void judgment; (5) satisfied, released or discharged judgment; (6) any other reason justifying relief
    - Rule 60 motion is filed w/judge who issued the judgment
    - Standard of review: abuse of discretion
  - Only trial courts can enter an official judgment
- Mandate – appellate court equivalent to judgment
- Consequence of judgment → right to appeal
  - Ackerman v. United States (additional materials pg 141) – motion for relief from judgment under Rule 60b6 was correctly denied b/c insufficient showing of justifiable circumstances
    - Ackerman made a decision not appeal when Keilbar did and decided not to appeal even when his case was thrown out – relying on bad legal advice is not a sufficiently justifiable circumstance

- Appeal
  - Law of Appeals
    - Statutory provisions establishing appellate jurisdiction
      - 1291 – final decisions of district courts
      - 1292a – injunctions, receivers
      - 1292b – certification
      - 1651 – mandamus (writ filed against trial judge by appellate court)
      - Rule 54b – trial judge entering partial judgment (converts interlocutory order into a final judgment)
  - Commencement
    - Notice of appeal filed in court
    - Certification requires petition to the trial judge – must be approved by trial judge and appellate court
    - Mandamus – commenced by filing a writ of mandamus
  - Stays Pending Appeal
    - Have to meet a standard similar to that for preliminary injunctions
      - Assessment of likelihood of success on the merits
      - Harm to the parties
      - Public interest
  - Basis for Appeal
    - Issue must have been raised in the lower court
    - Appeal is decided on the record – no new evidence – briefs, and sometimes oral arguments
  - Disposition
    - Appellate opinion, mandate, or settlement
    - Rule 16 applies to court of appeals settlement negotiations
  - Standards of Review
  - Timing
    - SCt review of state high court decisions is by the same standards as courts of appeal review of lower court decisions
    - Some judgments which are not final are immediately appealable b/c of their importance and the impact the judgment would have if it was decided incorrectly
    - Cox Broadcasting Corp. v. Cohn (pg 1270) – sets out four categories of cases which are reviewable by the SCt in exception to the general rule (appeal only from final judgment) – ultimately, if the Court wants to review the judgment, it will find a way to do so
Digital Equipment Corp. v. Desktop Direct, Inc. (pg 1278) – judgment which vacates a settlement agreement is not a collateral order w/in the meaning of §1291 and is therefore not immediately appealable
- Examples of collateral orders: denials of immunity, bail, double jeopardy claims, refusal to recuse – these mistakes cannot be remedied if you wait until after a final judgment is rendered to grant an appeal
- Collateral orders are conclusive, completely separate from the merits of the case, and are effectively un-reviewable on appeal of final judgment

Kerr v. United States District Court (pg 1284) – mandamus should only be issued in drastic circumstances b/c it is an exceptional remedy; party must have no other adequate means of obtaining relief and show that the right to issuance of the writ is ‘clear and indisputable’

COLLATERAL EFFECTS OF A JUDGMENT
- Effects of judgment
  - Interest starts to run on monetary judgments in some areas of law
  - Costs are assessed
  - Right to appeal
  - Preclusion of claims in subsequent litigation
- Res judicata – claim preclusion
  - Claim – cause of action
  - Can only have claim preclusion b/t the same parties (but does not have to be on the same side → P v. D, D must bring all possible claims in a counterclaim); cannot assert claim preclusion against a party that was not represented in the first litigation
  - Applies to all claims that could have been raised in the first suit
- Federated Department Stores, Inc. v. Moitie (pg 1159) – res judicata effects are not altered by the fact that the final judgment in the first suit may have been wrong or rested on a legal principle that was later overruled in another case
  - State law allegations in the 2nd suit were essentially the same as the federal allegations already litigated
- Davis v. Dallas Area Rapid Transit (pg 1166) – since the conduct of the second suit came from the ‘same nucleus of operative facts’ (transactional test), it should have been raised in the first suit – D should have sought a stay pending the EEOC right to sue letter
  - 4 elements for claim to be barred by res judicata
    - Parties in both suits are identical
    - Court must have had proper jurisdiction over prior suit
    - Prior judgments must have been final and on the merits
    - P must raise the same cause of action in both suits
  - Transactional test: whether two actions are based on the same nucleus of operative facts and whether all claims arise from a continuous series of events and conduct
- Collateral estoppel – issue preclusion
  - Issues are narrower than claims
  - Mutuality rule – one party should not be bound by an adverse judgment unless, if the judgment had gone the other way, the opposing party would also have been bound
    - Hypo: A is injured by B and C, and loses suit against B
    - A is not bound by judgment in suit against C b/c since C was not a party to the suit against B and therefore C would not have been bound by that judgment had A won
  - Parklane Hosiery Co v. Shore (pg 1212) –
    - Defensive collateral estoppel: A is injured by B and C
      - A v. B → B wins
      - A v. C → A is estopped
      - Generally allowed
    - Offensive collateral estoppel: A and B are injured by C
      - A v. C → A wins
      - B v. C → C is estopped b/c he already lost
      - Should not be allowed where P could have joined in the earlier litigation or application would be unfair to D
      - Trial courts are given broad discretion over whether to allow the use of offensive collateral estoppel
  - Critical questions:
    - Was issue litigated in the first case?
    - Was the issue determined in the first case?
    - Was that determination necessary to the first judgment?
  - If offensive collateral estoppel, then ask:
    - Did D have incentive to litigate vigorously in the first suit?
    - Is judgment inconsistent w/prior judgments?
    - Are there procedural opportunities in the second suit that were unavailable in the first suit?
  - If P could have easily joined the earlier action or if application of offensive issue preclusion would be unfair to D, then it should not be allowed
- Merger – when P wins 1st judgment, her claims are merged into judgment
- Bar – when D wins 1st judgment, subsequent claims are barred
- Recognition of Judgments from Other Jurisdictions
  - Csohan v. United Benefit Life Ins. Co. (pg 1251) – OH court only had personal jurisdiction over the daughter whereas CA has personal jurisdiction over both mother and daughter – there CA was the more proper court to issue judgment in this case