

Domestic Relations

I. Unmarried co-habitants

A. Agreements

1. Express agreements – NY will enforce express Ks unless sole consideration is sex
2. Implied agreements – NY will not find
3. Pre-nuptial agreements
 - a. Generally deal with money and children
 - b. Four issues:
 - i. Only valid if freely made (no duress)
 - ii. Must be in writing, signed, and acknowledged (notarized)
 - iii. Can't pre-agree on divorce
 - iv. Agreements can't be unconscionable (waiver of support the poorer party as a public charge – welfare)
 - c. Not enforceable unless the couple gets married (then binding)

B. Unmarried co-habitants and children

1. Non-marital children – conceived by and born to parents that have never married
2. Determining who is the father:
 - a. Filiation proceeding – suit to prove paternity
 - i. Can be brought anytime up to age (child) 21
 - ii. Evidentiary issues:
 - (A) Standard – clear and convincing evidence
 - (B) Blood-typing only admissible when offered by the Def. To rule out paternity
 - (C) DNA evidence admissible by either party
 - (D) Mother's claim of sexual access of the Def. need not be corroborated
 - (E) Def.'s claim of sexual access by other men must be corroborated
 - iii. When it is established that Def. is the father, it puts the child in the same position as a marital child (same legal obligations, e.g. inheritance)

C. Miscellaneous

1. Heart-balm actions

- a. NY used to recognize tort causes of action for heart balm, but they have been abolished (and it is a felony to file a heart-balm complaint)
 - i. Five types
 - (A) Breach of promise to marry
 - (B) Seduction of an unmarried female (suit by father)
 - (C) Alienation of affections (turning married person against spouse)
 - (D) Criminal conversion (civil cause of action for adultery against spouse's lover)
 - (E) Jactitation of marriage (boasting of a non-existent marital relation)

2. Deceit – a COA for deceit still exists in NY if you lie in order to entice someone into co-habitation (e.g. - arrange a bogus marriage in order to get someone into bed)

3. Gifts – gifts given in contemplation of marriage can be recovered if marriage falls through (e.g. an engagement ring)

- a. doesn't generally apply to gifts while dating

II. Getting married in NY

A. Capacity (see declaration of nullity, annulment)

- 1. Sanity
- 2. Age

B. Must observe formalities

- 1. License
 - a. No blood test required
 - b. Must wait 24 hours after getting license before getting married
 - c. License expires after 60 days
 - d. Failure to get license does not affect the validity of the marriage (a directory requirement)
- 2. Solemnization
 - a. Must have a formal moment when the marriage becomes effective
 - i. Ceremonial marriage – ceremony is the formal moment
 - (A) Need parties, officiant (anyone qualified to administer an oath) and a witness (only need one, but 2 customary)

- ii. Contractual marriage – when parties are not in the same location, each party can sign a K in front of a witness in their respective locations in front of a judge in NY ct
- iii. Marriage at sea – NY recognizes marriage at sea
- iv. Common law marriage – NY does not recognize
 - (A) However, NY will respect common law marriages from other states

III. Once married

- A. Spouses have reciprocal duties to support each other (fair and reasonable support)
 - 1. Fair and reasonable – determined by looking at means of payor (not needs of payee)
 - a. Only look at needs of payee if recipient could become a public charge
 - 2. If not getting requisite support, can go to family court and get a support decree (w/o disturbing the validity of the marriage)
- B. For all other purposes, spouses are considered to be legally separate individuals
 - 1. Can own property in own name
 - 2. Can have separate domiciles
 - 3. Can engage in Ks with one another
 - 4. Can commit torts/crimes against each other
 - 5. Can have whatever names they want to (no requirement to take the husband's name)

IV. Termination of marriage

- A. Five causes of action
 - 1. Declaration of nullity – used by parties in void relationships (legally void b/c serious capacity problems – parties want a piece of paper acknowledging that the marriage doesn't exist)
 - a. Two grounds:
 - i. Bigamy (already married) – innocent party may get declaration of nullity
 - ii. Incest – parties too closely related
 - (A) Blood relation only in NY (ancestors, descendants, or lineal relatives up or down 1 generation)

- (1) Can marry cousins or adopted/step siblings
- b. Grounds not waivable
- 2. Annulment – voidable marriages (valid until annulled)
 - a. Five grounds (+1 additional ground that post-dates marriage)
 - i. Non-age – must be 18 to marry, 16 with consent of 1 parent, 14 with consent of 1 parent and 1 judge
 - (A) Annulment is discretionary on the part of the courts
 - ii. Lack of mental capacity – not lucid at time of marriage
 - (A) If become lucid and stay in marriage, you waive the right to annul
 - (B) Guardian (“committee”) can seek annulment on behalf of incapacitated person
 - iii. Duress – physical threats, etc
 - (A) If after duress is removed, you remain in the marriage, you waive the right to annul
 - iv. Fraud – exists when prior to the marriage, one fiancee lied to the other about something that goes to a vital element of the marriage
 - (A) Three types of fact patterns
 - (1) Misrepresentation concerning religion (considered vital)
 - (a) Waived if stayed in marriage
 - (2) Fraud relating to sex or procreation (considered vital)
 - (a) E.g. - lying about ability/willingness to have children or about sexual expectations
 - (b) Waived if stayed in marriage
 - (B) Statute of limitations – three years from discovery
 - v. Lack of physical capacity – an incurable physical condition that prevents safe and normal sexual intercourse
 - (A) This ground is based on the assumption that couples don't have sex until married
 - (B) Focuses on the ability to have sex, not the ability to have children
 - (C) No jury trial
 - (D) Statute of limitations – 5 years
 - vi. Five years of incurable insanity – must begin after the

marriage

- (A) This is considered a separate ground because it is not something that pre-exists the marriage.
- (B) No statute of limitations

3. Separation and divorce

- a. Separation – does not terminate the marriage; allows parties to live separately; adjudicates the rights of the parties and boils them down to a court order
 - i. Why separation – financial benefits (S.S. Etc); ethical reasons (against divorce)
 - ii. procedure – no jury trial
- b. Grounds (for separation and divorce)
 - i. Cruel and inhumane treatment – encompasses physical and mental abuse
 - (A) Must endanger the well-being of one spouse (subjected test – can this Pl. tolerate behavior or is the Pl. well-being in danger)
 - (B) Sex after abuse is a factor in establishing a defense but is not an absolute defense
 - ii. Abandonment
 - (A) Four elements
 - (1) A voluntary departure of one spouse from the other
 - (2) Departure is without the consent of the Pl. spouse
 - (3) Departure is without justification
 - (4) No intent to resume cohabitation
 - (B) Length of abandonment
 - (1) Separation abandonment must be at least for one year
 - (2) Divorce – no minimum period
 - (C) Constructive abandonment
 - (1) Pl. can establish abandonment if one party leaves the relationship w/o physically leaving the relationship (e.g. Def. is unwilling to have conventional sex or is being uncommunicative)
 - (a) Pl. must establish repeated requests
 - iii. Adultery – an act of sex or deviant sex with a person who

not your spouse

(A) Defenses

- (1) Recrimination – can't get divorced on grounds of adultery if you yourself are an adulterer
- (2) Condonation – waiver or forgiveness (if resume co-habitation after)
- (3) Connivance – entrapment (spouse was set up to cheat)

(B) Statute of limitations – five years

(C) Procedural aspects

- (1) Pleadings -answer in adultery cases does not have to be sworn to (generally pleadings in NY must be sworn to)
- (2) Spouses can only testify to three things:
 - (a) Both spouses can testify to facts of the marriage (when married, etc)
 - (b) Def. can testify to deny adultery
 - (c) Pl. can testify to disprove defense
- (3) Anything else must be proven through circumstantial evidence and third party testimony
- (4) Two kinds of witnesses whose testimony must be corroborated:
 - (a) Detectives
 - (b) Prostitutes

iv. Three years of consecutive imprisonment

c. Ground (for separation only)

i. Failure to support – separation order will fix amount of support and set up periodic payments

d. Ground for divorce only

i. Conversion divorce – NY does not have true no-fault divorce; to get a conversion divorce, couple must be formally separated for 1 year pursuant to a separation agreement (when both parties agree to separate) or court order (when one party has grounds for separation)

(A) Separation agreements

- (1) Analogous to prenuptial (a K in contemplation of divorce)

(2) Customarily deal with

- (a) Property division
- (b) Periodic maintenance payments
- (c) Child custody
- (d) Testamentary

(i) Formal requirements

- Must be freely made;
- In writing; and
- Acknowledged

(ii) Must file with clerk

- Does not need to be on file for full year

(iii) After executed, must be separate and apart for 1 year to get a conversion divorce

- Can't cohabit (sex) with intent to reconcile (this rescinds agreement)
- Sex without intent to reconcile does not rescind agreement

(B) Separation decrees (court ordered)

(1) Can cohabit without affecting 1 year conversion

4. Dissolution of marriage – when spouse disappears

- a. A judicial presumption of death
- b. Must show that spouse has been missing without tiding for 5 years
 - i. Must first make diligent search
 - ii. Must publish request that spouse returns for 3 consecutive weeks in English speaking newspaper
 - iii. Party must have lived in NY for 1 year or NY must have been matrimonial domicile at time of disappearance

B. Procedural issues (for termination of marriage)

1. Subject-matter jurisdiction – 1 spouse must be a NY domiciliary (which can be accomplished almost overnight and Pl. must meet certain residency requirements
 - a. Residency requirements
 - i. If both parties live in NY and grounds occur there, then immediate access to NY courts

ii. If only 1 party lives in NY, can gain access after 1 year residency if one of certain plus factors is present

(A) Plus factors

- (1) Originally married in NY
- (2) Lived at one time in NY as a married couple
- (3) Grounds occurred in NY

iii. If only 1 party lives in NY and no plus factors are present, there is a two-year residency requirement to gain access to NY courts

2. Personal jurisdiction – in order to issue collateral orders (re: money, children, etc) must have PJ over Def.

a. Ways to establish PJ

- i. Def. is NY resident
- ii. Def. voluntarily appears
- iii. Minimum contacts, etc

C. Substance of court orders

1. If there is a separation agreement, the court can simply enforce the K. If not, however, the court must allocate money, property, and custody between the parties

a. Money

i. Maintenance (alimony) – based on the needs of the recipient; court fixes based on a list of factors including marital fault

(A) Usually in the form of periodic payments

(1) Can get order modified if circumstances change (must be substantial change – e.g. payor gets laid off or payee finishes college early)

(B) If maintenance being paid under separation agreement that was not merged into divorce, modification is only available in cases of extreme hardship

ii. How long last?

(A) As long as the order says it does unless automatic termination which occurs if:

- (1) 1 party dies;
- (2) recipient gets married; or
- (3) recipient lives openly with another person as if married.

(B) Parties can provide in separation agreement that payments will continue beyond automatic termination dates (above are simply default rules)

b. Property

- i. NY is an equitable distribution state

(A) Assets are divided into 3 categories

- (1) Husband's separate property
- (2) Wife's separate property
- (3) Marital property

(B) Separate v. Marital property

- (1) Separate property
 - (a) Anything owned prior to marriage;
 - (b) Gifts or inheritance that spouse received during marriage in sole and separate name;
 - (c) Anything spouses agreed would be treated as separate property;
 - (d) Personal injury compensation;
 - (e) Passive appreciation on all of the above
 - (i) Any appreciation caused by the active effort of the other party (both homemakers and parents considered active participants, if in providing that service they freed up time for the other spouse to increase the value of the asset)
- (2) Marital property
 - (a) Anything that is not separate property is marital property regardless of whose name the title is in (including pension plans and educational degrees)

(C) Division

- (1) Husband and wife get all of their respective separate properties
- (2) Marital property divided equally
 - (a) Court is not supposed to consider marital fault (unless egregious)
 - (b) Court can distribute assets in kind or in the form of cash money (taking into account tax concerns, etc)

- (i) In distributing license or degree, court will look at stream of income and require payment of a distributive share
- (c) The longer the marriage the more inclined the court is to give a 50/50 split

c. Children

i. In general

- (A) If you don't want them, you don't have to have them
 - (1) You have constitutional right to contraception and abortion
- (B) If you want them, then you can have them
 - (1) Artificial insemination – if married and husband consents, husband will be treated as father (donor has no legal connection to child)
 - (2) Surrogate parenting – NOT allowed; any agreement between surrogate mother and married couple is void
 - (3) Adoption
 - (a) Any adult can adopt
 - (b) A minor can adopt if married and seeking to adopt spouses children
 - (c) Must be looking for a bona fide parent/child relationship
 - (d) Consent to adopt
 - (i) Need child's consent if over 14
 - (ii) Need parent's consent if child under 18
 - Parents lose right to veto adoption if:
 - i. surrender child to an adoption agency
 - ii. abandon child (6 months with no contact)
 - iii. Neglect (1 year without substantial contact)
 - iv. parent is mentally incapacitated
 - Consenting parents are given a period to think about giving consent (can revoke if they change their mind)
 - (e) There will be an investigation of the adopting home (NY believes in religious matching where possible)

- (f) Adoption order is issued at a court hearing
- (g) Once final, it creates the exact same relationship between a bio parent and child
- (C) If you have them, you must support them
 - (1) Both parents must support child through age 21 (or college graduation in special circumstances)
 - (2) Amount is determined by guidelines, tables, and formulas (very mechanical)
 - (a) Subject to modifications
 - (i) If child is seeking modification, look for changed circumstances
 - (ii) If parent is seeking modification, look for severe and unforeseen changes in circumstances
- ii. Child custody
 - (A) Generally, if court is going to give custody to 1 parent, it will do so “in the best interests of the child”
 - (1) A court will consider various factors in determining what is in the child's best interest
 - (2) No gender presumption
 - (3) In custody battle between bio parent and non-parent, there is a rebuttable presumption that the child's best interests lie with the bio parent
 - (B) Visitation
 - (1) Bio parent without custody is always entitled to visitation
 - (a) It is not dependent on payment of support
 - (b) To interfere with right to visitation could result in contempt
 - (2) Non-parents can petition for visitation and it will be granted if the court determines it to be in the best interests of the child
 - (a) SCOTUS: visitation cannot be given to grandparents over objection of bio parents

V. Conflicts of laws (Federalism)

A. Marriages – a marriage valid where contracted will be honored in NY

unless the rule under which the marriage occurred violates a strong public policy of NY

B. Divorce

1. Bilateral divorce in another state – valid in NY (no collateral attack)
2. Unilateral (ex parte) divorce in another state – presumptively valid (can be collaterally attacked)
3. Bilateral divorce in a foreign country – valid in NY
4. Unilateral (ex parte) divorce in a foreign country – invalid in NY

VI. Domestic relations supplement

A. NY will recognize divorces valid in other states even if that divorce would not have been valid in NY

1. Exception – if grounds violate a strong public policy of NY

B. Out-of-state divorce

1. Four scenarios

- a. Bilateral sister state divorce – granted full faith and credit in NY
- b. Unilateral (ex parte) divorce – respected by state of NY but non-participating party can challenge the jurisdiction of the out-of-state court
- c. Bilateral foreign divorce – recognized by NY under principle of comity
- d. Unilateral (ex parte) foreign divorce – Not recognized

C. Interstate custody order

1. Scenario – one parent moves to another state, wants to get custody re-evaluated in new state
2. UCCJA – statute provides that a court only has jurisdiction in a child custody matter if it is the home state of the child (state when child has been living with parent for 6 months prior to litigation)
 - a. No home state, jurisdiction belongs to the state with substantial contact with the child and substantial evidence is located

D. Interstate support issues

1. A parent is obligated to pay child support, moves to a new state, asks for a re-evaluation of support
2. State-level statute
 - a. UIFSA – every state must defer to the state that is the home state of

the child receiving support

3. Two federal statutes

- a. FFCCSOA – obligates every state to give full faith and credit to the jurisdiction that initially entered the support order
- b. CSRA – if you fall 1 year or \$5000 behind in child support payments and your child lives in another state, you may be sent to prison.

- I. Jurisdiction - state acquires jurisdiction to adjudicate a crime if that state is the legal situs of the crime (the conduct happened there or the results happened there)
 - A. No jurisdiction just because a participant is a resident of a particular state
 - B. Omission – jurisdiction lies where act should have been performed
- II. Merger – generally no merger of crimes
 - A. For bar purposes, solicitation and attempt merge into the substantive offense
 1. Conspiring does not merge into the substantive offense
- III. Essential elements of a crime
 - A. Act or omission
 1. Act – any bodily movement
 - a. The following bodily movements don't qualify for criminal liability
 - i. Conduct not product of own volition (e.g. pushed into person)
 - ii. Reflexive or compulsive acts (e.g. epileptic seizure)
 - iii. Acts performed while unconscious or asleep (e.g. sleepwalking, not falling asleep at the wheel)
 2. Omission – a legal duty can arise in one of five ways
 - a. By statute (e.g. must file tax return)
 - b. By contract (e.g. lifeguard)
 - c. Because of a relationship between the parties (e.g. parent/child, etc)
 - d. Where 1 party voluntarily assumes a duty of care towards another and fails adequately to perform it (e.g. - person is drowning, Def. swims out to help, sees who it is, and swims back)
 - e. Where your conduct created the peril (e.g. pushed someone into a pool that can't swim)
 - B. Mental state
 1. Four mental states
 - a. Specific intent – qualifies for additional defenses
 - b. Malice – murder and arson (only 2 malice crimes)
 - c. General intent – catch all category (e.g. battery and rape)
 - d. Strict liability – no intent necessary
 2. Specific intent crimes

- a. Solicitation
- b. Conspiracy
- c. Attempt
- d. 1st degree murder
 - i. "Murder on the bar exam means common law murder (2nd degree murder in NY – a malice crime)
 - ii. The exam will specify if it is referring to 1st degree murder
- e. Assault – under attempted battery theory of assault (assault as a threat is a general intent crime)
- f. Larceny
- g. Embezzlement
- h. Robbery
- i. Burglary
- j. Forgery

3. Malice crimes

- a. Arson
- b. Murder

4. General intent crimes

- a. Rape
- b. Battery
- c. All other crimes unless they qualify under formula for strict liability

5. Strict liability crimes

- a. Formula – if statute is in the administrative, regulatory, or morality area and you don't see any adverbs in the statute (knowingly, etc) then strict liability applies
- b. Any defense that negates intent is irrelevant

6. Transferred intent

- a. If Def. tried to kill one person but accidentally hit another, he has the requisite intent to be found guilty of both murder and attempted murder
 - i. These crimes don't merge because different victims

IV. Accomplice liability

A. Accomplices are liable for the crime itself and all other foreseeable crimes

1. *Never give anyone accomplice liability unless they were in on the

crime

- a. To be convicted as an accomplice, the person must have given aid, counsel, or encouragement with the intent to aid or encourage the principal in the commission of the crime charged

2. NY distinctions

- a. Accomplice liability cannot benefit from a principal's defense that negates the mental state (e.g. if the principal is found insane, accomplice can still be prosecuted)
- b. Accomplice cannot be charged with intentional murder if he did not share intent
 - i. Accomplice is not absolved from liability even if the principal is acquitted, immune, or not prosecuted
 - ii. A person may not be convicted solely on the uncorroborated testimony of an accomplice.

V. Inchoate offenses

A. Three things

- 1. Solicitation
- 2. Conspiracy
- 3. Attempt

B. Solicitation – asking someone to commit a crime

- 1. If person agrees, then conspiracy (and solicitation merges into conspiracy)

C. Conspiracy

- 1. Tip – people must be pursuing unlawful objective

- 2. Does not merge with substantive offense

- 3. Elements

- a. Agreement (does not have to be express)

- b. Intent to agree

- c. Intent to pursue the unlawful objective

- 4. Liability – each conspirator is liable for all of the crimes of the co-conspirators if those crimes were committed in furtherance of the conspiracy and were foreseeable

- 5. Overt Act requirement

- a. NY and majority – in order to ground liability in conspiracy, the Def. must have committed an overt act in furtherance of the

- conspiracy (any little act will do – e.g. showing up at the place you intent to rob)
- b. Common law and minority – can ground liability in agreement itself (no overt act required)
- 6. Impossibility – no defense to conspiracy
- 7. Withdrawal – can never withdraw from conspiracy itself but can withdraw from liability for co-conspirators' subsequent crimes
- 8. Conspiracy in NY
 - a. Overt act is required (overt act by any conspirator, not each conspirator)
 - b. You can conspire with a police officer (a unilateral approach to conspiracy)
 - c. You can withdraw from liability for conspiracy if you renounce conspiracy and prevent commission of crime
 - d. One who merely conspires to commit crime is only liable for conspiracy (not the subsequent crimes of co-conspirators)
 - i. Acquittal of co-conspirators does not affect charges of other co-conspirators

D. Attempt

- 1. Need specific intent + a substantial step (beyond mere preparation) in the direction of the commission of the crime (act is done with intention of committing the crime but falls short of actually committing crime)

VI. Defenses to crime

A. Insanity – a defense to all crimes including strict liability crimes

- 1. Tests
 - a. M'Naughten test – at time of conduct, Def. lacked the ability to know the wrongfulness of his actions or understand the nature and quality of his actions
 - i. NY uses a similar test – a person is not criminally liable for conduct, if, at the time of the conduct, as a result of mental disease or defect, he lacked the capacity to know or appreciate either the nature or consequences or that it was wrong.
 - b. Irresistible impulse test – Def. lacked the capacity for self-control and free choice

- c. Durham's rule – Def.'s conduct was the product of mental illness
- d. MPC test – Def. lacked the ability to conform his conduct to the requirements of the law

B. Intoxication

- 1. Voluntary (includes addicts) – defense only to specific intent crimes
 - a. Reduces 1st degree murder to 2nd degree
- 2. Involuntary (e.g. someone slips something into your drink) – a defense to all crimes including strict liability (a form of insanity)

C. Infancy

- 1. Under the age of 7, no criminal liability
- 2. Under 14, rebuttable presumption of no criminal liability

D. Self-defense

- 1. Non-deadly force – a victim may use non-deadly force in self-defense any time that a victim reasonably believes force is about to be used on him
- 2. Deadly force – a victim may use deadly force in self-defense any time the victim reasonable believes deadly force is about to be used on him
- 3. NY and minority – only allows deadly force if victim 1st retreats to wall (if safe to do so)
 - a. 3 exceptions
 - i. You don't have to retreat out of your own home
 - (A) Recent case – home does not include hallway/lobby of apartment house
 - ii. You don't have to retreat if you are a victim of rape or robbery
 - iii. Police officers have no duty to retreat

- 4. Do not give back to original aggressor the defense of self-defense except in extreme circumstances (where original aggressor withdraws, runs for the door, and communicates withdrawal to original victim)

E. Defense of a dwelling – deadly force may never be used solely to defend your property (spring gun example)

F. Duress

- 1. On multistate – defense to all crimes except homicide
- 2. NY distinction – duress is an affirmative defense to all crimes including homicide

G. Mistake of Fact

1. Mental state of the crime charged

a. Specific intent – never a defense *

b. Malice or general intent – reduces 1st degree murder to 2nd degree *

c. Strict liability – any mistake, reasonable or not

H. Consent – for bar purposes don't indulge in a consent of the victim defense

I. Entrapment

1. Very narrow exception

2. Generally never available because a predisposition on the part of the Def. negates the defense

3. Entrapment is an affirmative defense in NY

VII. Common law of crimes

A. Battery – a completed assault

B. Assault (two theories):

1. As an attempted battery – a specific intent crime

a. Merges into battery

2. As a threat – general intent crime

C. Homicide

1. Miscellaneous tips

a. Victim must be human

b. "Murder" on the bar exam means common law murder (2nd degree murder in NY – malice crime)

i. The exam will specify if referring to 1st degree murder

2. Murder

a. A homicide is murder if you can show:

i. Intent to kill

ii. Intent to do bodily harm

iii. Highly reckless murder (intentionally doing something that has substantial likelihood of causing death)

iv. Felony murder

b. 1st degree murder

i. No degrees at common law

ii. On multistate, exam will either label it as a 1st degree or give you 1st degree statute

c. Manslaughter

- i. Voluntary – killing out of passion (need some provoking event)
- ii. Involuntary – killing from criminal negligence (e.g. - falling asleep at the wheel of a car)

d. NY Homicide

- i. Murder
 - (A) 1st degree (narrow) – an intentional killing + one of the special circumstances set out on p.5 of the NY distinctions outline (including if intended V was a cop, Def. committed murder for hire, or if committed in the course of the following felonies: robbery, 1st or 2nd degree burglary, kidnapping, arson, rape, sodomy, sexual abuse, escape, attempted 2nd degree murder)
 - (B) 2nd degree – an intentional killing with special circumstances, highly reckless murder, and felony murder (felony = offense for which death or prison sentence of more than one year may be imposed)
- ii. Manslaughter
 - (A) 1st degree – killing someone with the intent to do bodily injury or a provoked killing (voluntary manslaughter at common law = killing out of passion)
 - (B) 2nd degree – killing from recklessness (not highly reckless)
 - (1) Intoxication is not a defense
 - (C) Negligent homicide – a killing from criminal negligence (involuntary manslaughter at common law)

e. Felony murder defenses

- i. If Def. has a defense to underlying felony, then he had a defense to felony murder
- ii. If the felony was independent of the killing
- iii. If death was not foreseeable
- iv. Once Def. reaches some point of temporary safety, subsequent deaths are not felony murders (deaths caused while fleeing are felony murders)
- v. Def. is not liable for death of co-felon as a result of resistance or police

vi. Special NY defense (must prove all elements by a preponderance of the evidence):

- (A) Def. did not commit or aid in the commission of the homicidal act;
- (B) Def. was not armed with a deadly weapon;
- (C) Def. reasonably believed co-felons were not armed with deadly weapons; and
- (D) Def. reasonably believed that co-felons did not intend to engage in conduct likely to result in death or serious bodily injury

D. Kidnapping

- 1. Multistate – requires a victim and a napping
- 2. NY:
 - a. 1st degree – abduction +
 - i. held for ransom;
 - ii. restrained victim with intent to inflict injury; or
 - iii. victim dies
 - b. 2nd degree – all other abductions
 - c. It is a felony murder to kill someone in the course of a kidnapping (any degree)

E. Sex offenses

- 1. Rape – the slightest penetration completes the crime of rape
- 2. Statutory rape – strict liability (consent of victim or mistake of fact is no defense)

F. Property offenses

- 1. Larceny
 - a. Elements:
 - i. A wrongful taking (stealing) and
 - ii. Carrying away (even the slightest bit) of
 - iii. The personal property of another
 - iv. Without consent (consent obtained out of fear or fraud is no consent)
 - v. With the intent (at the time of taking) to deprive the owner permanently of his interest in the property
 - b. Taking property under the belief that it is yours is not common law

larceny

c. NY points

- i. Under NY statute issuing of a bad check is considered larceny
- ii. Larceny is graded based on value of property taken, and in some instances by the manner in which acquired

2. Embezzlement

- a. Key – embezzler always has lawful possession followed by illegal conversion (e.g. trustee)

- b. Embezzler doesn't have to benefit himself

3. False pretenses

- a. Def. persuades owner to convey title by a false pretense (as to a present or past fact)

- i. A false promise to do something in the future is not grounds for false pretense liability

G. Robbery

1. Common law robbery – larceny + assault

a. Elements

- i. Must take from the person or his presence (e.g. tie up farmer in barn and steal from house)
- ii. Must use violence (even the slightest) or put victim in fear (must be threat of imminent harm, not future harm - “your money, or your life!”)

- (A) Ex – pick pocketing is larceny but not robbery
- (B) Threat of future harm is extortion not robbery

b. Extortion v. robbery

- i. Two distinctions

- (A) Don't have to take from person or his presence
- (B) Threat of future harm

c. NY Robbery

- i. 3rd degree – forcibly stealing property (no physical injury and no firearm)

- ii. 2nd degree – forcibly steal property + any one of the following aggravating factors:

- (A) Def. aided by another;
- (B) Def. caused physical injury;

(C) Def. displayed firearm

iii. 1st degree – Def. armed with deadly weapon and caused serious physical injuries

H. Offenses against habitation

1. Burglary

a. Common law burglary (elements):

i. Break-in:

(A) Actual – with some force (however slight)

(1) At common law, if you entered through an open door/window not break-in until you open an interior door

(B) Constructive – entering via fraud or deceit (e.g. - servant uses key given to him)

ii. Entering (when any part of body crosses plane of dwelling)

iii. Dwelling/house of another (not barn/commercial property)

iv. At night

v. With the intent (at the time of the break-in) to commit a felony therein

b. NY burglary (statutory)

i. 3rd degree – includes breaking or entering or remaining behind inside; at any time of day; of any structure (dwelling, office, etc); with the intent to commit any crime inside

ii. 2nd degree – if any one of the following is true

(A) In dwelling

(B) Injury to non-participant

(C) Any burglar was armed

iii. 1st degree – must be dwelling and either there was an injury to non-participant or burglar was armed

2. Arson

a. Common law arson – the malicious burning of the dwelling of another

i. Must be material wasting of the fiber of the building by fire (e.g. - setting carpet on fire and building doesn't burn is not common law arson)

b. NY statutory arson – covers burning, explosion, smoke damage, water damage, etc of any building of anyone (including your own)

Criminal Procedure

I. Exclusionary Rule – remedy whereby victim of illegal search or coerced statement can have that evidence excluded from subsequent proceedings

A. Exceptions

1. Exclusion does not apply in the context of Grand Juries
2. Exclusion is not an available remedy in civil proceedings
3. In order to qualify for exclusion, search in question must violate federal or state constitution or statute
4. Exclusion is not available remedy in parole revocation proceedings
5. Good faith defense to exclusion:
 - a. We will not exclude evidence where the police, in good faith relied on a judicial opinion that was later changed by other opinion
 - b. Good faith reliance on a statute or ordinance later declared unconstitutional
 - c. Good faith reliance on defective search warrant
 - i. NY distinction – NY does not recognize good faith reliance on defective search warrants
6. Excluded evidence may be used for impeachment of Def.'s trial testimony (but not to impeach other Def. witnesses)

B. Expansion of the exclusionary rule:

1. Fruits of the poisonous tree doctrine – expands the exclusionary rule by excluding evidence that is the fruit of unlawful police activity
 - a. 3 ways to break the chain between the original unlawful police activity and the evidence:
 - i. Independent source;
 - ii. Inevitable discovery;
 - iii. Intervening acts of free will of Def.
 - (A) E.g. - Def. is illegally arrested Friday, let out Monday, hired attorney Tuesday, voluntarily returns to police station and confesses on Wednesday > no exclusion

II. The law of arrest

A. Arrest warrants

1. Generally not required before arresting someone in public
2. A non-emergency arrest of an individual in his own home requires an

arrest warrant

3. Station house detention – police need probable cause in order to compel a person to come to the police station either for interrogation or fingerprinting

B. Arrests in NY

1. Sliding scale of police authority (from most minimal intrusion to most intrusive):
 - a. Request for information – police can approach and request information on a whim or caprice. The individual asserting his right not to respond and even to run away does not give police probable cause to arrest him.
 - b. Common law right to inquire – police must have founded suspicion that criminal activity is afoot. The police can ask questions but the detention must be brief. If the individual gives an explanation, the police must release him.
 - c. Stop and frisk – police must have reasonable suspicion.
 - d. Arrest – requires probable cause.

III. The law of search and seizure

A. Model for answering search and seizure questions

1. Does the person even have a 4th Amendment right?
 - a. Government conduct – The 4th Amendment only protects people from government conduct
 - i. Whose conduct is government conduct
 - (A) Publicly paid police (on or off duty)
 - (B) Any party acting at the direction of police
 - (C) Not privately paid police unless deputized with the power to arrest
 - b. Reasonable expectation of privacy? - there are two instances where there is not:
 - i. Where person have no standing to object to the illegality of the search
 - (A) 3 automatic categories of standing
 - (1) You own the premises searched
 - (2) You live at the premises searched
 - (3) Overnight guests

- (B) 2 categories that sometimes give you standing
 - (1) You own property seized
 - (2) You are legitimately present when search takes place
- (C) For the bar exam
 - (1) Overnight guests have standing
 - (2) Passengers in cars who don't claim to own evidence do not have standing
 - (3) An individual briefly on premises of someone else solely for business purposes does not have standing

ii. When item that government wants to seize from you is something that you hold out to the public (and the seizure of which implicates no privacy right):

- (A) The sound of your voice
- (B) The style of your handwriting
- (C) Paint on the outside of your car
- (D) Account record held by a bank
- (E) The location of your car on a public street or in your driveway
- (F) Anything that can be seen across an open field
- (G) Anything that can be seen flying in public airspace
- (H) Odors emanating from your luggage
- (I) Garbage set out on curb for collection

2. If the person is protected by the 4th Amendment, did the police have a search warrant?

- a. If yes, is the search warrant valid?
 - i. Elements of a valid search warrant:
 - (A) Issued on a showing of probable cause
 - (1) Use of informants in NY – to be valid search warrant based in part on an informant's tip the warrant must:
 - (a) Set forth sufficient underlying facts and circumstances to permit the magistrate to know how the informant got his information; and
 - (b) the affidavit must establish the reliability and credibility of that informant (e.g. - “we used this informant twice in the past and both times the information

led to a conviction”)

- (B) Warrant must state with particularity the place to be searched and the things to be seized
- (C) Must be issued by a neutral and detached (“detached from the often competitive business of law enforcement) judicial officer
 - (1) State attorney general – no
 - (2) U.S. Attorney general – no
 - (3) Court clerks – yes

b. If no search warrant (or invalid) does the search fall into one of the 6 exceptions?

i. Search incident to lawful arrest

- (A) Requirements
 - (1) Search must be lawful
 - (2) Search must be contemporaneous in time and place with arrest
 - (3) Scope – the person and his wingspan (areas where he could reach and procure a weapon or destroy evidence)
 - (a) NY distinction – officer must suspect that the arrested person may be armed to search containers in the wingspan
 - (4) Scope when arrested in car – SCOTUS: interior compartment and everything in it but not the trunk (even if occupant has already been removed from the car)
 - (a) NY distinction – once occupant has been removed from the car, police may not remove closed containers or bags to look for weapons or evidence.

ii. Automobile exception

- (A) Police need probable cause
 - (1) Probable cause necessary to justify search can arise after car is stopped (e.g. - a traffic stop) but must exist before any person or thing is searched
- (B) If the police have probable cause, they may search the whole car, including trunk, and any package, luggage, or container that may reasonably contain the item the police have

the probable cause to seize

(C) When arises? - when the police have probable cause to believe that the car is involved in a crime but don't have probable cause to arrest the driver

iii. Plain view exception

(A) Key – law enforcement officer must be legitimately present where he does the viewing

iv. Consent

(A) People can consent to warrantless searches

(1) Standard – consent must be voluntary and intelligent

- (a) Police saying that they have warrant negates consent
- (b) Police do not have to warn you that you have a right not to consent

(2) Authority to consent – where 2 or more people have an equal right to use a piece of property, any one of them can consent to the warrantless search

v. Stop and frisk

(A) Standard – reasonable suspicion

(B) Scope – pat down of clothing

(1) Finding a weapon – if a police officer feels something and it turns out to be a weapon, the weapon is always admissible so long as the stop was reasonable.

(2) Finding contraband – if a police officer feels something and it turns out to be contraband, whether it is admissible depends on how obvious from outside of the clothing that the object was a weapon or contraband

vi. Hot pursuit and evanescent evidence

(A) Hot pursuit – if police are in hot pursuit of a fleeing felon, police can enter anyone's home

(1) How hot – 15 minutes not enough

(2) No other limits – once police enter a home in hot pursuit, they can continue to search the house, look for accomplices, etc.

(B) Evanescent evidence – evidence likely to disappear in the time it would take to get a warrant

(1) E.g. blood sample in DUI case; scraping under finger nails

B. Wiretapping and eavesdropping

1. All wiretapping requires a warrant
2. Everyone in this society assume the risk that the person they are speaking to will consent to government monitoring or will be wired

IV. Miranda rights

A. Constitutional prerequisite to admissibility of any custodial interrogation

B. In order for Miranda rights to be required, there must be:

1. Custody – if at any time you are not free to leave
 - a. Probation interviews and routine traffic stops are not custodial
2. Interrogation – includes any conduct that police knew or should have known might result in a damaging statement (this encompasses more than just asking questions)
 - a. Miranda warnings are not required prior to spontaneous statements (“blurts”)

C. To have a valid confession, police must give a warning and get a waiver

1. Waiver of rights – must be voluntary and intelligent
 - a. No waiver from silence or should shrugging

V. 5th Amendment Right to Counsel

A. SCOTUS created the 5th amendment right to counsel for Def.s who, upon hearing Miranda warnings, ask for an attorney (thus indicating that they want held in the interrogation process)

1. Right – once Def. asserts his right to terminate the interrogation and requests an attorney, reinitiation of interrogation by police without attorney present violates his 5th amendment right to counsel (unless Def. reinitiates questioning)
 - a. Not offense specific – the Def. may not be questioned for any crime without his attorney present (not just the crime he was taken in for)

VI. 6th Amendment right to counsel

A. All other times that a Def. requests an attorney (other than directly after hearing the Miranda warning) the 6th Amendment right to counsel is invoked.

- B. When attached? - 6th Amendment right to counsel attached at all adversarial proceedings (arrest not enough – formal charges must have been filed)
- C. Offense specific – Def.'s attorney must only be present at interrogation (unless right is waived) if Def. is being asked questions related to the case for which the attorney was obtained

VII. Right to counsel in NY

- A. An indelible right to counsel attaches:
 1. When Def. is in custody and police are engaging in activity overwhelming to the lay person and Def. requests counsel
 2. At arraignment
 3. Upon filing an accusatory instrument (e.g. - indictment)
 4. When there has been any significant judicial activity
- B. Once right to counsel attaches
 1. Waiver of rights – a waiver of rights may be obtained from a criminal Def. who is actually known to be represented by an attorney in the pending case only if counsel is present
- C. Child confessions – efforts to keep parent from child (under 16) held by police may invalidate child's confession
 1. No invalidation if no attempt to conceal child or deceive family

VIII. Pretrial identification

- A. 2 substantive ways to attack pretrial identification
 1. Denial of right to counsel – post charge lineups and show-ups give rise to a right to counsel
 - a. Photographic lineups – no right to have counsel present
 2. Denial of due process – some pretrial identification techniques are so unnecessarily suggestive and substantially likely to produce a misidentification that they violate due process
- B. Remedy – exclusion of in-court identification
 1. The purpose behind such rules is to assure that the witness is remembering the Def. from the crime and not just the person from the proceedings
 2. No exclusion if:
 - a. The prosecutor can defeat the remedy by showing an adequate independent source for the identification (e.g. - the witness had

ample time to see the Def. during the crime)

IX. Bail

- A. Bail issues are immediately appealable
- B. Preventative detention is constitutional

X. Grand juries

- A. No multistate issues because states don't have to use Grand juries
- B. Grand juries in NY
 - 1. Consist of between 16-23 people (12 of whom must concur in order to indict)
 - 2. A witness who has been granted immunity may consult with counsel but not in the grand jury room
 - 3. A witness who waives immunity may be accompanied in a grand jury room by counsel
 - 4. A grand jury indictment must be based on legally sufficient (admissible) evidence
 - 5. Any witness who testifies before the grand jury receives transactional immunity (can't be prosecuted for any transaction about which they testify)
 - 6. If Def. requests the opportunity to testify before the grand jury (this is rare), he is entitled to do so provided that he waives immunity

XI. Prosecutorial duty to disclose exculpatory evidence:

- A. Not an issue for the multistate
- B. NY Rosario disclosures
 - 1. NY provides that upon demand, Def. may obtain for inspection and copying:
 - a. His own or co-Def.'s statement to law enforcement officer (including grand jury testimony)
 - b. Tapes or bugged conversations intended to be used at trial
 - c. Relevant photos or drawings prepared by police
 - d. Reports of physical, mental, or scientific tests
 - e. Any other property obtained from Def.
 - f. Approximate time, date, and place of offense charged
 - g. Anything that the state or federal constitution requires to be disclosed to Def. by prosecutor prior to trial
 - h. All specific instances of Def.'s conduct the prosecution intends to

use at trial to impeach Def.'s credibility

2. Between time jury is sworn in and prosecutor's opening statement, the prosecutor must give the Def. any prior written or recorded statements of persons to be called as witnesses and the criminal records of the prosecution's witnesses
3. Def. must notify the prosecution within 30 days of a not-guilty plea, if he plans to raise the insanity defense
4. Within 20 days after arraignment, prosecution may serve Def. with a demand for an alibi defense
 - a. Def. must reply with 8 days
5. Before Def.'s direct case, Def. must make available any relevant prior written or recorded statements by defense witnesses
6. Failure to make Rosario disclosures – results in reversal only if Def. can show that there is a reasonable possibility that the non-disclosures materially contributed to the result of the trial or other proceedings.

XII. Right to a jury trial

- A. Attaches whenever the Def is tried for an offense, the maximum authorized sentence for which exceeds 6 months
 1. Criminal contempt – if sum of sentence exceeds 6 months, alleged contemnor can go back and have a jury trial
- B. Number an unanimity of jurors
 1. Minimum – 6 (must be unanimous)
 2. No federally protected right to a unanimous 12 person jury verdict
 - a. SCOTUS has approved 10-2 and 9-3 verdicts
- C. Preemptory challenges
 1. It is unconstitutional for the prosecution or the defense to exercise preemptory challenges on account of race or gender

XIII. Ineffective assistance of counsel

- A. Elements
 1. Deficient performance by counsel (including conflicts of interest); and
 2. But for such deficiency, the result of the proceeding would have been different
- B. On the bar exam – set out the standard, deny relief (unless you think the Def. was not guilty)

XIV. Guilty pleas and plea bargaining

A. Guilty plea – waiver of right to jury trial

1. General trends

- a. SCOTUS will not disturb guilty pleas after sentencing
- b. SCOTUS has adopted the contract theory of plea-bargaining
 - i. Terms should be revealed on record and both sides held to terms

2. If the Def. pleads guilty, the judge must address him personally about:

- a. The nature of the charge
- b. The maximum authorized sentence and any mandatory minimum sentence
- c. And must tell Def. he has the right to plead not guilty and have a jury trial
- d. Remedy for mistake – Def. may withdraw his plea and plead again

3. Attacking guilty plea after sentencing

- a. Four good bases for attack (despite above trend):
 - i. Plea was involuntary (e.g. - judge didn't tell Def. about minimum sentence)
 - ii. Lack of jurisdiction
 - iii. Ineffective assistance of counsel
 - iv. Failure of prosecutor to keep agreed upon plea bargain

XV. Death penalty

A. Summation

- 1. A death penalty statute that does not give the Def. a chance to present mitigating facts and circumstances is unconstitutional
- 2. There can be no automatic category for imposition of the death penalty
- 3. The state may not by statute limit the mitigating factors; all relevant mitigating evidence must be admissible or state statute is unconstitutional

XVI. Double jeopardy

A. When does double jeopardy attach

- 1. At a jury trial – when jury is sworn in
- 2. At a judge trial – when 1st witness is sworn in
- 3. In civil proceedings, jeopardy does not attach (this is why you can be charged criminally and sued civilly for the same crime)

B. Four exceptions permitting retrial

1. Jury is unable to agree on a verdict (in states requiring unanimous verdict, etc)
2. Mistrial for manifest necessity (e.g. - Def. gets appendicitis)
3. Retrial after successful appeal
4. Breach of an agreed upon plea bargain by the Def.
 - a. Rule – when Def. breaches a plea bargain agreement, his plea and sentence may be withdrawn and the original charges reinstated against him

C. What constitutes the same offense?

1. General rule – 2 crimes do not constitute the same offense if each crime requires proof of an additional element that the other does not
 - a. E.g. - Def. may be charged with manslaughter and hit & run arising out of the same set of facts because manslaughter requires killing (while hit & run does not) and hit & run requires running (while manslaughter does not)
 - b. NY distinction – all criminal offenses arising from the same transaction must be tried together
2. Lesser included offenses – (e.g. robbery = larceny + assault)
 - a. Being put in jeopardy for lesser offense bars retrial for greater offense
 - i. Exception – if put in jeopardy for battery and victim dies, can be tried for murder
3. Separate sovereigns
 - a. Double jeopardy applies to the same sovereign only
 - i. State and federal – not same
 - ii. 2 different states – not same
 - iii. State and locality (e.g. county) – same

XVII. 5th Amendment privilege against self-incrimination

A. Who can assert? Any body (witness, party, etc) asked a question under oath in any kind of case (civil, criminal, administrative, congressional, etc) the response to which might incriminate

1. Must assert the first time asked under oath or you waive the right for all subsequent criminal proceedings

B. Scope of privilege

1. Protects us from compelled testimony (can't make us take lie detector

tests or undergo police interrogation)

2. Does not prevent government from using body to incriminate (can be forced to give hair, blood, urine samples, etc)
- C. It is unconstitutional for prosecution to make a negative comment regarding Def.'s failure to testify or his remaining silent upon hearing Miranda rights
- D. Elimination of 5th Amendment privilege
 1. Three ways
 - a. Grants of immunity
 - i. Common law: use and derivative use immunity – can't use immune testimony to convict but can use evidence that it can be shown was possessed prior to granting immunity
 - ii. NY distinction – transactional immunity: can't be prosecuted for any transaction about which you testify
 - b. No possibility of prosecution (e.g. statute of limitations has run)
 - c. Waiver
 - i. A criminal Def., by taking the stand, waives the privilege as to all subjects on cross-examination

I. Relevance

A. Threshold question – is the evidence relevant?

1. Logical relevance – if the evidence has the tendency to make a material fact or proposition more probable or less probable than without the evidence then that evidence is relevant.
 - a. Warning signs – if the evidence comes from some time, event, or person other than that directly involved in the litigation itself, then it may be too remote to be relevant (see below).
2. Discretionary/pragmatic/policy-based relevance – even if evidence is logically relevant, a trial court may exclude the evidence if its probative value it substantially outweighed by the danger of:
 - a. unfair prejudice
 - b. confusion of the issues
 - c. misleading the jury
 - d. undue delay
 - e. waste of time
 - f. cumulative evidence
 - g. What's missing from this list? - unfair surprise (may possibly get an adjournment but not an exclusion)

B. 8 situations where the evidence concerns some time, even, or person other than that directly involved in the litigation itself, and yet is still admissible.

1. To prove causation in complicated situations
 - a. Example – Pl. got sick after eating at McDonald's; can present evidence that other McDonald's patrons also got sick to prove that McDonald's caused the sickness
 - b. Prior accidents or claims
 - i. Prior accidents or claims by Pl. – generally not admissible
 - (A) Exceptions:
 - (1) Common plan or scheme of fraud (ex. – claims show pattern of fraud)
 - (2) If relevant on issues of damage to Pl. (ex. – injury caused by previous accident, not this accident)
 - ii. Prior accidents involving instrumentality of Def. – Pl. may introduce evidence of other accidents involving the same

instrumentality that occurred under the same or similar circumstances (ex. – 6 other drivers drove into the same bridge support that Pl. did).

(A) Rationale – could show knowledge by Def., or defect in instrumentality

c. If intent or state of mind is an issue

(A) Ex. – in a gender discrimination case, Pl. can show that other qualified women were also denied a job in order to prove Def.'s state of mind.

d. To rebut defense or claim of impossibility

e. Comparable sales to establish value (provided that same kind, time, and geographic area)

f. Habit evidence

i. What constitutes habit?

(A) NOT disposition – disposition of a person is generally not admissible to show that a person acted in accordance with that disposition.

(B) NOT specific acts of conduct – past conduct of a person is generally not admissible to infer person acted in the same way.

(C) Habit is...

(1) Specific – detailed conduct

(2) Recurrent – must occur often enough to say it is habitual (exactly how many times is up to the discretion of the court)

(3) Exam tip: will use words like "invariably" or "routinely" to indicate habit.

ii. NY Distinction – NY is stricter than Federal Rules in terms of admission of habit evidence.

(A) Evidence of habit in professional or business context is admissible.

(B) Habit is not admissible to show that a party used care (or failed to use care) in a negligence situation.

(1) Exception – habit evidence will be admitted if relevant to show Pl.'s use/misuse of a product in a products liability suit.

g. Industrial or business routine (like habit, but here we are talking

about a business, corporation, entity, etc.)

- h. Industrial custom as evidence of the standard of care (not conclusive evidence)
 - i. Evidence may be offered to show what other in the same trade or business have done (perhaps as evidence of what this business should have or could not have done).
 - ii. Ex. – In a negligence action against a bus company, Pl. may introduce evidence that other bus companies have devices that do not allow buses to move while the door is ajar.

C. Rules based on discretionary/policy-based relevance

- 1. Liability insurance – evidence of liability insurance is not admissible as any kind of indication of fault or ability to pay (or absence of liability insurance as indication of inability to pay).
 - a. Still admissible:
 - i. To show ownership or control when in dispute
 - ii. Where relevant to impeach the credibility of a witness by showing bias or motive to misrepresent
- 2. Subsequent remedial measures – not admissible to show negligence or culpable conduct
 - a. Still admissible
 - i. to show ownership or control when disputed;
 - ii. To rebut or show feasibility of precautionary measure when disputed
 - b. Strict liability cases:
 - i. Federal rule – evidence of subsequent remedial measures is also not admissible to show any of the forms of strict liability (failure to warn, defective design, defective product)
 - ii. NY Distinction – NY does not allow the use of evidence of subsequent remedial measures to show failure to warn or defective design, but does allow use of such evidence to show defective product (manufacturing defect).
 - c. Evidence of subsequent remedial measure by non-parties is admissible if relevant.
- 3. Settlements – evidence of settlements is not admissible as any indication of fault, liability, or damages
 - a. This includes an offer to settle a claim that is disputed as to either liability or damages.

- b. Also includes offers to plead guilty, no contest, etc. in a criminal case (and withdrawal of such pleas)
- c. An admission of fact/liability/fault/damages made in course of offer to compromise a claim is not admissible either to prove liability or amount of damages.
- d. Limitations:
 - i. There must be a claim (ex. - Def. Goes to neighbor and asks if he is the one that was bitten by Def.'s dog; it then occurs to the neighbor to bring a lawsuit)
 - ii. There must be a dispute as to liability or amount
- e. Offers to pay hospital or medical bills – not admissible (even though it doesn't qualify as offer to settle because payor gets nothing in return)
 - i. Ad admission of liability made in the course of an offer to pay hospital or medical expenses is admissible.

D. Character evidence:

1. 4 preliminary considerations:
 - a. What is the purpose for the use of character evidence?
 - i. Possible purposes:
 - (A) Character as direct evidence – character itself is a material issue
 - (B) Character as circumstantial (disposition) evidence – character is used to infer conduct at time of litigated event
 - (C) Character to impeach
 - b. How is character proven?
 - i. By specific acts of conduct;
 - ii. By opinion testimony;
 - iii. By reputation (the only NY way)
 - c. What kind of case (civil or criminal)?
 - d. Character for what trait?
 - i. Character evidence must be offered to prove a trait that is substantively at issue in the case.
 2. Character in civil cases
 - a. NO character evidence is admissible in civil cases as circumstantial evidence to infer conduct at time of litigated event (purpose 2 above)
 - b. Character evidence is admissible in civil cases when character

itself is a material issue (purpose 1 above – these cases are very rare)

- i. Can prove in any of three ways (specific acts, opinion, reputation)
- ii. Character evidence can also be used for purposes other than to infer conduct (MIMIC – motive, intent, M.O., common plan, identity)

3. Character in criminal cases

- a. Criminal cases never involve purpose 1
- b. Character as circumstantial evidence to show conduct (purpose 2 above)
 - i. Basic rule - the prosecution may not initiate the presentation of bad character evidence (prior acts, crimes, convictions, bad opinion, bad reputation, etc.) to show the Def.'s criminal disposition to commit the crime charged unless the Def. First shows good character evidence in order to infer innocence (Def.'s testifying to the facts first shows good character to infer innocence (Def.'s testifying to the facts is not enough but this would subject the Def. To impeachment like any other witness)).

(A) How does Def. Show good character?

- (1) Call witness to testify to character trait that is substantively at issue in the case (ex. – peacefulness in assault case)
- (2) Specific acts of conduct – Not allowed in Federal or NY
- (3) Opinion testimony – allowed in Federal but not in NY
- (4) Reputation testimony – allowed in Federal and NY

(B) If Def. Introduces good character evidence, how can prosecution respond?

- (1) Prosecution can cross-examine the Def.'s witness by inquiring as to any specific acts that would tarnish the reputation of the Def. (in order to test the witness's knowledge of the Def.'s reputation)
- (2) Example 1 – "Have you heard the Def. Was arrested 6 times for robbery?"

(3) Example 2 – "Do you know that the Def. Was arrested 6 times for robbery?" (NY distinction – can't ask "do you know" in NY)

- (a) Prosecution must take the answer of the witness even if he says no.
- (b) Prosecution can call bad opinion or bad reputation witness.
- (c) NY Distinction – prosecution can only call bad reputation witness.

(C) NY only:

- (1) Prosecution may also respond by showing any convictions for crimes that involve the pertinent trait or character.

ii. Character of victim:

- (A) Federal rule – if victim's character is relevant to defense, then Def. Can take initiative to show bad character of victim (ex. – Def. is arguing self-defense and wants to offer evidence of victim's aggressive nature) through opinion testimony or reputation (no specific acts)
 - (1) Prosecution can rebut by showing the good character of victim or bad character of the Def. (through opinion testimony or reputation – no specific acts)
- (B) NY Rule – No character evidence may be offered to show the disposition of the victim
- (C) Rape Shield laws (Federal and NY – can't use character of victim to show consent in rape cases)

c. Specific acts used to show things other than disposition

- i. Specific acts (evidence of past acts, crimes, convictions, etc.) are only inadmissible if offered to show Def.'s disposition to commit the crime.
- ii. They can be offered to prove other elements such as (MIMIC):
 - (A) Motive
 - (B) Intent or state of mind
 - (C) Mistake, absence of mistake
 - (D) Identity
 - (E) Modus operandi
 - (F) Common plan or scheme

4. Additional wrinkles:

- a. Trial judge's discretion to exclude the aforementioned evidence when its probative value is outweighed by unfair prejudice
- b. 2 narrow exceptions to the rule that the prosecution may not offer bad character evidence until the Def. offers good character evidence: (1) child molestation cases and (2) sexual assault cases.
 - i. Federal rule – in civil or criminal cases where the Def. is charged with child molestation or sexual assault (even if Def. was not convicted or even prosecuted for the act) may be offered by the prosecution (or Pl. in civil cases) regardless of whether Def. has offered good character evidence.
 - ii. NY Rule – this exception does not exist in NY. *

II. Writings and documentary evidence:

A. Authentication:

1. General rule – a writing is not admissible unless authenticated (the court needs preliminary proof that the writing is what it purports to be)
 - a. Generally, writings are not self-authenticating
 - b. How to authenticate?
 - i. Direct evidence:
 - (A) Admission (e.g. – this is my signature on the contract)
 - (B) Eye witness e.g. – someone who saw the person sign the contract)
 - (C) Proof of handwriting
 - (1) with lay witness – anyone familiar with the person's signature
 - (2) with expert witness – by comparison
 - (3) by jury comparison – if there is genuine specimen admitted
 - ii. Circumstantial evidence:
 - (A) Some types of circumstantial evidence have been indoctrinated
 - (1) Ancient document rule – a writing is admissible if
 - (a) It is 20 years or older (30 years in NY);
 - (b) It is regular on its face (no evidence of erasure); and
 - (c) It is found in a place of natural custody.

(2) Solicited reply doctrine – a disputed writing is admissible if it comes in response to a prior communication

iii. How strong does proof of genuineness have to be?

(A) Rule – a party need only present sufficient evidence to justify a jury finding of genuineness (whether the document is in fact genuine is an issue for the jury to decide)

iv. Self-authenticating writings:

(A) Certified copies of business or public records;

(B) Official publications (books and pamphlets that purport on their face to be from a public authority);

(C) Newspapers and periodicals;

(D) Trade inscription or labels (which are fixed in the course of business purporting to indicate control or ownership);

(E) Acknowledged documents (certificate of acknowledgment attached);

(F) Signatures on commercial documents in accordance with the UCC.

v. Photographs – authentication only requires that any witness look at the photograph and state that it is a fair and accurate portrayal of the people/objects portrayed.

(A) The only situation where admissibility of photographs is questionable is when you don't have a witness to state that it is a fair and accurate portrayal (e.g. – photo from a surveillance camera)

(1) In such cases, testimony regarding whether the camera was operating properly, how the film was handled, etc. is necessary to authenticate

B. Best evidence rule

1. Narror rule – applies only to writings (liberally defined to include films, photos, x-rays, and recordings)
 - a. Expresses a preference for the original document by requiring that a party seeking to prove the content of a writing either:
 - i. Produce the original document; or

(A) Public records – certified copy will do (don't need to produce the original because can't get original)

(B) Voluminous document modification – when original document is so voluminous that it can't conveniently be examined in court, proponent may prove its content by use of a summary, chart, or calculation if:

- (1) The voluminous originals themselves would be admissible (not hearsay, etc.); and
- (2) The opponent is given access to the voluminous originals
- (3) E.g. – personnel records that show a pattern of age discrimination

(C) Duplicates

- (1) Federal rule – duplicates (counterparts produced by any process or technique that accurately reproduces the original and avoids casual error; e.g. - faxes, copies, etc.) are admissible just like the original unless:
 - (a) A genuine question is raised about the validity of the original; or
 - (b) It would be unfair (e.g. – contract is 250 pages, produce copy of 2 sentences taken out of context)
- (2) NY Rule – photocopies are admissible if the copies are made, kept, or recorded in the ordinary course of business.

ii. Account satisfactorily for its absence (in which case a copy or oral testimony may be used to prove the content of the writing)

b. When applies?

- i. When the writing is a legally operative document (creates or destroys a legal relationship that is at issue in the case)
 - (A) E.g. – deed, contract, divorce decree
- ii. Anytime the witness's sole knowledge of a fact is gleaned from the document (no personal knowledge)
 - (A) E.g. - H is arrested and tried for murder of W. H claims he didn't do it, he loved his wife and had no motive to kill her. Police find anonymous note in H's possession which said that W was having sex with another man. Police officer wants to testify to content of the letter to establish motive.

c. When doesn't the Best Evidence Rule apply?

- i. Where the fact to be proven has an existence independent of

the writing (you have a witness with personal knowledge and the fact happens to be in writing as well)

(A) Example 1 – can testify to birth/death without certificate

(B) Example 2 – the issue in the case is whether S made payment. The witness wants to testify and say "I saw S make the payment and get a receipt." (Best Evidence Rule not implicated)

(C) Example 3 – Same witness testifies that he knew S made the payment because he saw the receipt (Best Evidence Rule Implicated – sole knowledge gleaned from receipt)

ii. Collateral documents exception – Best Evidence Rule does not apply to writings of minor significance

III. Witnesses

A. Competency of witnesses:

1. Basic testimonial qualifications:

- a. Perception (witness must have observed something);
- b. Memory (witness must remember something observed);
- c. Communication (witness must be able to communicate what he saw);
- d. Sincerity (witness must demonstrate an appreciation for the obligation to tell the truth).

2. Federal rules:

a. Witness must

- i. Have communicable personal knowledge;
- ii. Take oath or affirmation.

b. Infancy – no automatic disqualification

i. NY distinction:

(A) Civil cases – all testimony must be sworn and all witnesses must be able to understand the oath (thus a child might not be able to testify)

(B) Criminal cases – children under 12 or anyone with a mental defect that does not understand the oath can still testify if the witness has the intelligence to justify the reception of the evidence (but this evidence can't be the sole basis for a conviction)

- c. Many common law reasons for disqualification no longer apply:
 - i. Religion of witness – now irrelevant
 - ii. Judicially declared incompetence – not automatically disqualified if person can give helpful testimony
 - iii. Convictions for crime – not grounds for automatic disqualification
 - iv. Conflicts of interest – not grounds for automatic disqualification, but:
 - (A) Dead Man Statute:
 - (1) Federal rule – there is no Dead Man Act in the Federal Rules, but a state Act will apply in federal cases where state law, under the Erie doctrine, provides the rule of decision (e.g. – diversity cases)
 - (2) Most states – requirements:
 - (a) Interested witness (direct stake in outcome of litigation);
 - (b) Witness must testify against decedent (or incompetent) or their representatives;
 - (c) About communications or transactions with the decedent (or incompetent);
 - (d) Civil cases only;
 - (e) There can be waiver (if decedent's testimony somehow gets before the jury – deposition of decedent, etc.)
 - (3) NY Dead Man Statute – an interested survivor may not testify for his/her interests against a decedent or incompetent or their representatives about a communication or transaction with the decedent or incompetent in a civil case, unless there is a waiver.
 - (a) Rationale – fear of perjury (if decedent was alive, could offset lies, but if he is dead, alive party has the advantage)
 - (b) Exception – an interested survivor may testify regarding facts (but not communications afterwards) of negligence or contributory negligence in accident arising out of operation of automobile, plane, or boat.

B. Examination of witnesses

1. It is the witness not the lawyer who should testify
2. Must be an interrogative not a narrative, but
 - a. No leading questions – questions that suggest answers to witness who is likely to use the suggestion
 - i. A lawyer may use leading questions in the following situations
 - (A) On cross-examination;
 - (B) On direct examination as to preliminary matters (non-crucial);
 - (C) When having difficulty eliciting answers because the witness is handicapped (old, young, immature, dumb, forgetful, etc.);
 - (D) When examining an adverse party (or someone under control of adverse party) or a generally hostile witness.
 - b. No misleading/compound/argumentative questions – kind of questions which assume as true something that is still in dispute.
 3. Use of writing to aid oral testimony
 - a. Basic rule – witnesses are not supposed to read in court (they are supposed to testify from their own recollection of events)
 - i. Exceptions
 - (A) Refreshing recollection ("present recollection revived") – any writing (or even any thing: song, scent, etc.) can be used to jog the memory of a witness.
 - (1) Foundation – witness must say "I can't remember."
 - (2) Doesn't have to be authenticated because it is not being offered into evidence (thus can be hearsay, or not best evidence, etc.)
 - (3) Opposing counsel must be allowed to see and use the item (and can put into evidence if so desired)
 - (B) Recorded recollection ("past recollection recorded") – if witness can't remember to be refreshed, writing can replace recollection of witness.
 - (1) E.g. - witness can remember what was taken in burglary 2 years ago, but such information is contained in a list which the witness prepared for the police at the time of the burglary.
 - (2) Can get the list, etc. into evidence provided you lay the proper foundation:

- (a) At one time witness had personal knowledge;
- (b) Must show writing was made by witness, under supervision of witness, or adopted by witness at the time it was made;
- (c) Writing must have been timely made (when fresh in memory of witness);
- (d) Must show writing is accurate/reliable;
- (e) Necessity – witness must be unable to remember all or part of the details

(3) How it comes into evidence? - it is read to the jury, but does not go to the jury.

(4) Hearsay? – yes, but past recollection recorded is an exception to the hearsay exclusion

C. Opinion testimony

1. Lay opinions – admissible if:
 - a. Opinion is rationally based on the perception of the witness (witness has personal knowledge); and
 - b. Opinion is helpful to the trier of fact (not legal opinions like "Def. was negligent").
2. Expert opinions – 4 requirements for expert testimony:
 - a. The subject matter must be appropriate for expert testimony;
 - i. Relevance – opinion must fit facts of case;
 - ii. Reliable – methodology underling the opinion must be scientifically valid (e.g. - DNA tests)
 - (A) Who determines reliability
 - (1) Federal – it is up to the judge whether the methodology used by the expert is acceptable.
 - (2) NY (General Acceptance Test) – methodology must have gained general acceptance in the scientific community
 - b. The witness must be qualified as an expert (qualifications need not be formal or academic; can be an expert by experience only);
 - i. Must be established to satisfaction of judge by preponderance of the evidence.
 - c. The witness must possess reasonable certainty or probability regarding the opinion (more than mere speculation);
 - d. The opinion must be supported by a proper factual basis

- i. 3 kinds of facts which can support an expert's opinion:
 - (A) facts within the personal knowledge of the expert;
 - (B) facts in evidence in case which are supplied to the expert in court (usually via a hypothetical question)
 - (C) facts of the type that experts in the field would rely upon in making out of court professional decisions (e.g. - general doctor can rely on radiologist's report).

D. Learned texts or treatises

- 1. Federal rule – may use text or treatise in support of own expert witness
 - a. Hearsay problem? – learned treatise exception
 - i. Must establish reliability in 1 of 4 ways
 - (A) If opponent's expert relied on it in his testimony;
 - (B) Eliciting an admission on cross that it is reliable;
 - (C) By calling own expert to testify to its reliability;
 - (D) Judicial notice (if so well-known that judge may take judicial notice of its reliability)
 - ii. Limitations
 - i. There must be an expert on the stand (information is filtered through the expert, own, or opposing.)
 - ii. Text is only read to jury, not given to jury.
 - 2. NY Rule – no hearsay exception (thus can't offer to prove truth of the matter therein), but can offer to impeach opponent's expert.
 - a. Must establish reliability in 1 of 4 ways:
 - i. If opponent's expert relied on it in his testimony;
 - ii. Eliciting an admission on cross that it is reliable;
 - iii. By calling own expert to testify to its reliability;
 - iv. Judicial notice (if so well-known that judge may take judicial notice of its reliability)

E. Cross-examination

- 1. You are entitled as of right to cross-examine any witness who testifies live against you.
 - a. Scope – limited to scope of direct examination and testing the credibility of the witness
 - b. Collateral Matters Doctrine – no extrinsic evidence is allowed to contradict a witness as to collateral matters
 - i. Collateral matters – anything that is only relevant to show

contradiction

F.Credibility and Impeachment

1. Bolstering your own witness:

- a. Rule – you cannot bolster the credibility of your own witness unless there has been an impeachment attack against him (bad before good)
 - i. Prior consistent statements – included in this prohibition
 - (A) Exception – prior statements of identification by a witness
 - (1) Scenario 1 – witness identifies Def. in court, and then testifies to previous ID he made (e.g. - lineup)
 - (a) Federal – allowed
 - (b) NY – allowed
 - (2) Scenario 2 – witness IDs Def. in court, and then police officer testifies to that witness's prior identification
 - (a) Federal – allowed
 - (b) NY – not allowed (when witness makes in court ID, only that witness can testify to prior ID)
 - (3) Scenario 3 – witness can't ID Def. in court (Def. looks different, etc.), so police officer testifies to that witness's prior ID
 - (a) Federal – allowed
 - (b) NY – allowed (3rd party can testify only when eye witness who made identification lacks present recollection)
 - (4) Scenario 4 – person who made prior ID is unavailable so police officer testifies to that person's prior ID
 - (a) Federal – not allowed (hearsay because exception for prior consistent statements only applies to IDs made by a witness, an unavailable person is not a witness)
 - (b) NY – not allowed

2. Impeaching own witness:

- a. Federal – you may freely impeach your own witnesses with no conditions (e.g. – call to stand, goes badly, now need to impeach).
- b. NY – can't impeach own witness except by a prior inconsistent statement which is in writing and signed or given under oath.

3. Impeaching adversary's witness:

a. 5 techniques:

- i. Prior inconsistent statement – showing that witness at some time made a statement different from or inconsistent with a material portion of that witness's in-court testimony
 - (A) Admissible for its truth, or only to impeach the witness?
 - (1) Federal – a prior inconsistent statement that was given under oath and was given as part of a formal trial, hearing, proceeding, or deposition comes in for its truth as well as to impeach (excluded from the definition of hearsay)
 - (2) NY – only admissible to impeach
 - (B) Extrinsic evidence (or only cross-examination?) - extrinsic evidence allowed
 - (1) Foundation (must you give witness opportunity to explain or deny making the inconsistent statement before using extrinsic evidence)?
 - (a) Federal – witness should have the opportunity to explain or deny, but there is no time requirement (thus could introduce the extrinsic evidence and then give the witness an opportunity to explain or deny)
 - (b) NY – yes; and must first give witness opportunity to explain or deny
 - (C) Tip: if it is a prior inconsistent statement by a party, it is an admission and needs no foundation (falls under party admission exception to hearsay)
 - ii. Showing bias, interest, or motive to lie
 - (A) Extrinsic evidence? - yes
 - (1) Foundation – yes
 - iii. Prior conviction of crime
 - (A) Federal rule
 - (1) Any crime, felony or misdemeanor, involving dishonesty or false statement is usable to impeach
 - (a) Public policy relevance (Rule 403 – probative value) does not apply (admissibility is automatic, no discretion for judge)
 - (b) What is a crime of dishonesty? – involves deceit or

false statement (not robbery, not ordinary larceny, yes larceny by trick)

- (2) A felony not involving dishonesty is usable to impeach but is discretionary (Rule 403 applies)
- (3) Remoteness – even if the crime falls into the above 2 categories, it may not be used to impeach if more than 10 years has elapsed since release from confinement (or conviction if no confinement)
- (4) Extrinsic evidence? – yes
 - (a) Foundation? – yes

(B) NY Rule – any crime (felony, misdemeanor, etc.) can be used to impeach at the discretion of the judge

- (1) Extrinsic evidence? – yes
 - (a) Foundation? – yes

iv. Specific acts of misconduct (which do not amount to a conviction):

- (A) Federal rule – must concern act of deceit or lying
 - (1) Must have a reasonable basis for believing the act was committed
 - (2) Extrinsic evidence? - no (cross-examination only)
- (B) NY Rule – any specific acts of misconduct can be used (immoral, etc.)
 - (1) Must have a reasonable basis for believing the act was committed
 - (2) Extrinsic evidence? – no (cross-examination only)

v. Bad reputation for truth or veracity

- (A) Extrinsic evidence? – yes (only way is by calling witness)
- (B) Federal rule – witness can testify as to reputation or give his opinion (based on personal knowledge of reputation)
- (C) NY Rule – reputation only (will allow opinion only if based on reputation)

4. Rehabilitation:

a. Methods:

- i. Good reputation for truth and veracity – can be shown only when there has been a direct character attack on your witness

(impeachment techniques 3, 4, and 5 above)

- ii. Prior consistent statement – can only be used to rebut a charge of recent fabrication because of improper basis or motive (by showing that witness gave a consistent statement before that motive existed)
 - (A) Excluded from the definition of hearsay, thus can be used for its truth as well as to rehabilitate the witness
 - (B) Can't be used to rehabilitate a witness who was impeached by prior inconsistent statement.

IV. Privileges

A. Applicable law:

- 1. Federal – federal privilege law is determined by reference to the common law (judge-made)
- 2. State – state privilege law is determined in accordance with state statutory law

B. Exceptions (that apply to all privileges):

- 1. Future (and continuing) crime/fraud exception;
- 2. At issue exception (no privilege if client affirmatively puts in issue the communication made to attorney, doctor, etc.);
- 3. Disputes between the professional and the client/patient.

C. Attorney-Client privilege – confidential communications between attorneys and their clients made during the professional/legal consultations are privileged from disclosures unless waived by the client (or representatives of the deceased client – the privilege survives the death of the client).

- 1. No privilege for statements made in the presence of 3rd party.
- 2. No privilege for physical evidence or pre-existing documents.
- 3. Must have intent to establish a professional/legal relationship (casual advice to neighbor is not covered).
- 4. Includes things you say to an attorney in retainer negotiations even if you don't ultimately retain that attorney.
- 5. Exceptions (specific to attorney-client privilege):
 - a. If 2 or more clients communicate together with an attorney about a matter of common interest, no privilege exists between or among these joined parties.
 - b. No privilege for information regarding preparation, execution, or revocation when persons are claiming through a deceased client's

will or trust in actions regarding probate, validity, or construction of the will or trust (assumes if client were alive he would have waived privilege).

D. Physician-Patient privilege (includes psychiatrists) – the patient has a privilege against the disclosure of confidential information acquired by a physician in a professional relationship entered into for purposes of obtaining treatment.

1. Patient must be seeking treatment (not doctor that examining for purposes of litigation or court ordered evaluations, etc.)
2. Patient-litigant exception – does not apply in any case where person sues or defends by putting physical/mental condition at issue.
3. For test purposes:
 - a. It is not clear that the physician-client relationship even exists in federal court (though it is clear that the psychiatrist-patient relationship does)
 - b. Thus, test makers will usually give a reason for it not to apply.

E. Spousal privileges

1. Spousal immunity privilege – one spouse cannot be forced to give adverse testimony against the other in a criminal case (witness spouse holds this privilege – can testify if wants to)
 - a. Rationale – protects the stability of existing marriages.
 - b. Requirements:
 - i. Must be married at the time of trial (even if concerns are pre-marital events)
 - ii. Protects against all testimony;
 - iii. Holder is witness spouse
 - iv. Only applies in criminal cases
2. Confidential marital communications privilege – a husband or wife shall not be required or, without the consent of the other, shall not be allowed to disclose a confidential communication made by one to the other during marriage.
 - a. Rationale – encourages open marriages
 - b. Requirements:
 - i. Must be married at the time of communication;
 - ii. Privilege outlasts the marriage;
 - iii. Applies only to confidences (not all testimony);

iv. Holder is either spouse (not just witness spouse – thus both must agree to waive);

v. Applies in both civil or criminal cases

3. Neither privilege applies in intra-family injury cases.

V. In federal court, what law applies as to matters of evidence?

A. When federal substantive law applies (federal question cases, etc.) – Federal rules of evidence apply

B. When substantive state law applies (diversity cases, etc.) – generally federal rules of evidence apply except state evidence rules apply with regard to:

1. burdens of proof and presumptions;

2. rules regarding the competence of witnesses (this is how a state's dead man statute can apply in federal court even though the federal rules don't have such a statute);

3. privileges.

VI. Hearsay

A. Definition of Hearsay:

1. General definition – an out-of-court statement, which is offered for the purpose of establishing the truth of the matter contained in the statement.

2. Cast of characters:

a. Scenario 1 – declarant makes out-of-court statement; witness testifies that he/she heard declarant make the statement.

b. Scenario 2 – declarant makes out-of-court statement in writing; writing is presented in court.

c. Same problem in both – declarant is unavailable to take the stand and be cross-examined.

3. Rationale:

a. When offered to proof truth of the matter – problematic because it denies opponent the opportunity to cross-examine the declarant in order to test the declarant's perception, memory, sincerity, etc.

b. When offered simply to prove that defendant said those words – not problematic because the person whose perception, memory, or sincerity is at issue is the witness's, who is on the stand to be cross-examined.

4. Not hearsay

a. Verbal acts (legally operative facts) – those words which by their

mere utterance carry legal significance.

i. Example 1 – witness testifies: "I heard declarant accept the offer."

ii. Other examples:

- (A) words of contract in contract suit;
- (B) words of defamation in defamation action;
- (C) words of bribery in bribery action;
- (D) words of conspiracy in a conspiracy action;
- (E) words of cancellation;
- (F) words of misrepresentation;
- (G) words of wiver

b. Words offered to show affect on mind of listener/reader – offered to show why listener/reader acted the way they did; reaction

c. Statements offered as relevant circumstantial evidence to show Declarant's own state of mind, which must be relevant to case

5. When witness and declarant are the same person:

a. can still be hearsay (thus inadmissible if offered for the truth of the matter) even this goes against the rationale above

b. Statements excluded by fiat (though they meet hearsay definition):

i. Prior consistent statement given under oath in prior proceeding (see above);

ii. Prior consistent statement offered to rebut charge of recent fabrication because of improper influence or motive (see above);

iii. Prior statements of identification admissible for truth (see above)

B. Exception (because of special reliability):

1. Admission of a party – a declaration of a party offered against that party; party-opponent.

a. Special reliability – there isn't any

b. Exception or non-hearsay?

i. Federal – non hearsay

ii. NY – exception

c. Declarant doesn't need personal knowledge (e.g. - airline president says "negligent again!" in response to news of a crash, even though he doesn't know any of the facts of the accident.)

- i. This comes in even though that same airline president would not have been able to testify to the statement because it is a legal conclusion
- d. Who is a party?
 - i. Vicarious admission (does post-accident declaration of employee bind employer?):
 - (A) Federal – a statement made by an employee concerning a matter in scope of employment is admissible against employer if made during the employment relationship (before fired).
 - (B) NY – a matter of agency (was employee authorized to speak for the company?)
 - ii. When next of kin sue, statements by the decedent are not admissible (unless some other exception applies) because the decedent is not a party.
 - iii. Victim is not a party in a criminal action.
- 2. Former testimony – witness testified live in proceeding 1 but is not available in proceeding 2.
 - a. Special reliability – made under oath
 - b. Admissible under exception if:
 - i. There was a meaningful opportunity to cross-examine the witness in proceeding 1.
 - (A) Not grand jury testimony (because no cross)
 - (B) Issues must be the same in the two proceedings
 - (C) Must be certain of identity of parties (offered against same party as in proceeding 1 or party in privity with that party) who had opportunity to cross-examine.
 - (1) Example 1 – A and B are passengers injured in bus accident; each sues bus company; witness to bus accident testifies *against* the bus company in A's trial but is unavailable for B's trial (testimony comes in under exception – bus company had opportunity to cross-examine in A's trial).
 - (2) Example 2 – A and B are passengers injured in bus accident; each sues bus company; witness to bus accident testifies *for* the bus company in A's trial but is unavailable for B's trial (testimony is excluded because B did not have

opportunity to cross-examine in A's trial and B is not in privity with A).

ii. Unavailability

- (A) death;
- (B) absence from jurisdiction;
- (C) physical/mental illness;
- (D) includes refusal to answer or failure of memory.

3. Statement against interest – a declaration of a person, now unavailable as a witness, against that person's monetary, proprietary, or penal interest or that would expose declarant to defeat of a civil claim at time statement is made.

- a. Special reliability? - likely wouldn't say unless true
- b. Limitation (re: 3rd party confessions) – statement against penal interest offered to exculpate the accused is not admissible unless there are corroborating circumstances clearly indicating trustworthiness of the statement.
- c. Differences from admission of party-opponent:
 - i. Against interest at time made (admission is normally against interest at time of trial);
 - ii. Can be made by anyone (admission must be made by and offered against a party);
 - iii. Personal knowledge required (declarant must know what he is talking about);
 - iv. Unavailability is required (admission requires availability because must be a party)

4. Dying declaration – statement made under sense of impending death

- a. Special reliability – no motive to lie
- b. Four basic aspects
 - i. State of mind requirement – must be made under sense of impending death (for exam – fact pattern must indicate declarant knew he was going to die – saying and then dying is not enough);
 - ii. Death requirement?
 - (A) Federal – declarant need not die (but must be unavailable at time of trial)
 - (B) NY – declarant must die
 - iii. What types of cases?

- (A) Federal – homicide cases and any civil cases
- (B) NY – homicide cases only

iv. Content limitation – must concern the cause or circumstances of the impending death.

5. Group of exceptions (unavailability not required; rationale – what declarant said back then might be more reliable than what declarant might say now):

- a. Declaration of then present state of mind which is at issue in the case;
- b. Declaration of present intent to do something in not too distant future – admissible to infer that the intended future act was carried out.
- c. Excited utterance
 - i. 3 requirements:
 - (A) Startling event
 - (B) Statement must be made under stress of the excitement (can't think, thus can't lie);
 - (1) There can't be a time lapse, depending on what's going on during that lapse.
 - (C) Statement must concern the facts of the startling event;
 - d. Present sense impression – declarant is describing something at very moment it is happening.
 - i. E.g. - mother calls victim; victim says "hold on a second, someone's at the door. I can't talk it's S." Victim is then found dead. Mother can testify to what victim said at S's trial
 - ii. NY corroboration requirement – content of statement must be corroborated
 - e. Declaration of present physical condition – admissible by anyone who hears it.
 - f. Declaration of past physical condition – admissible if made to medical personnel for purposes of diagnosis or treatment (including diagnosis solely for purposes of giving testimony)
 - i. Does not exist in NY

6. Business records

- a. Special reliability – employees have incentive to be accurate in observing, reporting, etc. because they may be fired if they are not.

- b. Function – allows record to substitute for what employees could say live
- c. Requirements:
 - i. Entry must be germane to business;
 - ii. Information in record must come from someone who has duty within scope of business to accurately record (information in record that came from outsider who reported it to the company and employee put the information in a business record – doesn't fall under exception because employees couldn't testify to this live: 2 levels of hearsay so you need 2 exceptions).
 - (A) 3rd party source – double level hearsay (both levels must have an exception)
 - (1) E.g. - police reports:
 - (a) Observations of officer – in under business record exception
 - (b) Statement of witness questioned by officer – inadmissible because two levels
 - (c) Statement of Def. taken by police – hearsay but admissible because of business records and party admission exceptions

C. Recurring fact questions on exam:

1. Who decides preliminary questions of fact upon which admissibility depends?
 - a. Judge determines, but judge is not bound by the rules of evidence (can use hearsay, unauthenticated documents, etc.)
 - i. E.g. - judge can use letter from declarant saying he is unavailable even if it is unauthenticated and hearsay.
2. Can impeach credibility of hearsay declarant like any live witness
 - a. E.g. - dying declaration or excited utterance by declarant who later contradicts himself; witness testifies as to hearing the first statement; can impeach witness with prior inconsistent statement.
3. Witness wants to testify as to what he heard on a recording
 - a. Recording itself must not be inadmissible hearsay
 - b. Best Evidence Problem (because witness's sole knowledge comes from what he heard on the tape)
 - i. Must explain why recording itself was not produced

New York Practice

I. SM jurisdiction

- A. Ct must have SMJ (competence) to hear the type of controversy brought before it
 - 1. NY Supreme Ct - the only ct in NY that has general, original SMJ
 - a. One branch in each of 62 counties
 - b. Unlimited monetary jurisdiction (no min. or max.)
 - c. Full equity jurisdiction (specific performance, injunctions, etc)
 - d. Exceptions
 - i. Where federal law confers exclusive jurisdiction to federal cts (eg – bankruptcy, patents, copyrights)
 - ii. Claims for \$ damages in tort of K against the State (not municipal government) of NY (must be brought to NY Ct of Claims)
 - e. NY Supreme Ct has exclusive SMJ over:
 - i. Matrimonial actions
 - ii. CPLR Art. 78 proceedings
 - iii. Declaratory judgment actions
 - 2. All other cts – characterized by limited monetary jurisdiction
 - 3. Appeals cts – highest ct in NY is the Ct of Appeals, and the intermediate appellate ct is the Appellate Division

II. Statute of limitations

- A. An affirmative defense based on passage of time
- B. When does SoL begin to run?
 - 1. General rule: when CoA accrues
 - a. P.I./prop. damage – when impact occurs
 - b. Breach of K – date of breach
 - c. Infant injured in utero – child has no CoA unless born alive, then date of birth
- C. To satisfy SoL, action must be commenced not later than last day of prescribed period
 - 1. Supreme and County Cts – process filed before last day
 - 2. All other cts – process served on D on or before last day
- D. SoLs
 - 1. P.I. - 3 yrs

2. Wrongful death – 2 yrs
3. Breach of K, not UCC Art. 2 – 6 yrs
4. Breach of K, UCC Art 2 – 4 yrs
5. Intention tort to person – 1 yr
6. Art 78 proceeding – 4 mos.
7. Medical malpractice – 2 $\frac{1}{2}$ yrs (from date of malpractice)
 - a. Suing hospital on theory of respondeat superior – same 2 $\frac{1}{2}$ yrs
 - b. Suing hospital for negligent hiring – 3 yrs from date of hiring
 - c. Two exceptions
 - i. Continuous treatment rule – 2 $\frac{1}{2}$ yrs after termination of treatment
 - ii. Foreign object rule – not intended to be left behind, 2 $\frac{1}{2}$ yrs from operation or 1 yr from discovery or should have discovered (whichever longer)
 - (A) Not foreign objects – chemical substances (eg – medicine), prosthetic device, fixation device (internal sutures, pacemaker, diaphragm)
8. Other professional malpractice (architects, engineers, accountants, attorneys)
 - a. SoL – 3 yrs from termination of particular services
 - i. Eg – architect after completion of building
 - ii. If P.I. Involved, then 3 yrs after injury
 - (A) Legislation – if P.I. Claim against architect/engineer brought >10 yrs after completion
 - (I) P must serve notice on D at least 90 days before suit
 - (II) D may obtain discovery from potential P during 90 day period
 - (III) If D moves for summary judgment, then P must make evidentiary showing of substantive basis that D negligence was the proximate cause of the injuries
9. Products liability
 - a. Negligence – 3 yrs from date of injury (as against all Ds in chain of distribution)
 - b. Strict products liability – same as above
 - c. Breach of warranty – UCC 4 yr SoL (when particular D sold

product)

10. Indemnity and contribution

- a. 6 yr SoL running from date of payment of judgment

11. Exposure to toxic substances

- a. 3 yrs from date injury is or should have been discovered by P
- b. Toxic substance – any inherently harmful toxin that has latent or slow developing effects (e.g. - DES, asbestos, HIV)
- c. Exposure – assimilation into one's body or prop. , including implantation (breasts)

E. Tolling and extensions

1. Toll for D's absence

- a. If D not in NY when CoA accrues, the SoL does not run until D comes to NY
- b. If D is in NY when CoA accrues but leaves and is continually absent for 4 mos. , then toll applies to entire period of absence
- c. Exception – neither toll for absence if P has basis for PJ over D such that D could be validly served outside of NY

2. P's infancy or insanity (legal disabilities)

- a. Infants (under 18) or insane Ps may sue w/i regular SoL through competent adult representative but may also get benefit of a toll
- b. If P is infant/insane at time CoA accrues, the SoL is tolled until disability ends
 - i. Insanity – any mental disorder that causes an overall inability to function (need not have gone through formal ct proceeding)
 - c. When disability ends, how long does Pl have to sue?
 - i. If original SoL greater than or equal to 3 yrs – 3 yrs
 - ii. If original SoL less than 3 yrs – period of original SoL
 - d. 10 yr outside time limit
 - i. For infancy toll – claim for medical malpractice must be commenced no later than 10 yrs from date of accrual
 - ii. For insanity toll – all claims time barred after 10 yrs from date of accrual

3. Tolls for death

- a. Potential P death

- i. Survival claim – any CoA P herself would have brought if she

was alive

- (A) SoL – if underlying claim still timely on date of death, P gets time remaining on decedent's claim or 1 yr from date of death (whichever longer)
- ii. Wrongful death claim – a tort claim for the pecuniary damages of decedents statutory distributees (surviving spouse, children, etc)
 - (A) SoL – 2 yrs from date of death, if at time of death, decedents underlying PI claim would still be timely
- b. Potential D death
 - i. If occurs before SoL expires, mos. are always added to relevant limitations period
- 4. Six month grace period
 - a. If a NY action is timely commenced, but is thereafter dismissed before trial AND at the time of dismissal the SoL expired or less than 6 mos. remaining, P gets six mos. from date of dismissal to refile same action and serve process on same D
 - i. 4 types of dismissal not applicable
 - (A) on merits
 - (B) voluntary discontinuance by Pl
 - (C) Pl's negligence to prosecute
 - (D) lack of PJ
- 5. The "Borrowing Statute"
 - a. If the CoA arises outside of NY, a choice of law problem exists if SoL of other state different. Borrowing statute prevents forum shopping by non-resident Ps seeking longer SoL in NY
 - i. If P was non-resident of NY when out-of-state claim arose – a NY ct will apply other SoL if shorter
 - (A) If longer, then apply NY SoL
 - ii. If P was a N resident when out-of-state claim arose – a NY ct will always apply NY SoL

III. Personal Jurisdiction

A. Overview

1. In addition to SMJ, 3 additional jurisdictional elements required for ct to render valid judgment (enforceable in NY and full faith & credit elsewhere)

- a. Proper commencement of action
- b. Proper service of process on D
- c. Proper basis of jurisdiction over person/prop. involved in the action

B. Proper commencement of the act

1. How

- a. Lower civil cts – serving process on D (a summons and complaint or summons on notice)
- b. Supreme Ct and County cts – filing process w/ ct clerk (filing must be accompanied by payment of fee for purchase of an index number [?] and is followed by service of process on D(s))
 - i. If served on D w/ (1?)20 days → commencement = valid
 - (A) Ct has discretion to extend the period upon showing of good cause (due diligence) or in the interest of justice
 - (B) If D wants to challenge timeliness of service of process, D must make mtn to dismiss for untimely service and ct may determine whether there exists good cause for extension and grant it retroactively

C. Proper service of process

1. Form

- a. Summons and complaint – summons advises D that P is suing in particular ct. Complaint is P's claim and specifies transaction or occurrence that is the subject matter of the action and spells out essential elements of P's CoA; OR
- b. Summons w/ notice – when not complaint, must have sufficient "notice" inscribed on face or 1 page attachment
 - i. Notice must consist of:
 - (A) Brief statement of nature of action
 - (B) Nature of relief being sought
 - (C) If P is seeking damages, must specify amount

c. Consequence of service of naked summons

- i. It is a defect in PJ and action is subject to dismissal for this reason alone

2. Methods of serving process

a. Basic points

- i. Who may serve? Person 18 or older and not a party

- ii. Process may be served on any day of the week (including holidays) except:
 - (A) Sunday
 - (B) Saturday (if P knows D is a Saturday Sabbath observer)
- b. Traditional methods of serving natural persons
 - i. Personal deliver to Def – by process server → complete
 - ii. Leave and mail – process server leaves w/ person of suitable age and discretion at D's actual dwelling or place of business PLUS mail a copy by regular mail to D at his place of business or last-known residence w/i 20 days of leaving
 - (A) Security guard – OK
 - (B) Multiple Ds – if live/work at same location, need to leave and mail separate copies
 - (C) Service is complete 10 days after proof of service filed (an affidavit by process server describing details of service, eg time, date, place, description of person served, mailing, etc)
 - (I) This is when D's response time will begin to run in such cases
 - (a) P's failure to file proof of service does not cause jurisdictional defect and is not grounds for dismissal
 - (b) The only consequence of failure or delay is the postponement of D's response time
 - iii. Affix and mail – process server may affix process to the door of D's actual dwelling or place of business PLUS mail a copy by regular mail to D at D's place of business or last-known residence (affixing and mailing must be performed w/i 20 days of each other)
 - (A) BUT process server must 1st exercise due diligence in attempting to serve D directly or to leave w/ a person of age/discretion (several attempts, on different days, at different times)
 - (B) Service complete 10 days after PoS filed
 - iv. Expedient service – if foregoing methods are not practicable, P may make an ex parte mtn to ct for an order allowing improv method (some reasonable alternative appropriate under

circumstances – e.g. service on liability insurer)

- v. Agent specifically designated by D to receive process – party expressly (in written K, etc) specifies agent upon whom process may be served in dispute arising from K
- vi. Serving infants and the mentally incapacitated
 - (A) Infants – D's name on summons but served on eligible adult
 - (I) Eligible adult – parent, guardian, custodian, or live-in spouse
 - (II) If over 14, process served on eligible adult and infant
 - (B) Mentally incapacitated person w/ ct appt'd guardian – process must be served on guardian and D
 - (I) If not guardian, then normal service and GAL later appt'd by ct.
- vii. Service outside of NY – same methods (assuming there exists a basis for out-of-state service)
 - (A) Who may serve?
 - (I) Any NY resident authorized under NY law
 - (II) Process server authorized in the other state
 - (III) L licensed in other state

c. Traditional methods of serving corps

- i. Personal delivery (anywhere in U.S. Assuming basis of NY jurisdiction over corp) to an officer, director, designated agent, or managing agent (corp employee w/ supervisory responsibility)
- ii. Service on NY Sec. Of State
 - (A) Domestic corp or licensed foreign corp – 2 copies of process served on the NY Sec of St (sec will mail 1 copy by certified mail to corp at address on file)
 - (B) Unlicensed foreign corps – deliver 1 copy to NY Sec of St and P mails 1 copy to corp by certified mail

d. Non-traditional methods for persons/corps

- i. Service by 1st-class mail plus acknowledgment – enclose statutory acknowledgment form and a return envelope, postage prepaid, addressed to sender. Service will only be effective if D signs and returns form to P w/i 30 days after D receives it.

Service complete upon D mailing form.

- (A) If D doesn't return, traditional method must be used but D pays for second try.
- (B) D's return of acknowledged form is not a concession that ct has jurisdiction (just acknowledgment of receipt of process)

D. Basis of jurisdiction over D's person

- 1. Territorial connection between D and state of NY (enables judgment for \$ damages to be enforced in full):
 - a. Presence in NY – personal delivery to a D while that D is physically present in NY establishes a basis of PJ
 - b. Doing business in NY – a domestic corp or licensed foreign corp or unlicensed corp doing business – ct has PJ no matter where CoA arose
 - i. Best evience – NY office
 - ii. Ads/solicitation in NY not enough
 - iii. Transient presence of officer – not enough (even if served personally while in N)
 - c. Domicile – NY has jurisdiction over all Ds who are domiciliaries at time action commenced
 - i. Domicile vs. residence – domicile – permanent; residence – where u stay @
 - d. Long-arm jurisdiction – 1 of 5 categories of NY related activity
 - i. Business transaction in NY
 - ii. K for goods/services to NY
 - (A) One-shot order not enough
 - (B) K to pay \$ in NY not enough
 - iii. Tortious act w/i NY
 - (A) Defamation claims excluded
 - iv. Tort injury in NY *plus*:
 - (A) D solicits business in NY
 - (B) Business in NY is substantial part o f revenue
 - (C) Tort in NY foreseeable + substantial revenue from interstate commerce
 - (I) Purposefully include NY (for due process)
 - (D) Notes

- (I) A physician's medical services are inherently local → no long-arm jurisdiction
- (II) Defamation claims excluded
- v. Claim arises from D's real prop. in NY
- vi. Exam tip – in essay questions, first discuss whether facts of P's case fall w/i 1 or more of the 5 long-arm categories. Then, briefly discuss whether particular assertion of jurisdiction would satisfy due process
 - (A) Test for DP – D purposefully directed business to NY → should reasonably anticipate PJ
- e. Non-resident motorist statute (actually non-domiciliary) confers PJ over an accident claim arising on NY roadway
 - i. Overlaps w/ long-arm jurisdiction method #3 but 2 unique features
 - (A) P serves process on D by serving one copy on Sec. Of St. plus mailing 2d copy to D by certified mail to D's out-of-state residence.
 - (B) Allows for jurisdiction over car's owner if driver w/ permission
- f. Consent – parties to a K may consent in advance to PJ in NP in a forum selection clause. Such clause is generally enforceable absent fraud, overreaching, or unreasonableness

E. Matrimonial jurisdiction

1. Supreme Ct is only ct w/ SMJ over these actions
2. Don't need PJ over D for separation, divorce, or annulment
3. P must be a domiciliary of NY (in rem [owning prop. ?] - marital status deemed to be in NY)
4. If seeking \$ support, etc, must have PJ over D spouse
 - a. Matrimonial long-arm statute – where P spouse is a resident of NY, long-arm jurisdiction can be acquired over D spouse if:
 - i. NY was matrimonial domicile of P and D prior to separation
 - ii. D abandoned P in NY
 - iii. D's monetary obligation accrued under an agreement executed in NY; or
 - iv. D's monetary obligation accrued "under the laws of NY"

5. Serving process – P cannot use "leave and mail" or "affix and mail" w/o first getting ct order
6. Event if PJ over D, check P's durational requirements because if insufficient → dismissal on merits (substance of case, not ct jurisdiction, see Dom Rel)

IV. Venue

- A. Actions in which judgments would affect title or possession to real prop.
– proper venue is NY county where land is
- B. All other actions – proper venue is any county in NY in which any one of the parties resides at commencement (if no party resides in NY, then any county is proper venue)
 1. D must serve a demand on P for change of venue
 2. Before or w/ answer
 3. P can just consent to change
 4. Or if P objects/is silent, D must make mtn for change (which must be granted at a matter of right if the P chose an improper venue and D chose a proper venue)

V. D's response

- A. Response to summons and complaint
 1. D can response in 2 ways:
 - a. Serve an answer, or
 - i. Contests allegations or raises affirmative defenses (waived if not plead); also counter-claim(s) and cross-claim(s) (against other D's and can be based on any other type of claim that D has against other D(s)) Each party must serve copy of pleading on all other parties who have appeared in the action
 - ii. Service of answer (and other interlocutory papers) – done by 1st class mail and served on L for the other party(ies) (deemed made upon mailing, not receipt)
 - iii. Time limits for serving answer:
 - (A) If D was served by personal delivery w/i NY – D must serve answer w/i 20 days of delivery
 - (B) If D served by 1st class mail and acknowledgment (and D replied) – w/i 20 days of returning acknowledgment form
 - (C) D served under other circumstances – D must serve

answer w/i 30 days from when service process was complete

iv. Affirmative defenses not raised in answer are waived except:

- (A) Non-joinder of necessary party
- (B) Failure to state cause of action
- (C) Lack of SMJ

b. Make a mtn to dismiss under CPLR 3211

i. There are 8 grounds:

- (A) Documentary evidence as basis for defense
- (B) Other action pending between same parties on same CoA
- (C) Want of capacity (e.g. - P is an infant suing w/ oproper representative, or P is beneficiary suing on behalf of trust
- (D) Non-joinder of necessary party
- (E) Failure to state CoA – prima facie insufficient in light favorable to non-moving party
- (F) Affirmative defenses under CPLR (SPARERIBS):

- (I) SoL
- (II) Payment
- (III) Arbitration award
- (IV) Release
- (V) Estoppel (collateral)
- (VI) Res judicata
- (VII) Infancy of D
- (VIII) Bankruptcy discharged
- (IX) SoF

(G) Lack of PJ

- (I) Improper commencement (defective summons)
- (II) Improper service
- (III) Lack of basis of jurisdiction

(H) Lack of SMJ

ii. Procedural aspects

- (A) mtn made before service of answer
- (B) Mtn extends time to answer (10 days after denial of mtn)
- (C) D has to state all possibles grounds in 1 mtn to dismiss
- (D) Waiver – a mtn on any ground listed in 3211 does not preclude raising any other ground in answer, except lack of PJ

defense:

(I) How to preserve PJ defenses

- (a) Before serving answer, make 3211 mtn to dismiss and include lack of PJ; or
- (b) Make no 3211 mtn on any ground and include lack of PJ in answer
- (c) Note: if D pleads improper service, must later move for summary judgment w/i 60 days of serving answer

B. Responses to summons w/ notice

- 1. To avoid default, D must serve
 - a. a demand for complaint, or
 - b. Notice of appearance
- 2. Time limits (for either above) – same as w/ responding to summons and complaint
- 3. Effect of above – P req'd to serve complaint w/i 20 days
 - a. Assuming that P timely serves complaint, D has 20 days from such service to either answer or make a 3211 mtn to dismiss
 - b. P failure to do so allows D to move to dismiss based on P's non-compliance (failure to prosecute). To avoid dismissal, P must show reasonable excuse for a delay and make evidentiary showing that there is merit to the P's CoA
 - c. Neither demand for complaint nor a notice of appearance is a waiver of jurisdictional objections

C. Amendments and pleadings

- 1. Allowed once as a matter of right (w/ judicial permission). "Free amendment" can include anything that could have been in original pleading. Can be made during the following periods:
 - a. P can amend up to 20 days after D answers
 - b. D can amend up to 20 days after D answers
- 2. When 'free amendment' period has expired, or the party uses up, a mtn for leave to amend in req'd
 - a. Std (liberal) – in general, the amendment will be allowed as long as opponent will suffer no incurable prejudice (detrimental change in position) as a result of delay – e.g. a witness died

VI. 3d Party practice, contribution, and indemnification

A.3d party practice (impleader)

1. A procedural device used by D to join another party alleged to be liable in whole or in part to D for damages that D may have to pay P (the usual claim in these circumstances is for indemnity or contribution)
 - a. Rather than forcing D to pay judgment to P then sue, D just adds 3d party D (TPD)
 - i. In relation to TPD, D technically is now 3d party P
 - b. Procedure – D may implead TPD any time after answer.
 - i. D must:
 - (A) File summons and 3d party complaint
 - (B) Serve (within 120 days of filing) a copy of above on P and TPD (must have basis of jurisdiction over TPD and properly serve)
 - ii. TPD answer time same – 20 or 30 days depending on where and how TPD was served w/ process
 - iii. After TPD is joined, P may amend complaint to assert claim directly against TPD, thereby making TPD additional D in P's action. P can make w/ judicial permission if within 20 days after served w/ TPD answer. If after 20 days – P needs ct permission
 - (A) Timely – the P's amendment deemed timely (even if SoL on action has run) as long as the TPD was impleaded within SoL of Def's claim

2. Grounds for impleading

- a. Indemnity – allows 1 party to shift 100% of the responsibility to another entity
 - i. By K – ex: in construction K, subcontractor may agree to indemnify contractor for subcontractor's work
 - ii. Implied in law
 - (A) Products liability – retailer held liable for selling defective product is entitled to indemnity from manufacturer
 - (B) Vicarious liability situations – in NY, the owner of a car vicariously liable for damage caused by negligent driver using w/ permission. Owner who pays victim is entitled to indemnity

from driver.

- b. Contribution – involves a sharing of loss (apportionment) among multiple tortfeasors who are all actual participants of the tort
 - i. Purpose – mitigate harshness of joint and several liability
 - ii. Mechanics of judgment for joint and several liability -
 - (A) Each tortfeasor is liable to the P for full amount, regardless of % of fault (judgment entered in full for each D)
 - (B) P only entitled to collect only the judgment amount, but may collect from any one of them
 - (C) The paying D may then seek contribution from the other Ds
 - iii. Intentional tortious conduct
 - (A) Multistate rule – contribution not available when nature of liability involves intentional wrongdoing
 - (B) NY Rule – contribution available in all tort cases
 - iv. Ways to assert claims for contribution
 - (A) If P originally joined tortfeasors as Co-Ds, they can assert cross-claims for contribution against each other
 - (B) If P omits a tortfeasor, a D can implead the outsider as TPD
 - v. Allocating contribution amount
 - (A) Equal shares formula (minority view) – shares always equal in amount regardless of D's respective % of fault
 - (B) Comparative degrees of fault (multistate and NY view) – the amount of contribution to which a tortfeasor is entitled is the excess actually paid by him, over and above his equitable share of the judgment
 - vi. Substantive law rule for contribution – the general rule is that a right to contribution exists whenever TPD breached a duty in tort which contributed to or aggravated the damages for which D may be held liable to P Thus, TPD may be held liable for contribution even if TPD has no direct liability to P
 - (A) Ex – P owns building, buys fire alarm from A, forms K w/ B for alarm monitoring w/ clause limited liability to gross negligence, fire occurs, alarm fails, and B negligently reported

fire too late. P sues A for products liability and A impleads B for contribution. Allowed even though B not liable to P because limiting clause.

(B) Exception – worker's comp

(I) MS rule – a TPD (e.g. - manufacturer of product employee was using at work when injured) never has the right of contribution from P's employer.

(II) NY Rule – a TPD only has the right to contribution from P's employer if the P sustained a grave injury

(a) Grave injury – death, loss of body part (index finger or >1 finger, >1 toe), para-/quadriplegia, severe facial disfigurement, total deafness or blindness, or brain damage causing total disability.

c. Settlements in cases involving multiple tortfeasors

i. The pretrial release of 1 tortfeasor in partial satisfaction of a claim does not discharge liability of other tortfeasors

ii. Reduction formula – any judgment against a non-settling tortfeasor must be reduced by either the amount of the settlement or the settling tortfeasor's equitable share of the fault (whichever is larger)

iii. Effect of settlement in cases involving contribution claims – pretrial settlement extinguishes contribution claims by and against settling party

iv. Effect on indemnity claims – settlement does not extinguish claims for indemnity by settling party

d. CPLR Art 16

i. NY rule that modifies joint and several liability in NY

(A) Rule – In P.I. claim, joint tortfeasor whose fault is found to be 50% or less cannot be req'd to pay more than his equitable share of P's non-economic damages

(I) Only applies to P.I. claims (not claims for wrongful death)

(II) Non-economic damages – pain suffering, mental anguish, loss of consortium

(B) Exclusions from Art. 16 – following tortfeasors subject to

full joint and several liability for all damages

(I) Acted w/i ntent or reckless disregard for safety of others

(II) Released hazardous substances into the environment

(III) Drivers and owners of motor vehicles, not police and fire vehicles

VII. mtn procedure

A. mtns on notice

1. Give adversary an opportunity to be heard in opposition
2. Party must serve a notice of mtn (advises opponent of nature and time) and supporting affidavits (written statements under oath showing why mtn should be granted)
3. Mtn is "made" when mtn papers served on other party
 - a. If served by mail, mtn is made when papers dropped in mailbox
4. The day upon which mtn papers are presented to the ct is called the return date aka the hearing date
 - a. The moving pary must serve the mtn papers on the opponent at least 8 days before return date
 - b. All mtn papers, those of the moving party as well as the opponent, must be filed w/ the ct no later than return date. (Ct begins to deliberate on the return date and then issues an order either granting or denying the mtn)
5. Order to show cause (alternative way to make mtn on notice)
 - a. Preliminary order, signed by judge, giving due date to show why mtn should not be granted
 - b. 3 possible reasons for moving by order to show cause rather than ordinary notice of mtn:
 - i. Statute that governs the particular notice may require it
 - ii. It is a means of accelerating the return date where exigent circumstances make the usual 8-day advance notice too long to wait for judicial assistance. In signing order to show cause, the judge can specify sooner return date
 - iii. Judge can grant an immediate stay or TRO
 - c. Procedure
 - i. The moving party drafts order to show cause and submits is to a

judge along w/ supporting affidavits for underlying mtn. The judge will set the return date in order and will specify the method of service on the adversary (usually personal delivery)

(A) E.g. a proposed order to show cause is signed by judge on May 1, 2003 and it states "Let P show good cause on May 5, 2003 why an order should not be granted requiring him to produce documents x, y, and z." After signed, the order and underlying mtn papers are then served on the opponent. The opponent then may submit opposition papers on return date.

B. The deciding order

1. After the return date of the mtn on notice, the ct's decision must be embodied in a written order signed by the ct
 - a. The prevailing party (whether movant or opponent) serves a copy of the order on the losing party
 - b. Service of the order is necessary for the order to take effect
 - c. Appeals
 - i. Service of the order starts the running of a 30-day time limit for an appeal of the order
- (A) NY allows an immediate appeal to Appellate Division as of right within 30 days of service of any order that results from a mtn on notice (unusual, called an interlocutory appeal). However, party can wait and appeal final judgment

C. Ex parte mtn

1. No advance notice is given to adversary (i.e. w/o giving any opportunity to be heard in opposition). The moving party goes straight to the ct w/ the mtn and request an order granting relief sought.
2. Only allowed when statute expressly authorizes
3. Appeal of grant – opponent must first move ct to vacate and if denied, then appeal

VIII. Mtn for summary judgment

A. Enables D before trial to show that even though pleading are *prima facie* sufficient, that there is no genuine issue of material fact requiring a trial, and judgment entitled as a matter of law

1. Exam tip – discuss underlying CoA

B. Timing – after D files answer

1. Exception – pre-trial mtgs for SJ – 2 situations
 - a. D's pre-answer mtn to dismiss for no CoA can be converted to mtn for SJ if:
 - i. D submitted factual affidavits w/ mtn to dismiss
 - ii. When ct gives notice to P of conversion and allows P to submit additional affidavits in support of CoA
 - b. Mtn for SJ in lieu of complaint
 - i. In two types of actions, P may, if he wishes, move for SJ at the same time as serving summons (both involve documents that show prima facie that P entitled to relief):
 - (A) An action on an instrument for the payment of \$ only, e.g. - a promissory note, not breach of K action
 - (B) An action on an out-of-state judgment
 - ii. Procedure
 - (A) After filing process w/ the ct, P must serve on D D response date – same determination as answer

C. Any party can move for summary judgment w/ respect to any claim or defense asserted in the pleadings

D. Support = affidavits

E. Defeating – if non-moving party shows triable issue → denial

1. or if not yet able to make showing through no fault → Ct can grant SJ for P on issue of liability and order immediate trial on issue of damages

IX. Provisional remedies

A. Overview

1. Lawsuits can take time and P's rights may be jeopardized while matter is pending, provide a measure of security to P for ultimate enforcement of potential judgment
2. 5 types
 - a. Attachment
 - b. Preliminary injunction
 - c. Temporary receivership
 - d. Order to seize chattel
 - e. Notice of pendency
3. All of the provisional remedies require a ct order, except notice of

pendency

- B. Attachment – provides security for the enforcement of \$ judgment
 - 1. P obtains order and gives to sheriff who levies upon prop. (puts lien on prop. pending outcome) of D in NY, giving P security interest; superior to any subsequent lien holder.
 - 2. prop. types
 - a. Real
 - b. Personal
 - i. Tangible – i.e. car
 - ii. Intangible – debt owed to D (e.g. bank account, etc)
 - (A) Garnishee – 3d person who owes debt to D or who has possession of D's tangible personal prop.
 - 3. How sheriff's levy made on prop. ?
 - a. On real prop – sheriff files order of attachment w/ county clerk in NY county where prop. is located
 - b. Personal prop – sheriff delivers the order of attachment to person holding prop (D or garnishee)
 - i. Imposes lien and is injunction against transfer until disposition
 - 4. Types of actions
 - a. P seeks \$ damages (OK if there are other claims joined seeking equitable relief); and
 - i. D is unlicensed foreign corp or non-domiciliary of NY; or
 - ii. D is about to conceal or remove assets from the state w/i ntent to defraud creditors or frustrate enforcement of a judgment
 - 5. Procedure
 - a. P must make mtn
 - i. Req's of mtn
 - (A) Affidavits in support of mtn must show 1 of 2 grounds for attachment
 - (B) Affidavits must show probability of success on the merits of P's CoA
 - (C) P must post an undertaking (bond) to indemnify D for any damages or expenses caused by attachment (D will get if: attachment is wrongful or D wins on the merits)
 - b. Mtn can be made on notice or ex parte. Req's for ex parte:

- i. A hearing promptly after seizure of D's prop. so he can contest
 - (A) After sheriff levies on the prop. , P must make mtn on notice to confirm the ex parte order of attachment
 - (B) Ex parte mtn becomes automatically void if P fails to make mtn on notice w/i x days after levy
 - (I) x determined on these grounds
 - (a) If D is unlicensed foreign corp or NY non-domiciliary – mtn to confirm on D w/i 10 days after levy
 - (b) If D about to conceal/remove assets etc. mtn to confirm served on D w/i 5 days

C. Preliminary injunctions – used to maintain status quo while action pending

- 1. Types of actions
 - a. Equity where P seeks either
 - i. Permanent injunction, or
 - ii. If D threatens to harm P's interest in subject matter
 - b. Not actions just for \$ damages
- 2. Procedure
 - a. Mtn on notice
 - b. Mtn served w/ or after summons, anytime before final judgment
 - c. Req's for mtn
 - i. P's affidavit shows grounds for equitable relief including threat of irreparable injury
 - ii. Show probability of success on merits of underlying CoA
 - iii. Must give an undertaking (bond) to indemnify D for damages if preliminary injunction should have been granted
- 3. Relation to TRO
 - a. w/ a TRO – in a case involving threat of immediate injury, P may request a TRO ex parte
 - i. Function – maintains the status quo until mtn for preliminary injunction is decided
 - ii. Procedure – to make mtn on notice for a preliminary injunction by way of order to show cause served on D, who is immediately restrained by TRO pending resolution of mtn for preliminary injunction

D. Temporary receivership – a person is appointed by court to manage prop. In D possession

1. Type of action – P must be asserting an equity claim in which specific prop. Is

Contracts

I. Vocabulary

A. K – agreement plus

1. Express K – find agreement from words of parties
2. Implied K – parties act as though there is a K

B. Quasi-K – an equitable remedy

1. Need not apply K rules
2. Applies when strict application of K seems unjust
3. Elements
 - a. P has conferred benefit on D, and
 - b. P has reasonably expected to be paid; and
 - c. D realized unjust enrichment if P is not compensated
4. Measure of recovery
 - a. K price not measure
 - b. K price is ceiling if D is in default or K recovery barred by SoFs

C. Bilateral K – results from an offer that is open as to the method of acceptance.

D. Unilateral K – results from an offer that expressly requires performance as the only possible method of acceptance

1. A K is bilateral unless
 - a. A reward, prize, or contest, or
 - b. Offer expressly requires performance for acceptance

II. Applicable law

- A. Common law – applies to services, real estate, and others not covered by the UCC
- B. Articles 1 & 2 of the UCC – apply to Ks that are primarily sales of goods (tangible personal property)
 1. Mixed deal – USS applies to Ks that include both goods and services if the goods are the more important part of the deal (if service is more important then CL applies)
 - a. Exception – if K divides payment, then UCC applies to goods part and CL to services

III. Formation of Ks

A. Offers

1. General test – manifestation of an intention to K. The basic test is whether a reasonable person in the position of the offeree would

believe that his or her assent creates a K.

2. Content:

- a. General rule – an offer does not have to contain all material items
 - i. Missing price term in sales K:
 - (A) In sale of real estate (CL) – price and description required (if missing, not offer)
 - (B) Sale of goods (Art. 2) – no price requirement (offer if parties so intend)
 - ii. Vague or ambiguous material terms:
 - (A) Under CL and UCC – an offer using vague or ambiguous material terms is not an offer (e.g. - "I'll sell you my car for a fair price")
 - iii. Requirements Ks/Output Ks:
 - (A) A K for the sale of goods can state the quantity of goods to be delivered under the K in terms of the B's requirements of the S's output or in terms of exclusivity.
 - (1) Ex. - B "offers" to buy all of his grits from S for 5 years (this is sufficiently specific to be an offer)
 - (a) No unreasonably disproportionate increases – B can increase requirements so long as the increase is in line with prior demands (in the example above, if B buys 1,000 lbs of grits in each of the 1st 3 years of the agreement, he cannot order 6,000 lbs in the 4th year – this is too large and increase and will be reduced)

3. Communication /Context

a. General rules

- i. Price quotation is not an offer
- ii. An ad is not an offer

b. Exceptions

- i. Price quotation can be an offer if it is in response to a specific inquiry
- ii. An advertisement can be an offer if it is in the nature of a reward
- iii. An ad can be an offer if it is specific as to quantity and who can accept ("1 widget available, 1st come, 1st serve")

B. Termination of offers

1. An offer cannot be accepted if it have been terminated (it is dead)

2. Methods of termination

- a. Lapse of time – an offer that has not been accepted within the time stated for acceptance or within a reasonable time is considered terminated
- b. Words or conduct of offeror – an offer can be revoked by either:
 - i. An unambiguous statement by offeror to offeree of unwillingness or inability to contract; or
 - ii. Unambiguous conduct by offeror indicating an unwillingness/inability to K that offeree is aware of
 - (A) Ex. - B → S offer to sell car, S sees C driving car next day
- iii. Revocation of an offer:
 - (A) Sent by mail, not effective until received
 - (B) An offer cannot be revoked after it has already been accepted
 - (C) Offers that cannot be revoked:
 - (1) An offer cannot be revoked if the offeror has promised to keep the offer open and this promise is supported by consideration ("option K")
 - (2) Firm offer rule (UCC Art. 2) – an offer cannot be revoked for up to 3 months if:
 - (a) Offer to buy or sell goods;
 - (b) Signed, written promise to keep offer open; and
 - (c) Party is a merchant (person in business).
 - (i) If writing promises to keep offer open for longer than 3 months, the merchant can still revoke after 3 months
 - (ii) If writing does not state a time period, the merchant can't revoke for a reasonable time period fixed by the court (up to 3 months)
 - (3) Firm offers in NY – in Ks other than sale of goods Ks, an offer that states in writing that it will be held open is irrevocable for time stated or a reasonable time
 - (a) No signature requirements
 - (b) No time limit
 - (c) In general, NY gives greater significance to the existence of writing.

(4) An offer cannot be revoked if there has been detrimental reliable by the offeree that is reasonably foreseeable (e.g. - subcontractor cannot revoke his bid when a general contractor who is bidding on a K relies on that bid).

(5) The start of performance pursuant to an offer to enter into a unilateral K makes that offer irrevocable for a reasonable time to complete performance

(a) Requires start of performance not just mere preparation (though if mere preparation, offer could be irrevocable under detrimental reliable above if preparation was reasonably foreseeable)

c. Words or conduct of the offeree – Rejection:

- i. Counteroffer – terminates the offer and becomes a new offer
 - (A) "Will you take \$100?" does not constitute a counteroffer
- ii. Conditional acceptance – operates the same way as a counteroffer. Look for phrases such as:
 - (A) if
 - (B) so long as
 - (C) provided
 - (D) on condition that
- iii. Additional terms to a CL K ("mirror image rule") – an "acceptance" that adds new terms is treated like a counteroffer rather than an acceptance.
 - (A) Does not apply to the sale of goods
- iv. Additional terms under UCC Article 2 – a response to an offer that adds new terms (but does not make the new terms a condition of acceptance) is generally treated as an acceptance
 - (A) Is the additional term part of the K?
 - (1) If both parties are merchants – the general rule is that the additional term is part of the K.
 - (a) Exceptions – the additional terms are not part of the K if:
 - (i) They materially change the offer; or
 - (ii) The original offeror objects to the change.
 - (2) If one or both parties is not a merchant – the

additional term is merely a proposal that is to be separately accepted or rejected

d. Death of party prior to acceptance

- i. General rule – death or incapacity of either party terminates the offer
 - (A) Exceptions:
 - (1) Options
 - (2) Part performance of offer to enter into unilateral K

C. Acceptance of an offer

- 1. Who can accept – generally an offer can only be accepted by a person who knows about the offer who is the person to whom it was made (offers cannot be assigned; options can be assigned unless option expressly provides otherwise)
- 2. Methods of accepting an offer (6 fact patterns):
 - a. If the offeree performs – the only question is whether notice of performance is required. This answer turns on whether offeree has reason to believe that offeror will not learn of the acceptance and whether the offer dispenses with notice.
 - b. If the offeree starts to perform – start of performance is acceptance of an offer to enter into a bilateral K but is not acceptance of offer to enter into a unilateral K
 - i. Unilateral K – completion of performance is required to constitute acceptance.
 - c. If offeree promises to perform – most offers can be accepted by a promise to perform (not offers that expressly require performance for acceptance and reward offers)
 - d. If the offeror and the offeree are at different places and there are conflicting communications – if an offeree is invited to accept by mail, acceptance is effective when sent ("Mailbox rule")
 - i. Thus if C mails an acceptance letter and then the offer is revoked before the letter arrives, the acceptance is valid
 - (A) Rejection and acceptance exception – if C mails a rejection letter but changes his mind and then mails an acceptance letter, whichever arrives first will be effective.
 - e. If S sends the wrong goods – general rule is that S accepted the B's offer but breached the K
 - i. Accommodation exception – in the shipment of nonconforming

goods includes a note saying the shipment is offered merely as an accommodation, it is viewed as a counteroffer not breach (B can accept or reject shipment with no other remedy)

- f. If the offeree is silent – generally silence is not acceptance
 - i. Exception – if offeree by words or conduct agrees that silence is acceptable, then it is.

D. Formation (Second view):

- 1. Some agreements are not legally enforceable: Legal reasons for not enforcing an agreement include:
 - a. Lack of consideration or consideration substitute for the promise at issue
 - b. Lack of capacity of the person who made that promise
 - c. SoFs
 - d. Existing laws that prohibit performance of the agreement
 - e. Misrepresentations
 - f. Duress
 - g. Unconscionability
 - h. Ambiguity in words of agreement
 - i. Mistakes at the time of the agreement as to the material facts affecting the agreement

E. Consideration or consideration substitute

- 1. Consideration – bargained for legal detriment to promisee
 - a. Forms of consideration
 - i. Performance (doing something not legally obligated to do)
 - ii. Forbearance (not doing something legally entitled to do)
 - iii. Promise to perform
 - iv. Promise to forbear
 - b. "Bargained for"
 - i. Versus conditional gift – there is no consideration when you say to a homeless man, "If you go to the clothing shop, you may buy a coat on my credit."
 - c. Illusory promises – an illusory promise is one where the promisor has not committed himself in any manner and is not consideration.
 - i. Ex. 1 – E agrees to sell his car to C unless C changes his mind. E is not legally obligated to sell his car to C because no consideration; illusory promise.

- ii. Ex. 2 – Same facts but C promises to buy car by Dec. 7 or notify E by Dec. 6 not to buy. E's promise not to sell to someone else in exchange for assuming obligation to notify.
- d. The adequacy of consideration is not relevant in K law.
- e. Past consideration
 - i. General rule – not consideration (e.g. A saves L's life. H is so grateful that he promises to pay A \$3k. H changes his mind. Promise not enforceable.)
 - (A) Exception – past consideration was expressly requested and there was an expectation of payment (e.g. - H sees L is in danger and asks A to save her, knowing that A would expect to be paid. After A saves L, H promises to pay a \$3K – legally enforceable)
- f. Pre-existing contractual or statutory duty rule
 - i. CL
 - (A) General rule – doing what you were already legally obligated to do is not consideration for a promise to pay your more to do merely that (you need new consideration for the modification of an existing K)
 - (1) Ex. - B makes K then demands more money to perform
 - (a) Exceptions:
 - (i) Addition to or change in performance – any slight change will do
 - (ii) Unforeseen difficulty so severe as to excuse performance
 - (iii) 3d party promise to pay – no existing legal duty to 3d party
 - ii. UCC Article 2
 - (A) No pre-existing legal duty rule – good faith is the test for changes in existing sale of goods Ks
 - (1) Ex. - S Ks to sell grits to B for \$1000. S subsequently tells B that it cannot deliver grits for less than \$1,300. By promises to pay the additional \$300. S delivers. B is obligated to pay the additional \$300 as long as S was acting in good faith.
 - g. Part payment as consideration for release (promise to forgive

balance of debt):

- i. If debt is due and undisputed – part payment is not consideration for release
- ii. If debt is not yet due or is disputed – part payment is consideration for release.

h. Consideration substitutes

- i. A written promise to satisfy an obligation for which there is a legal defense is enforceable without consideration (as a consideration substitute)
 - (A) Ex. - D owes C \$1k but C's claim to collect the debt is barred by the SOL. D writes C, "I know that I owe you \$1000. I will pay you \$600." C can collect on the \$600 promise.
- ii. Under UCC, a written release of all or part of a claim for breach of K for sale of goods is enforceable without consideration.
- iii. Promissory estoppel – most important consideration substitute
 - (A) Exam tip: on multiple choice, first look for consideration, and only if there is not look for promissory estoppel
 - (B) Elements:
 - (1) Promise;
 - (2) Reliance on the promise which is reasonable, detrimental, and foreseeable; and
 - (3) Enforcement is necessary to avoid injustice.

F. Defendant/Promisor's lack of capacity

1. Who lacks capacity
 - a. An infant (under 18)
 - b. Mental incompetent (lack ability to understand agreement)
 - c. Intoxicated persons (if other party had reason to know)
2. Consequences of incapacity
 - a. The person without capacity has a right to disaffirm K (the party cannot invalidate, only incapacitated person can)
 - b. Implied affirmation – the incapacitated person implicitly affirms the K (and thus cannot invalidate it) by retaining the benefits after gaining capacity.

- c. Liability for necessaries – a person who does not have capacity is legally obligated to pay back for things that were necessary such as food, clothing, medical care, or shelter
 - i. This liability is based on quasi-K law not on K law (thus other party can only recover benefit conferred, not K price)

G.SOF defense

- 1. Ks within SOF:
 - a. A promise in consideration of marriage (not promise to marry)
 - b. Promise by executor or administrator to pay obligation of estate from his own funds (not from estate funds)
 - c. Promise to answer for (guarantee) debts of another
 - i. Not promise to pay, but promise to pay in someone else does not
 - ii. Main purpose exception – if purpose of underlying obligation was to benefit guarantor (SOF does not apply)
 - (A) Ex. – S sells to O paint on credit. S claims that O promised to pay if P didn't. P's purpose in buying the paint was to paint O's house.
 - (B) NY Distinction – main purpose exception requires independent duty of payment (if guarantor would have been legally obligated to pay anyways)
 - d. Service K not capable of being performed within a year from the time of K
 - i. Examples
 - (A) Employment K for 3 years – SOF
 - (B) Employment K for 3 years that can be terminated on 30 day notice – SOF
 - (C) Employment K for a year beginning next month – SOF
 - (D) Ks to perform tasks – Not SOF because in theory with unlimited resources, any task could be completed within the year
 - (1) Doesn't matter if in reality the task was not completed within the year (it was still capable of being completed within the year and thus not within SOF)
 - (E) Ks for life – not SOF, regardless of health, etc
 - (1) Ks for life in SOF in NY
 - e. Transfers of interest in real estate for a term more than 1 year

- i. Includes sales, leases, easements, etc (not building because not transfer of interest)
- f. Sale of goods for \$500 or more
- g. NY Exam only
 - i. Leases of goods with payments totaling \$1k or more
 - ii. K to assign insurance policy or name beneficiary
 - iii. K to pay finder's fee or broker's fee to person other than a licensed broker or lawyer

2. Satisfying SOF

- a. Performance
 - i. Service Ks – full performance by either party satisfies SOF
 - (A) Part performance does not satisfy SOF (thus no remedy under K law, though possible remedy as a quasi-K).
 - ii. Sale of goods Ks
 - (A) Ordinary goods – part performance of a K for the sale of goods satisfies the SOF but only to the extent of part performance (thus, S can sue for payment for goods delivered but B can't sue compelling delivery of remaining goods)*
 - (B) Specially manufactured goods – SOF is satisfied as soon as S makes a substantial beginning of making or obtaining the goods (enough work to know the goods were specially manufactured).
 - iii. Real estate transfer K
 - (A) Full payment by the B of real estate does not satisfy the SOF*
 - (B) Part performance by B of real estate can satisfy SOF if any of the following 3 are satisfied: payment, possession, and/or improvements
 - (1) Ex. – B orally agrees to buy Blackacre from S for \$10,000. B takes possession of Blackacre and pays \$2,000 (SOF satisfied because part payment and possession)
- b. Writing
 - i. CL COF – all of the material terms (the what and how much) of the K must be in writing(s) and it must be signed by the D
 - ii. UCC SOF – same as above but writing also must include quantity term

- (A) "Answer the damn letter" exception – does away with signature requirement if both parties are merchants and the person who received a signed writing with a quantity term that claims there is a K fails to respond within 10 days of receipt.
- iii. UCC 2A – leases of personal property – writing must indicate that it is a lease, describe what is being leased, and state the duration of the lease.
- c. Judicial admission of sale of goods agreement – a statement in pleadings, discovery, or testimony that there was an agreement

3. Related issues

- a. Authorization to enter into a K for someone else – must be in writing if the K to be signed in within the SOF (equal dignity rule)
- b. K modifications
 - i. When law requires a writing to modify – If the deal with the alleged change would be within the SOF, then the alleged modification agreement must be in writing.
 - ii. When K requires writing to modify:
 - (A) CL – K provisions requiring that all modification be in writing are ignored
 - (B) UCC – effective unless waived

H. Illegality, Misrepresentation, Duress

- 1. Illegal subject matter/purpose
 - a. Illegal subject matter – a K to do something illegal is void
 - b. Illegal purpose – a K to do something that is legal but in furtherance of an illegal purpose is not void (and is enforceable, but only by the person who did not know of the illegal purpose)
- 2. Misrepresentation
 - a. A false assertion of fact or a concealment of facts
 - i. As to terms of the K (e.g. – this house has no termites) makes the agreement voidable if the misrepresentation is fraudulent or material (K misrepresentation, unlike tort does not require fraud) and the misrepresentation induced the making of the K
 - (A) A misrepresentation as to the nature of the K – (e.g. – this is just a lease when it is actually a purchase agreement) is void (it cannot be enforced)

ii. Remedy – rescission

3. Duress

a. Elements

i. Improper threat

ii. No reasonable alternative

I. Unconscionability

1. Empowers a court to refuse to enforce all or part of an agreement if there was unfair surprise or oppressive terms as tested at the time of the agreement was made
2. Under 2A, a court may grant relief from a consumer lease even though no provision of the lease is unconscionable, if there is unconscionable conduct in inducing or enforcing the lease.

J. Ambiguity in words of agreement

1. There will be no K if:
 - a. Parties use a material term that is open to at least 2 reasonable interpretations; and
 - b. Each party attaches a different meaning to the term; and
 - c. Neither party knows or has reason to know the term is open to at least 2 reasonable interpretations
 - i. If 1 party did know that the term was open to 2 reasonable interpretations, the K will be enforced under terms as understood by the other party.

K. Mistake of fact

1. Mutual mistake of material fact

a. There will be no K if:

i. Both parties were mistaken as to

ii. A basic assumption of fact, which

iii. Materially affects the agreed exchange

b. Key is whether the agreed upon subject matter exists

i. Mutual mistake as to what something is – the agreement is not legally enforceable

ii. Mutual mistake as to what something is worth – the agreement is still legally enforceable

2. Unilateral mistake of material fact:

- a. General rule – courts are reluctant to allow a party to avoid a K for mistake made by only one party
 - i. Exceptions

- (A) "Palpable" mistakes – if the other party to the K knows or should have known of the mistake, courts may grant relief to the mistaken party.
- (B) Mistakes discovered before significant reliance by the other party

IV. Terms of the K

A. Parties words and parol evidence rule

- 1. Vocabulary
 - a. Integration – written agreement that court finds is the final agreement (triggers parol evidence rule)
 - b. Partial integration – written and final but not complete
 - c. Complete integration – written, final, and complete
 - d. Merger clause – K clause such as "This is the complete and final agreement"
- 2. Triggering facts
 - a. Written K that the court finds is the final agreement, and
 - b. Oral statement made at the time the K was signed or earlier oral or written statements by parties to the K.
- 3. Parol evidence fact patterns (4):
 - a. Changing written deal – regardless if the writing is complete or partial integration, the parol evidence rule prevents a court from considering earlier agreements as a source of terms that are inconsistent with the terms of the written K
 - i. The court may, however, consider evidence of such terms for the limited purpose of determining whether there was a mistake in integration (a mistake in reducing the agreement to writing)
 - (A) Ex. 1 – S Ks in writing to sell B 1,000 chickens per month for 12 months. B claims that S told him just as they were signing the K that he would deliver as many chickens as B needs during the 12 months K term and offers evidence of telefaxes from S supporting this claim
 - (1) The court cannot consider the evidence in determining what the terms of the K are.
 - b. Establishing a defense to the enforcement of a written deal – regardless of whether the writing is a complete or partial integration, the parol evidence rule does not prevent a court from considering earlier words of the parties for the limited purpose of

determining whether there is a defense to the enforcement of the agreement such as misrepresentation, fraud, duress (not asking the court to change the deal, but to cancel it)

- c. Explaining terms in a written deal – earlier agreements can be considered to resolve ambiguities in written K
- d. Adding to the written deal – the parol evidence rule prevents the court from considering earlier agreements as a source of consistent, additional terms unless the court finds the written agreement was only a partial integration.
 - i. Ex. – S Ks in writing to sell B chickens. The written K does not specify how the chickens are to be packaged and wrapped. The court can consider evidence of earlier agreements between S and B as to how the chickens are to be packaged and wrapped if it determines the written agreement was only a partial integration.
 - ii. "Naturally and normally" exception – even if the writing is a complete integration, a court can still consider evidence of earlier agreements for terms that would naturally be in a separate agreement.

B. Conduct, course of performance, and custom & usage

- 1. The words are parties are not the only source of K terms. Courts look first at the course of performance, then course of dealing, then custom & usage to explain words in Ks or to fill in gaps in Ks:
 - a. Hierarchy
 - i. Course of performance – same people, same K
 - (A) Ex. – S Ks to sell 1,000 chickens a month to B for 12 months. 1St 3 shipments are boiling hens and B does not complain
 - ii. Course of dealing – same people, similar but different Ks
 - (A) Ex. – S Ks to sell 1,000 chickens per month to B for 12 months. Under prior chicken Ks, S sent be boiling hens and B complained
 - iii. Custom & usage – different but similar people, different but similar K
 - (A) Ex. – S Ks to sell 1,000 chickens a month to B for 12 months. It is customary in the chicken industry to use the

word "chicken" when deal covers chickens up to 6 lbs.

C.UCC terms

1. Delivery obligations of S of goods:

- a. No place of delivery has been agreed upon – absent agreement, the place is the S's place of business unless both parties know that the goods are somewhere else and then that place
- b. Place of delivery by common carrier has been agreed upon – then there is question as to what the S has to do to complete its delivery obligation
 - i. If shipment K – S completes delivery when
 - (A) It gets the goods to the common carrier,
 - (B) Makes reasonable arrangements for delivery, and
 - (C) Notifies the B
 - ii. If destination K – the S doesn't complete its delivery obligation until goods arrived where B is.
 - iii. Determining whether K is a shipment or a destination K
 - (A) If K says "FOB – [S's city]" – shipping K
 - (B) If K says "FOB – [B's city]" – destination K

2. Risk of loss

- a. Risk of loss issues arise where (1) after the K has been formed but before the B receives the goods (2) the goods are damaged or destroyed, and (3) neither the B nor the S is to blame.
 - i. If risk of loss is on the B – he has to pay the full K price for the lost or damaged goods
 - ii. If the risk of loss is on the S – no obligation on the B's party (and possible liability on the S for non-delivery)
- b. Four rules for risk of loss (a hierarchy):
 - i. Agreement of the parties controls
 - ii. If no agreement, look for an unrelated breach (breaching party has the risk of loss)
 - (A) Ex. – S Ks with B for coffee. Coffee is destroyed by rats (no fault by either party). S was already 2 weeks late in delivering the coffee before it was destroyed. S has the risk of loss.
 - iii. Delivery by common carrier other than S – risk of loss shifts from S to B at the time that the S completes his delivery obligations (what constitutes completion depends on whether it

is a shipment or a destination K)

iv. No agreement, no breach, no delivery by a carrier:

(A) The determining factor is whether the S is a merchant (whether the B is a merchant is irrelevant)

(1) Risk of loss (merchant S) – shifts from a merchant-S to a B on the B's receipt of the goods (taking physical possession)

(2) Risk of loss (non-merchant S) – shifts from a non-merchant-S to a B when he tenders goods; makes goods available

(a) Ex. B – B, a used car dealer, buys a used van from his friend S. S tells B to pick up the van at his convenience, that the keys are behind the front bumper. Vandals damage the van before B gets it. S is not liable because he tendered the van to B.

c. 2A lease of personal property – generally, risk of loss is on the lessor

i. Exception – finance leases (risk on lessee)

3. Warranties of quality

a. Express warranty

i. Words – look for words that promise, describe, or state facts (distinguish from sales talk)

(A) Ex. 1 – "All machine parts are steel." = express warranty

(B) Ex. 2 – "This machine is well-made." = no warranty

(C) Exam tip – look for parol evidence issues (S made statement about quality but K does not include these terms)

ii. Use of sample model – creates an express warranty that the goods the B receives will be like the sample model.

b. Implied warranty of merchantability

i. When any person buys any goods from any merchant, a term is automatically added to the K by operation of law – that the goods are fit for the ordinary purpose for which such goods are used.

(A) Triggering fact – S is a merchant (meaning he deals in goods of that kind)

(B) Warranty – goods are fit for ordinary purposes

- c. Implied warranty of fitness for a particular purpose
 - i. Triggering facts – B has a particular purpose, B is relying on S to select suitable goods, and S has reason to know of the purpose and reliance
- d. 2A warranties on leases
 - i. General rule – lessor of personal property makes the same warranties as S: express, merchantability, fitness
 - ii. Finance leases – in a "finance lease" warranties made by supplier to lessor are enforceable by lessee (can only enforce against S, not against bank – can't stop making lease payments to bank because of defect)

4. Contractual limitations on warranty liability

- a. Disclaimer (e.g. – there are no warranties) – eliminates implied warranties
 - i. Express warranties (words or showing model/sample) cannot be disclaimed
 - ii. Implied warranties of merchantability and fitness can be disclaimed (with words like:
 - (A) as is
 - (B) with all faults
 - (C) or conspicuous language of disclaimer mentioning merchantability
- b. Limitation of remedies (e.g. – "warranty liability should be limited to replacement parts" – does not eliminate warranty, simply limits or sets recovery for any breach of warranty.
 - i. Possible to limit remedies, even for express warranties
 - ii. General test is unconscionability
 - iii. Prima facie unconscionable if limitation of warranty on consumer goods does not allow for recovery for personal injury

V. Performance

A. Sale of goods performance concepts

1. Goods
 - a. Perfect tender – the general standard of Article 2. Subject to limited exceptions, the S is obligated to deliver perfect goods
 - b. Cure – in some instances, a S who fails to make a perfect tender will be given a "second chance," an option of curing. Note that every S does not have the opportunity to "cure," and that the B

cannot compel the S to cure.

- i. Time for performance not yet expired – In very limited situations, a S has the option of curing even after the K delivery date
 - (A) Statutory test – whether the S has reasonable grounds for believing that the improper tender would be acceptable, perhaps with a money allowance (look for information in the question about prior deals between the B and S with such allowance)

c. Rejection of the goods

- i. Effect – if goods are non-conforming, B's rejection of goods has effect of creating a breach of K by S so there can be a lawsuit
- ii. When can the B reject the goods?
 - (A) Rejection of the goods must occur before acceptance of the goods
 - (1) If the goods are less than perfect, the B has the option to reject unless it is an installment k
 - (2) Installment sales Ks – a K that requires or authorizes
 - (1) delivery in separate lots (2) to be accepted separately
 - (a) B has right to reject only where there is a substantial impairment in that installment that can't be cured.
 - (b) E.g. – S and B enter into an installment sales K for the delivery of 10 kegs of beer at 6pm for each night of bar review course. One night S delivers 9 kegs at 6:30 pm (B cannot reject installment because it is not a substantial impairment – even though not perfect tender)

d. Acceptance of goods

- i. When is acceptance?
 - (A) Express
 - (B) Payment without opportunity to inspect is not treated as acceptance
 - (1) Pre-inspection payment provision in K – payment still not treated as acceptance.
 - (C) Implied acceptance – retention after opportunity for

inspection without objection is acceptance (bar exam rule of thumb: if B had goods for more than a month without complaint – acceptance)

ii. Effect of acceptance

(A) If B accepts, he cannot later reject

e. Revocation of acceptance of the goods

i. In limited circumstances, a B can effect a cancellation of the K by revoking his acceptance of the goods

ii. Requirements for revocation:

(A) Non-conformity substantially impairs the value of the goods;

(B) Excusable ignorance of grounds for revocation or reasonable reliance of S's assurance of satisfaction; and

(C) Revocation within a reasonable time after discovery of non-conformity.

2. Payment

a. Payment is in cash unless otherwise agreed upon.

b. Buy can pay by check

c. S does have to take the check but that gives the B an additional reasonable time

B. Conditions of performance

1. What is an express performance condition?

a. A condition is a mutually agreed upon promise modifier

i. True condition – an event beyond the influence of either of the parties to the K that affects the duty to perform

ii. Covenant (duty/promise) is not a condition

iii. Condition coupled with covenant – an event that is to some extent within the influence of one of the parties of the K that affects the duty to perform

iv. Condition coupled with an implied covenant – where the conditioned event is subject to the efforts of one of the parties to the K, then the law implies a promise to use reasonable efforts (if not, then breach of K)

(A) E.g. – B Ks to buy H's house. The K provides in part "This sale is conditioned on B's obtaining an 8% mortgage

(1) If B makes reasonable efforts to obtain the mortgage by cannot – no K

(2) If B does not make reasonable efforts to obtain mortgage – breach of K

2. How can an express condition be modified:

- a. if
- b. provided that
- c. so long as
- d. subject to
- e. in the event that
- f. until on condition that

3. How can express condition be satisfied?

- a. General rule – strict compliance with express conditions
 - i. E.g. – condition to use Reading pipe in house, builder uses comparable Coho – no payment required
 - (A) Exception – "payment upon approval," if reasonable person would approve, then payment due, unless subject art or other matters inherently discretionary

4. How can an express condition be excused?

- a. Estoppel
 - i. Identify the person who benefits from or is protected by the condition. Then look for a statement by that person giving up the benefits and protection condition
 - ii. Estoppel is based on a statement by the person protects BEFORE the conditioning event was to occur and requires a change of position.
- b. Waiver
 - i. is based on a statement by the person protected by the condition AFTER the conditioning event was to occur and does not require a change of position

5. What is a constructive condition and how is it satisfied?

- a. Identification
 - i. Constructive conditions are less obvious, are keyed to order of performance. On bar, the most common constructive condition question involves a fact pattern in which K is silent as to time of payment. In real world, unless there is an advance agreement for payment in advance, you pay when work is done. On bar, in such a situation, doing work is constructive condition precedent to the payment performance

b. Satisfaction

i. Standard – substantial performance

(A) Ex. 1 – J Ks to build Y's house. K: "All pipe must be Reading"

(1) Express condition – no (not language)

(2) Constructive condition – Yes, work before payment

(3) Construction satisfied – Yes, only need substantial compliance

(B) Ex. 2 – P Ks to paint 20 apartments for O for \$10K. P paints 19 of the apartments then stops.

(1) The constructive condition precedent of P's painting 20 apartments has been satisfied so that, under K law, O has to pay P for the 19 apartments that have been painted (because 19/20 is substantial performance – there will be a price adjustment or damages because of partial breach).

(C) Ex. 3 – P Ks to paint 20 apartments for O for \$10k. P paints 4 of the apartments and then stops.

(1) Not substantial performance. P could recover for 4 apartments under quasi-K theory of recovery.

ii. Divisible K and the substantial performance rule:

(A) Divisible K – like installment K (but not dealing with the sale of goods)

(1) If K itself divides the performance of each party into the same number of parts with each part performance by one party serving as consideration for the corresponding part performance by the other, then the K is a divisible K and the substantial performance test is applied to each divisible part of the K.

(2) Ex. – P Ks to paint 20 apartments for \$500 and apartment. P paints 4 of the apartments and then stops.

(a) The constructive condition precedent has been satisfied so that, under K law, O has to pay P for the apartments she painted.

VI. Excuse for non-performance

A. Excuse by reason of other party's breach

1. Sale of goods – perfect tender

a. Remember that in a sale of goods K, the S generally is obligated

to make a perfect tender. In the tender is less than perfect, the B can reject the goods and withhold payment (the B is excused from paying). Excuse by reason of the other party's breach.

2. Common law Ks – material breach

- a. CL generally requires only substantial performance. If one party to a K substantially performs, the other party is required to perform. A minor breach by one party to the K will not excuse performance by the other party.
- b. At common law, only a "material breach" by one party excuses the other party's performance "Material breach" is the converse of "substantial performance" (material breach results from a performance that is not substantial). Whether a breach is material is a question of fact.

B. Excuse of performance by reason of other party's anticipatory repudiation or inability to perform

1. Anticipatory repudiation

- a. An unambiguous statement (1) that the repudiating party will not perform (2) made prior to the time performance is due.
 - i. Anticipatory repudiation by one party excuses the other party's duty to perform.
 - ii. It also generally gives rises to an immediate claim for damages unless the claimant has already finished his performance (in which case must wait until K date)
- b. Can be reversed or retracted so long as there has not been a material change in position by the other party. If the repudiation is timely retracted, the duty to perform is reimposed but performance can be delayed until adequate performance is assured.

2. Inability to perform

- a. Likely fact pattern – doing work for someone, not for money, but for something that the worker wants, and then that something is no longer available)
 - i. Ex. – P Ks to paint O's house in exchange for O's Blackacre. Before P finishes paying, O sells Blackacre to X. P is excused from continuing painting.)

C. Excuse by reason of later K

1. Recission (cancellation)

- a. A K can be rescinded (both parties agree to rescind) if some performance is still remaining from of the K parties
- 2. Accord and satisfaction (substituted performance)
 - a. Accord is an agreement by the parties to an already existing obligation to accept different performance in satisfaction of the existing obligation (satisfaction is different from performance)
 - b. The accord suspends legal enforcement of the original obligation to provide time to perform the accord.
- 3. Modification (substituted agreement)
 - a. Modification is an agreement by parties to an existing obligation to accept a different agreement in satisfaction of the existing obligation
 - b. Issues to remember
 - i. Consideration rules for modification (CL, Art. 2, NY)
 - ii. SoFs
- 4. Novation (substituted person)
 - a. Same performance, different party
 - b. Novation excuses the contracted for performance of the party who is substituted or replaces
 - c. How delegation is different from novation>
 - i. Novation requires the agreement of BOTH parties to the original K and excuses the person replaced from any liability for non-performance
 - ii. Delegation does not require agreement of both parties and does not excuse the party to the original K who sought to delegate

D.Excuse of performance by a later unforeseen event:

- 1. Performance of K duties (other than a K duty to pay money) can be excused under impossibility, impracticability, or frustration of purpose
 - a. Something happens after K formation but before the completion of K performance;
 - b. it was unforeseeable; and
 - c. it makes performance impossible, commercially impracticable, or frustrates the purpose of performance.
- 2. 3 basic facts patterns where issue is likely to arise:
 - a. Damage or destruction of subject matter of K
 - i. Ex. 1 – P Ks with O to paint house. P begins, house burns

down, P is excused.

- ii. Ex. 2 – B Ks with O to build house. B begins, house burns down, B is not excused (can still build house)
- iii. Ex. 3 (S's risk of loss and damage/destruction) – E Ks with C to sell special car. After K but before risk to C, car destroyed by flood, E's non-performance excused
- iv. Ex. 4 (B's risk of loss and damage/destruction) – assume in #3 above that flood occurs after risk shifts to C, C's performance not excused.
- v. Ex. 5 – In #3, if subject was 100 sacks of grits, E's performance not excused because fungible (and replaceable)

b. Death

- i. Party to K who is special person
 - (A) Ex. – H delays in housing house until he can get F, famous architect, to form K. F dies before designing. H hires another architect, A to design house. F's non-performance is excused because she is "special" person and party to K
- ii. Person not party to K
 - (A) Ex. – B Ks to build house to O for \$100k. Before B builds house, C, one of B's carpenters dies. B does not build house. B's non-performance is not excused.
- iii. Party to the K but not "special" person
 - (A) Ex. – H Ks with P to paint house because P had lowest bid, \$1000. P dies, H hires another painter for \$4,000. P's non-performance not excused. (H can sue P's estate for \$1,000)

c. Subsequent law or regulation

- i. Later law makes performance of K illegal – excuse by impossibility
- ii. Later law makes mutually understood purpose of K illegal – excuse by frustration of purpose

VII. Breach remedies

- A. Punitive damages – not generally recoverable for breach of K
- B. Liquidated damages – K can stipulate damages or methods of giving damages, but a K cannot provide for a penalty
 - 1. 2 general tests for determining whether a K provision is a valid liquidated damages clause or an invalid penalty provision

- a. The amount of possible damages from any later breach of K is difficult to determine; and
- b. The K provision is a reasonable forecast of possible damages

2. Example of invalid penalty provision – B Ks with O to build Ski Rental place; K includes \$10,000 late fee – not valid
3. Example of valid penalty provision – Same as above but \$500 per day late fee (expected profit)
 - a. NY – a S of a house may keep down payment as liquidated damages as long as it doesn't exceed 10% of the K price.

C. Damages rules for ordinary Ks

1. General measure of damage – injured party is entitled to recover amount that would have put him in as good a position as if the K had been performed
 - a. These rules are based on protecting P expectation interests by trying to put the P in same position as if the K had been performed (put this in a NY essay).
 - b. Ex. 1- P Ks with O to paint house for \$1k. P breaches and O has to pay \$1,400 to another painter for the same work. O can recover \$400 from P.
 - c. Ex. 2 – Same facts except that O breaches shortly after B begins, after P has incurred cost of \$100. P can recover costs actually incurred plus lost profits.
2. Additional limitations
 - a. Plus incidental damages – the injured party can also recover costs she incurs in dealing with the breach such as costs of finding a replacement
 - b. Plus foreseeable consequential damages – the injured party can also recover for consequential damages (damages that were special to that P) that were in reasonable contemplation of both parties at the time of the K.
 - c. Minus avoidable damages (mitigation) – no recovery for loss that could have been avoided by appropriate steps. Burden of proof on avoidability is on the D (affirmative defense)

D. Damage rules for sale of goods

1. Part 7 of Art. 2 reflects the general K damages policy of putting the innocent party where it would have been had the K been performed. There are two relevant facts: who breached and who has the goods.

Thus there are 4 basic Article 2 damages fact patterns and four sets of rules.

- a. S breaches, B keeps the goods – fair market value if perfect minus fair market value as delivered
 - i. Ex. – S sells B antique car for \$30k. The car is defective. B keeps the car and sues for breach of K. The jury finds that the car as delivered was only worth \$20k and that if the car had been delivered as K'ed, it would have been worth \$34k. B can recover \$14k.
 - ii. S breaches, B has goods but does not accept
- b. S breaches, S keeps goods – where the S does not deliver or the B properly rejects or revokes acceptance of tendered goods, the B's basic remedy is the difference between the K price and either the market price or the cost of buying replacement goods (cover).
 - i. Where B has paid for goods which are non-conforming, and the S has refused the B's offer to restore the goods and the B's demand for repayment, the B may resell the goods and credit the proceeds to the amount owed by the S (under the same rules that apply to a S's resale of wrongfully rejected goods.) The B may sell at either a public or private sale; but if it is a private sale, reasonable advance notice must be given to the S.
- c. B breaches, B has the goods – K price
 - i. E.g. - B Ks to buy carpeting from K. K price is \$800. B receives the carpeting and does not pay for it. B owes \$800 (always owes K price, regardless of market price.)
- d. B breaches, S has goods – K price – market price at reasonable time and place of delivery (or K price – resale price) and in some situations, provable lost profits.
 - i. Ex. 1 – E Ks to sell his 1973 Cadillac to C for \$1k. C breaches. E then sells to S for \$800. E can recover \$200 from C.
 - ii. Ex. 2 (lost profits) – S&M Leather Ks to sell leather clothing to C for \$1k. (Assume that C is buying goods apart of S&M's regular inventory. C breaches. S&M sells the very same items to J for \$1,000. S&M can recover damages from C (??))
 - (A) Critical facts in lost profit hypos
 - (1) Regular inventory
 - (2) There is a breach followed by resale at exactly the

same price

2. S breaches:

a.

E. Quasi-K

1. Unjust enrichment

F. Non-Monetary remedies:

1. Specific performance/Injunction (an equitable remedy when remedy at law is inadequate)

a. Ks for sale of real estate

b. Ks for sale of unique goods

i. Unique antiques, art, custom-made

c. Ks for services – no specific performance but possible injunctive relief

i. Ex. – If E Ks with C to lecture for a Company, C cannot obtain a court order requiring E to lecture but could possibly bar E from lecturing for a competing company (negative specific performance)

(A) 3 part test for validity

(1) Reasonable business need for the protection;

(2) Reasonable time limitation; and

(3) Reasonable geographic limitation

d. Defenses

i. Laches – a claim that the plaintiff has delayed bringing the action and that the delay has prejudiced the defendant;

ii. Unclean hands – a claim that the party seeking specific performance is guilty of wrongdoing in the transaction being sued upon; and

iii. Sale to a bona fide purchaser – a claim that the subject matter has been sold to a person who purchased for value and in good faith.

2. Reformation

a. An equitable remedy

b. Changes a written K

c. Facts to watch for

i. Mistake in writing the agreement – clerical errors

ii. Fraudulent misrepresentation as to what is in the writing due to the other party's fraudulent misrepresentation

3. Adequate assurances of future performance

a. Look for

- i. One party to K learning something after the K that gives him reasonable grounds for insecurity about the other party's performance; and

- ii. Written demand for adequate assurance

- b. Ex. – P Ks to paint O's house for \$1k with payment due 30 days after completion of work. After making K, P learns of O's record of not paying his bills. P can make written demand for adequate assurances.

4. Reclamation

- a. Right of an unpaid S to get his goods back.

- b. Key facts are that

- i. The B must have been insolvent at the time that is received the goods;

- ii. That S demand return goods within 10 days of receipt (this "10-day rule" becomes a "reasonable time rule" if before delivery there has been an express representation of solvency by the B); and

- iii. The B still has the goods at time of demand.

- c. Ex. – On Jan. 15, S sells B grits on credit. The grits are delivered to B and Jan. 22. B is insolvent on Jan 22. S learns of B's financial difficulties and demands return on Jan. 27th. B still has grits on Jan. 27th. S can recover the grits through reclamation.

5. Right of good faith purchaser in entrustment

- a. If an owner leaves his goods with a person who sells goods of that kind and that person wrongfully sells the goods to a 3d party, then such a good faith purchaser cuts off the rights of the original owner/entruster

VIII. 3d party problems

A. 3d party beneficiaries

1. Identifying 3d party beneficiary problems

- a. Lack for 2 parties K'ing with the intent of benefiting a 3d party

- i. Ex. 1 – S agrees to pay Jumbo Bagels \$100 and JB agrees to deliver 12 dozen bagels to E. If JB refused to deliver, E can sue on the K.

- ii. Ex. 2 – life insurance policies (beneficiaries can sue insurance

company)

2. Vocabulary

- a. 3d party beneficiary – not a part to the K. Able to enforce Ks others made for his benefit.
- b. Promisor – a person who is making the promise that benefits the 3d party.
- c. Promisee – a person who obtains the promise that benefits the 3d party
- d. Creditor/donee – 3d party beneficiary is usually a donee unless he was already a creditor of the promisee

3. Dealing with efforts to cancel or modify

- a. Test – 3d party knows of or has relied on or assented as requested, then the rights have vested and the K cannot be cancelled or modified without consent unless the K provides otherwise.
 - i. Ex. – in bagel example, S and JB can cancel the K before E learns about it but not after E learns about it and relies on it.

4. Who can sue whom?

- a. Beneficiary can sue promisor;
- b. Promisee can sue promisor;
- c. Donee beneficiary cannot sue promisee, but creditor beneficiary can sue on a pre-existing debt.

5. Defenses

- a. If the 3d party sues the promisor, the promisor D can assert any defenses he would have had if sued by the promisee.

B. Assignment of rights

1. What is an assignment? Transfer of rights under a K in two separate steps: (1) K between only two parties; (2) one of the parties later transfers rights under that K to a 3d party

a. Assignment vs. 3d party beneficiary:

- i. Assignment – On Jan. 15, Batman Ks with Gotham to provide security services for a year; the K provides that Batman is to be paid \$300k for the services. Batman later transfers his rights under the K to Robin.

- ii. 3d party beneficiary – Batman Ks with Gotham to provide security services for a year; the K provides that Gotham will pay Robin \$300k for Batman's services

2. Vocabulary

- a. Assignor – party to the K who later transfers his rights under the K to another
- b. Assignee – not a party to the K. Able to enforce the K because of the the assignment
- c. Obligor – other party to the K.

3. Limitations on assignments:

- a. K provisions
 - i. Prohibition – language of prohibition takes away the right to assign but not the power to assign which means that the assignor is liable for breach of K but an assignee who does not know of the prohibition can still enforce the assignment.
 - ii. Invalidation – language of invalidation takes away both the right to assign and the power to assign so that there is a breach by the assignor and no rights in the assignee
- b. Common law
 - i. Even if a K does not an any way limit the right to assign, CL bars an assignment that substantially changes the duties of the obligor.
 - (A) Assignment of right to payment – this does not substantially change the duty of the obligor
 - (B) Assignment of other performance rights – this does substantially change the duty of the obligor (e.g. – Gotham assigns its rights to security services to Metropolis, i.e. Batman is to defend Metropolis, not Gotham)

4. Requirements for assignment

- a. Must have language of present assignment ("I assign" not "I promise to assign" or "I will assign");
- b. Consideration is generally not required

5. Rights of assignee:

- a. Assignee can sue obligor
- b. Obligor has same defenses against assignee as it would have against assignor
- c. Payment by obligor to assignor is effective until obligor knows of assignment
- d. Modification agreements between obligor and assignor are effective if obligor did not know of the assignment.

6. Multiple assignments

a. Gratuitous assignments:

i. General rule – last assignee wins

(A) It is possible to make a gratuitous assignment.

Generally, however, such a gift assignment can be freely revoked. Revocation can be accomplished directly or indirectly by bankruptcy, death, the assignor taking performance directly from the obligor, or the maker of another assignment. Since a later gift assignment revokes an earlier gift assignment, the general rule for resolving claims among assignees who did not provide consideration is a last in time rule.

ii. Exception – if the gift assignment is not revocable, then it will take priority over a later assignment

(A) A gratuitous assignment is not revocable if:

- (1) It is the subject matter of a writing delivered to the assignee;
- (2) The assignee has received some sort of indicia of ownership; or
- (3) The assignee has relied on the assignment in a way that is reasonable, foreseeable, and detrimental

iii. NY rule – Gratuitous assignment is not revocable if it is in writing

b. Assignment for consideration

i. General rule – first assignee for consideration wins

ii. Limited exception – a subsequent assignee takes priority over an earlier assignee for value only if he both (1) does not know of the earlier assignment and (2) is the first to obtain payment, a judgment, a novation, or indicia of ownership (first to notify is irrelevant)

iii. Multiple assignments for consideration as a breach of warranty – in an assignment for consideration, the assignor makes a warranty that the rights are assignable and enforceable.

(A) Losing assignee can sue assignor for breach of warranty

C. Delegation of duties

1. What is a delegation? – party to K transferring work under that K to 3d party

2. Relationship of assignment a delegation:

- a. Assignment is the transfer by a party to a K of his rights or benefits under the K to a 3d party who was not a party to the K
- b. Delegation – the transfer by a party to a K of duties or burdens under the K to a 3d party who was not party to the K.
- c. Often a K'ing party makes both an assignment and a delegation of his rights and duties under the same K to a 3d party.
 - i. Often the multistate examiners use the term "assignment" in a problem involving an assignment and a delegation even in a problem involving only a delegation.

3. Which duties are delegable?

- a. General rule – K duties are delegable
- b. Limitations (very limited) – delegations are permitted unless either:
 - i. K prohibits delegations or prohibits assignments; or
 - ii. K calls for very special skills; or
 - iii. Person to perform K has a very special reputation.

4. Consequences of delegation

- a. Delegating party always remains liable
- b. Delegatee is liable only if he receives consideration from delegating party
 - i. Ex. 1 – P Ks with O to paint house for \$1,000. X then agrees with P that X will do the painting for P because P is a good friend. X does not do the work.
 - (A) O can sue P.
 - (B) P cannot sue X (because delegation was not for consideration)
 - ii. Ex. 2 – P Ks with O to paint house for \$1,000. P and X agree that X will do the work and P will pay X \$9000. X does not do the work.
 - (A) O can sue P.
 - (B) P can sue X (because delegation was for consideration)
 - (C) O can sue X (delegation for consideration creates a 3d party beneficiary obligation)

Corporations

I. Organization of NY Corps

A. Formation requirements (people, paper, acts):

1. Incorporators (people)

a. What does an incorporator do

- i. Executes the certificate and delivers it to the Dept. of State
- ii. Holds the organizational meeting

b. Number of incorporators required – 1 or more

c. Who can be one? Humans only, not entities

2. Certification of incorporation (paper):

a. Purpose:

- i. K between corp and SHs
- ii. K between corp and state

b. Info on certificate

i. Names and addresses

(A) Corp name – must include one of the following words:

- (1) Corporation
- (2) Incorporated
- (3) Limited

(B) County in NY of the office of the corp

(C) Designation of NY Sec. Of State as agent for service of process (and address for forwarding process)

(1) May also name registered agent for service of process

(D) Name and address of each incorporator

ii. Statement of duration

(A) If none, presume perpetual existence

iii. Corp purpose (statement required):

(A) General statement of purpose

(1) Eg. - to "engage in all lawful activity after first obtaining necessary state agency approval"

(B) Specific statement of purpose and ultra vires rules

(1) If you give a specific statement of purpose, activity that falls outside of the scope of that is an ultra vires act

(a) Ultra vires Ks are valid (enforceable)

- (b) SHs can seek injunction to stop the ultra vires act
- (c) Th responsible officers and directors are liable to the corp for ultra vires losses

iv. Capital structure

(A) Definitions

- (1) Authorized stock – maximum number of shares that the corp can sell
- (2) Issued stock – the number of shares the corp actually sells
- (3) Outstanding stock – shares that have been issued and not re-acquired by the corp

(B) What must be included in the certificate about stock

- (1) Authorized stock
- (2) Number of shares per class
- (3) Info on par value, rights, preferences, and limitations of each class
 - (a) Note – at least one class of stock or bonds must have unlimited voting rights and at least one class of stock must have unlimited dividend rights
- (4) If preferred shares are issued in series (subclasses), statement of variation in the series or of Board's power (if any) to establish series and fix variations between them, and limitations (if any) on Bd's authority to change number of shares in any series of preferred shares

3. Acts

- a. Each incorporator signs certificate and acknowledges it before a notary and they deliver it to the NY Dept. of State
 - i. If it conforms with the law and filing fees paid, then the Dept. files the certificate
 - (A) Effect of filing – this is conclusive evidence of a valid formation (a de jure corp)
 - ii. Then, incorporators hold an organizational meeting (or they can do it by written consent) to adopt any bylaws and elect the initial board of directors
 - (A) Bd then takes over management

B. Legal significance of formation of corp

1. Internal affairs of NY Corp (relationship among directors, officers, SHs, etc) are governed by NY law
2. A corp is a separate legal person. It has broad powers by statute, including power to enter Ks, transfer property, buy and sell securities (its own or others) and to sue or be sued. It can make political contributions regardless of corp benefit (but cannot contribute more than \$5k per year to any candidate or organization [check this]). It can make charitable contributions with no statutory ceiling.
3. Because the corp is a separate entity, generally the people who run it (directors and officers) are not liable for its obligations and the owners (SHs) generally enjoy "limited liability" which means that a SH is liable only for the price of his shares.

C. De facto corp doctrine/Corp by estoppel

1. Doctrines by which a business failing to achieve de jure corp status nonetheless is treated as a corp (SHs will not be personally liable for business debts)
 - a. De facto corp – 1) Exists relevant incorporation statute; 2) parties made good faith, colorable attempt to comply with it; and 3) some exercise of corp privileges
 - i. If applicable – treated as corp for all purposes except in an action by the state
 - ii. Status in NY – because the Dept. of State certification is conclusive proof of formation, the doctrine was thought to be abolished. BUT case law suggests it may be alive, at least in limited circumstances:
 - (A) Incorporators put together proper certificate and deliver it to the Dept. of State but the Dept. failed to file it (without rejecting it). Not de jure, because not filed (can argue de facto if meet the test); or
 - (B) People who plan to incorporate commence business after signing certificate but before delivering it for filing. During the interval, arguably sufficient colorable attempt to comply to result in de facto corp.
 - b. Corp by estoppel – abolished in NY

D.Bylaws

1. Adoption of bylaws is not a condition precedent to formation of a corp. But virtually all corps have them. They set up internal procedures, define responsibilities of different person (i.e. officers), lay out how notice of director meetings is given, etc.
 - a. If the bylaws conflict with the certificate of incorporation – the certificate controls because bylaws are internal (not filed with state) so outsiders are not bound by them or charged with knowledge of them. Bylaws are essentially a K among SHs
2. Who adopts the initial bylaws? The incorporators (these have the status of a SH bylaw)
3. Who can amend or repeal the bylaws or adopt new ones – the SHs
 - a. The Bd can do so only if the certificate or SH bylaws allows (and SHs can amend or repeal any Bd-adopted bylaw)

E. Pre-incorporation Ks

1. Promoter – a person acting on behalf of a corp not yet formed
2. Liability on pre-inc Ks
 - a. Corporation – the corp is not liable on pre-inc Ks until it adopts the K
 - i. Express adoption – e.g. Bd resolution
 - ii. Implied adoption – the corp's knowing acceptance of the K
 - b. Promoter – generally, unless th K clearly indicates that the parties do not intend the promoter to be liable, the promoter remains liable on pre-inc Ks until there has been a novation (an agreement of the promoter, the corp, and the other K'ing party that the corp will replace the promoter under the K)
 - i. Adopting of K by corp does not relieve the promoter of liability (only novation)

F. Secret profit rule (when promoter deals with corp itself)

1. Rule – promoter cannot make secret profit on her dealings with the corp
 - a. Was there a profit
 - i. Sale to corp of property acquired before becoming promoter(A) Profit – price paid by corp minus FMV
 - ii. Sale to corp of property acquired after becoming promoter

- (A) Profit – price paid by corp minus price paid by promoter
- b. If profit, the promoter is liable to the corp for that profit only if the profit was secret (not liable if Bd consents to or ratifies the profit)

G. Foreign corps

- 1. Foreign corps doing business in NY must qualify
 - a. Foreign corp is one inc anywhere but BY
 - b. Doing business means the regular course of intrastate, not interstate, business activity. Not occasional or sporadic business (not just having meetings in NY, etc)
 - c. Foreign corp can qualify by applying to Dept. of State and designating Sec. Of State as agent for service of process
 - i. It applies by giving information from its certificate and by proving good standing in home state
 - d. Consequences of foreign corporations transacting business without qualifying:
 - i. Penalty when the corp finally does qualify, and
 - ii. Until it qualifies, the foreign corp cannot sue in NY (but it can be sued)

(A) These are the only consequences (the business transacted is valid, etc)

II. Issuance of stock

A. What is an issuance

- 1. When a corp sells or trades its own stock
- 2. Issuance of stock is one way a corp can raise capital
 - a. Investors buy stock and thereby become equity holders – owners of the corp. (their equity interest brings with it various rights that will be discussed)
 - b. This is distinguished from issuance of bonds
 - i. With a bond, the investor makes a loan to the corp to be repaid (usually with interest) as agreed in the K (the holder of a bond is a creditor (not a owner of the corp))

(A) A "debenture" is simply a loan that repayment of which is not secured by corp assets

B. Subscriptions (written, signed offers to buy stock from corp):

- 1. Revocation of pre-inc subscriptions – a pre-inc subscriptions is

irrevocable for 3 months (unless it says otherwise and all other subscribers agree)

a. Why? - so people forming the corp can rely on the money's being there (if these were revocable, people could pledge to buy stock and then pull the rug out right before the corp was formed)

2. Revocation of post-inc subscriptions – revocable until acceptance
3. When do the corporation and subscribers become obligated under a subscription? - the Bd accepts the offer (at that point, there is an agreement to sell to this subscriber. The call for payment must be uniform within each class or series of stock)
4. Subscriber default on payment
 - a. If the subscriber has paid less than 50% of the purchase price – and fails to pay the rest within 30 days of written demand, the corp can keep the money paid and cancel the shares (the shares become authorized and unissued)
 - b. If the subscriber has paid 50% or more – and fails to pay the rest within 30 days of written demand, the corp must try to sell the stock to someone else for cash (or a binding obligation to pay cash). If no one will pay the remaining balance, the defaulting subscriber forfeits what he has paid and the shares are canceled. If someone will pay more than the remaining balance due (plus the corp's expenses in selling) the original subscriber recovers any excess over the total he originally agreed to pay

5. Defenses to get out of K after corp accepts subscription offer

- a. Material change in purpose of corp
- b. Corp not fully subscribed
 - i. Promoter says 10k shares being sold, but only gets 5k subscriptions and corp tries to open business anyways
 - ii. On exam, number of shares may appear in subscription agreement
- c. Not a de jure corp
 - i. No substantial compliance

C. Consideration (what must the corp receive when it issues stock)

1. Forms of consideration

a. Permitted:

- i. Money (cash or equivalent, e.g. check)
- ii. Tangible or intangible property
- iii. Labor or services already performed for the corp
- iv. A binding obligation to perform for the corp future services having an agreed value
- b. Prohibited (results in "unpaid stock," treated as water): anything else

2. Amount of consideration

- a. Par value – means "minimum issuance price": must sell for at least that amount
- b. No par stock – no minimum issue price (Bd sets price unless certificate reserves the right to set price to the SHs)
- c. Treasury stock – this is stock that was previously issued and then re-acquired by corp
 - i. Corp may then sell the treasury stock with no minimum (treated as no par stock)
- d. Acquiring property with par value stock
 - i. Form of consideration – property (tangible property)
 - ii. Amount of consideration – total value of the property must be at least the par value of the stock (par value/share x number of shares)
 - (A) Bd always values the consideration in a par issuance
 - (B) In no-par, Bd values consideration unless certificate allows SHs to do so
 - (C) Bd's valuation is conclusive if made in absence of fraud
- e. Consequences of issuing par stock for less than par (i.e., watered stock):
 - i. E.g. - C corp issues 10,000 shares of \$3 par to X for \$22k. The corp (or creditors if the corp is insolvent) can sue for \$8k of "water"
 - (A) Directors liable? - yes if they knowingly authorized the issuance
 - (B) X liable? Yes, charged with the knowledge of par value
 - (1) What if X transfers the stock to a 3d party? - the 3d party is not liable if he acted in good faith (did not know)

about water)

D.Preemptive rights

1. What is?

- a. The right of an existing SH to maintain her percentage of ownership by buying stock whenever there is a new issuance of stock for money (which includes cash or checks)
 - i. New issuance – unless the certificate says otherwise, "new issuance" does not include:
 - (A) The sale of treasury shares; or
 - (B) The sale of shares authorized by the original certificate and sold within 2 years of formation
 - ii. For money – no preemptive rights when stock is issued in exchange for property, etc.

2. If the certificate of incorporation is silent regarding preemptive rights, do they exist?

- a. For corps formed on or before Feb 22, 1998 – yes (for common stock)
- b. For corps formed after Feb 22, 1998 – no (preemptive rights only exist if the certificate says so)

III. Directors and officers

A.Directors – statutory requirements

1. Number – one or more adult natural persons
 - a. The number can be set in bylaws or by SH action or by the Bd if a SH-adopted bylaw allows the Bd to do it
 - b. If no number of directors is set in any such manner, then one director
2. Incorporators elect initial directors, after that SHs elect directors at annual meeting
 - a. Can elect whole Bd or can classify the Bd in the certificate or bylaw adopted by SHs. Can have 2, 3, or 4 classes of equal number (or as close as possible). No class can have fewer than 3 members
3. Directors can be removed for cause by SHs if permitted in certificate or bylaw. Directors can be removed without cause by SHs, but only if certificate or bylaws allow.
 - a. Director cannot be removed if cumulative voting is in effect and the

number of votes cast against removal would have elected her

4. Who selects who fills a vacancy on the Bd? - the remaining directors vote
 - a. But if the vacancy is caused because the director was removed by SHs without cause, then (unless the certificate or SH bylaw provides to the contrary), the SHs select the replacement
5. Bd action
 - a. There are 2 ways the Bd can take a valid act (if neither is met, the "act" is void unless later ratified by a valid corp act)
 - i. Unanimous director consent in writing to act without meeting; or
 - ii. A meeting
 - (A) A conference call qualifies as a meeting
 - (B) Meetings can be held anywhere (need not be in NY)
 - (C) Notice of meetings
 - (1) No notice required for regular meetings
 - (2) Notice is required for special meetings and the method (mail, phone, 2-day notice, etc) can be set in the bylaws
 - (a) If required notice not given, action taken is void unless those not given notice waive the defect in signed writing anytime or by attending the meeting without objection
 - (D) Proxy – directors cannot give proxies for director voting
 - (E) Voting agreements – directors cannot enter into voting agreements
 - (F) Quorum for a meeting:
 - (1) To do business, there must be a majority of the "entire Bd" (duly constituted Bd = the number of positions if no vacancies) present at meeting
 - (a) Certificate or bylaw can decrease quorum to less than majority, but never to fewer than 1/3 of the directors
 - (b) Certificate (not bylaw) can increase quorum to super majority)
 - (G) Voting requirement
 - (1) If quorum, then passing resolution requires majority vote of those present

- (a) You can never decrease the requirement of a majority vote of those present
- (b) Certificate (not bylaw) can increase the voting requirement to greater than a majority

B. Role of directors

- 1. Generally, Bd manage business of corp. It sets policy, monitors and supervises officers, declares dividends and other distributions, recommends fundamental corp changes, etc.
- 2. If the certificate or bylaws allow, a majority of the "entire Bd" can delegate all powers and responsibilities to a committee
 - a. A committee cannot amend, repeal, or adopt bylaws, recommend action to SHs requiring SH approval, fill Bd vacancy or set director compensation (but committee can recommend any of these for Bd action)

C. Duty of care

- 1. Std – directors must discharge her duties in good faith and with that degree of diligence, care, and skill that an ordinarily prudent person would exercise in under similar circumstances in like position
 - a. Nonfeasance (director does nothing):
 - i. Eg – a director of C Corp fails to attend any of the Bd meetings. Will be held liable for breach of duty of care
 - (A) He violated the std of care but he is only liable if his breach caused a loss to the corp
 - b. Misfeasance (directors do something that hurts the corp)
 - i. Eg – Bad business decision
 - (A) Not liable if meets the business judgment rule
 - (1) BJR – a court will not 2d guess a business decision if it was made in good faith and was reasonably informed and had a rational basis (prudent people do their homework, analyze, deliberate, etc)

D. Duty of loyalty (because these cases involve conflicts of interest, BJR doesn't apply)

- 1. Duty of loyalty std – a director must act in good faith and with the conscientiousness, fairness, morality, and honesty that the law requires of fiduciaries

- a. Interested director transactions – any deal between the corp and one of its directors (or a business that the director is also a director or officer or in which he has substantial financial interest)
 - i. Interested director transactions will be set aside unless the director shows either (1) the deal was fair and reasonable to the corp when entered; or (2) the material facts and her interest were disclosed or known and the deal was approved by any of these:
 - (A) SH vote; or
 - (B) Bd approval by sufficient vote not counting the votes of interested directors; or
 - (C) Unanimous vote of disinterested directors if interested directors are needed to make a quorum
 - ii. Bd can fix compensation of directors in any capacity, unless certificate or bylaw says they can't
 - (A) Compensation must be reasonable and in good faith (if excessive, it is a waste of corp assets which is a breach of duty of loyalty)
 - iii. Sometimes a corp may want to give a director or officer stock options as an incentive to service
 - (A) This use of stock options must be approved by a SH vote if the stock is not listed on the stock exchange
 - (B) If the stock is listed, this use of options must be authorized under exchange policies and no shareholder vote is needed
- b. Competing ventures
 - i. A director may serve on another bd if that company does not compete with the corp of which he is already a bd member
 - ii. However, a director may not serve on the bd of a competing company
 - (A) If so, the corp gets constructive trust on that director's profits
- c. Corporate opportunity
 - i. A director cannot usurp a corporate opportunity for himself
 - (A) This means he cannot take it for himself until he:
 - (1) Informs the Bd of its existence and

(2) Waits for the Bd to reject it

(B) What is a corp opportunity? - something that the corp needs, has an interest or tangible expectancy in, or is logically related to its business

(C) The corp's financial inability to pay for the opportunity is probably not a defense (maybe a defense that the corp could not take advantage of the opportunity)

(D) Remedy for usurpation – constructive trust

(E) Exam tip: look for "classic combo" (usurpation with interested director transaction): D usurps opportunity then sell/leases to property to corp

E. Other state law bases of director liability

1. Ultra vires act
2. Watered stock
3. Improper loans (eg – bd votes to lend a director \$100k of corp funds)
 - a. For corps formed on or before Feb 22, 1998, such loans must be approved by SH vote (in which quorum is majority of disinterested shares), unless certificate allows Bd to decide if the loan benefits the corp
 - b. For corps formed after Feb 22, 1998 – instead of SH approval, can OK by Bd conclusion that loan is in the corp's interest which means it benefits the corp
4. Improper distributions
5. For these or any other thing for which a director can be liable, which directors are liable?
 - a. General rule – a director is presumed to have concurred with Bd action unless her dissent is noted in writing in Corp records.
Generally, this means entering dissent:
 - i. in the minutes
 - ii. in writing to the corp secretary at the meeting, or
 - iii. in registered letter to the corp promptly after adjournment
(cannot dissent if voted for resolution at the meeting)
 - b. Exceptions
 - i. Absent directors are not liable if they register written dissent (by delivery or registered mail to the corp secretary or ensuring that

the dissent is filed with the minutes within reasonable time after learning of the action

- ii. Good faith reliance on information, opinions, reports or statement by (1) officers or employees of the corp whom the director believes competent and reliable, (2) lawyers or public accountants whom the directory or officer believes are acting within their competence, or (3) a committee of which the person relying is not a member, as to which the person relying is not a member, as to matters within its designated authority
 - (A) This seems like a pretty big exception

F. Officers

- 1. Owe the same duty of loyalty as do directors
- 2. Status – officers are agents of the corp (watch for cross-over issues)
- 3. The Bd may select a president, one or more VPs, a secretary, a treasurer, and any others the Bd may determine or for which the bylaws provide
 - a. One person may hold multiple offices simultaneously (thus when all stock is owned by one person, that person may hold all offices)
- 4. Selection and removal of officers
 - a. Officers are selected by and removed by the directors, unless the certificate allows SHs to elect them (if SHs elect, only they can fire. Even then, for cause, directors can suspend officer's authority to act)
 - i. If fire, corp may be liable for K damages
 - ii. Hierarchy – SHs hire and fire directors, directors hire and fire officers
 - (A) So as a general rule, SHs do not hire and fire officers
 - b. Judicial actions – the NY AG or holders of 10% of all shares may sue for a judgment removing an officer for cause. Court can bar reappointment of a person so removed from office

G. Indemnification of Directors and officers

- 1. A person sued in his capacity as director or officer incurs costs, attorney's fees, maybe even fines, a judgment or settlement, and then he seeks reimbursement from the corp.
 - a. In an action by or on behalf of the corp there are three possibilities:
 - i. Reimbursement prohibited – if director/officer held liable to the

corp

ii. Of right – corp must indemnify if the director/officer was successful in defending the actions, on merits or otherwise (the Bd passes a resolution regarding indemnification)

(A) But the director or officer cannot recover litigation expenses and atty fees incurred in litigating to establish his right to indemnify

iii. Permissive – in situations not satisfying (i) or (ii), the corp may indemnify the officer or director

(A) Std – the officer or director must show that she acted in good faith and for a purpose reasonably believed to be in the corp's best interest. Reimbursement can include settlement amount, expenses, and attorney's fees (not judgment though)

(B) Note: reimbursement not allowed if it would be contrary to a provision in the certificate or bylaws or Bd/SH resolution or agreement in effect at the time the cause of action accrued

b. In an action by and for someone other than the corp, reimbursement is permitted if the director/officer shows she acted in good faith and for a purpose reasonably believed to be in the best interest of the corp (in a criminal case, must also show she had no reason to believe her conduct was unlawful)

i. Reimbursement can include judgment, settlement, expenses, and atty's fees

c. Who determines eligibility?

i. The Bd (with quorum of directors being non-parties); or if there is no such quorum

ii. SHs or a quorum of those directors who are disinterested; or

iii. The Bd pursuant to report from independent legal counsel

2. Court where officer/director was sued can order indemnification if it finds the officer/director is fairly and reasonably entitled to it. Any such order cannot include reimbursement for a judgment against the director/officer though

3. Certificate or bylaws can provide for indemnification by resolution of Bd or SHs or by agreement, unless the officer/director acted in bad faith, was deliberate and dishonest in a way material to the case or

wrongfully profited

4. Corp can advance litigation expenses to the officer/director but the expenses must be repaid if it turns out that the officer or director is not entitled to indemnification
5. Corporation can buy insurance to cover director/officer liability

IV. SHs

A. Holding SHs liable for debts of the corp:

1. Generally, a SH is not liable for the debts or acts of a corp. But a ct may pierce the corp veil and hold SHs personally liable if they have abused the privilege of incorporating and if fairness demands that they don't enjoy limited liability
 - a. The PCV std – NY cts may PCV to prevent fraud or to achieve equity (the cts will prevent use of corp as cloak for illegality)
 - i. Alter ego (Identity of interests, agency, excessive domination)
 - (A) In NY a ct will not PCV if corp has any mind-existence or will of its own (very difficult in NY)
 - (1) Might PCV in following situations
 - (a) A dummy corp, where SHs carry on carrying on business in personal capacity or for purely personal, not corp, ends
 - (b) A parent corp so controls the daily operations of a subsidiary as to be true prime movers for the subsidiary's actions
 - (c) A group of separate corps are operated as one, so dominated by one that they have no mind, existence, or will of their own
 - (B) Undercapitalization alone is apparently not enough to PCV (need illegality, fraud, or excessive domination as well)
 - (C) Exam tip – state the general rule and PCV std and explain PCV
 2. Wages – in a closely held (or close) corp, the ten largest SHs are personally liable for wages and benefits to the corp's employees

B. SH mgmt of corp

1. Remember that generally the directors (not SHs) manage the corp. There is a public policy that the Bd must exercise the mgmt power,

and the SHs should not encroach directly on that power. This is a trend away from that public policy in some instances

2. Members of a licensed profession, such as doctors and lawyers, cannot practice the profession through a general business corp. They can incorporate, however, by forming a professional service corp, often abbreviated "P.C.". SHs must be licensed in the profession but the P.C. Can hire non-professionals as employees
 - a. Professionals are personally liable for negligence in rendering professional services. The P.C., however, is liable as an entity for Ks and for rents due on leases in the P.C.'s name.
 - i. In general, the P.C. is governed by rules of the business corp. Certificate of inc must meet general requirements except for use of "P.C." must indicate the profession practiced and include names and addresses of original SHs, directors, and officers. As to each, the certificate must be accompanied by certification that each proposed SH, director, and officer is licensed to practice.
 - b. The P.C. must purchase shares of a SH who dies or is disqualified from the practice
3. SHs can manage corp directly if it is close. A close corp has few SHs and the shares are not publicly traded
 - a. A provision in the certificate can restrict or transfer Bd power to SHs or others. OK if:
 - i. All incorporators or SHs (voting and non-voting) approve it;
 - ii. All subsequent SHs have notice;
 - iii. It is conspicuously noted on front and back of all shares (this is not technically required but is a way to make sure subsequent SHs have knowledge); and
 - iv. Shares are not listed or regularly quoted over the counter
 - b. When SHs do manage the corp, the managing SHs owe the duties of care a loyalty
 - c. There is a trend toward imposing fiduciary duties on SHs in their dealings with each other. Controlling SHs cannot use their power for personal gain at the expense of minority SHs or the corp or to oppress minority SHs or the corp. They owe a duty of utmost faith. Cts are increasingly willing to step in to help minority SHs in a

close corp because minority SHs have no way out of a close corp (no market to sell shares)

C. Shareholder Derivative Suits

1. In a derivative suit, a SH is suing to enforce the corp's claim. It's a case in which the corp is not pursuing its own claim, so a SH steps in to prosecute the claim (always ask yourself whether the corp could have brought this suit – if so, likely derivative)
 - a. Ex 1 – S, SH of C Corp, sues X for breaching its K with C Corp
 - b. Ex 2 – S sues the Bd of C Corp for usurping corp opportunities
 - i. This is for breach of duty of loyalty owed to the corp. Same with duty of care. Both duties are owed to the corp so breach hurts corp itself.
 - c. Ex 3 – S sues regarding waste of corp assets
2. What are the consequences of a successful derivative suit
 - a. Generally, the recovery in any successful derivative suit goes to the corp
 - i. SH gets costs and atty's fees, usually from the judgment won for the corp (because she conferred a benefit upon the corp by winning)
 - ii. S can recover damages directly in a derivative suit if the recovery by the corp would simply return the money to the bad guys
 - (A) Eg – a close corp has 3 SH, each of whom owns 1/3 shares and participate in mgmt. One breaches duty of loyalty by engaging in a competing venture. In a derivative suit, the corp wins a judgment to recover the bad guy's profits. But giving the recovery to the corp will return 1/3 of it to the bad guy. Court might let the other SHs recover directly, although it is a derivative suit
 3. What are the consequences of an unsuccessful SHs derivative suit?
 - a. SH cannot recover costs and expenses
 - b. SH is probably liable for costs of opposing party (because winner usually recovers costs from loser)
 - i. Maybe opposing party can recover atty's fees from SH if SH sued without reasonable cause
 - c. Other SHs cannot later sue opposing party on the same transactions

4. What are the requirements for bringing a SH derivative suit?
 - a. Stock ownership – the person bringing the suit must have owned stock (or held a voting trust certificate) at the time the claim arose or she must have gotten it by operation of law (e.g. inheritance or divorce decree) from someone who owned it when the claim arose. In addition, she must own the stock when the action is brought and through entry of judgment
 - b. Must adequately represent the interests of the corp and SHs
 - c. Must also make demand that director bring suit unless it would be futile to do so
 - i. When futile
 - (A) If the majority of the Bd is interested or under control of the interested directors
 - (B) If the Bd did not inform itself of the transaction to the extent reasonable under the circumstances, or
 - (C) The transaction is so egregious on its faces that it could not be the result of sound business judgment
 - ii. Pl. must plead with particularity Bd's initiation of suit or why demand was excused
 - iii. If demand to sue is made and refused, S cannot sue unless she can show a majority of the Bd is interested or its procedure was incomplete or inadequate
 - d. Corp may be able to demand that the Pl. SH post security for costs unless she owns 5% or more of any class of stock or her stock is worth more than \$50,000
 - e. Corp can move to dismiss the derivative suit based upon the finding by independent directors (or a committee of independent directors sometimes called a "special litigation" committee) that the suit is not in the corp best interests (eg low chance of recovery, or cost of litigation would exceed recovery)
 - i. The court will scrutinize the independence of those doing the investigation and the sufficiency of the investigation
5. Litigation
 - a. Role of the corp
 - i. Must be a party

ii. Nominal defendant – named as defendant because corp didn't bring suit on its own?

b. Defenses

- i. Defendant can raise any defense that could have been brought against the corp if the corp had sued
- ii. Defendant can raise defenses to disqualify SH from suing
- c. No dismissal or settlement of a derivative suit without court approval. Ct may order notice given to other SHs whose interests will be substantially affected by the discontinuation of the case.

D. Voting

1. Who votes

- a. General rule – the record owner as of record date has the right to vote
 - i. The record owner to the person shown as the owner in corp records. The record date is a voter eligibility cut-off, set no fewer than 10 and no greater than 60 days before the meeting
(A) Eg – C corp sets the annual meeting for 7/7 and record date of 6/6. S sells her C corp stock on 6/25 (S is entitled to vote the shares because owned on 6/6)
- b. Exceptions to the general rule that record owner on record date votes
 - i. Even if it is the record owner on the record date, corp does not vote treasury stock
 - ii. Death of SH – if SH dies, executor can vote the shares even if SH was the owner on the record date
 - iii. Proxies
 - (A) A proxy is a 1) writing, 2) signed by record SH or authorized agent, 3) directed to the SH or the corp, 4) authorizing another to vote the shares
 - (1) A proxy can be created by fax or email (you don't need the SH's signature if fax or electronic transmission or telegram makes clear that it is authorized by SH)
 - (2) Proxies are only for 11 months (unless proxy says otherwise)
 - (3) A SH can revoke his proxy even if it says irrevocable

(a) Exception – SH sells B his shares after the record date but before the annual meeting. S gives B an "irrevocable proxy" to vote the shares at the annual meeting. S cannot revoke this proxy because 1) it says irrevocable and 2) the proxy-holder has some interest in the shares other than voting. This is a proxy coupled with an interest, ownership. Interest could also be option, pledge, etc.

c. Voting trusts and voting agreements

i. Voting trusts

(A) Requirements

- (1) A written trust agreement controlling how the shares will be voted;
- (2) Copy to corp;
- (3) Transfer legal title of shares to voting trustee; and
- (4) Original SHs received voting trust certificates and retain all SH rights except voting

(B) Time limit – 10 years max (but within 6 months of expiration, may extend for another term of up to 10 years)

ii. Voting agreement (or "pooling agreement")

(A) SHs can enter into voting agreements (must be signed in writing)

- (1) Apparently are not specifically enforceable
- (2) A proxy given subject to a voting agreement is irrevocable if it says so
- (3) Scope of agreement – two SHs agree to vote to elect each other as directors – OK because electing directors is what SHs do
 - (a) But cannot agree further about future actions intended to take as directors (this violates the rule re: no voting agreements among directors; probably OK if only 2 SHs; it is OK to agree to use "best efforts" to act in a particular way)

2. Where do SHs vote

a. There are two ways SHs can take valid action

- i. Unanimous written consent of all the holders of all voting shares to act without meeting; or
 - (A) If the certificate allows, can take action without meeting if there is agreement in writing of the holders of enough shares to pass a resolution if all voting shares were present and voting at a meeting
- ii. A meeting
 - (A) Annual meeting – can be held anywhere; ct can order one if not held
 - (1) This is where SH elect directors
 - (B) Special meeting – can be held anywhere
 - (1) Who can call? - the BD or anyone designated by the certificate
 - (a) A special meeting to elect directors must be called by the Bd if there is a failure to elect enough directors to conduct the business of a corp. If the Bd fails to call such a meeting, the holders of 10% of the voting shares may demand in writing that the corp hold the meeting. In this case the corp secretary must give notice of the meeting. If the secretary fails to do so, the SH may give notice.
 - (C) Notice requirement – must give written notice (that includes fax and email) to every SH entitled to vote, for every meeting (annual and special) between 10 and 60 days before the meeting
 - (1) Contents of notice – it must state when and where the meeting will be held
 - (a) Also must inform if the proposed action would entitle SHs to appraisal rights and tell why (and even include the statute about appraisal rights)
 - (b) Notice of a special meeting must state who called it and the purpose (which limits the business that can be done at the meeting – must also be for proper SH purpose [not to remove an officer because SHs don't remove officers])
 - (2) Consequences of failure to give proper notice to all SHs

– actions taken at the meeting are void unless those not given notice waive the notice defect

(a) How does waiver occur

(i) Express – in writing, signed, anytime, or

(ii) Implied – if attend meeting without objection

3. How do SHs vote

a. Quorum requirement

i. There must be a quorum represented at the meeting

(A) Determination of a quorum focuses on the number of SHs.

Generally, a quorum requires a majority of outstanding shares

(1) The certificate can provide increase in the % of shares required for a quorum

(2) The certificate or bylaws can reduce quorum to less than a majority but not less than 1/3

b. Voting requirement

i. If a quorum is present, a majority may act to bind the corp unless the certificate requires a higher vote (can never set it at less than a majority)

(A) Majority means majority of the shares actually voting in favor or against the proposal

(1) Ex – X corp has 120,000 shares outstanding. 62K shares at the meeting, 50k shares vote on a particular proposal, 25,001 shares must vote for the proposal for it to be accepted by the SHs

(2) And, unlike director's meeting, a quorum is NOT lost if people leave the meeting

4. How and when do SHs use cumulative voting

a. Only available in voting for directors (it is a device to help small SHs get representation on the Bd)

b. Only exists if certificate allows (if silent – no cumulative voting)

c. Multiply number of shares by number of directors to be elected (you can put those votes on any one director, or divide them up as you wish)

i. Ex – you own 1,000 shares in C Corp. C Corp has 9 directorships open for election. You want Derek Jeter to be director so you cast

9k votes for Derek

d. Formula

- i. % of shares required to elect one directors if cumulative voting is in place
 - (A) You need one more than this %: $x + 1$ ($x = \#$ of directors being elected)
 - (B) Ex – if the SHs were going to elect 9 directors, you would need 1 share more than 10% to elect one director

E. Sale of stock by a SH

1. Amount of consideration

- a. SH can sell stock for any amount regardless of par value (par is an issuance rule, so is only relevant when the corp is selling its own shares)

2. Transfer of stock restrictions

a. Example of restriction

- i. Right of first refusal – selling SH must first offer his stock to the corp

b. Violation of stock transfer restriction

i. Action against selling SH

- (A) Look to the validity of the restriction: it will be upheld provided that they are reasonable under the circumstances (which means not an undue restraint on alienation)

- (1) A right of first refusal is acceptable so long as the price offered is reasonable

- (2) A corp might be able to require corp approval for a SH to sell his stock if the approval requirement says the approval cannot be withheld unreasonably (if it doesn't, unlikely a reasonable restraint on alienation)

ii. Action against the transferee (buyer) of the stock

- (A) Look for buyer's knowledge or notice

- (B) Even if the restriction is reasonable and thus valid, it cannot be invoked against the transferee unless either

- (1) It is conspicuously noted on the stock certificate; or

- (2) The transferee has actual knowledge of the restriction

F. Right of SH (in person or by agent) to inspect (and copy) the books and

records of the corp

1. Statute gives SH a right to inspect and copy (1) minutes of SH proceedings and (2) the record of the SH
 - a. Any SH can demand access on 5 days written demand
2. Statute also gives a right to inspect and copy the list of current officers and directors
 - a. Any SH can demand this on two days written demand
3. The corp may demand that the SH give an affidavit that his purpose is not other than in the interest of the corp and he has not within 5 years tried to sell any list of SHs (corp cannot require more detail in an affidavit)
4. A SH can make written request for the corp's latest annual balance sheet, profit and loss statement, and latest interim statement distributed to SHs or public
 - a. A corp must provide the documents (can mail to SH)
5. CL right to inspect – in addition to the foregoing, for all SH, there is a CL right to inspect corp records at a reasonable time and proper place for a proper purpose (related to her role as a SH)

G.Distributions

1. Forms of distributions
 - a. Dividends
 - b. Payments to repurchase shares
 - c. Payments to redeem shares (redemption is a forced sale to the corp at a price set in the certificate)
2. Distributions of any type are to be declared at the Bd's discretion. Thus, there is no SH right to a distribution until it is declared.
 - a. Cts will not interfere with Bd's discretion absent bad faith or dishonest purpose. So it is tough for a Pl. to win a case trying to compel the declaration of a distribution.
 - b. Example of strong argument to compel dividend – where the corp makes consistent profit, but refuses to issue a dividend while paying themselves bonuses
3. Redemptions, as noted, are set in the certificate. They generally must be made proportionately within each class of stock that is subject to redemption.

4. Repurchases, on the other hand, are individually negotiated, and generally the corp can discriminate – can buy back some people's and not other's. However, in close corp, this type of discrimination may constitute unfair oppression of those minority SHs. So in te close corp there may be a duty of "equal opportunity" by which the corp must purchase pro-rata from all who want to sell their shares

5. Which SHs get dividends

- a. 4 hypos: for each of these hypos the Bd declares a dividend of \$400k. Who receives what if the outstanding stock is
 - i. 100k shares of common stock? \$4/share
 - ii. 100k shares of common and 20k of preferred with \$2 dividend preference?

(A) Preferred means pay first. So those 20K preferred shares must be paid their \$2 preference first, before anyone else gets anything. 20K shares multiplied by \$2 = a total preference of \$40k, leaving \$360 which goes to the common shares

- (1) Preferred stock - \$2/share
- (2) Common stock - \$3.60/share

iii. 100k shares of common and 20k shares of \$2 preferred that is participating

(A) Participating means pay again. So these 20k shares get paid twice. Same as above, \$40k first to preferred and then divide \$360k by 120k shares

- (1) Preferred stock - \$5/share
- (2) Common stock - \$3/share

iv. 100k shares of common and 20k shares of \$2 preferred that is cumulative (and no dividends were paid in 3 prior years.

- (A) Preferred stock - \$8/share (2×4)
- (B) Common stock - \$2.40/share

6. Which funds must be used for any distribution? (dividend, repurchase, redemption)

a. Surplus

- i. Computed: assets minus liabilities minus stated capital (or net assets minus stated capital)
- ii. Only surplus can be used for distributions

- b. Stated capital
 - i. Cannot be used for distributions
 - ii. Determining stated capital
 - (A) For par stock – par value x number of shares (remainder of equity is surplus)
 - (B) For no par stock – within 60 days after issuance, the Bd can allocate any part but not all to surplus
 - (1) WHY?
- 7. Corp can make distributions even though it lost money last year; corp cannot make distributions if it is insolvent or if the distribution would render it insolvent. Insolvent means unable to pay debts as they come due in the ordinary course of business. And, of course, after a distribution, net assets must be at least equal to stated capital.
- 8. Directors are personally liable for unlawful distributions as are SHs who know the distribution was unlawful when they received it. Remember, however, director's possible defense of good faith reliance.

V. Fundamental corp changes

A. Characteristics of a fundamental corp change:

- 1. These are so fundamental that they require both Bd and SH approval. In addition, in most, the corp must notify the Dept. of State by delivering a document that the Dept. files
- 2. Appraisal rights – dissenting SH right of appraisal is the right of a SH to force the corp to buy her shares at a fair value
 - a. What actions by corps trigger SH right of appraisal?
 - i. Some amendments to the certificates
 - ii. Consolidation
 - iii. Merger
 - iv. Transfer of substantially all assets; or
 - v. Shares acquired in share exchange
 - b. But, even if the corp is doing one of these things, there is no right of appraisal if the corp is listed (the disgruntled SH can simply sell on public market)
 - c. What actions are taken by SH to perfect the right (assuming the the corp's stock is not listed)
 - i. Before SH's vote, file written notice of objections and intent to

demand payment

- ii. Abstain or vote against the proposed change; and
- iii. After the vote, make written demand to be bought out

- d. If the SH and the corp cannot agree on the fair value of the stock, the corp sues and the ct determines the value
 - i. In setting the value of the stock, the ct cannot discount the value to reflect the fact that minority shares may be worth less than controlling shares

3. Amendments to certificate

- a. Minor changes, such as those relating to office location, registered agent, etc are made by the Bd
- b. Other amendments, such as change of name, purpose, or duration, increase or decrease of shares or par, creation of new classes of stock, denial or grant or limitation of preemptive rights, must be approved by Bd action and by a majority of the shares entitled to vote
 - i. Quorum rules, etc (above) do not apply here
 - (A) Ex – if there are 3,000 outstanding shares entitled to vote, 1501 must approve the amendment for it to pass
 - (B) Ex- same as above, except suppose only 2,400 shares attend the meeting to vote on the amendment and only 2000 shares actually vote. Still 1,501 must approve the amendment for it to pass
- c. What about amendments to change or strike supermajority quorum or voting requirements or to strike a provision restricting BD authority? The amendment will require approval by Bd action. What about SH approval?
 - i. If the amendment will change or stick a supermajority quorum or voting requirements for *Bd* or will strike a provision restricting Bd authority, in addition to Bd approval, we need:
 - (A) For a corp formed on or before Feb 22, 1998 – must get Bd approval and approval by 2/3 of the shares entitled to vote
 - (B) For a corp formed after Feb 22, 1998 – must get Bd approval and approval by a majority of the shares entitled to vote

- ii. But if the amendment will change or strike a supermajority quorum or voting requirement for *SH* (not *Bd*), in addition to *Bd* approval, the amendment must be approved by 2/3 of the shares entitled to vote, regardless of when the corp was formed
- d. If an amendment is approved, deliver certificate of amendment to Dept. of State for its filing
- e. Are there dissenting *SH* rights of appraisal? Yes, if the amendment alters or abolishes a preference, changes redemption rights, alters or abolishes a preemptive right, or limits voting rights (assuming, of course, that stock is not listed)

4. Mergers ($A+B \rightarrow A$) or Consolidations ($A+B \rightarrow C$)

- a. Each corps *Bd* adopts a plan of merger (or consolidation) and need *SH* approval
 - i. How many shares must vote for the proposed merger of $A+B$?
 - (A) For corps formed on or before Feb 22, 1998 – 2/3 of the shares entitled to vote
 - (B) For corps formed after Feb 22, 1998 – a majority of the shares entitled to vote
 - ii. No *SH* approval required in "short-form" merger, where a parent corp owns 90% or more of each class of stock of a subsidiary that is merged into a parent corp
- b. Deliver certificate of merger (or consolidation) to Dept of State for filing
- c. Are there dissenting *SH* rights of appraisal?
 - i. In a merger – yes for *SHs* of the acquired company (because it disappeared)
 - (A) Not for *SHs* of the surviving corp in a merger (even though they voted on the deal)
 - ii. In a consolidation – yes because both corps disappear
 - d. Effect of merger or consolidation – the surviving corp succeeds to all rights and liabilities of the constituent companies (because constituents disappeared)

5. Transfer (not just mortgage) of all or substantially all of the assets not in the ordinary course of business or share exchange (one company acquired all the outstanding shares of one or more classes of another

corp)

- a. These are fundamental corp changes for the selling corp only. Not for the buying corp (no SH vote required for the buying corp)
- b. Each company's Bd of directors must authorize the deal and need approval by selling corp's SHs
 - i. Number of shares of S corp that must approve the sale
 - (A) For corps formed on or before Feb 22, 1998 – 2/3 of the shares entitled to vote
 - (B) For corps formed after Feb 22, 1998 – a majority of the shares entitled to vote
- c. Are there dissenting SH rights of appraisal? Yes, for SHs of the selling corp only
 - i. Exception – no right of appraisal even for SHs of selling corp if a sale of assets is for cash and the company will dissolve and distribute to SH within 1 year
- d. In the share exchange, deliver plan of exchange to Dept. of State for filing. In the transfer of assets, no such filing is required.
- e. General rule – the acquiring company will not be liable for the torts of the acquired company unless (1) the deal provides otherwise, or (2) the purchasing company is mere continuation of the seller (buyer?), or (3) the deal was entered into fraudulently to escape such obligations
 - i. Rationale – company that sold off its assets still exists (and now has cash)

6. Dissolution

- a. Voluntary
 - i. No Bd vote necessary
 - ii. SH vote required
 - (A) Corps on or before Feb 22, 1998 – 2/3 of SHs entitled to vote
 - (B) Corps after Feb 22, 1998 – majority of all SHs entitled to vote
 - iii. Either way, certificate of dissolution delivered to Dept. of State for filing
- b. Involuntary (judicial – someone is asking for a ct order of

dissolution)

- i. By Bd resolution or resolution of majority of shares entitled to vote, stating that (1) the corp has insufficient assets to discharge liabilities or that (2) dissolution would be beneficial to SHs
- ii. One-half or more of shares entitled to vote may petition if (1) directors are too divided to manage or (2) SHs are too divided to elect directors or (3) the magnitude of internal dissension makes dissolution beneficial to SHs
- iii. Any SH entitled to vote may petition if SHs unable to elect directors for two annual meetings
- iv. 20% or more of voting shares in corp whose shares are not traded on a securities market may petition on either of these grounds:
 - (A) Management's illegal, oppressive, or fraudulent acts toward complaining SHs
 - (1) Mgmt – directors (or managing SHs in a close corp)
 - (B) Mgmt's wasting, diverting, or looting assets
 - (C) Ct may deny dissolution if there is some other way the complaining SH can obtain a fair return on his investment (ex – by ordering buy out. Ct will consider whether liquidation is necessary to protect the petitioners and is the only way for them to get a fair return on their investment)
 - (1) How may the corp or non-complaining SHs try to avoid dissolution here?
 - (a) Within 90 days of the petition, buy the petitioner's shares at fair value on terms approved by the ct
- c. Winding up: 1) gather all assets, 2) convert to cash, 3) pay creditors, and 4) distribute remainder to SHs, pro-rata and by share unless there's a dissolution preference (meaning pay first, like dividend preference)
 - i. Certificate must specify which preferences (dividend, dissolution, etc)

VI. Controlling SH considerations

- A. Traditional rule – outside the close corp, SHs generally do not own fiduciary duties to each other or the corp. They can act in their own self-interest

B. Controlling SH

1. Owes a duty. But a SH who also occupies a control position (such as director or managing SH in a close corp) or whose ownership is such that she has working control over the corp owes a fiduciary duty to minority SHs and sometimes others (including the corp)
 - a. Cannot use dominant position for individual advantage at the expense of minority SHs or the corp (usually a problem in close corps, but can happen in any corp)
 - b. Watch especially for oppression of minority SH in a close corp
2. Sale of controlling SH interest
 - a. Because of her control, the SH may be able to sell her shares at a premium. That is, she can sell the stock for more than the shares themselves would be worth because she also has control
 - i. If she does sell for a premium, can she keep the money?
Generally, yes – no case imposes liability just for this; the minority would not share in the premium. But cts may impose liabilities if:
 - (A) The controlling SH sold to looters without making reasonable investigation (watch for facts that would put a person on notice of a problem, eg agent for undisclosed principal offers to buy)
 - (1) If controlling SH sells without reasonable investigation to someone who then loots the corp, the selling SH is liable for all damages done to that corp
 - (B) The controlling SH de facto sells a corp asset. If she does, all SHs should share the premium paid by the buyer.
 - (C) The controlling SH sells a corp office, such as her position on the Bd. Fiduciaries cannot sell their position. Eg, controlled SH sells controlling interest and agrees that she and "her" directors will resign from the Bd. It is one thing to have the new controlling SH elect new directors. But it is another to sell seats on the Bd
 3. Freeze-out mergers
 - a. All mergers must have a legitimate corp purpose, even though approved by the requisite number of shares. Watch for "freeze-out"

merger aimed solely at cashing out minority SHs unfairly. Usually, majority SHs cause their corp to merge with another corp which they own. The minority SHs shares are purchased for cash so they have no interest in either corp. Cts may be increasingly protective of minority and will look to transaction as a whole to see (1) if it is tainted with self-dealing or fraud, (2) whether the minority SHs are dealt with fairly and (3) whether there is a legitimate business reason for the merger

- i. Cts will look at the price and course of dealing with the minority SHs

4. Market trading on inside information

- a. Suppose a director or office engages in market trading based on inside information from the corp. He makes a profit by so doing. In NY, the director/officer has breached a duty to the corp by doing this and the corp can sue him to recover the profit he made in the market trading

5. Non-disclosure of "special facts" (or "special circumstances")

- a. This is CL insider trading
- b. All directors and officers (and probably controlling SHs) owe an affirmative duty to disclose special facts in a securities transaction with a non-insider. So they cannot trade on secrets; they must disclose or abstain from dealing.
 - i. What special facts? Those a reasonable investor would consider important in making an investment decision (they bear on potential value of the securities)
 - ii. Who can sue? The SH dealing with an insider who violates the special facts doctrine
 - iii. Measure of damages – difference between price paid and value of stock a reasonable time after public disclosure

I. Professional Responsibility

II.

III. NY State Lawyer's Code of Professional Responsibility

A. Made up of Disciplinary Rules (DRs) which lawyers must comply with or they will be subject to discipline and Ethical Considerations (ECs) which lawyers should comply with

IV. Misconduct

A. A lawyer or firm shall not:

1. Violate a DR
2. Circumvent a DR through the actions of another
3. Engage in illegal conduct that adversely reflects on the the lawyer's honest, trustworthiness, or fitness as a lawyer (e.g. - assisting client with perjury; an act, even if out of practice)
4. Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation (need not be illegal)
5. Engage in conduct that is prejudicial to the administration of justice (very broad)
6. Unlawful discrimination in the practice of law (in hiring or promoting)
7. Engage in any other conduct that adversely reflects on fitness as a lawyer (e.g. - possession of marijuana)

V. Reporting misconduct

A. Duty to report – a lawyer must report another lawyer's violation of DRs that raise substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer

B. Exception – confidences and secrets – if a lawyer learns about a violation in the context of representation, there is no duty to report

C. Duty of cooperation – if a lawyer is called in by grievance committee, he has a duty to cooperate

D. A lawyer cannot be fired for reporting violations as required under the code

VI. Responsibility of supervisory and subordinate lawyers

A. Law firm – shall make efforts to ensure that all lawyers comply with the DRs

B. Supervisory lawyers – have same duty as above to subordinate lawyer

C. Subordinate lawyers – must obey DRs even if acting at direction of

superior

VII. Disciplinary authority and choice of law

- A. Disciplinary authority – a lawyer admitted in NY can be disciplined in NY for any conduct no matter where it occurs
- B. Choice of law
 - 1. Conduct in connection with proceeding – apply rules of state where ct proceeding conducted
 - 2. Any other conduct
 - a. Lawyer only admitted in NY – NY Code applies
 - b. Lawyer admitted in NY and other jurisdiction – apply rules of jurisdiction where lawyer principally practices unless conduct has predominant effect elsewhere, then apply rules of that jurisdiction

VIII. Preservation of confidences and secrets

- A. Confidences – any info protected by A-C relationship
- B. Secrets – any other info gained in the professional relationship that:
 - 1. The client has requested to be kept confidential
 - 2. Would be embarrassing to C if revealed
 - 3. Would be detrimental to C if revealed (C does not waive secrets by telling 3d party)
- C. Generally, an L shall not:
 - 1. Reveal of confidence or secret
 - 2. Use one to disadvantage of C (can't be waived with C's consent)
 - 3. Use one to the advantage of lawyer or 3d person unless C consents
- D. Exceptions – a L may reveal con/sec:
 - 1. After informed consent of C (unless to disadvantage to C)
 - 2. When required by law or court order
 - 3. To reveal intent of C to commit crime and info necessary to prevent crime
 - 4. To collect fee and defend accusation of wrongful conduct in civil malpractice action or disciplinary proceeding
 - 5. To the extent implicit in withdrawing a written or oral opinion or representation that lawyer now knows is false
 - a. Correcting a false statement
- E. A lawyer has a corresponding duty to ensure that her employees, associates, and others whose services she uses, i.e. accountants and

paralegals, do not reveal confidences or secrets

IX. Advertising

A. A lawyer shall not use or disseminate or participate in the preparation of dissemination of any publication or communication to a prospective client that is false, deceptive, or misleading.

B. Examples of proper advertising

1. Education, degrees, and other scholastic distinctions
2. Dates of admission to any bar
3. Areas of law in which lawyer or law firm practices (can't say "specialize")
4. Public offices and teaching positions held
5. Memberships in bar associations or other professional societies or organizations
6. Foreign language fluency
7. Names of clients regularly represented (provided written consent)
8. Bank references
9. Credit arrangements accepted
10. Legal fees for initial consultation
11. Contingent fee rates in civil matters, when accompanied by the following:
 - a. Whether % computed before or after deduction of costs, disbursements, and other expenses of litigation
 - b. A statement that, in the event of no recovery, the C shall remain liable for the expenses of litigation including ct costs and disbursements
12. Range of fees for services, provided that there by available to the public, free of charge, a written statement clearly describing the scope of each advertised service
13. Hourly rates
14. Fixed fees for specified legal services
15. Others – list not exhaustive
 - a. Cannot put in awards received in prior cases unless thorough disclaimer ("no guarantee")

C. Radio and Tv ads: permitted in NY if -

1. prerecorded, taped, and approved for broadcast by lawyer

2. lawyer keeps copy of ad for 1 yr following last transmission

D. Direct mail

1. Permissible but lawyer must file copy of ad with appellate division

2. Lawyer cannot reference the filing in the direct mail (why not?)

3. Lawyer must keep mailing list for 1 year following law mailing

E. Changes in rates – if lawyer advertises fees, she can't change the rate until after a reasonable period of time (must keep rate open for at least 30 days)

F. Name, office address, and phone number – each ad must include

X. Solicitation

A. A L shall not solicit professional employment from a prospective client in person or by telephone contact (applies to written, recorded, or personal communication)

1. Exceptions

a. Close friends

b. Relatives

c. Former clients

d. Current clients

B. A L shall not solicit professional employment by written or recorded communications if:

1. The communication is false, misleading, or deceptive (can't promise results)

2. The recipient has communicated a desire not to be solicited by the lawyer

3. The solicitation involves coercion, duress, or harassment (e.g. communication directed at someone in hospital)

4. The age or the physical, emotional, or mental state of recipient make it unlikely that he/she will be able to execute reasonable judgment in retaining an atty

5. the L expects but does not disclose that the legal services necessary to handle the matter competently will be provided by a L not affiliated with soliciting L as

a. Partner

b. Associate

c. Of counsel

C. Referral fees – a lawyer cannot give anything of value to a person or entity for recommending employment

D. Refusing employment – a L must refuse employment if person who seeks to retain a L does so because of violation of these rules

E. Internet ads

1. Web page – apply ad rules
2. Emails – apply rules for direct mail
3. Chat room – apply solicitation rules

XI. Fees

A. No excessive fees – a L cannot enter into an agreement for, charge, or collect excessive fees

B. Factors

1. Time and labor required (no double billing)
2. Likelihood, if apparent or made known to the client, that the acceptance of the particular employment will preclude other employment by the L
3. Locality (relative to other L's fees in the area)
4. Amount involved and results obtained
5. Time limitations imposed by client or circumstances
6. Nature and length of the professional relationship (the longer, the more money)
7. Experience, reputation, and ability of lawyer
8. Whether fee is fixed or contingent (latter can result in higher hourly rate) (?)

C. Written letter of engagement

1. Doesn't need to be signed (just must memorialize agreement)

2. Effective date

3. Contents

- a. Explanation of scope of sources to be provided
- b. Explanation of fees to be charged, expenses, and billing practices
- c. Notice of client's right to arbitration of fee disputes

4. Exceptions

- a. If L uses signed retainer agreement that contains three items above
- b. Where fee is expected to be less than \$3k
- c. Where L's services are of same general kind as previously renders

and paid for by the client

- d. Domestic relations matter (see below – need special letter)
- e. Where lawyer has no office in NY or no material portion of services rendered in NY

5. Insurers – if L is being paid by insurer to represent insured, letter of engagement must be sent to both insurer and insured

D. Contingent fees

- 1. Writing – must be in writing and filed with appellate division
 - a. Writing must include
 - i. Method by which fee is to be determined, inc. % that shall accrue to lawyer in event of settlement, trial, or appeal (as specific %)
 - ii. Litigation and other expenses to be deducted from recovery
 - iii. Whether such expenses are to be deducted before, or if not prohibited by statute or ct rule, after the contingent fee is to be calculated
- 2. Written closing statement – after representation is over, L must provide client a statement computing the fee (must be filed with appellate division)
- 3. Contingent fees are prohibited in
 - a. Criminal
 - b. Domestic relation

E. Dom Rel matters

- 1. Definition – when a L represented a C in any claim, action, or proceeding in any ct including appellate cts for
 - a. divorce
 - b. separation
 - c. annulment
 - d. custody
 - e. visitation
 - f. maintenance
 - g. child support
 - h. alimony
 - i. proceedings to enforce or modify a judgment or order in connection with any of the above claims, actions, or proceedings
- 2. No contingent fee in dom rel matters (even if to collect an unpaid

support judgment)

3. Fee agreement must be in writing, as prescribed by ct rule. The writing must be signed by L and C. The L shall provide a prospective client with a statement of client's rights and responsibilities at the initial conference and prior to the signing of a written retainer agreement.
4. Retainer fees:
 - a. No nonrefundable fees in dom rel matters
 - b. A L must return any unused portion of retainer
5. In dom rel matter, L must resolve fee disputes by arbitration at the election of the client

F. Division of fees among Ls

1. A L shall not divide a fee for legal services with another L who is not a partner in or an associate of L's firm unless:
 - a. C consents after full disclosure that a division of fees will be made; and division is in proportion to services performed by each lawyer; or
 - b. division may be made in any manner provided each L assumes joint responsibility for the representation in a writing given to C and total fees of all Ls do not exceed reasonable compensation in totem

G. Fee dispute resolution program

1. Where representation has commenced on or after Jan. 1, 2002, civil matter fee disputes between L and C are subject to arbitration at C's option.
 - a. Exceptions
 - i. Fee disputes in criminal matters
 - ii. Where amount in dispute is <\$1k or >\$50k
 - iii. Claims involving malpractice

XII. Withdrawal

- A. Permission of tribunal – if matter is before tribunal, L must obtain ct's permission before withdrawing from employment
- B. Delivery of property – L must return property of C including:
 1. Unused portion of retainer
 2. All docs in L's possession (even drafts)
 - a. Exception – can exercise retaining lien on file if client hasn't paid bill (can even withhold property)

C. Mandatory withdrawal – a L representing a C **must** make a motion to withdraw from representation when:

1. the lawyer knows or it is obvious that the C is asserting a position in the litigation merely for the purpose of harassing any person (e.g. - frivolous lawsuit)
2. continued employment will result in violation of a BR (e.g. perjury)
3. the lawyer's mental or physical condition make it unreasonably difficult to carry out the employment effectively
4. the L is discharged by the C

D. Permissive withdrawal

1. A L **may** withdraw from representing a C, or make motion to do so, if:
 - a. Withdrawal can be accomplished without material adverse effects on interest of the C
 - b. the C insists on presenting frivolous claim or defense (lawsuit itself is valid but wants to avoid frivolous claim)
 - c. if C persists in course of action involving the L's services that L reasonably believes is criminal or fraudulent
 - d. the C insists on course illegal or prohibited by DRs
 - e. by any other conduct, the C renders it unreasonably difficult for the L to carry out employment effectively
 - f. the C insists, in a matter not pending before a tribunal, that the L engage in conduct contrary to judgment and advice of L even though not prohibited by DRs
 - g. C deliberately disregards an agreement or obligation to L as to expenses or fees (failure to pay bill, standing alone, not enough unless deliberate refusal)
 - h. C has used L's services to perpetuate crime or fraud
 - i. L's continued employment is likely to result in DR violation
 - j. L's inability to work with co-counsel indicates best interests of C would be withdrawal
 - k. C knowingly and freely agrees to termination of the employment
 1. the lawyer believes in good faith in proceeding before tribunal that tribunal will find there exists other good cause for withdrawal
 2. L may not agree with client to alter these rules to allow for withdrawal

under any circumstance

XIII. Conflicts

A.2 issues

1. Does there exist a conflict
2. Can client consent and allow representation

B. L's own personal interests – L shall not accept or continue employment if the exercise of professional judgment reasonably may be affected by the lawyer's own financial, business, property, or personal interests

1. If disinterested L would believe that rep of C will not be adversely affected and C consents to rep after a full disclosure of implications of L's interest
2. Wills – a L should not suggest that C give a gift or bequest (dict: inheritance?) to the L

3. Mortgages – a L cannot take one in a C's property to secure a fee

C. Business transactions between L and C – a L shall not enter into a business transaction with a C if they have differing interests therein and the C expects the L to protect C's interest in the transaction (e.g. representing C in a purchase of land and taking joint ownership in land)

1. Consent, if:

- a. Transaction is fair and reasonable to C (when entered into and down the road when questioned about it)
- b. Transaction is fully disclosed and transmitted in writing to C in terms that can be reasonably understood
- c. lawyer advises C to seek advice of independent counsel; and
- d. C consents in writing

2. Ex – where L receives stock in exchange for incorporating services

D. Simultaneous representation – a L shall decline to rep a prospective C if independent judgment on behalf of the prospective party is likely to be affected by L's rep of a current C (eg – rep'ing co-defendants in a criminal matter virtually never proper, nor in rep'ing passenger and driver in same car in P.I. Action)

1. Consent – a L can rep multiple Cs whose interests may differ if a disinterested L would believe that L can competently represent interest of each and if each consents to the rep after full disclosure of the implication if the simultaneous rep and advantages/risks involved

E. Former clients – a L who has rep'd a former C in a matter shall not thereafter rep another person in the same or substantially related matter in which the current client's interests are materially adverse to the interests of the former C

1. Rationale – a L cannot reveal or use con/sec of a former client in rep'ing a current C
2. Proponent of Disqualification motion based on a former C conflict must establish 3 things:
 - a. There existed an A-C relationship between moving party and opposing L
 - b. Substantially related maters
 - c. Materially adverse interests
3. Former client conflict of departing L – if L leaves firm, she cannot thereafter rep a C whose interests are materially adverse to a C of her former firm if she acquired con/sec while at the prior firm that are material to the current matter
4. Former C conflict of firm from which L has departed – after a L departs from a firm, the firm is prohibited from thereafter rep'ing a client with interests that are materially adverse to those of a client rep'd by the departing L and not currently rep'd by the firm only if a L remaining in the firm has info protected as a con/sec of the former C that is material to the current matter
 - a. Consent- a L can rep a current C in a matter that is substantially related to prior rep of former C if former C provides consent after full disclosure

F. Imputed disqualification – while Ls are associated in a law firm, none of them can accept or continue employment if any one of them, practicing alone, would be prohibited from doing so because of a conflict based on:

1. L's personal interests
2. Simultaneous rep conflict
3. Former client conflict

G. Checking for conflicts – every firm must keep conflicts checking system to allow L's to check

H. Organizational Cs

1. When a L employed or retained by an org is dealing with the org's

directors, officers, employees, members, SHs, or other constituents, and it appears that the org's interests may differ from those of the constituents, the L must state that she is L for the org not the constituents and must advise constituents if interests of corp are different from their interests

2. If a L for a an org knows that a director, employee, or other person associated with the org is engaged in action, intends to act, or refuses to act in a manner related to the rep that is a violation of law that reasonably might be imputed to the org and is likely to result in substantial injury to the org the L shall proceed as is reasonably necessary in the best interest of the org (any measures taken shall be designated to minimize disruption of the org and the risk of revealing confidential info to persons outside the org)
 - a. Such measures may include, among others:
 - i. asking a person to reconsider the proposed action
 - ii. ask for a separate legal opinion
 - iii. refer matter to a higher authority
 - iv. withdraw from rep of the corp

I. Rep'ing the insured

1. L rep's insured not insurance co paying the bill
 - a. L cannot let insurer direct rep
 - b. Letter of engagement goes to both insured and insurance co

XIV. Communicating with Rep'd and Unrep'd parties

A. A rep'd party – during course of rep of C, a L cannot communicate with a party the L knows to be rep'd by a L in that matter

1. Exceptions

- a. Consent from party's lawyer
- b. Communication doesn't relate to representation
- c. Communication is authorized by law (e.g – deposition)

B. Unrep'd party – a lawyer may not give advice to an adverse party who is not rep'd (except to advise them to get an L)

C. Causing a C to communicate with a rep'd person – only with advance notice to other L

XV. The client who commits perjury

A. Crim def – has a right to testify, not to perjure himself

1. L must try to talk him out of it
2. If C insists, L may withdraw and claim irreconcilable differences
3. If during trial, L *can* reveal to ct without revealing con/sec
4. L can't knowingly use perjury or refer to perjured testimony later

B. Party is civil litigation – no constitutional right to testify

1. If L has reasonable belief that client will testify falsely, L can prevent C from taking the stand
2. An L can withdraw any written or oral opinion given by L that L now knows to be false

Real Property

I. The Present Estates:

A. Fee Simple Absolute:

1. What language will create:
 - a. "To A" or "To A and his heirs"
2. Distinguishing characteristics:
 - a. This is absolute ownership of potentially infinite duration.
 - b. It is free devisable, descendible and alienable.
3. Accompanying future interest:
 - a. None
 - b. A living person has no heirs, thus while A is alive, A has no heirs (only prospective heirs).

B. Fee Tail:

1. What language will create:
 - a. "To A and the heirs of his body."
2. Distinguishing characteristics:
 - a. Virtually abolished in the U.S. today, including NY.
 - b. Historically, the fee tail would pass directly to grantees lineal blood descendants (no matter what).
 - c. Today, the attempted creation of a fee tail creates a fee simple absolute instead.
3. Accompanying future interest
 - a. Historically, if in the grantor it was called a reversion. If in a 3rd party it was called a remainder.

C. Defeasible fees:

1. Types:
 - a. Fee simple determinable (fee on limitation):
 - i. What language will create:
 - (A) "To A for so long as..." "To A during..." or "To A until..."
 - (B) Grantor must use clear durational language.
 - (C) If the stated condition is violated, forfeiture is automatic.
 - ii. Distinguishing characteristics:
 - (A) This estate (like all defeasible fees) is devisable, descendible and alienable, but always subject to a condition

(can't convey more than what you started with).

iii. Accompanying future interest:

(A) in the grantor – possibility of reverter.

b. Fee simple subject to a condition subsequent (fee on condition):

i. What language will create:

(A) "To A, but if X event occurs, grantor reserves the right to reenter and retake."

(B) Grantor must use clear durational language and must carve out the right to reenter.

ii. Distinguishing characteristics:

(A) This estate is not automatically terminated, but it can be cut short at the grantor's option if the stated condition occurs.

(B) This estate (like all defeasible fees) is devisable, descendible and alienable, but always subject to a condition (can't convey more than what you started with).

iii. Accompanying future interest:

(A) right of entry (a.k.a. power of termination)

(B) NY – called right of reacquisition.

c. Fee simple subject to executory limitation:

i. What language will create:

(A) "To A, but if X event occurs, then to B."

ii. Distinguishing characteristics:

(A) This estate is just like the fee simple determinable, only now, if the condition is broken, the estate is automatically forfeited in favor of some other grantor.

(B) This estate (like all defeasible fees) is devisable, descendible and alienable, but always subject to a condition (can't convey more than what you started with).

iii. Accompanying future interest:

(A) shifting executory interest.

2. Rules of construction (for all defeasible fees):

a. Words of mere desire, hope, or intention are insufficient to create a defeasible fee.

i. Courts disfavor restrictions on the free use of land.

ii. Thus, courts will not find a defeasible fee unless clear durational

language is used.

(A) example - in each of these instances, A is vested with a fee simple absolute, and NOT a defeasible fee: "To A for the purpose of constructing a day care center"; "To A with the hope that he becomes a lawyer"; "To A with the expectation that the premises will be used as a Blockbuster video store."

b. Absolute restraints on alienation are void.

i. An absolute restraint on alienation is an absolute ban on the power to sell or transfer that is not linked to any reasonable, time limited purpose.

(A) Example 1 – O conveys: "To A so long as she never attempts to sell." A has a fee simple absolute (O has nothing).

(B) example 2 – contrast with: O conveys: "To A so long as she does not attempt to sell until the year 2004, when clouds on the title will be resolved." A has a fee simple determinable and O has a possibility of reverter (b/c the restraint is linked to a reasonable, time-limited purpose).

D. Life estate:

1. What language will create:

a. "To A for life."

b. This is an estate that must be measured in explicit lifetime terms and never terms of years.

c. Life estate pur autre vie: (i) A life estate measured by a life other than the grantee's.

i. example 1 – "To A for the life of B."

ii. example 2 – "To A for life," but A sells the life estate interest to D (D has possession of the land until A's death).

2. Distinguishing characteristics:

a. The life tenant is entitled to all the ordinary uses and profits from the land.

b. The life tenant must not commit waste (can't do anything to harm future interest holders).

i. Three species of waste:

(A) voluntary or affirmative waste – actual overt conduct that causes decrease in value.

(1) Voluntary waste and natural resources - the general rule is that the life tenant must not consume or exploit natural resources on the property (such as timber, oil, or minerals), unless one of four exceptions applies, remembered by PURGE.

- (a) Prior Use – prior to the grant, the land was used for exploitation.
- (i) Open Mines Doctrine – if mining was done on the land before the life estate began, the life tenant may continue to mine, but is limited to the mines that are already open.
- (b) Reasonable repairs – the life tenant may consume natural resources for reasonable repairs and maintenance of the premises.
- (c) Grant – the life tenant may exploit if expressly granted the right to do so.
- (d) Exploitation – the land is suitable only for exploitation (e.g. – a quarry).

(B) permissive waste or neglect – this occurs when the land is allowed to fall into disrepair or the life tenant fails to reasonably protect the land.

- (1) Permissive waste and the obligation to repair – the life tenant must simply maintain the premises in reasonably good repair.
- (2) Permissive waste and the obligation to pay all ordinary taxes – the life tenant is obligated to pay all ordinary taxes on the land, to the extent of income or profits from the land. If there is no income or profit, the life tenant is required to pay all ordinary taxes to the extent of the premises fair market value.

(C) ameliorative waste – the life tenant must not engage in acts that will enhance the property's value unless all future interest holders are known and consent.

3. Accompanying future interest:

- a. if in the grantor – reversion.

b. if in a 3rd party – remainder.

II. Future interests:

A. Future interests capable of creation in the grantor:

1. Possibility of reverter – it accompanies only the fee simple determinable.
2. Right of entry (a.k.a. power of termination) – it accompanies only the fee simple subject to a condition subsequent.
3. Reversion – the future interest that arises in a grantor who transfers an estate of lesser quantum than he started with, other than fee simple determinable or a fee simple subject to a condition subsequent.
 - a. Examples:
 - i. “To A for life.”
 - ii. “To A for 99 years.”
 - iii. “To A for life, then to B for 99 years.”

B. Future interests in transferees:

1. Types:

a. Vested remainder:

- i. 3 species:
 - (A) indefeasibly vested remainder;
 - (B) vested remainder subject to complete defeasance (a.k.a. vested remainder subject to total divestment);
 - (C) vested remainder subject to open.

b. Contingent remainder:

c. Executory interest:

i. 2 species:

- (A) shifting executory interest;
- (B) springing executory interest.

2. What is a remainder?

- a. A remainder is a future interest created in a grantee that is capable of becoming possessory upon the expiration of a prior possessory estate created in the same conveyance in which the remainder is created.
 - i. It always accompanies a preceding estate of a known fixed duration (usually a life estate or term of years).
 - ii. A remainder cannot cut short or divest a prior transferee (it will

never follow a defeasible fee).

b. Vested remainders:

- i. A remainder is vested if it is both created in an ascertained person and is not subject to any condition precedent.
- ii. 3 kinds of vested remainders:
 - (A) indefeasibly vested remainder – the holder of this remainder is certain to acquire an estate in the future with no conditions attached.
 - (1) example – “To A for life, remainder to B.” A is alive. B is alive.
 - (a) If B predeceases A, B’s future interest passes by his will or by intestacy to his heirs.
 - (B) vested remainder subject to complete defeasance - right to possession could be cut short by a condition subsequent.
 - (1) Also known as the vested remainder subject to total divestment.
 - (2) NY - this remainder is called a "remainder vested subject to complete defeasance."
 - (3) Here, note the difference between a condition precedent, which creates a contingent remainder, and a condition subsequent, which creates a vested remainder subject to complete defeasance. To tell the difference, apply the "Comma Rule": When conditional language in a transfer follows language that, taken alone and set off by commas, would create a vested remainder, the condition is a condition subsequent, and you have a vested remainder subject to complete defeasance.
 - (4) example – O conveys: "To A for life, remainder to B, provided, however, that if B dies under the age of 25, to C." A is alive. B is 20 years old.
 - (a) A – life estate
 - (b) B – vested remainder subject to complete defeasance
 - (c) C – shifting executory interest
 - (d) O – reversion (if neither C nor C’s heirs exist if the condition is breached).

(5) By contrast, if the conditional language appears before the language creating the remainder, the condition is a condition precedent, and you have a contingent remainder.

(a) For example: O conveys "To A for life, and if B has reached the age of 25, to B." (B has contingent remainder, O has reversion).

(C) vested remainder subject to open – here a remainder is vested in a group of takers at least one of whom is qualified to take possession but each class member's share is subject to partial diminution b/c additional takers not yet ascertained can still qualify as class members.

(1) example - "To A for life, then to B's children." A is alive. B has two children, C and D.

(2) classes – a class is either open or closed.

(a) A class is open if it is possible for others to enter.

(b) A class is closed when its maximum membership has been set (so that persons born after are shut out).

(c) common law rule of convenience - a class closes when ever any member can demand possession.

(i) In the above example, the class closes in B's death (b/c B can't have any more children, and on A's death (b/c under the rule of convenience, C and D can demand possession).

(ii) Once A dies a child born to B or conceived thereafter will not share in the gift.

(iii) Exception: the womb rule – a child of B in the womb at A's death will share with C and D.

(iv) What if C or D predeceases A? – at common law, their share goes to there devisees or heirs.

c. Contingent remainders:

i. A remainder is contingent if it is created in an unascertained person or is subject to a condition precedent, or both.

(A) The remainder that is contingent because it is created in as yet unborn or unascertained persons.

(1) Example 1 - "To A for life, then to B's first child." A is

alive. B, as yet, has no children.

(2) Example 2 - "To A for life, then to B's heirs." A is alive. B is alive. Because a living person has no heirs, while B is alive his heirs are unknown.

(3) Example 3 - "To A for life, then to those children of B who survive A." A is alive. We don't yet know which, if any, of B's children will survive A.

(B) The remainder that is contingent because it is subject to a condition precedent.

(1) A condition is a condition precedent when it appears before the language creating the remainder or is woven into the grant to remainderman.

(a) Example 1 - "To A for life, then, if B graduates from college, to B." A is alive. B is now in high school. Before B can take, he must graduate from college. He has not yet satisfied this condition precedent. B has a contingent remainder. O has a reversion (if B never graduates, O or O's heirs take).

(i) If B graduates from college during A's lifetime, B's contingent remainder is transformed automatically into an indefeasibly vested remainder.

(b) Example 2 - "To A for life, and, if B has reached the age of 21, to B." A is alive. B is 19 years old. Again, B must satisfy a condition precedent before B can take. B therefore has a contingent remainder. O has a reversion (if B never reaches 21, the estate reverts back to O or O's heirs).

(i) If B obtains the age of 21 during A's lifetime, B's contingent remainder is transformed automatically into an indefeasibly vested remainder.

(C) The rule of destructibility of contingent remainders:

(1) At common law – a contingent remainder was destroyed if it was still contingent at the time the preceding estate ended.

(a) e.g. – "To A for life, and if B has reached the age of

21, to B.” Now, A has died, leaving behind B, who is still only 19 years old. At common law, B’s contingent remainder would be destroyed and O (or O’s heirs) would take in fee simple absolute).

- (b) Today – the destructibility rule has been abolished.
 - (i) Thus if B is still under 21 when A dies, O (or O’s heirs) hold the estate subject to B’s springing executory interest. Once B reaches 21, B takes.
 - (ii) The Rule of Destructibility has been abolished in NY.

(D) The Rule in Shelly’s case:

- (1) Applies in one setting only – O conveys “to A for life, then on A’s death to A’s heirs.” A is alive.
 - (a) Historically – the present and future interest would merge, giving A a fee simple absolute (this was a rule of law and thus would apply in the face of contrary grantor intent)
 - (b) Today – Rule in Shelly’s Case has been virtually abolished. Thus, A would have a life estate, A’s as yet unknown heirs have a contingent remainder, and O has a reversion (since A could die without heirs).
 - (c) NY – the Rule in Shelly’s Case has been abolished in NY.

(E) The Doctrine of Worthier Title (a.k.a. rule against a remainder in Grantor’s heirs):

- (1) This doctrine is still viable in most states today. It applies when O, who is alive, tries to create a future interest in his heirs.
 - (a) e.g. – O, who is alive, conveys “to A for life, then to O’s heirs.”
- (2) If the Doctrine of Worthier Title did not apply:
 - (a) A – life estate;
 - (b) O’s heirs – contingent remainder.
- (3) With the Doctrine of Worthier Title:
 - (a) Contingent remainder in O’s heirs is void (promotes

free transfer of land).

(b) A – life estate.

(c) O – reversion.

(4) The Doctrine of Worthier Title is a rule of construction not a rule of law, thus grantor's intent controls.

(a) If the grantor clearly intends to create a contingent remainder in his heirs, that intent is binding.

(5) NY – The Doctrine of Worthier Title has been abolished in NY with respect to transfers taking effect after September 1, 1967.

3. Distinguishing remainders from executory interests:

a. What is an executory interest? - it is a future interest created in a transferee (a third party), which is not a remainder and which takes effect by either cutting short some interest in another person ("shifting") or in the grantor or his heirs ("springing").

i. Shifting executory interest – it always follows a defeasible fee and cuts short someone other than the grantor.

(A) example - "To A and her heirs, but if B returns from Canada sometime next year, to B and his heirs."

(1) A – fee simple subject to B's shifting executory interest.

(2) B – shifting executory interest

(3) B does not have a remainder b/c remainders never follow defeasible fees.

(4) RAP problem? – this conveyance does not violate the RAP b/c of the one-year limit on B's potential power.

ii. Springing executory interest – it always follows a defeasible fee and cuts short the grantor.

(A) example - : O conveys: "To A, if and when he marries." A is unmarried.

(1) O – fee simple subject to A's springing executory interest

(2) A – springing executory interest

(3) RAP problem? – no, b/c we will know by the end of A's life whether the condition is met or not.

iii. NY - has abolished the distinction between executory

interests and contingent remainders. Instead, contingent remainders and executory interests are called remainders subject to a condition precedent.

C. The Rule Against Perpetuities:

1. Rule - Certain kinds of future interests are void if there is any possibility, however remote, that the given interest may vest more than 21 years after the death of a measuring life.
2. Four-Step Technique for Assessing Potential RAP Problems:
 - a. Determine which future interests have been created by the conveyance. The RAP potentially applies only to contingent remainders, executory interests, and certain vested remainders subject to open.
 - i. The RAP does NOT apply to any future interest created in O (the grantor), or to indefeasibly vested remainders or vested remainders subject to complete defeasance.
 - ii. example: "To A for life, then to A's children." A is alive. She has no children.
 - (A) A – life estate
 - (B) as yet unborn children – contingent remainder
 - b. Identify the conditions precedent to the vesting of the suspect future interest.
 - i. E.g. – in the above example, A must die leaving a child.
 - c. Find a measuring life. Look for a person alive at the date of the conveyance and ask whether that person's life or death is relevant to the condition's occurrence.
 - i. In the above example, A qualifies as a measuring life.
 - d. Ask: Will we know, with certainty, within 21 years of the death of our measuring life, if our future interest holder(s) can or cannot take?
 - i. If so, the conveyance is good. If not (if there is any possibility, however remote, that the condition precedent could or could not occur more than 21 years after the death of a measuring life), the future interest is void.
 - ii. The above conveyance, therefore, is good b/c we will know, at the instant of A's death, if A has left behind a child or not.

3. Applying the 4 steps:

- a. example - "To A for life, then to the first of her children to reach the age of 30." A is 70. Her only child, B, is 29 years old.
 - i. Step 1: classify the future interest – contingent remainder
 - ii. Step 2: condition precedent – A must die, and must have a child reach 30
 - iii. Step 3: find a measuring life – A (not B b/c conveyance to A's children is not B specific).
 - iv. Step 4: ask relevant question - Will we know, with certainty, within 21 years of the death of our measuring life, if a future interest holder can take? In other words, is there any possibility, however remote, that A would not have a child to reach 30 until more than 21 years after A's death? – Yes (thus the contingent remainder violates RAP).

(A) The common law RAP is miserable. It presumes that anything is possible (e.g. – B, who is 29, could die tomorrow. Thereafter, A could have another child, no matter that A is 70. (This is called the Fertile Octogenarian Rule: it presumes that a person is still capable of having children no matter what his/her age). A could die in labor, or, A could live. We just don't know for sure, today, whether the condition precedent to any potential newborn's taking—the child's turning 30—will be satisfied within 21 years of A's death.

(B) Thus, we are left with: a. A – life estate b. O - reversion

4. Two bright line Rules of Common Law RAP:

- a. A gift to an open class that is conditioned on the members surviving to an age beyond 21 violates the common law RAP.
 - i. "Bad as to one, bad as to all." - to be valid, it must be shown that the condition precedent to every class member's taking will occur within the perpetuities period. If it is possible that a disposition might vest too remotely with respect to any member of the class, the entire gift is void.

(A) For example: "To A for life, then to such of A's children as live to attain the age of 30." A has two children, B and C. B is 35 and C is 40. A is alive.

- (1) B and C's vested remainders subject to open are voided by the CL RAP and its "bad as to one, bad as to all" principle.
- (2) Thus, under the common law RAP, we are left with:
 - (a) A – life estate ii. O – reversion
- b. Many shifting executory interests violate the RAP. An executory interest with no limit on the time within which it must vest violates the RAP.
 - i. example 1 - "To A and his heirs so long as the land is used for farm purposes, and if the land ceases to be so used, to B and his heirs."
 - (A) Step 1: classify the future interest – shifting executory interest
 - (B) Step 2: condition precedent – land must cease to be used for farming purposes.
 - (C) Step 3: find a measuring life – A
 - (D) Step 4: ask relevant question – Will we know within 21 years of A's death if the B can take? NO
 - (1) Thus we are left with:
 - (a) A – fee simple determinable
 - (b) O – reversion RAP problem? – No, b/c RAP doesn't apply to future interest in O
 - ii. example 2 - "To A and his heirs, but if the land ceases to be used for farm purposes, to B and his heirs."
 - (A) Same result as above, except that now, once the offensive future interest is stricken, the conveyance no longer is grammatically sound. Thus the entire conditional clause is stricken.
 - (1) A – fee simple absolute
 - (2) O – nothing
 - iii. Charity-to-charity exception – A gift from one charity to another does not violate RAP.
 - (A) e.g. - "To the American Red Cross, so long as the premises are used for Red Cross purposes, and if they cease to be so used, then to the YMCA."

- (1) Ordinarily the YMCA would have a void shifting executory interest.
- (2) However, b/c of the charity-to-charity exception to RAP, the gift is good.
- (3) Thus the Red Cross has a fee simple subject to the YMCA's shifting executory interest.

5. Reform of the RAP:

- a. the "wait and see" or "second look" doctrine - under this majority reform effort, the validity of any suspect future interest is determined on the basis of the facts as they now exist at the conclusion of the measuring life. 302
- b. Uniform Statutory Rule Against Perpetuities (USRAP) - codifies the common law RAP and, in addition, provides for an alternative 90 year vesting period.
- c. Both the "wait and see" and USRAP reforms embrace:
 - i. The cy pres doctrine ("as near as possible") - if a given disposition violates the rule, a court may reform it in a way that most closely matches the grantor's intent while still complying with RAP.
 - ii. The reduction of any offensive age contingency to 21 years.
- d. The New York Perpetuities Reform Statute:
 - i. New York applies the common law rule against perpetuities, and has rejected wait and see and cy pres, except for charitable trusts and powers of appointment, to be taken up in Trusts.
 - ii. Three points of note:
 - (A) Under the New York perpetuities reform statute, where an interest would be invalid because it is made to depend on any person's having to attain an age in excess of 21 years, the age contingency is reduced to 21 years.
 - (B) The common law fertile octogenarian principle is modified by the New York perpetuities reform statute. The New York statute presumes that a woman over the age of 55 cannot have a child.
 - (1) The possibility that the person may have a child by adoption is disregarded.

(C) The New York "suspension" rule (tested with Trusts and Wills):

- (1) The rule against suspension of the absolute power of alienation applies the common law RAP to restrictions on the power to sell or transfer.
- (2) Thus, an interest is void if it suspends the power to sell or transfer for a period longer than the lives in being plus 21 years.
 - (a) In other words, for a conveyance to be valid under the suspension rule, there must be persons in being who could join together in a conveyance of the full fee simple title within lives in being plus 21 years.

III. Concurrent Estates:

A. Types:

1. Joint tenancy - two or more own a share with the right of survivorship and the right to use and enjoy the whole.

a. Distinguishing characteristics:

- i. The right of survivorship – when one joint tenant dies, his share passes automatically to the surviving joint tenants.
- ii. Joint tenant's interest is alienable, it is not, however, devisable or descendible.

b. Creation:

i. 4 unities ("T-TIP") – joint tenants must take their interests:

- (A) Time – at the same time;
- (B) Title – by the same title (in the same instrument);
- (C) Interests – with identical (equal) interests;
- (D) Possession – with identical rights to possess the whole. (

ii. Grantor must clearly express the right of survivorship.

iii. Use of a straw:

- (A) 1. If one individual is the sole owner of BA and he wants to hold it as a joint tenant with 1 or more individuals, under the common law he must use a straw in order to satisfy the 4 unities.

- (1) Step 1 – original owner conveys BA to a strawman.
 - (2) Step 2 – straw conveys back to original owner and

prospective joint tenants with the right of survivorship (now all 4 unities are present including time and title).

(B) In NY – by statute, NY has dispensed with the need for a straw. In NY it is permissible for original owner to convey, using only 1 piece of paper to himself and prospective joint tenants.

c. Severance of a joint tenancy (“SPAM”) – Sale, Partition And Mortgage.

i. Severance and Sale:

(A) A joint tenant can sell or transfer his interest during his lifetime. a. He can even do so secretly without the consent of fellow joint tenants.

(B) One joint tenant’s sale severs the joint tenancy as to the seller’s interest b/c it disrupts the 4 unities.

(1) Buyer becomes a tenant in common.

(2) To the extent that we started with more than 2 joint tenants in the first place, the joint tenancy remains in tact as between the other, non-transferring joint tenants.

(3) e.g. – O conveys BA “To P, R and M as joint tenants with the right of survivorship.” P, R, and M now each own a presumptive 1/3 share in BA and a right to use and enjoy the whole. If P then sells her interest to C, this severs the joint tenancy as to P’s interest. C owns 1/3 as tenant in common with R and M, R and M still hold 2/3 as joint tenants.

(C) At equity, a joint tenant’s mere act of entering into a contract for the sale of her share will sever the joint tenants as to that contracting party’s interest under the Doctrine of Equitable Conversion (“equity regards as done, that which ought to be done”).

ii. Severance and Partition:

(A) Three variations:

(1) by voluntary agreement – an allowable peaceful way to end the relationship.

(2) partition in kind – a judicial action for physical division of the property if it is in the best interest of all parties

(divide the property itself).

(3) forced sale – judicial action, if in the best interests of all involved, where the land is sold and sale proceeds are divided up proportionately (works best when BA is a building).

iii. Severance and Mortgage:

(A) Title theory of mortgages (minority) – one joint tenant's execution of a mortgage or a lien on his or her share will sever the joint tenancy as to that now encumbered share.

(B) Lien theory of mortgages (majority and NY) – a joint tenant's execution of a mortgage on his or her interest will not sever the joint tenancy.

2. Tenancy by the entirety (recognized in 21 states) - a protected marital interest between husband and wife with the right of survivorship.

a. Distinguishing characteristics:

i. This is a very protected form of co-ownership:

(A) Creditors of only one spouse cannot touch the tenancy.

(1) In NY – one spouse may mortgage his interest and his creditors may enforce against that interest, but only as to debtor spouse's share. Further, the non-debtor spouse's rights, including the right of survivorship, must not be compromised.

(B) Neither tenant, acting alone, can defeat the right of survivorship by a unilateral conveyance to a 3rd party.

b. Creation:

i. It can only be created in husband and wife as fictitious one person with the right of survivorship.

ii. In those states that recognize the tenancy by the entirety, it arises presumptively in any conveyance to husband and wife, unless clearly stated otherwise.

3. Tenancy in Common - two or more own with no right of survivorship.

a. Three features:

i. Each co-tenant owns an individual part and each has a right to possess the whole.

ii. Each interest is descendible, devisable and alienable (there are no

survivorship rights between tenants in common).

iii. The presumption favors tenants in common.

B. Rights and Duties of Co-Tenants (for all three above):

1. Possession – each co-tenant is entitled to possess and enjoy the whole.
 - a. If one co-tenant wrongfully excludes another tenant from possession of the whole or any part, he has committed wrongful ouster.
2. Rent from co-tenant in exclusive possession – absent ouster, a co-tenant in exclusive possession is not liable to other co-tenants for rent.
3. Rent from 3rd parties – a co-tenant who leases all or part of the premises to a 3rd party must account to his co-tenants, providing them their fair share of the rental income.
4. Adverse possession – unless he has ousted the other co-tenants, one co-tenant in exclusive possession for the statutory adverse possession period cannot acquire title to the exclusion of others.
 - a. Why? – the hostility element of adverse possession is absent. There is no hostility b/c there was never any ouster.
 - b. In NY – a co-tenant may acquire full title by adverse possession if he is in exclusive possession for 20 continuous years under a theory of implied ouster.
5. Carrying costs – each co-tenant is responsible for his fair share of carrying costs (such as taxes and mortgage interest payments), based upon the individual share that he holds.
6. Repairs – the repairing co-tenant enjoys a right to contribution for necessary repairs provided that she has notified the others of the need for repairs (based on percentage of ownership).
7. Improvements – during the life of the co-tenancy, there is no right to contribution for so called “improvements” (b/c one co-tenant’s improvements could be another’s nightmare).
 - a. However, at partition, the improving co-tenant is entitled to a credit equal to any increase in value caused by her efforts.
 - b. In addition, at partition, the “improver” bears full liability for any decrease in value caused by her efforts.
8. Waste – a co-tenant must not commit waste (voluntary, permissive or ameliorative)

- a. A co-tenant can bring an action for waste during the life of the co-tenancy.
- 9. Partition – a joint tenant or tenant in common has a right to bring an action for partition (see above).

IV. Landlord/Tenant Law:

A. The four leasehold or non-freehold estates:

- 1. The Tenancy for Years (a.k.a. the Estate for Years or the Term of Years):
 - a. This is a lease for a fixed determined period of time (could be 1 day, 2 months, 5 years, etc).
 - b. Triggering fact - when you know the termination date from the start.
 - c. Because a term of years states from the outset when it will terminate, no notice is necessary for termination.
 - d. A term of years greater than 1 year must be in writing to be enforceable b/c of the SOF.
- 2. The Periodic Tenancy:
 - a. This is a lease that continues for successive intervals until landlord or tenant gives proper notice of termination.
 - b. The periodic tenancy can be created expressly (e.g. – L conveys “To T from month to month”) or impliedly in one of 3 ways:
 - i. Land is leased with no mention of duration, but provision is made for the payment of rent at set intervals.
 - ii. An oral term of years in violation of the SOF creates an implied periodic tenancy measured by the way rent is tendered.
 - iii. In a residential lease, if the landlord elects to holdover a tenant who has wrongfully stayed past the conclusion of the original lease, an implied periodic tenancy arises measured by the way rent is now tendered.
 - (A) In NY – a landlord who elects to holdover a tenant creates an implied month-to-month periodic tenancy, unless otherwise agreed.
 - c. Termination:
 - i. Notice, usually written, must be given.
 - ii. At common law, time for notice must at least be equal to the length of the period itself unless otherwise agreed.

(A) exception – if the tenancy is from year-to-year or greater, 6 months notice is required.

- iii. By private agreement, the parties may lengthen or shorten these common-law prescribed notice provisions (freedom of contract).
- iv. The periodic tenancy must end at the conclusion of a natural lease period.

3. Tenancy at Will:

- a. This is a tenancy for no fixed period of duration (e.g. – “To T for so long as L or T desires”).
- b. Unless the parties expressly agree to a tenancy at will, the payment of regular rent will cause a court to treat the tenancy as an implied periodic tenancy.
- c. The tenancy at will may be terminated by either party at any time. However, a reasonable demand to quit the premises is typically required.
- d. In NY – the landlord terminating a tenancy at will must give a minimum of 30 days written notice of termination.

4. The Tenancy at Sufferance:

- a. It is created when T has wrongfully held-over past the expiration date of the lease. This wrongdoer is given a leasehold estate (the tenancy at sufferance) to permit the landlord to recover rent.
- b. The tenancy at sufferance lasts only until the landlord either evicts the tenant or elects to hold the tenant to a new term.
- c. In NY – landlord’s acceptance of rent subsequent to the expiration of the term will create an implied month-to-month periodic tenancy, unless otherwise agreed.

B. Tenants Duties:

1. Liability to 3rd parties:
 - a. T is responsible for keeping the premises in reasonably good repair.
 - b. T is liable for injuries sustained by 3rd parties he invited, even where the landlord has expressly promised to make all repairs.
2. T’s duty to repair:
 - a. When the lease is silent:
 - i. standard – T is required only to keep the premises in reasonably

good repair.

ii. T must not commit waste:

- (A) voluntary waste – overt harmful acts.
- (B) permissive waste – neglect.
- (C) ameliorative waste – alteration that increase the premises' value.

iii. The law of fixtures:

- (A) T must not remove a fixture, no matter that he installed it (fixtures pass with ownership of the land).
- (B) When a tenant removes a fixture, he commits voluntary waste.
 - (1) fixture – a once moveable chattel that, by virtue of its annexation to realty objectively shows the intention to permanently improve the realty.
 - (a) Fixtures pass with ownership of the land.
 - (b) e.g. – heating systems, customized storm windows, a furnace, certain lighting installation, etc..
 - (2) How to tell when a tenant installation qualifies as a fixture:
 - (a) Express agreement controls – the agreement between landlord and tenant is binding.
 - (b) In the absence of an agreement – the tenant may remove a chattel that she has installed so long as removal does not cause substantial harm to the premises.
 - (c) If removal will cause substantial harm – in objective judgment, tenant has shown the intention to install a fixture (the fixture must stay put).

b. When tenant has expressly covenanted in the lease to maintain the property in good condition for the duration of the lease:

- i. At common law – historically, a tenant was responsible for any loss to the property including loss attributable to force of nature (e.g. – earthquakes, lightning, etc.).
- ii. Today (majority view) – a tenant may terminate the lease if the premises are destroyed without the tenant's fault.
- iii. NY – absent tenant's express undertaking to restore the

premises in the event of their destruction, if the premises are destroyed through no fault of the tenant, tenant may quit the premises and surrender possession without any further duty to pay rent.

3. Tenant's duty to pay rent:

- a. Tenant breaches the duty and is in possession of the premises:
 - i. The landlord's only options are to evict the tenant through the courts or continue the relationship and sue for rent due.
 - (A) If the landlord moves to evict, he is nonetheless entitled to rent from the tenant until the tenant, who is now a tenant at sufferance, vacates.
 - ii. Landlord must not engage in self-help, such as changing the locks, forcible removing the tenant, or removing any of the tenant's possessions.
 - (A) Self-help is flatly outlawed and is punishable civilly and criminally.
 - (B) In NY – self-help is flatly prohibited and entitled tenant to treble damages.
- b. Tenant breaches the duty but is out of possession (e.g. – wrongfully vacates the time left on a term of years lease):
 - i. Remember SIR:
 - (A) Surrender – landlord can choose to treat tenant's abandonment as an implicit offer of surrender, which the landlord accepts.
 - (1) Surrender occurs when a tenant demonstrates by words or actions that she wishes to give up the leasehold
 - (2) If the unexpired term is greater than 1 year, surrender must be in writing to satisfy the statute of frauds.
 - (B) Ignore – landlord can ignore the abandonment and hold the tenant responsible for the unpaid rent, just as if tenant were still there.
 - (1) Only available in a minority of states.
 - (C) Re-let - landlord can re-let the premises on the wrongdoer tenant's behalf, and hold him liable for any deficiency.
 - (1) Majority rule – landlord must at least try to re-let

(mitigation principle).

(2) NY – generally, NY does not require a landlord to mitigate damages when a tenant abandons the premises.

C. Landlord's Duties:

1. Duty to deliver possession – the majority rule requires that L put T in actual physical possession of the premises. Thus if at the start of T's lease a prior holdover is still in possession, L is in breach and the new T is entitled to damages.
2. Implied covenant of quiet enjoyment – applies to both residential and commercial leases. T has a right to quiet use and enjoyment without interference from L.
 - a. Breach by actual wrongful eviction – this occurs when L wrongfully evicts T or excludes T from the premises.
 - b. Breach by constructive eviction – for example, every time it rains, D's apartment floods (D has a claim for constructive eviction if the three elements below are met).
 - i. 3 elements for constructive eviction (SING):
 - (A) substantial interference – a chronic problem attributable to L's actions or failure to act.
 - (B) notice – T must give L notice of the problem and L must fail to respond meaningfully.
 - (C) goodbye – T must vacate the premises within a reasonable time after L fails to correct the problem. (
 - ii. Is the landlord liable for acts of other tenants?
 - (A) general rule – no
 - (1) two exceptions: a. L had a duty not to permit a nuisance on the premises.
 - (2) L must control common areas.
 3. Implied warranty of habitability – applies only to residential leases. It is non-waivable.
 - a. standard – the premises must be fit for basic human habitation (basic living requirements must be met).
 - i. The appropriate standard may be supplied by local housing code or judicial conclusion.
 - ii. Example of problems that trigger breach of the warranty:

- (A) failure to provide heat in winter;
- (B) lack of plumbing; 3. lack of running water.
- b. T's entitlements when the implied warranty of habitability is breached (MR3):
 - i. Move (and terminate lease);
 - ii. Repair and deduct (allowable by statute is a growing number of jurisdictions).
 - iii. Reduce rent (or withhold all rent until the court determines fair rental value; typically T must place withheld rent in escrow to show her good faith).
 - iv. Remain in possession (pay rent and affirmatively seek money damages).
- 4. Retaliatory eviction – if T lawfully reports L for housing code violations, L is barred from penalizing T by raising rent, ending lease, harassing T, etc.

D. Assignment versus the sublease:

- 1. In the absence of some prohibition in the lease, T may freely transfer his interest in whole (an assignment) or in part (a sublease).
 - a. In the lease, L can prohibit T from assigning or subletting without L's prior written approval. (i) Once L consents to one transfer by T, L waives the right to object to future transfers by T unless L expressly reserves the right.
 - b. NY – unless the lease provides otherwise, a residential T may not assign without L's written consent. L can unreasonably withhold consent to assign, and T's sole remedy is to seek release from the lease.
 - i. By contrast, in NY, a T in a residential building having four or more units has the right to sublease subject to L's written consent. Consent to sublease cannot be unreasonably withheld (unreasonably withheld consent is deemed consent).
- 2. The assignment:
 - a. Example 1 – T1 has ten months remaining on a two-year term of years. T1 transfers all 10 months to T2 (this is an assignment).
 - i. As a result, L and T2 are in privity of estate (this means that L and T2 are liable to each other for all of the covenants in the

original lease that run with the land: promise to pay rent, duty to repair, etc.).

- ii. L and T2 are not in privity of contract unless T2 expressly assumed the performance of all promises of the original lease.
- iii. L and T1 are no longer in privity of estate, but remain in privity of contract. 1. This L and T1 remain secondarily liable to each other.

b. Example 2 – L leases BA to T1. T1 assigns to T2. T2 assigns to T3. T3 then engages in flagrant abuse of the premises.

- i. L can proceed against T3 (b/c in privity of estate).
- ii. T1 is secondarily liable to L (b/c in privity of contract).
- iii. L cannot proceed against T2 (no privity of estate or contract).

3. The sublease:

- a. L and the sublessee are in neither privity of estate or privity of contract.
- i. T2 can proceed against T1 and vice versa.

E. Landlord's Tort Liability:

1. general CL rule (caveat lessee) – in tort, L is under no duty to make the premises safe.
2. Five Exceptions (CLAPS):
 - a. Common areas – L must maintain all common areas such as hallways and stairwells.
 - b. Latent defects rule – L must warn T of hidden defects of which L has knowledge or reason to know of (L is under no duty to repair).
 - c. Assumption of repairs – while under no duty to make repairs, once undertaken, L must complete them with reasonable care.
 - d. Public use rule – L who leases public space (such as convention hall, museum) and who should know, b/c of the nature of the defect and the length of the lease, that T will not repair, is liable for any defects on the premises.
 - e. Short-term lease of a furnished dwelling – L is responsible for any defective condition that proximately injures T.

V. Servitudes:

A. Easements:

1. easement – the grant of a nonpossessory property interest that entitles its holder to some form of use or enjoyment of another's land (the servient tenement).
2. Easements can be affirmative or negative.
 - a. affirmative easement – most easements are affirmative (the right to go onto and do something on servient land).
 - b. negative easement – entitles its holder to prevent the servient landowner from doing something that would otherwise be permissible.
 - i. Negative easements are generally recognized in only four categories (LASS):
 - (A) light;
 - (B) air;
 - (C) support;
 - (D) streamwater from an artificial flow. (
 - ii. Negative easements can only be created expressly, by writing signed by the grantor. There is no natural or automatic right to a negative easement.
 3. An easement is either appurtenant to land or it is held in gross.
 - a. Easement appurtenant – an easement is appurtenant when it benefits its holder in his physical use or enjoyment of the property. Two parcels of land must be involved:
 - i. the dominant tenement (which derives the benefit); and
 - ii. the servient tenement (which bears the burden).
 - b. Easement in gross – an easement is in gross if it confers upon its holder only some personal or pecuniary advantage that is not related to his use or enjoyment of his land. Here the servient land is burdened, but there is no benefited or dominant tenement.
 - i. Examples:
 - (A) right to place a billboard on another's lot;
 - (B) right to swim in another's pond;
 - (C) utility's right to lay power lines on another's land.
 4. Transferability:
 - a. Easement appurtenant – passes automatically with the dominant tenement, regardless of whether it is even mentioned in the

conveyance.

- i. Note that the burden of the easement appurtenant also passes automatically with the servient estate, unless the new owner is a bona fide purchaser w/o notice of the easement.
- b. Easement in gross – is not transferable unless it is for commercial purposes.

5. Creation of an affirmative easement:

- a. Four ways:
 - i. By grant – an easement to endure for more than one year must be in a writing that complies with the formal elements of a deed (b/c of SOF concerns - called a deed of easement). (
 - ii. By implication – also known as an easement implied from existing use
 - (A) example – A owns two lots. Lot 1 is hooked up to a sewer drain located on lot 2. A sells lot 1 to B, with no mention of B's right to continue to use the drain on A's lot 2. A court may nonetheless imply an easement on B's behalf if:
 - (1) the previous use had been apparent; and
 - (2) the parties expected that the use would survive division b/c it is reasonably necessary to the dominant land's use and enjoyment.
 - iii. By necessity – the landlocked setting; an easement of right of way will be implied by necessity if grantor conveys a portion of his land with no way out except over one part of grantor's remaining land.
 - iv. By prescription – an easement may be acquired by satisfying the elements of adverse possession.
 - (A) elements of adverse possession (COAH):
 - (1) continuous use for given statutory period;
 - (a) NY - the statutory period is 10 years
 - (2) open and notorious use;
 - (3) actual use;
 - (4) hostile use (w/o servient owner's position)

6. The scope of an easement:

- a. The scope of an easement is set by the terms of the grant or

conditions that created it.

i. Unilateral expansion is not allowed.

7. Termination of an easement (“END CRAMP”):

- a. Estoppel – servient owner materially changes his or her position in reasonable reliance on the easement holder’s assurances that the easement will no longer be enforced.
- b. Necessity – Easements created by necessity expire as soon as the necessity ends. However, if the easement, attributable to necessity, was nonetheless created by express grant it does not end automatically once the necessity ends.
- c. Destruction – of the servient land, other than through the willful conduct of the servient owner.
- d. Condemnation – of the servient estate, by governmental eminent domain power.
- e. Release – a written release, given by the easement holder to the servient landowner.
- f. Abandonment – the easement holder must demonstrate by physical action the intention to never make use of the easement again.
 - i. Abandonment requires physical action by the easement holder (mere nonuse or mere words are insufficient to terminate by abandonment).
(A) e.g. – A has a right of way across B’s parcel. A erects a structure on A’s parcel that precludes him from ever again reaching B’s parcel. That action signifies abandonment.
- g. Merger – also known as unity of ownership
 - i. The easement is extinguished when the easement and title to the servient land become vested in the same person.
 - ii. If complete unity of title is achieved, the easement is extinguished. If there is later separation of title the easement is not automatically revived (easement would have to be created from scratch).
- h. Prescription – the servient owner may extinguish the easement by interfering with it in accordance with the elements of adverse possession.
 - i. Requirements for adverse possession:

- (A) continuous interference that is
- (B) open and notorious; and
- (C) actual; and
- (D) hostile to the easement holder.

ii. E.g. – A has an easement of a right of way across B's parcel. B erects a chain link fence on B's parcel, thereby precluding A from reaching it. Over time, B may succeed in extinguishing the easement through prescription.

B. The License:

1. Definition – a mere privilege to enter another's land for some delineated purpose.
2. Does not need to be in writing (not subject to the SOF).
3. Licenses are freely revocable, at the will of the licensor, unless estoppel applies to bar revocation.
4. Typical cases:
 - a. Ticket cases – tickets create freely revocable licenses.
 - b. Neighbors talking by the fence – attempts to create oral easements (unenforceable b/c of SOF) instead result in a freely revocable license (nothing good comes when neighbors talk by the fence).
 - i. e.g. – Neighbor A, talking by the fence with neighbor B, says, "B, you can have that right of way across my land." This oral easement is unenforceable due to SOF, instead a freely revocable license is created.
 - c. Estoppel – will apply to bar revocation only when the licensee has invested substantial money, labor or both in reasonable reliance on the license's continuation.

C. The Profit:

1. The profit entitles its holder to enter the servient land and take from it the soil or some substance from the soil such as minerals, timber or oil.
2. All the rules of easements apply to profits.

D. The covenant:

1. The covenant is a promise to do or not do something related to land. It is unlike the easement b/c it is not the grant of a property interest, but rather a contractual limitation or promise regarding land (one tract is

burdened by the promise and another is benefited).

- a. Negative (restrictive) covenants – a promise to refrain from doing something related to land (e.g. – I promise not to build for commercial purposes on my land).
- b. Affirmative covenants – a promise to do something related to land (e.g. – I promise to maintain our common fence).

2. Covenant vs. Equitable Servitude:

- a. Difference lies in the remedy sought.

- i. If Pl. seeks money damages – covenant.

- ii. If Pl. seeks an injunction – equitable servitude.

3. When will a covenant run with the land? – when it is capable of binding successors (both benefit and burden must run):

- a. elements necessary for the burden to run (“WITHN”)

- i. Writing – original promise must have been in writing.

- ii. Intent – original parties must have intended that the covenant would run.

- iii. Touch and concern the land – the promise must affect the parties’ legal relations as landowners, and not simply as members of the community at large.

- (A) Covenants to pay money to be used in connection with the land (e.g. – homeowners association fees) and covenants not to compete do not touch and concern the land.

- iv. Horizontal and vertical privity – both required for the burden to run.

- (A) Horizontal privity refers to the nexus between the originally promising parties.

- (1) It requires that they be in succession of estate, meaning that they were in a grantor/grantee, landlord/tenant or mortgagor/mortgagee relationship.

- (B) Vertical privity refers to the nexus between original owner and their successor to title in the parcel.

- (1) It requires some non-hostile nexus such as though contract, devise or descent (the only time when vertical privity will be absent is when successor obtains land through adverse possession).

- v. Notice – successor must have had some notice of the promise when he took.
- b. Elements necessary for the benefit to run (“WITV”):
 - i. Writing – original promise was in writing.
 - ii. Intent – original parties intended that benefit would run.
 - iii. Touch and concern – promise affects the parties as landowners.
 - iv. Vertical privity – same non-hostile nexus between original holder of the benefited parcel and his successor in title.
 - (A) horizontal privity is not required.

E. Equitable servitudes:

- 1. The equitable servitude is a promise that equity will enforce against successors.
- 2. It is accompanied by injunctive relief.
- 3. To create an equitable servitude that will bind successors you need:
 - a. Writing – generally, although not always, the original promise is in writing.
 - b. Intent – the original parties must intend that the promise would be enforceable by and against assignees.
 - c. Touch and Concern – the promise must effect the parties as landowners.
 - d. Notice – the assignees of burdened land must have notice of the promise.
 - e. Privity is not required to bind successors.
- 4. The implied equitable servitude:
 - a. Under the general or common scheme doctrine, a court will imply a reciprocal negative servitude to hold an unrestricted lot-holder to a restrictive covenant.
 - i. Requirements - when the sales began, the subdivider:
 - (A) had a general scheme of residential development which included Pl.’s lot now in question; and
 - (B) the Pl. lot-holder had notice of the promise contained in the prior deeds.
 - (1) There are 3 types of notice potentially imputed to Pl. (“AIR”):

- (a) Actual notice – Pl. had literal knowledge of promises contained in those prior deeds;
- (b) Inquiry notice – neighborhood seems to conform to common restrictions;
- (c) Record notice – the form of notice sometimes imputed to buyers on the basis of publicly recorded documents.
- (i) courts are split: some take the view that a subsequent buyer is on record notice of the contents of prior deeds transferred to other by a common grantor. The better view, taken by other courts and NY, is that the subsequent buyer does not have record notice of the contents of those prior deeds transferred to others by the common grantor).

5. Equitable defenses to enforcement of an equitable servitude:

- a. Changed conditions – the changed circumstances alleged by the party seeking release from the terms of an equitable servitude must be so pervasive that the entire area or a subdivision has changed (piecemeal change is never good enough).

F. Adverse possession:

- 1. Basic concept – possession, for a statutorily prescribed period of time can, if certain elements are met ripen into title.
- 2. Elements for possession to ripen into title (COAH):
 - a. Continuous – uninterrupted for given statutory period (10 years in NY);
 - b. Open and Notorious – the sort of possession that usual owner would make under the circumstances;
 - c. Actual – entry can't be hypothetical or fictitious (no symbolic entry);
 - d. Hostile – the possessor does not have true owner's permission to be there.
 - e. Possessor's subjective state of mind is irrelevant.
- 3. Tacking:
 - a. One adverse possessor may tack on to his time with the land his predecessor's time, so long as there is privity which is satisfied by

any non-hostile nexus (e.g. – blood, contract, deed or will).

b. Tacking is not allowed when there has been an ouster.

4. Disabilities:

- a. The statute of limitations will not run against a true owner who is afflicted by a disability at the inception of the adverse possession.
 - i. Common disabilities include insanity, infancy and imprisonment.

VI. Land Conveyances - the Purchase and Sale of Real Estate:

A. Every conveyance of real estate consists of a two- step process.

1. Land contract – which endures until step II
2. Closing – where the deed becomes the operative document

B. The land contract:

1. The land contract and the Statute of Frauds:

a. standard – the land contract must be in writing, signed by the party against whom enforcement is sought (it must describe the land and state some consideration).

b. When the amount of land recited in the land contract is more than the actual size of the parcel: the buyer is entitled to specific performance with a pro rata reduction in the purchase price.

c. Exception to the SOF:

i. Doctrine of part performance – if you have two of the following three, the doctrine is satisfied and equity will decree specific performance of an oral contract for the sale of land:

(A) B takes physical possession of the land;

(B) B pays all or part of the purchase price;

(C) B makes substantial improvement to the land.

2. The problem of risk of loss:

a. Apply the doctrine of equitable conversion: equity regards as done that which ought to be done.

i. Thus, in equity, once the contract is signed, B is the owner of the land, subject of course to the condition that he pays the purchase price.

ii. One important result flows from this: Destruction.

(A) If, in the interim, between contract and closing, BA is destroyed through no fault of either party, B bears the risk of loss (unless the contract says otherwise).

- b. NY – so long as the buyer is without fault, the risk of loss remains with seller until buyer has title or takes possession
- 3. Two implied promises in every land contract:
 - a. Seller promises to provide marketable title – title free from reasonable doubt, free from lawsuits and the threat of litigation.
 - i. Three circumstances will render title unmarketable:
 - (A) adverse possession – if even a portion of the title rests on adverse possession, it is unmarketable (seller must be able to provide good record title).
 - (B) encumbrances – marketable title means an unencumbered fee simple. Thus servitudes and mortgages render title unmarketable unless the buyer has waived them.
 - (1) Seller has the right to satisfy an outstanding mortgage or lien at the closing, with the proceeds from the sale. Thus, buyer cannot claim that title is unmarketable b/c it is subject to a mortgage prior to closing, so long as the parties understand that the closing will result in the mortgage being satisfied or discharged.
 - (C) zoning violations – title is unmarketable if the property violates a zoning ordinance.
 - b. Seller promises not to make any false statements of material fact – the majority of states now also hold sellers liable for failing to disclose latent material defects (thus seller is responsible for his material lies and material omissions).
 - i. If the contract contains a general disclaimer of liability (e.g. – “property sold as is” or “with all faults”), it will not excuse seller from liability for fraud or failure to disclose.
 - ii. NY – in March 2002, NY passed the Property Condition Disclosure Act, which requires sellers of 1-4 family residential dwellings to provide the prospective buyer with a completed statutory disclosure form (condition of the premises) before the contract is final.
 - (A) Does not apply to coops, condos, or new construction.
 - 4. The land contract contains no implied warranties of fitness or habitability (the CL norm is caveat emptor).

- a. Exception – the implied warranty of fitness and workmanlike construction applies to the sale of a new home by a builder-vendor.

C. The Closing:

- 1. controlling document – the deed
- 2. Unless otherwise specified, acceptance of the deed discharges all of the seller's contractual obligations, and leaves buyer only with remedies on any covenants contained in the deed.
 - a. exam tip – once closing has occurred, don't select any answer choices pertaining to the land contract.
- 3. How does the deed pass legal title from seller to buyer (LEAD):
 - a. Lawful Execution of the deed:
 - i. standard – must be in writing, signed by the grantor
 - (A) The deed need not recite consideration, nor must consideration pass to make a deed valid. (
 - ii. description of the land – does not have to be perfect, only an unambiguous description or a good lead (e.g. – “all of my land”).
 - b. Delivery Requirement:
 - i. The delivery requirement could be satisfied when grantor physically or manually transfers the deed to the grantee (it is permissible to use the mail, an agent, or a messenger).
 - ii. However, delivery does not necessarily require actual transfer of the instrument itself.
 - iii. The standard for delivery is a legal standard, and is a test solely of present intent.
 - (A) Ask: did the grantor have the present intent to be immediately bound irrespective of whether or not the deed itself has been literally handed over.
 - iv. Recipient's express rejection of the deed defeats delivery.
 - v. If a deed, absolute on its face, is transferred to the grantee with an oral condition, the oral condition drops out (not provable – thus delivery is deemed accomplished).
 - vi. Delivery by escrow is permissible.
 - (A) Grantor may deliver an executed deed to a third-party, known as an escrow agent, with instructions that the deed be delivered to grantee once certain condition are met. Once the

conditions are met, title automatically passes to the grantee.

4. Covenants for title and the three types of deeds:

- a. quitclaim deed – contains quitclaim; grantor isn't even promising that he has title to convey
- b. general warranty deed – it warrants against all defects in title, including those attributable to grantor's predecessors.
 - i. The general warranty deed typically contains all six of the following covenants:
 - (A) Present covenants (breached at the time the deed is delivered – SOL runs from then):
 - (1) covenant of seisin – grantor warrants that he owns the estate he now claims to convey.
 - (2) covenant of right to convey – grantor promises that he has the power to make this conveyance (no temporary restraints on grantor's power to sell).
 - (3) covenant against encumbrances – grantor promises that there are no sertitudes or mortgages on the land.
 - (B) Future covenants (breached when grantor is disturbed of poss.- SOL runs from then):
 - (1) covenant for quiet enjoyment – grantor promises that grantee will not be disturbed in possession by a third-party's lawful claim of title.
 - (2) covenant of warranty – grantor promises to defend the grantee should there be any lawful claims of title asserted by others.
 - (3) covenant for further assurances - grantor promises to perform whatever future acts are reasonably necessary to perfect grantee's title if it later turns out to be imperfect.
 - c. statutory special warranty deed – provided for by statute in many states, this deed contains two promises (note: grantor makes no representations on behalf of his predecessors in interest):
 - i. The grantor promises that he has not conveyed this estate to anyone other than the grantee.
 - ii. The grantor promises that the estate is free from encumbrances made by the grantor.

iii. NY – this deed is called a bargain and sale deed.

VII. The Recording System:

- A. Model scenario – O conveys BA to A. Later, O conveys BA (the same parcel) to B. O, our double-dealer, has skipped town. In the battle between A and B, who wins?
- B. Two brightline rules:
 1. Notice jurisdiction – if B is a bona fide purchaser, B wins regardless of whether or not she records before A does.
 2. Race-notice jurisdiction – if B is a bona fide purchaser, B wins if she records properly before A does.
- C. Recording Acts exist only to protect bona fide purchasers and mortgagees.
- D. A bona fide purchaser is one who:
 1. purchases BA for value; and
 - a. bargain sales - are considered for value (B must remit substantial pecuniary consideration).
 - b. Must be a purchaser – B always loses if B is O's heir, devisee, or donee.
 2. w/o notice that someone else got there first.
 - a. Three forms of notice (AIR):
 - i. actual – prior to B's closing, B gets literal knowledge of A's existence
 - ii. inquiry – B is on inquiry notice of whatever examination of the land would reveal, whether B actually looks or not (a form of constructive notice).
 - (A) If a recorded instrument makes reference to an unrecorded transaction, the grantee is on inquiry notice of whatever a reasonable follow-up would have revealed.
 - iii. record – B is on record notice of A's deed if at the time B takes, A's deed was properly recorded within the chain of title (a form of constructive notice).
 - (A) To give record notice to subsequent takers, the deed must be recorded properly within the chain of title, which refers to that sequence of recording documents capable of giving record notice to subsequent takers. In most states, chain of title is

established through a title search of the grantor/grantee index.

(B) Two discrete chain of title problems:

- (1) The problem of the wild deed – O sells BA to A, who does not record. A then sells to B. A records the A → B deed.
 - (a) The A → B deed, although recorded is NOT connected to the chain of title b/c it contains a missing grantor (the O → A link is missing from the public record).
 - (b) Rule of the wild deed – if a deed, entered on the record (A → B above) has a grantor unconnected to the chain of title (O → A above), the deed is a wild deed and incapable of giving record notice of its existence.
 - (c) Thus in our problem above, if O then sells BA to C, C is a bona fide purchaser (assuming he didn't have actual or inquiry notice), and wins in both a notice state (by being A BFP), and in a race-notice state (by being first to record b/c B's recording is a nullity).
- (2) Estoppel by deed:
 - (a) In 1950, O owns BA. He is thinking about selling it to X, but for now decides against it. In 1950, X who does not own BA, sells it anyway to A. A records.
 - (b) In 1960, O finally sells BA to X. X records in 1960.
 - (c) In 1970 X, a double dealer, sells BA to B. B records.
 - (d) As between X and A, who owned the property from 1960-69?
 - (i) A - b/c of the rule of estoppel by deed (one who conveys realty that in which he has no interest is estopped from denying the validity of the conveyance if he subsequently acquires the interest that he previously transferred).
 - (e) Who owns BA in 1970?
 - (i) B – as long as B is a BFP (B wins in a notice system b/c he is a BFP; B wins in a race-notice system b/c he is a BFP who won the race to record).

(ii) How did B win the race to record? – A's 1950 recording is a nullity b/c A recorded too early. B's title searcher would not find A's deed b/c one is entitled to assume that no one sells land until they first own it. Thus B's title searcher would not discover X's 1950 pre-ownership transfer to A.

VIII. Mortgages:

- A. A mortgage is the conveyance of a security interest in land, intended by the parties to be collateral for the repayment of a monetary obligation.
- B. It is the union of 2 elements:
 - 1. a debt; and
 - 2. a voluntary transfer of a security interest in debtors land to secure the debt.
 - a. Debtor – the mortgagor.
 - b. Creditor – the mortgagee.
- C. Legal mortgage - typically must be in writing to satisfy the SOF
 - 1. a.k.a. - mortgage deed, note, security interest in land, deed of trust, or a sale leaseback.
- D. Equitable mortgage – parties understand that land is collateral for the debt, but instead of executing a note or mortgage deed, the debtor hands the creditor a deed to the land that is absolute on its face.
 - 1. Parole evidence is freely admissible to show the parties' true intent.
 - 2. If creditor proceeds to sell the land to a bona fide purchaser, the bona fide purchaser owns the land. The original owner's only recourse is to proceed against the creditor for fraud and recover the proceeds of the sale.
- E. Once a mortgage has been created, what are the parties rights?
 - 1. Unless and until foreclosure, debtor-mortgagor has title and the right to possession.
 - a. Creditor mortgagee has a lien (the right to look to the land if there is default).
 - 2. All parties to a mortgage can transfer their interests.
 - a. The mortgage automatically follows a properly transferred note.
 - b. Creditor-mortgagee can transfer his interest:
 - i. Ways to transfer:

- (A) endorsing the note and delivering it to the transferee; or
- (B) by executing a separate document of assignment.

ii. If the note is endorsed and delivered, the transferee is eligible to become a holder in due course. This means that he takes the note free of any personal defenses that could have been raised against the original mortgagee.

- (A) “personal defenses” include lack of consideration, fraud in the inducement, unconscionability, waiver and estoppel.
- (B) Thus the holder in due course may foreclose the mortgage despite the presence of any such personal defense.
- (C) By contrast, the holder in due course is still subject to “real” defenses that the maker might raise (“MAD FIFI4”).
 - (1) Material Alteration;
 - (2) Duress;
 - (3) Fraud In the Factum (a misrepresentation about the instrument);
 - (4) Incapacity;
 - (5) Illegality;
 - (6) Infancy;
 - (7) Insolvency.
- (D) To be a holder in due course of the note, the following criteria must be met:
 - (1) the note must be negotiable, made payable to the named mortgagee;
 - (2) the original note must be indorsed, signed by the named mortgagee;
 - (3) the original note must be delivered to the transferee (a photocopy is unacceptable);
 - (4) the transferee must take the note in good faith without notice of any illegality;
 - (5) the transferee must pay value for the note, meaning some amount that is more than nominal.

c. If debtor-mortgagor sells mortgaged property:

- i. The lien remains on the land so long as the mortgage interest has been properly recorded (recording statutes protect mortgages).

(A) It doesn't matter which recording state the jurisdiction has enacted.

(1) Notice state – buyer takes subject to the lien b/c he is on record notice of the lien at the time he takes.

(2) Race-notice state – buyer takes subject to the lien b/c he is on record notice and the first creditor-mortgagee won the race to record.

(B) If the original mortgage was not recorded when the land was sold but is recorded before buyer records the deed, whether the buyer holds the land subject to the mortgage depends on which recording statute has been enacted.

(1) Notice state – buyer takes the land free of the mortgage so long as he was a bona fide purchaser when he took.

(2) Race-notice state – buyer takes subject to the mortgage b/c he lost the race to record.

ii. Who is personally liable on the debt if debtor mortgagor sells the mortgaged property?

(A) If the buyer has assumed the mortgage – than both the original owner and the buyer are personally liable (buyer is primarily liable and original owner is secondarily liable).

(B) If the buyer takes subject to the mortgage – the buyer assumes no personal liability on the debt (only the original owner is personally liable).

(1) However, if recorded, the mortgage remains on the land and if the original owner does not pay, the mortgage may be foreclosed.

F. Foreclosure:

1. The mortgagee must foreclose by proper judicial proceeding. At foreclosure, the land is sold. The sale proceeds go to satisfying the debt (with attorney's fees, expenses of foreclosure and any interest accrued on the mortgage taken off the top).

a. If the proceeds from the sale are less than the amount owed – the mortgagee can bring a personal action against the debtor for a deficiency judgment.

b. If there is a surplus from the sale – junior liens are paid off in order

of their priority (each claimant is entitled to satisfaction in full before a subordinated lienholder may take). Any remaining surplus goes to the debtor.

2. Effect of foreclosure on various interests:

- a. Foreclosure will terminate interests junior to the mortgage being foreclosed but will not affect senior interests.
 - i. Junior lienholder will be paid in descending order with the proceeds from the sale, assuming funds are leftover after full satisfaction of superior claims.
 - ii. Junior lienholders should be able to proceed for a deficiency judgment, but once foreclosure of a superior claim has occurred, with the proceeds distributed appropriately, junior lienholders can no longer look to the property for satisfaction.
 - iii. Those with interests subordinate to those of the foreclosing party are necessary parties to the foreclosure action.
 - (A) The debtor mortgagor is also considered a necessary party and must be joined, particularly if creditor wishes to proceed against debtor for a personal deficiency judgment.
 - (B) Failure to include a necessary party results in the preservation of that party's claim despite the foreclosure and sale. Thus if a necessary party is not joined, his mortgage will remain on the land.
- b. Foreclosure does not affect any interest senior to the mortgage being foreclosed. The buyer at the sale takes subject to such interest. This means that the buyer is not personally liable on the senior debt, but, as a practical matter, if the senior mortgage is not paid sooner or later, the senior creditor will foreclose against the land.
 - i. Therefore the foreclosure sale buyer has a strong incentive to pay off any senior mortgages still attached to the land in order to avoid a later foreclosure action that could be brought by that mortgagee.
 - (A) Thus, bidder should offer for the purchase price the FMV of the property minus the amount he will have to pay to discharge any mortgages the land is still subject to.

3. Priorities:

- a. As to creditor, you must record (until you properly record your mortgage you have no priority).
- b. Once recorded, priority is determined by the norm of first in time, first in right.
- c. Purchase money mortgage – a mortgage given to secure a loan that enables a debtor to acquire the encumbered land.
 - i. The purchase money mortgagee is first priority as to the parcel he financed.
 - ii. E.g. – C1 lends \$200,000 to O, taking a security in all of O's real estate holdings, "whether now owned or hereafter acquired." (this is a permissible after-acquired collateral clause) C1 records the mortgage note. Six months later C2 lends O \$50,000 to enable O to acquire a parcel known as BA, taking back a security interest in BA and recording that interest. Subsequently, O defaults on all outstanding obligations. All that he has left is BA. C2, the purchase money mortgagee, has first priority in BA because he financed that parcel.
- d. Subordination agreements – by private agreement, a senior creditormay agree to subordinate its priority to a junior creditor.

4. Redemption in equity:

- a. At any time prior to the foreclosure sale, the debtor has the right to redeem the land and free it from the mortgage.
 - i. Equitable redemption is universally recognized up to the date of sale.
 - ii. Once a valid foreclosure has taken place, the right to equitable redemption is cut off.
- b. The right is exercised by paying off the amount due plus interests and costs.
 - i. If the mortgage or note contained an acceleration clause, the mortgagee is permitted to declare the full balance due in the event of default, therefore the full balance plus accrued interest plus costs must be paid to redeem.
 - ii. The debtor/mortgagor may not waive the right to redeem in the mortgage itself (this is known as clogging the equity of redemption and is prohibited).

- c. Statutory redemption – recognized in 1/2 the states, it gives the debtor/mortgagor a statutory right to redeem for some fixed period after the foreclosure sale has occurred (typically 6 months to 1 year).
 - i. Where recognized, statutory redemption applies only after foreclosure has occurred. The amount to be paid is usually the foreclosure sale price rather than the amount of the original debt.
 - ii. In most states recognizing statutory redemption, the mortgagor will have the right to possession of BA during the statutory period.
 - iii. When the mortgagor redeems, the effect is to nullify the foreclosure sale and the redeeming owner is restored to title.
 - iv. In NY – does not exist.

IX. Lateral Support:

- A. If land is improved by buildings and an adjacent landowner's excavation causes that improved land to cave in, the excavator will be liable only if he acted negligently.
- B. Strict liability does not attach to the excavator's actions unless Pl. shows that b/c of Def.'s actions, Def.'s improved land would have collapsed even if in its natural state (before improvements).

X. Water rights:

- A. There are 2 major systems for determining allocation of water in watercourses such as streams, rivers and lakes.
 - 1. The Riparian Doctrine – the water belongs to those who own the land bordering the water course.
 - a. These people are known as Riparians, who share the right of reasonable use of the water.
 - i. One Riparian will be liable if his or her use unreasonably interferes with others' use.
 - 2. The prior appropriation doctrine – the water belongs initially to the state, but the right to divert it and use it can be acquired by an individual, regardless of whether or not he happens to be a Riparian owner.
 - a. Rights are determined by priority of beneficial use. The norm for allocation is first in time, first in right, Thus, a person can acquire

the right to divert and use water from a watercourse merely by being the first to do so. Any productive or beneficial use of the water, including use for agriculture, is sufficient to create the appropriate right.

- B. Groundwater (a.k.a. percolating water) – water beneath the surface of the earth that is not confined to a known channel.
 - 1. The surface owner is entitled to make reasonable use of groundwater. However, the use must not be wasteful.
- C. Surface Waters – those which come from rain, springs or melting snow and which have not yet reached a natural watercourse or basin.
 - 1. Common enemy rule – surface water is considered a common enemy and a landowner may change drainage or make any other changes/improvements on his land to combat the flow of surface water (followed in 1/2 the states).
 - a. Many courts have modified the common enemy rule to prohibit unnecessary harm to others' land.

XI. Possessor's rights:

- A. The possessor of land has the right to be free from trespass and nuisance.
 - 1. Trespass – invasion of land by tangible, physical object.
 - a. To remove a trespasser, landowner brings an action for ejectment.
 - 2. Private nuisance – the substantial, intentional and unreasonable interference with another's use and enjoyment of land.
 - a. Unlike trespass, nuisance does not require tangible physical invasion. Thus, odors and noise could give rise to a nuisance but not a trespass.
 - b. Nuisance and the hypersensitive - there is no nuisance if the problem is the result of Pl.'s super sensitivity or specialized use.

XII. Eminent domain – governments 5th amendment power to take private property for public use in exchange for just compensation.

- A. Explicit takings – acts of governmental condemnation (e.g. – gov't condemns your land to make way for a public highway, gov't must pay just compensation).
- B. Implicit or regulatory takings – a governmental regulation that, although not intended to be a taking, has the same effect.
 - 1. e.g. – you buy land in NC for development. 3 months later the gov't

imposes a ban on all development. You have not been the target of an overt condemnation. Still, you argue that the regulation is an implicit taking b/c it has worked an economic wipeout of your investment.

2. Remedy for a regulatory taking – the government must either:
 - a. Compensate the owner for the taking; or
 - b. Terminate the regulation and compensate owner for damages that occurred while regulation was in effect.

XIII. Zoning – pursuant to police power, gov't may enact statutes to reasonably control land use.

A. Variance – permission to depart from requirements of a zoning ordinance (principal means to achieve flexibility in zoning).

1. Proponent must show:
 - a. undue hardship; and
 - b. variance won't work detriment to surrounding property values.
2. Variance is granted or denied by administrative action (typically a zoning board).

B. Non-conforming use – a once lawful, existing use now deemed nonconforming by a new zoning ordinance.

1. It cannot be eliminated all at once unless just compensation is paid. Otherwise, it could be deemed an unconstitutional taking.

C. Unconstitutional exactions – those amenities that the gov't seeks in exchange for granting permission to build.

1. They must be reasonably related in both nature and scope to the impact of the proposed development (if not they are unconstitutional exactions).
 - a. E.g. – you are a developer seeking permission to build a 200-unit residential development in the town of Utopia. The town tells you that it will grant you the requisite permit if you agree to provide several new streetlights, a small park, and wider roads.

Personal Property

I. Finders of property

A. Abandoned vs. lost property:

1. Abandoned property – when owner gives up possession with intent to relinquish title and control.
 - a. The finder of abandoned property becomes the owner by taking possession and having the intent to become owner.
2. Lost property – when owner parts with possession w/o the intent to relinquish title and control.
 - a. Obligations on a third party finder:
 - i. If value of property < \$20 – finder must make a reasonable effort to locate the owner.
(A) If after one year, the finder has not located the owner, he can keep the property.
 - ii. If value of property \$20 or more – finder must turn the property over to the police, who must hold it for a statutory period (based in the value of the property).
(A) If no one claims after the statutory period, finder can go to the police station and take possession of the property.

II. Gifts:

A. Two kinds of gifts:

1. Inter vivos gifts:
 - a. Donor must have donative intent (desire to transfer title).
 - b. Must be acceptance by the donee.
 - i. Silence constitutes acceptance, thus acceptance is only an issue if there is outright rejection.
 - c. Valid delivery – a turning over of the actual chattel or something representative of the chattel.
 - i. Four problems concerning delivery:
 - (A) first party checks – gift not delivered until check is cashed (donor can stop payment).
 - (B) third party checks – considered delivered when turned over (cashier's check, can't stop payment)
 - (C) stock certificates – delivery consummated when

certificate turned over (regardless of whether the new owner registers with the corporation).

(D) agents – turning over to own agent (with instruction to deliver) is not considered delivery; turning over to agent of recipient considered delivery.

2. Gifts Causa Mortis:

- a. Gifts made under circumstances that suggest donor was in imminent risk of death likely to occur.
 - i. Not valid if donor survives.
 - ii. Not valid if donee dies first (goes into donor's estate).

III. Liens:

A. Gives a person who has improved or enhanced the value of a chattel the right to continued possession until paid for work (e.g. – take car to get painted; painter has a lien until paid).

1. Three elements:

- a. An outstanding debt for services performed; -
- b. Debtor retains title to the property (not a gift or abandonment);
- c. Creditor has possession.
 - i. If creditor returns the property, that eliminates the lien (no claim to that item, but still debtor still owes debt to creditor).

(A) exception – general liens (arise when someone is responsible for a whole bunch of property – returning one does not release the lien on the rest).

IV. Bailment:

A. Someone takes custody of a chattel with the notion that they will care for it for a limited period of time (can be for the benefit of the owner or the custodian – coat check; lending your car to a friend).

B. The custodian has the responsibility to care for the property.

1. What bailment encompasses?

a. Thing within a thing:

- i. Safe deposit boxes – bank is custodian for anything in the box regardless whether bank is aware of its contents.
- ii. Parking lot (where leave keys) – not custodian for everything in the trunk (maybe spare tire).
- iii. Parking lot (where take keys) – not a bailment

iv. Coat check:

- (A) if didn't pay – may recover up to \$200
- (B) if paid – may recover up to \$300, but not more than actual value
 - (1) This assumes no negligence.
 - (2) If negligent, can get the value of the coat.

v. Exculpatory clause:

- (A) general rule – a bailee may not completely exonerate himself (but can limit recovery).
- (B) Only valid against ordinary negligence.

I. Execution of wills

A. Requirements for validly executed will:

1. Capacity – person is greater than 18 years old
2. 6 part test
 - a. Signed by testator
 - i. If signed by proxy
 - (A) Proxy must also sign;
 - (B) Proxy is not one of the 2 required witnesses; and
 - (C) Shall (not must) affix his address (failure does not make will invalid)
 - b. Signed at the end of the document
 - i. Words after signature ignored
 - (A) Unless material then the will is invalid
 - ii. Signature – any mark intended to be T's
 - iii. Witness may guide T's hand, so long as still a volitional act
 - c. 2 witnesses to signing
 - d. Publication – T must tell witnesses the document is a will
 - e. Witnesses
 - i. Don't need to sign in each other's or T's presence
 - ii. Must sign within 30 days of each other
 - iii. Order of signing (Ws and T) irrelevant as long as contemporaneous transaction
 - f. Execution ceremony within 30 days
 - i. 30 days starts when 1st witness signs
 3. A codicil (an amendment or supplement to will) requires the same formalities

B. Proof of wills in probate

1. Surrogates court proceeding in which
 - a. Ct determines whether there exists a validly executed will
 - i. If not, then intestate distributees determined
 - b. Personal representative identified
 - i. If there is a will, then the person is called an "executor"
 - ii. If intestate, then "administrator" appointed by court

2. Burden of proof – if one is a proponent that a will exists, then he has the burden of proof.
 - a. If will is "self-proved" then both W's must attest
 - b. If 1 W is dead, absent from NY, incompetent, or not able to be found with due diligence, then the other W's attestation is sufficient
 - c. If no Ws available, then signature of T and 1 W sufficient (?)
3. Attestation clause – it is below T's signature and above W's signatures and recites elements of due execution
 - a. Prima facie evidence of facts recited therein
 - b. Useful
 - i. W with bad memory
 - ii. Hostile witness

4. Self-proving affidavit – made after attestation by Ws; substitute for live testimony, depositions, and interrogatories

C. Interested W Statute

1. A beneficiary as a witness does not cause the will to be invalid
2. But the bequest to that W is void unless:
 - a. Supernumerary rule – 3 Ws and 2 disinterested
 - b. If T had died without a will and W would have been distributee (intestate heir), then W-beneficiary takes either will share or intestate share (whichever less)
3. Only beneficial gifts trigger the statute. If W executor, then this is earned compensation, not a gift

D. Foreign wills act

1. A will is admissible to NY probate if executed under:
 - a. NY law
 - b. law of state that is T's domicile and that is not T's domicile at execution
 - c. law of state that is T's domicile and place of execution or place of death
2. Essentially, a will is not admissible in NY probate if it was executed in a state that was not: your domicile at time of death, your domicile at time of execution, or your place of death.
3. Only question is admissibility. Once admitted, NY law applies to construction and application of provisions

E. Holographic wills

1. Handwritten, signed, not witnessed
2. Not valid unless
 - a. Armed forces during declared or undeclared war (expires 1 yr after discharge)
 - b. Mariners at sea
3. However, under Foreign Wills Act, holographic will made in state where valid is valid in NY

F. Attorney negligence

1. Could-have-been beneficiaries who don't take because will invalid due to atty negligence cannot sue atty because there is no privity of K
 - a. Atty's duty to C who K'd for services and C is dead

II. Revocation of wills

A. Is there a valid revocation?

1. 2 ways
 - a. Subsequent testamentary instrument (executed with necessary formalities); or
 - b. Physical act – burning, cutting, tearing, obliteration, mutilating
 - i. Must touch words of will

B. Revocation by implication

1. Ex – 1994 – "my last will"; 1998 – "my last will" and no language of revocation of 1994 will. 1998 will is a codicil to 1994 if consistent; inconsistent terms revoked, and if all terms inconsistent, then 1994 will revoked as an implied revocation

C. Revocation by physical act of another

1. Requirements
 - a. Act at request of T
 - b. In T's presence
 - c. With 2 Ws to the act (4 people in total in the room)

D. Rebuttable presumptions regarding revocation of wills

1. If will last seen in T's possession, then not found at time of probate, then presumption that T revoked b physical act
2. If will last in T's possession or control and mutilated, then same presumption
3. Neither presumption if will last seen in possession of someone

adversely affected by it

4. Evidence admissible to rebut presumption

E. Changes on face of will after execution

1. Added words disregarded

2. Partial revocation by physical act – not recognized in NY and thus read as written

3. To make change in NY, must write new will or codicil and satisfy 6 part test

4. Changes before T signs are valid

F. No revival of revoked will: Dependent Relative Revocation (DRR)

1. No will revoking prior wills is a proper revocation

2. A revoked will cannot be revived unless:

a. Re-executed – signed again by T and 2 Ws

b. Doctrine of re-publication by codicil – T validly executes codicil to 1st will that makes various changes

3. DRR – CL doctrine: permits a revocation to be disregarded when dependent (premised) upon mistake of law as to validity of another disposition (i.e. mistaken belief that revoking prior will would revive earlier will). Doctrine applied by 1 Appellate Division case by never CoA. If given DRR argue both ways.

a. DRR aka 2d best solution doctrine

b. Also, lost will doctrine

4. In NY, no revival rule also applies to codicils

III. Death of beneficiary during T's lifetime

A. NY Anti-lapse statute

1. If beneficiary dies before T, then gift lapses unless saved by anti-lapse statute

2. Which is applied when B is T's

a. Issue, brother, or sister; and

b. B leaves issue

3. Doesn't matter to deceased B left property to

4. Statute doesn't apply to gifts conditioned on beneficiary surviving T (To B, if he survives me)

B. Lapse in residuary gift: "Surviving residuary beneficiaries" rule:

1. By statute in NY, if T's residuary estate is devised to two or more

persons, and the gift to one lapses, the other residuary devisee(s) take(s) the entire estate, in proportion to their interests in the residue (absent contrary will provision)

2. Anti-lapse trumps this rule

a. Thus if T's 3 brothers were to share in T's residuary estate but one of them predeceases T, that brother's issue would get his share

C. Simultaneous deaths

1. Under Uniform Simultaneous Death Act (USDA), if two persons die under circumstances such that there is no sufficient evidence that they have died otherwise than simultaneously, then the property of each is distributed as though he survived

a. Ex – M (widow) is insured under a \$100k life insurance policy that names as beneficiary "my son S if he survives me; otherwise to daughter D". M and S are both killed instantly in a plane crash. M is survived by D and a grandson S Jr.

i. Who takes residuary estate? S Jr. (under anti-lapse) and D; both get half

ii. Who takes life insurance – D (as though M survived S)

2. Cases of intestacy

a. Treated as though property owner survives heir

3. If joint tenants (or TBTE) die simultaneously, one-half passes through each will or intestacy. In essence, converted to TIC

4. If there is sufficient evidence of survival (even 10 minutes), the USDA does not apply

D. Class gifts

1. Rule (of construction based on presumed intent) – If a will makes a gift to a group of persons generically described as a class ("children," "brothers and sisters," etc) and some class members predecease the T, only the class members who survive T take (absent contrary provision)

a. Rationale – T was "group-minded" in making the gift and wanted this class of persons and no one else to share ownership of the property. Another explanation: In determining the takers of a class gift, you read the will as of T's death.)

b. Contrast result when beneficiaries named individually and not as a class. If one devisee dies, share goes to residuary estate.

- c. Subject to possible application of the anti-lapse statute
- d. Rule of convenience – rule of construction used to determine takers of a class gift. The class is closed (and later born members excluded) at the time distribution to the class must be made. We close the class in order to determine minimum share of each class member so a distribution can be made without necessity of asking for a rebate or refund later on.
 - i. Subject to gestation principle

IV. Intestate succession

- A. The statutes of descent and distribution apply when:
 - 1. Decedent left no will (or left a will that was not properly executed)
 - 2. Will does not make complete disposition of the estate (partial intestacy), or
 - 3. An heir ("distributee") successfully contests the will and it is denied probate
- B. NY Note – the NY EPTL used term issue throughout and it means descendants (children, grandchildren, etc; not son-/daughter-in-law)
- C. Intestate decedent survived by spouse
 - 1. If spouse and 1 or more children or their issue, whether of this marriage or prior, the surviving spouse takes \$50k plus half of the balance
 - 2. If the intestate decedent is survived by her spouse but not by any issue, the surviving spouse takes the entire estate.
- D. Shares of issue
 - 1. Per capita at each generation
 - a. Step 1 – make initial division of shares (with 1 share for each line of issue, whether alive or dead), at the 1st generational level at which there are takers
 - b. Step 2 – all living persons at the 1st generational level take a share
 - c. Step 3 – the shares of deceased person at that level are combined and then divided equally among the takers at the next generational level in the same way (if someone in your line of issue already took in the previous level, their issue get nothing)
 - d. "Equally near, equally dear"
 - e. Note – in most other states, distribution is 'per stirpes'. Under this,

the issue of a deceased child take by representation the share their parents would have inherited if living (divided equally)

2. Before the decedent actually dies, his issue have no interest to bequeath only an expectancy. Thus, B, who predeceases his mother, cannot in his will bequeath "all my property, including any interest I have in my mother's estate to C"
3. For wills and trusts executed on or after Sept. 1, 1992, a gift to someone's 'descendants' or 'issue' is also distributed per capita at each generation.

E. Intestate decedent not survived by spouse or issue

1. All to parents or surviving parent
2. If there are no parents, to issue of parents (brothers, sisters, issue of deceased brothers and sisters) who take per capita at each generation
3. If no parents or issue of parents, $\frac{1}{2}$ to maternal and $\frac{1}{2}$ to paternal grandparent or if neither living to their children and grandchildren who take per capita. If no maternal or paternal, then all to the other.
4. If none of the above, issue of great-grandparents (1st cousins once removed), $\frac{1}{2}$ in equal shares to those on maternal/paternal side
5. No inheritance beyond this – estate then escheats to the state of NY (anti-laughing heirs statute)

F. Inheritance rights of adopted children

1. Same as bio children and if die, same as above
2. No rights from bio parents or kin
 - a. Exception – where child adopted by spouse of a natural parent
3. If child adopted by a relative – if child related to decedent by both natural relationship and adoption, child inherits under the natural relationship and adoption, child inherits under the natural relationship, unless the decedent was the adopting parent, then child inherits under adoptive relationship
 - a. Ex – M (widow) dies leaving child A. M's sister S adopts A. Then, S dies and Grandma dies, intestate. A inherits from G under the natural relationship and S under adoptive relationship
4. Construction of class gifts – "adopted out" child:
 - a. If child is adopted by new family, the adopted child does not take as a beneficiary of a class gift made in the will of a member of the

child's natural family.

i. Rationale

- (A) It is against NY policy that adoption records are sealed
- (B) Adopted child should not get 2 bites of the apple (new family should take care of him)

ii. Exception – adoption by family member (not sealed records, inherit from natural relationship)

G. Inheritance right of non-marital children

1. Child born out of wedlock has full inheritance rights from the mother (and mother's kin) and vice versa
2. Child inherits from natural father only if:
 - a. Legitimated by marriage (father marries mother after birth);
 - b. Order of filiation in paternity suit, entered during father's lifetime, adjudicating the man to be the child's father;
 - c. Father files a witness, authorized before a notary, affidavit of paternity with the Putative Father Registry;
 - d. Paternity established in a probate proceeding by clear and convincing evidence and man openly acknowledged as his own; or
 - e. DNA plus other evidence proving paternity by clear and convincing evidence

H. Lifetime gifts to intestate distributee – Advancements:

1. At CL – a lifetime gift to a child was presumptively an advancement of his intestate share and to be taken out of share of estate. Based on presumption that parent wants to treat children equally.
2. NY reject advancement presumption by statute
 - a. No advancement unless proven by a contemporaneous writing signed by a donor or donee
3. Computation
 - a. Advancement added to total estate
 - b. Then amount reduced in specific share. If larger than share, he doesn't have to return excess

I. Lifetime gift by testator to beneficiary – Satisfaction of legacies:

1. CL – a lifetime gift to a beneficiary is named in a donor's will (executed before gift was made) was presumptively in partial (or total) satisfaction of the legacy, to be applied against amount entitled to in

will

2. NY has rejected presumption by statute

a. Such a gift is not treated as a satisfaction of a legacy unless proven by contemporaneous writing signed by donor or donee

J. Disclaimer ("Renunciation") by intestate distributee or beneficiary:

1. No one can be compelled to be a beneficiary or heir against her will. A will beneficiary or intestate heir can disclaim or renounce (in whole or in part) her interest

2. To be a valid disclaimer

a. It must be in writing, signed, and acknowledged (before a notary)

b. It must be accompanied by a separate sworn affidavit that she received no consideration for making the disclaimer (unless the court authorizes such)

c. It must be irrevocable and filed with the Surrogate within 9 months after decedent's death (after disclaimer filed, you can't change your mind)

3. If disclaimed, the share is distributed as though disclaimant predeceased testator (anti-lapse statute will apply)

4. These parties can also disclaim: beneficiaries of life insurance, employee benefit plans, trusts, other non-testamentary transfers, surviving joint tenant or tenant by the entirety (to the extent that decedent furnished consideration for tenancy's acquisition)

a. With court approval, disclaimer can be made on a person's behalf by a guardian, holder of a durable power of attorney, or decedent's personal representative

5. Why disclaim? Avoid gift taxes and avoid creditor's claims (except federal tax liens)

6. An heir or beneficiary cannot disclaim in order to remain eligible for Medicaid

V. Changes in T's family after will is signed

A. T marries after will is signed

1. No effect on will because of election share statute

B. T divorced (or annulment) after execution of will

1. All gifts and appointments in favor of former spouse are automatically revoked by operation of law

- a. Will read as though former spouse predeceased T (a bequest to son or daughter of former spouse is not revoked by divorce)
 - i. Note that anti-lapse statute does not apply because we are dealing with bequests to spouse (outside scope of anti-lapse statute)
- b. Must be formal decree of divorce or annulment for rule to apply
- c. Rule only applies to wills
- d. Exceptions:
 - i. Appointment of former spouse as guardian of couple's children is not affected
 - ii. If couple reconcile and remarry, all provisions in favor of the former spouse are restored (statute applies only if they are divorced or annulled as of testator's death)

C. Pretermitted child (born or adopted after will is executed)

- 1. The pretermitted child statute gives no protection to children alive when the will was executed. The statute only applies to afterborn and after-adopted children.
- 2. Qualification for pretermitted child status
 - a. child is born or adopted after will is executed;
 - b. child is unprovided for by any settlement;
 - c. child is not provided for or mentioned in the will
- 3. Testator had other children when the will was executed – pretermitted child takes the same share as the siblings
 - a. Share comes out of gifts to other children (no one else's is cut down)
 - i. If children are given different amounts, an equal percentage is probably taken from each gift
 - ii. If will makes no provision for other children, pretermitted child gets nothing
 - iii. If will makes limited provision for testator's existing children (eg – I give \$5 to my children A and B") afterborn child takes amount equal to intestate share
- 4. If testator has no other children when will was executed – afterborn or after-adopted child takes intestate share

VI. Reference to acts and events outside the will

A. Incorporation by reference – extrinsic document:

1. At CL and in nearly every state, the terms of an extrinsic document, not present at the time the will is signed (and thus not part of the will itself) can be incorporated by reference, if:
 - a. The document was in existence when the will was signed;
 - b. The will shows an intent to incorporate the document's terms; and
 - c. The extrinsic document is clearly identified by language in the will.
2. NY does not recognize the incorporation by reference doctrine. All instruments must be signed and witnessed by 2 witnesses (except for armed forced and marines at sea).
 - a. Exception – pour-over gifts by will to an inter vivos trust (see below: trusts).

B. Acts of independent significance (“Non-testamentary Acts”):

1. Lifetime acts with lifetime motive or purpose, even though affecting will, is given full significance.
 - a. Example 1 – T executes a will that bequeaths “the automobile that I own at my death” to N, and “the furniture and furnishings in my living room” to S. Thereafter T trades his 1989 Chevy in for a new Mercedes. Shortly before his death T removes a Picasso (worth \$80,000) from his den and mounts it on his living room wall. N will take the Mercedes, S will take the Picasso.
 - b. Example 2 – T’s will leaves “all the contents of my sea chest to A.” All tangible property and cash can pass under such a gift.
 - i. Title documents such as deeds, stock certificates and bank passbooks cannot pass under such a gift.

C. Non-probate assets:

1. Non-probate assets – interests in property that are not subject to disposition by will or inheritance, and are not part of the probate estate for purposes of administration.
 - a. Major types:
 - i. property passing by right of survivorship (joint bank account, etc.);
 - ii. property passing by contract (life insurance, employee death benefits paid to beneficiary other than insured’s executor or estate);
 - iii. property held in trust (including revocable trusts – trust

terms govern distribution of assets);

iv. property over which the decedent held power of appointment.

VII. Problems associated with testamentary gifts:

A. Classification of gifts that can be made by a will:

1. Specific gift – “I devise BA to my son A.”
2. Demonstrative legacy – a general amount from a specific source (e.g. – “I bequeath \$5,000 to be paid from the proceeds of sale of my IBM stock, to B”).
3. General legacy – “I give the some of \$5,000 to C.”
4. Residuary disposition – “I give all the rest, residue and remainder of my estate to my brother D.”
5. Intestate property – if a partial intestacy b/c will, poorly drafter, has no residuary clause.

B. Abatement of legacies to satisfy creditors' claims:

1. Absent provision in the will the order of abatement of testator's property to pay debts and claims starts from the bottom of the above list and works up (no distinction is made within each class of gifts between real and personal property).
 - a. Intestate property;
 - b. Residuary estate;
 - c. General legacies;
 - d. Demonstrative and specific gift;
 - e. Dispositions that qualify for the estate marital deduction (property passing into spouse's outright ownership).

C. Pro Rata apportionment rule governs estate tax:

1. Absent contrary provision, death taxes are apportioned pro rata among all persons interested in the estate (beneficiaries of both probate and non- probate transfers).
 - a. Exception – interests that qualify for charitable or marriage deduction get benefit of that deduction (do not have to contribute pro rata).
 - i. Apportionment ratio – value of each testamentary & nontestamentary gift Total value of taxable estate

D. Specific gift of encumbered property – no exoneration of liens:

1. Common law – if testator made a specific bequest of property that was

subject to a mortgage or other lien on which the testator was personally liable, the beneficiary was entitled to have the lien exonerated (paid from the residuary estate)

2. NY – liens on specifically devised property are not exonerated unless the will directs exoneration.

a. A general provision in the will for payment of debts is not such an indication that liens are to be exonerated.

E. Ademption – if a will makes a specific gift of property and the property is not owned by the testator at death, the gift fails under the doctrine of ademption.

1. Example - T executes a will that provides: "I devise Blackacre to my son A, and my residuary estate to my daughter B. Two years later, T sells Blackacre for \$10,000 cash and a \$90,000 note that is secured by a mortgage on Blackacre. T dies six months later, survived by A and B. Ademption applies so A takes nothing, and the \$10,000 cash and \$90,000 note falls into residuary estate.

2. Three statutory exceptions to the ademption doctrine:

a. Casualty insurance proceeds for lost, damaged or destroyed property – beneficiary takes insurance proceeds to the extent paid after death.

b. Executory contract – beneficiary gets sale proceeds paid after death.

i. e.g. - T executes a will that provides: "I devise Blackacre to my brother A." T enters into a contract for the sale of Blackacre to B; the contract is still executory at Ted's death. B takes contract payments remaining after T's death (same rule applies to installment sales).

c. Sale by guardian or conservator of specifically bequeathed property – beneficiary gets sale proceeds to the extent not expended and can be traced back to sale.

3. Property taken by eminent domain:

a. Common law rule – under the identity theory the property is not owned by testator at death therefore ademption applies (the reason why the asset is not in the estate is irrelevant).

b. NY – no statutory exception so ademption applies.

4. Bequests of shares of stock and other securities:

- a. "I give \$5,000, to be paid from the proceeds of sale of my Acme stock to G."
 - i. result – demonstrative legacy (ademption does not apply b/c only applies to specific gifts).
 - (A) Thus on T's death, G gets \$5,000. a. If T's owns the stock at death but it sells for less than \$5,000, other assets must be sold in order to raise the total \$5,000. b. If T does not own the stock at death, other assets must be sold in order to raise the total \$5,000.
- b. Gifts of stock in a publicly-traded company:
 - i. "I give my 100 shares of IBM stock to G."
 - (A) result – specific gift (ademption applies if sold before T's death).
 - (B) "I give 100 shares of Kodak stock to M."
 - (1) Since the hypo doesn't include the possessive pronoun "my", it is treated as a general legacy and ademption does not apply (M gets the date of death value of 100 shares of Kodak stock).
- c. Gifts of stock in a closely-held company:
 - i. "I give 100 shares of FamilyCo. (a closely-held corporation) stock to M."
 - (A) result – whether or not there is a possessive pronoun, the gift is treated as a specific gift (and ademption applies).
- d. Stock splits:
 - i. The bequest of stock is treated as a specific bequest whether or not a possessive pronoun "my" was used, and whether not publicly traded or closely held stock is involved.
 - (A) example – "I give 100 shares of Kodak stock to B". Kodak splits two-for-one. B takes the additional shares produced by the stock split even though this would have been classified as a general legacy for ademption purposes.
 - (B) A specific bequest of stock includes stock splits but not stock dividends declared after the will is executed.
- e. Changes in form not substance – ademption does not apply if the new stock is directly traceable to the stock bequeathed in will and

the takeover.

- i. example – T makes a will that bequeaths "my 1,000 shares of Apple stock to my daughter D." Two years later, Apple is acquired by IBM in a friendly takeover in which Apple shareholders get one share of IBM stock for every two shares of Apple. T dies owning 500 shares of IBM but no Apple stock. D takes the 500 shares of IBM stock.

F. Mistake, Ambiguity:

1. Plain meaning rule - absent suspicious circumstances, it is conclusively presumed that the T read will and intended its contents. Extrinsic evidence is not admissible to show that a provision was mistakenly omitted from a will, or that a provision contained in the will is not what the testator intended.
2. If will is unambiguous – evidence is not admissible to show the testator made a mistake in describing a beneficiary or the property.
3. Latent ambiguity – "I give \$10,000 to my nephew John Paul Jones." T has a nephew named James Peter Jones, and a nephew named Harold Paul Jones, but no nephew named John Paul Jones.
 - a. If a misdescription results in a latent ambiguity (ambiguity only discovered when applying will to the facts) extrinsic evidence is admissible to try to find the meaning of the words used (if evidence fails to clear up ambiguity, gift fails).
 - i. Admissible evidence includes:
 - (A) Facts and circumstances (evidence about the testator, his family, claims and under the will and their relationship to the testator, testator's habits, thoughts, etc.);
 - (B) Testator's declaration of intent; statements made to 3rd parties
 - (C) Testator's statements to attorney who prepared the will
4. Patent ambiguity – "I give the sum of Twenty- five dollars (\$25,000) to by brother B"
 - a. If there is an ambiguity that appears on the face of the will extrinsic evidence is admissible to clear up the ambiguity.
 - i. Admissible evidence does not include testator's declarations of intent to a 3rd party (concerned about perjury). But statement to

attorney OK.

G. Conditional Wills:

1. A conditional will provides that it is operative only if a condition specified in the will is satisfied (e.g. – “If I should not survive this trip...”)
 - a. If a will is conditional, probate will be denied if the condition did not occur.
 - b. However, if language in a will merely reflects motive or inducement for making a will it will go to probate.
 - c. Exam tip – if T executes a will saying “If anything should happen to me on this trip my estate should be distributed as follows...” but then goes on the trip, returns safely and dies many years later without revoking the will, argue both ways (courts have gone both ways), the conclusion you reach is not important.
 - i. Some courts have pointed out that not changing a will for 3 years and putting it in safe keeping shows that T thought the will was still valid.

H. Contracts relating to wills:

1. By statute, a contract to make a will or not to revoke a will, can be established only by an express statement in the will that its provisions are intended to constitute a contract between the parties.
2. Joint wills (will of two persons on one piece of paper).
 - a. This statute has eliminated litigation of joint wills as to whether the will was executed pursuant to a contract that the survivor would not revoke it (the old New York cases sometimes found a contract merely from the execution of a joint will using plural possessive pronouns (we, us, our) that made a disposition of the combined estates).
3. If a will is contractual and survivor breaches the contract by writing a will with inconsistent provisions:
 - a. Step 1 – probate the new will, even though it was written in breach of contract. (Wills law controls to this extent.)
 - b. Step 2 – impose a constructive trust in favor of intended beneficiaries of contract.
4. However, a contractual will can be revoked by agreement of the

parties.

I. New York's "Negative Bequest" Rule:

1. At common law and in most states – when a will does not make a complete disposition of the estate (resulting in a partial intestacy), words of disinheritance in the will are ineffective.
 - a. rationale - property passing by intestacy is governed by the intestacy statutes, not by the decedent's will.
2. New York "negative bequest" statute – words of disinheritance in a will are given full effect (will can provide how property not be disposed of).
 - a. How is property distributed – as though disinherited heir predeceased T (anti-lapse statute applies because only that heir was disinherited).

VIII. Elective Share Statute:

- A. Purpose - to protect surviving spouse against disinheritance, by giving spouse entitlement to minimum share of decedent's estate.
- B. Amount of elective share – greater of \$50,000 or 1/3 of net estate, plus interest at 6% beginning 7 months after issuance of Letters Testamentary to the executor (or Letters of Administration to the administrator appointed by the court).
 1. Elective share applies to net estate after payment of debts, but before payment of estate taxes.
 2. Exempt personal property set-aside - these items come "off the top" over and above property passing to the spouse by will, intestate share, or elective share (total can be as high as \$56,000).
 - a. Car (up to \$15,000 in value);
 - b. Furniture, appliances, computers etc. (up to \$10,000 in value)
 - c. \$15,000 cash allowance;
 - i. Cash allowance is not subject to creditors' claims except funeral expenses.
 - d. Animals, farm machinery, tractor, lawn tractor (up to \$15,000);
 - e. Books, pictures, videotapes, software, etc. (up to \$1,000).
 - f. Exam tip – mention this at the end of the essay. Don't figure it in when computing elective share or surviving spouse's intestate share because it will mess up the numbers.

C. Contrast surviving spouse's intestate share:

1. Survived by spouse and issue: \$50,000 plus 1/2 of balance of estate
2. Survived by spouse and no issue: entire estate
3. Therefore, if the decedent died without a will, the surviving spouse's intestate share is always going to be larger than his or her elective share unless testamentary substitutes are involved.

D. Multistate problems:

1. Elective share statute applies only to estate of NY domiciliaries regardless of whether a non- domiciliary owns property located in NY (elective share cannot be invoked).
 - a. Exception – if T expressly states in his will that the disposition of his real property in NY is to be governed by NY law (e.g. – T retires to FL but still owns real property in NY and still has NY attorney write his will).
2. If NY domiciliary has real property located outside of NY, the value of that property can be included when calculated elective share, but the property itself cannot be part of adjudication in NY.

E. Testamentary substitutes:

1. The elective share applies to property owned at death and certain testamentary substitutes (b/c the probate estate is augmented by these testamentary substitutes, cases have referred to the amount subject to the elective share as the augmented estate).
 - a. rationale – if the elective share applied only to the probate estate, a person intent on disinheriting his or her spouse could make nonprobate transfers (revocable trusts, joint bank accounts, etc.) in favor of others, and thereby defeat the policy and protection of the elective share statute.
 - b. A disposition (other than an irrevocable disposition) is a testamentary substitute whether created before or after marriage.
2. Under current law, almost all nonprobate transfers (except life insurance, irrevocable dispositions made before marriage, and irrevocable dispositions made more than one year before death) are testamentary substitutes.
 - a. To remember the list of Testamentary Substitutes we need a LEG UP.

- i. Totten Trust - ("A, Trustee for B") bank accounts;
- ii. Survivorship estates – joint tenancies, tenancies by the entirety, joint and survivor bank accounts.
- iii. Lifetime transfers with strings attached – transfers with a retained power to revoke, invade, consume or dispose of principal or name new beneficiaries; and irrevocable transfers with retained life estate made on or after Sept. 1, 1992. (The most significant consequence of this rule: Revocable trusts are testamentary substitutes).
- iv. Employee pension, profit-sharing, deferred compensation plans – if employee designated the beneficiary on or after Sept. 1, 1992.
 - 1. Only 12 of a qualified plan (qualified for/ favorable income tax treatment), is a testamentary substitute.
- v. Gifts – (in excess of \$11,000 gift tax annual exclusions) made within one year of death.
 - (A) gifts causa mortis even within the \$11,000 exclusion are testamentary substitutes.
 - (1) Gifts causa mortis - gifts given in fear of impending death (automatically revoked if donor survives apprehended peril).
 - (a) But gift to a friend is not causa mortis if H died "suddenly" four weeks after gift.
- vi. United States government bonds and other P.O.D. ("pay on death") arrangements.
- vii. Powers of appointment – property over which decedent held a presently exercisable general power of appointment (but not property over which he held a general testamentary power).

b. The following are NOT testamentary substitutes, and do not affect the elective share: [LOGPIT]:

- i. Life insurance – whether payable to surviving spouse or third party.
- ii. Other one-half of qualified pension and, profit- sharing benefits (in any case, benefits in qualified pension plans are not testamentary substitutes if the employee named a beneficiary before September 1, 1992, and did not change the beneficiary

designation thereafter)

- iii. Gifts within \$11,000 gift tax annual exclusions, even made within one year of death.
- iv. Pre-marriage irrevocable transfers.
- v. Irrevocable transfers made more than one year before death (transfers in which grantor did not retain power to revoke, invade, consume or dispose of principal).
- vi. Transfers with retained life estate made BEFORE Sept. 1, 1992.

c. What amount of any survivorship estate is a testamentary substitute?

- i. Survivorship estates with deceased spouse and third party (joint tenancy, joint and survivor bank account) - “consideration furnished” test applies. The surviving spouse has burden of proof as to amount of decedent's contributions to property's acquisition (or amount of decedent's deposits in joint bank account)
 - (A) Rationale: surviving spouse is entitled to an elective share of decedent spouse's property, not property that belongs to someone else.
- ii. Survivorship estates with surviving spouse – (joint tenancy, tenancy by entirety, joint bank account) - the “consideration furnished” test does not apply. One-half is a testamentary substitute regardless of which spouse furnished the consideration for the property's acquisition.
- iii. Survivorship estates with deceased spouse and third party created before marriage – consideration furnished test applies, but it is complicated by the fact that irrevocable dispositions before marriage are not testamentary substitutes.
 - (A) example – If W purchases a piece of land with S as joint tenants before marriage, upon W's death H can prove that W furnished the entire consideration for the property's acquisition. Only one-half of the property's value, or \$75,000, is a testamentary substitute
 - (1) rationale - when W acquired the property in 1994 and took title in this form, she made an irrevocable gift of a one-

half interest to S. As this was an irrevocable disposition before marriage, this one-half is not a testamentary substitute.

F. Computing elective share:

1. Example 1 – W married H in 1995. In 1998, W and her sister S acquired real estate taking title as joint tenants with right of survivorship. In 1999, W and H opened a joint bank account under which the amount on deposit passes to the survivor. W died in 2001, leaving a net probate estate of \$300,000. W's will devised BA (\$75,000) to H, and her remaining estate (\$225,000) to S. Assume that there is \$60,000 on deposit in the H and W joint bank account, and that the W-S joint tenancy property is worth \$150,000 at W's death. If H is able to prove that all of the funds used to buy the joint tenancy property was contributed by W (and nothing was contributed by W's sister): \$300,000 net probate estate + 30,000 W-H bank account (1/2 is testamentary substitute) + \$150,000 W-S joint tenancy (testamentary substitute) \$480,000 augmented estate \$160,000 elective share amount (one-third of augmented estate) - \$75,000 amount passing to H under will - \$30,000 amount passing to H as testamentary substitute (1/2 joint bank account) / \$55,000 net elective share to which H is entitled

G. Satisfying the elective share –

1. in making up the elective share, all other beneficiaries contribute pro rata (beneficiaries under the will, beneficiaries of testamentary substitutes, and intestate distributees)
 - a. Ratio = amount of elective share/remaining assets. V

H. Procedural rules governing election:

1. Must be filed within 6 months after Letters (Letters Testamentary or Letters of Administration) are issued by Surrogate at start of probate proceedings, but even if there is no estate administration in no event more than 2 years after decedent's death.
2. Right of election is personal to the surviving spouse, executor or administrator of deceased spouse cannot elect (purpose of elective share is to protect the spouse, not her heirs). However, the guardian or committee of an incapacitated spouse may elect with court approval.
3. Can be waived with or without consideration; before or after marriage;

as to a particular will or testamentary substitute; or as to all wills and testamentary substitutes generally. Waiver must be in writing, signed, and acknowledged before a notary public.

- a. General waiver (in premarital agreement for example) of all rights in spouse's estate waives right to elective share or intestate share, but does not waive right to gifts made by the spouse's will; there must be an explicit waiver of such bequests. ix) When spouse disqualified from taking elective share:
 - i. Same circumstances disqualify spouse from taking as heir in an intestate distribution, wrongful death action recovery, and exempt personal property set-aside (DISMAL):
 - (A) Divorce – final decree of divorce or annulment valid under New York law;
 - (B) Invalid divorce - surviving spouse procured, outside of New York, divorce or annulment not recognized as valid under New York law (this is a one-way street rule - doesn't bar surviving spouse if deceased spouse procured invalid divorce or annulment);
 - (C) Separation decree - final decree of separation rendered against surviving spouse (doesn't bar spouse if the final decree of separation was rendered against deceased spouse). If H and W enter into a separation agreement and live apart from each other, but there is no decree of separation, the surviving spouse is not disqualified from filing for an elective share;
 - (D) Marriage void – marriage void as incestuous or bigamous;
 - (E) Abandonment, Lack of support – surviving spouse abandoned or refused to support deceased spouse.
 - ii. Compare effect of divorce following execution of will:
 - (A) Gifts and fiduciary appointments in favor of former spouse are revoked only if final decree of divorce or annulment. Thus a decree of separation disqualifies the surviving spouse from filing for an elective share, but does not disqualify the spouse from taking under the decedent's will.

IX. Will Contests:

A. Testamentary capacity:

1. Testator must have sufficient capacity to:
 - a. understand the nature of the act he was doing (writing a will);
 - b. know the nature and the approximate value of his property;
 - c. know the natural objects of his bounty;
 - d. understand the disposition he was making.
2. Adjudication of incapacity (appointing guardian) is not sufficient to establish that the person lacked capacity to make a will.
 - a. It involves a different legal test (capacity to contract, to manage one's affairs) than capacity to make a will.
 - b. Jury could find that the testator signed the will during a lucid interval (fleeting moment where he met 4-point test).

B. Undue Influence – existence of a testamentary capacity subjected to and controlled by a dominant influence or power.

1. Burden of proof on contestant to prove:
 - a. existence and exertion of an influence;
 - b. effect of such influence was to overpower the mind and will of the testator;
 - c. product is will (or a gift in the will) that would not have been executed but for such influence.
 - d. "Influence is not undue unless the free agency of the testator was destroyed and a will is produced that expresses the will, not of the testator, but of the one exerting the influence." (Mental duress.)
2. While evidence of undue influence usually circumstantial, these alone are not enough:
 - a. Opportunity to exert influence. Fact that one child (who received major share of estate) lived with mother, wrote checks for her, helped on income tax, held a power of attorney . . . is not evidence that the opportunity was taken advantage of.
 - b. Susceptibility to influence due to illness, age. Fact that Mother was very old, had broken her hip, had memory lapses, took Valium . . . this is not evidence of undue influence.
 - c. Unnatural disposition--i.e., that some children take less than others or are excluded entirely.
 - d. Surmise, suspicion and conjecture are not evidence, there must be some indication that influence was exerted.

3. Where a will makes a gift to one in a confidential relationship (e.g., attorney-client, financial adviser, child who held power of attorney) and that person was active in procuring the will, there is an inference of undue influence.
 - a. If an inference is raised, this doesn't affect the burden of proof (contestant still has burden of proof), but will proponent has the burden of going forward with evidence that no undue influence was exerted. If the will proponent does not produce sufficient rebuttal evidence, the inference satisfies the contestant's burden of proof on the issue of undue influence.
4. If will makes a bequest to the drafting attorney, the Surrogate must make a Putnam Scrutiny even if no objection is filed (i.e., an automatic inquiry) to determine whether the gift was voluntarily made.
5. If will names drafting attorney as executor, he must give written disclosure to the client.
 - a. Disclosure musts state that:
 - i. any person, not just attorneys, can be named executor;
 - ii. executors receive statutory commissions;
 - iii. attorney will also be entitled to legal fees for representing the estate.
 - b. Client must sign the acknowledgment with two witnesses.
 - c. Failure to comply with the statute results in executor's commission being reduced by 50%.

C. No-contest ("in torrorem") clauses:

1. Majority rule – no-contest clauses are given effect unless court finds that contest was brought in good faith and with probable cause (it wasn't a strike suit designed to extract a settlement).
2. In New York – no-contest clauses are fully enforceable regardless of whether the contest was filed with probable cause.
 - a. Rationale – a testator should be permitted to protect his testamentary plan, and his reputation, against post-death attack.
 - b. Exceptions:
 - i. ground of contest is forgery or that will was revoked by a later will (if the Surrogate finds that there was probable cause for the contest).

- ii. contest is filed on behalf of an infant or incompetent (action taken by a third party (guardian) should not work a forfeiture).
- iii. construction suit to construe the will's terms (not challenging the will, just want to know what interests are created by it).
- iv. objection to jurisdiction of court (e.g. – that testator was domiciled in NJ not NY, not challenging, just saying it should be probated in Trenton).

X. Powers of Appointment:

A. A power of appointment is the authority created in a person (donee) to designate, within the limits prescribed by the creator of the power (donor), the persons who will take the property and the manner in which they will take it. (takers in default of appointment are the persons designated to take the property if the donee fails to effectively exercise his power).

1. Purpose – permits the income beneficiary to designate the remaindermen.
2. General power of appointment – donee is not limited in the class of beneficiaries to whom she can appoint (can appoint the trust property to herself, OR her estate, OR her creditors).
3. Specific power of appointment – donee is limited in the class to whom she can appoint
4. Presently exercisable power – exercisable by the donee during her lifetime (or by will unless expressly prohibited)
5. Testamentary power – exercisable only by donee's will.

B. In New York, a will exercises all powers of appointment held by the testator (both special powers and general powers) unless the instrument creating the power called for its exercise by a specific reference to the power.

1. If T's will gave the remainder "to such of her descendants as D appoints by a will that specifically refers to this power" and D's will devises "all the rest and residue of my estate, including any property over which I may have a power of appointment, to my son A," D has not exercised her power of appointment b/c there was no specific reference to particular power as required in T's will (instrument

creating the power).

C. Powers of appointment as testamentary substitute subject to elective share:

1. General presently exercisable power of appointment – subject to elective share.
2. General testamentary power of appointment – not subject to elective share.
3. Special power of appointment – not subject to elective share.

D. Powers of appointment and creditors' claims:

1. General powers of appointment:

- a. Presently exercisable – donee's creditors can reach property subject to a presently exercisable general power of appointment.
- b. Testamentary – donee's creditors cannot reach property unless the donee is also the donor.

2. Special powers of appointment:

- a. Donee's creditors cannot reach property subject to a special power, even if the donee is also the donor, unless the transfer was in fraud of the donor- donee's creditors.

XI. Federal Estate Tax:

A. The federal estate tax grants a \$1,000,000 exemption for estates of decedents dying in 2003 (\$1.5 million in 2004 and 2005). For an estate under that size, no estate tax is due and no estate tax return has to be filed.

B. What interests are includable in the "gross estate"?

1. revocable trust;
2. totten trust bank account;
3. qualified pension plan benefits;
4. life insurance proceeds (look for incidents of ownership such as the power to name, and change, the beneficiary);
 - a. if decedent assigned the policy to someone else within 3 years of death it is still includable in the gross estate at its date of death value (concern – otherwise clients in poor health would try to give way the life insurance proceeds during lifetime).
5. 1/2 of joint tenancy between husband and wife / (without regard to which spouse furnished consideration);

6. joint tenancy between decedent and 3rd party (consideration furnished test applies);
7. irrevocable trust with retained life estate.

C. Bypass trust – a beneficiary can be given a life income interest and limited powers over trust principal, all without causing the property to be taxed in the beneficiary's estate on her death. (The trust "bypasses" the beneficiary's estate for estate tax purposes.) The trust will not be taxed in the beneficiary's estate as long as she is not given a general power of appointment.

1. No general power of appointment so long as the beneficiary's power to invade the trust and appoint principal to herself is limited to purposes of her health, education, maintenance or support.
 - a. Words that may create a general power of appointment – comfort (comfortable maintenance is ok - adjective), benefit, welfare, well-being.
 - b. If trustee holds power to invade trust for beneficiary's comfort, benefit, welfare, well-being, etc. it does not result in inclusion of trust in beneficiary's gross estate.
 - i. If beneficiary is also trustee, disabling statute prevents beneficiary who is trustee from distributing principal to self (only court can make distribution).
 - ii. If beneficiary is a co-trustee, only another trustee can deliver principal to beneficiary.

D. Estate tax charitable deduction:

1. For a remainder interest passing to charity, there is no charitable deduction under the income tax, gift tax, or estate tax, unless the gift takes the form of:
 - a. Annuity Trust – under which a stated dollar amount, which can be no less than 5% of the initial trust corpus, is payable to the individual beneficiary for life. (E.g., if a \$200,000 trust, the stated annuity must be at least \$10,000 per year.)
 - b. Unitrust – under which a stated percentage (which can be no less than 5%) of the trust corpus, valued annually, is payable to the individual beneficiary for life.

E. The marital deduction:

1. The federal estate tax grants an unlimited marital deduction under both the gift tax and the estate tax for qualifying gifts to a spouse. This enables a husband or wife to make provision for his or her spouse, without any diminution by estate taxes. However, to qualify for the marital deduction, the property must be left in a form that will cause it to be taxed in the surviving spouse's estate at his or her death. Thus, the marital deduction doesn't necessarily save taxes; it defers the estate tax until the surviving spouse's death.
2. What forms of transfer qualify for the unlimited marital deduction under the estate tax?
 - a. General test – must be an interest that will be includable in the surviving spouse's gross estate on her subsequent death, to the extent not given away, consumed or disposed of during the surviving spouse's lifetime.
 - i. Outright dispositions, by will, intestacy, elective share, life insurance in lump sum, etc.
 - ii. QTIP Trusts and the QTIP (Qualified Terminable Interest Property) election:
 - (A) Congress has permitted the use of trusts with certain specific provisions to qualify for the marital deduction, the most important (and the one they test on) being the QTIP trust.
 - (B) To be eligible for a QTIP election as a qualified terminable interest trust:
 - (1) Income must be payable to spouse annually for life. If the income interest terminates on the spouse's remarriage, the trust is not QTIPable (i.e., not eligible for QTIP treatment);
 - (2) During the spouse's lifetime, no other person can be a permissible beneficiary of the trust. (Neither spouse nor trustee can have power to distribute trust property to anyone other than the spouse.); and
 - (3) Executor must make QTIP election on estate tax return.
 - (C) Example - T, who is married to L and has children by his first marriage, dies leaving a will that bequeaths property worth \$500,000 in trust: "The trustee shall pay all trust income

to my wife L at least annually for life. On L's death, the trustee shall distribute the principal to my descendants." The will names T's brother B as executor. If T died before 1982 (before the "unlimited marital deduction" was enacted and the QTIP election rules were introduced), this disposition would not qualify for the marital deduction b/c it is a terminable interest (terminates at L's death so it would not be included in her estate). After 2001, it could qualify for a marital deduction if executor makes a Q-tip election.

- (D) Estate tax results of QTIP election – the amount qualifies for a marital deduction and the value of the property is includable in the recipient's gross estate (even though it is only a life estate).
- (E) Estate tax results of failure to elect – trust does not qualify for marital deduction and it is not includable in beneficiary's gross estate.
- (F) benefits of electing – beneficiary has income from all trust assets and testator can direct who the trust is to benefit after spouse's lifetime.

3. \$11,000 annual exclusion under the gift tax:

- a. There is a \$11,000-per-donee annual exclusion under the gift tax. The exclusion is available for gifts of present interests, but not for gifts of future interests.
 - i. Example – if Joe gives \$11,000 each to his three children, their spouses, and his six grandchildren (a total of 12 donees), Joe can deplete his estate by \$132,000 without having to file a gift tax return, and without having made a taxable gift that uses up any of Joe's \$1,000,000 "credit shelter." (a gift tax return has to be filed only if taxable gifts (over annual exclusions) are made during the calendar year).
- b. There is also an unlimited exclusion for tuition and medical payments if (but only if) the payment is made directly to the service-provider.
 - i. Example 1 – if Joe pays for his grandson Gary's \$24,000 tuition at Duke University by writing the check directly to Duke, the

payment qualifies for this exclusion—and Joe can give Gary an additional \$11,000 that will be covered by the annual exclusion.

- ii. Example 2 – paying off Joe's GSL loan does not qualify under this provision.
- c. A gift is “incomplete” for gift tax purposes if the transferor retains either the power to revoke the transfer or the power to change the beneficiaries.

F. New basis at death rule:

- 1. for lifetime gifts – for purposes of computing gain, donee takes donor's basis.
- 2. for testamentary gifts – all assets owned by decedent at death get new basis equal to their date on death value.

Trusts

- I. A trust is an arrangement for making gifts of property and for the management of assets, under which trustee holds legal title for the benefit of beneficiaries
 - A. Trustee has burdens of ownership (duty to manage, safeguard, invest, etc);
 - B. Beneficiaries have equitable title and all of the benefits of ownership
- II. Requirements for a valid trust:
 - A. No consideration is required for the creation of trust (you can have consideration but not required).
 - B. A trust can be created during the creator's lifetime ("lifetime trust") or by will ("testamentary trust").
 - C. All lifetime trusts must be evidenced by a writing that is signed by the settler and trustee and either acknowledged before a notary public or witnessed by two witnesses.
 - D. Creator (settler) must deliver legal title as to the res (trust property) to a trustee for the benefit of beneficiaries with intent to create a trust for a lawful purpose.
 1. Creator – must be over age 18 with capacity to enter into contracts and transfer title.
 2. Delivery of legal title – the mere intent to create a trust, or a gratuitous written promise to create a trust, is not enough.
 - a. In creating a lifetime trust:
 - i. titled assets – for assets whose title is evidenced by a document, (e.g. – real estate, stocks and bonds, etc.), legal title must be formally transferred to the trustee (whether the trustee is a third party or the settlor himself).
 - ii. other assets – transfer must be by a written assignment to the trustee.
 - b. Testamentary trusts – "delivery" requirement does not apply to testamentary trusts, wills law controls.
 3. Res (a.k.a. corpus, principal, subject matter of trust) – to have a trust, legal title to specific property must be formally transferred to the trustee.

- a. The subject matter of the trust must be certain and identifiable.
- b. If there is no trust property, there is no trust.
 - i. Expectancy interest in another's will is not property.
 - ii. Cannot create trust with "whatever money or property that I can contribute over the next 10 years" (this is promise to create a trust in the future, not supported by consideration).
 - (A) but if written promise to create trust of property (to be received in future) is supported by consideration, under contract principals, trust automatically arises upon receipt of the property.

4. Trustee:

- a. Testamentary trust – by statute, a testamentary trustee may not be an infant, incompetent, convicted felon, person incapable because of 407 drunkenness, dishonesty, want of understanding, improvidence.
 - i. Nonresident alien can serve as fiduciary (testamentary trustee, or executor or administrator of a decedent's estate) if:
 - (A) related to decedent (decedent's spouse; grandparent or descendant of grandparent of decedent or decedent's spouse; or spouse of any of the above persons); and
 - (B) NY resident must serve as co-fiduciary.
- b. Lifetime trusts – these rules do not apply to lifetime trusts b/c lifetime trusts are non-court trusts (no court is involved in the trusts' creation, strictly between settler and trustee).
- c. No trust ever fails for lack of a trustee. If the intent to create a trust is clearly manifested but no trustee is named (or the named trustee dies or resigns with no provision for a successor), the court will appoint a suitable trustee to carry out the trust purposes.

5. Beneficiaries - For a private (non-charitable) trust, beneficiaries must be definite and ascertainable, and their interests must vest, if at all, within lives in being plus 21 years.

- a. The rules for charitable trusts are exactly opposite: charitable trusts
 - i. cannot benefit identifiable individuals, and
 - ii. are not subject to Rule Against Perpetuities (see below).
- b. Extrinsic evidence is not admissible to identify beneficiaries (trust instrument must identify in clear terms).

- c. Example 1 - T's will bequeaths \$100,000 "to my good friend H as trustee, to pay the income therefrom to my best friends. I bequeath my residuary estate to my brother, S." There is no valid trust b/c there is no ascertainable beneficiary ("best friends" is too vague). Result is that H holds property as "resulting trust" for S, the residuary beneficiary.
 - i. A resulting trust is not a trust, it is the term courts employ when a trust fails for some reason. The court will order that the \$100,000 be distributed to Sam Slade.
- d. Example 2 – "trustee is to pay income "to my family (or my wife's next of kin) for then next 20 years." Valid trust. It is a class gift to indicated group. Though it is broader than usual class gift, court will give meaning to it, determining member of the class by looking by analogy to intestacy statutes.
- e. Example 3 – "trustee to use income to train spiritualistic meanings." If this is determined to be a charitable purpose (religion) it is a valid gift. If not, gift fails b/c there is no ascertainable beneficiaries (on exam, argue both ways).
 - i. Charitable purpose was found when T's will left \$240,000 estate "for research or some scientific proof of a soul of the human body which leaves at death. I think in time there can be a photograph..."

6. Intention to create a trust – is the language precatory (a non-binding suggestion), or did the settlor intend to impose an enforceable obligation? (a) example of precatory language – "it is my wish and desire that Sue use a portion of the income to pay the educational expenses of my favorite nephew, Nosh Nokes." (i) other precatory words – "request," "hope," "would like." (important to look at context).

7. Trust must be for a lawful purpose – trust that calls for commission of a crime or destruction of property is void as against public policy.

a. Also, conditions that are against public policy are unenforceable (2 types):

- i. Encouraging divorce; (
- ii. Total restraint on marriage.

- (A) partial restraints on marriage are ok (e.g. – “to my son N provided he marries a Jewish woman within 7 years after my death. If he does not do so to the State of Israel.
- (B) testamentary trusts conditioned on beneficiary not remarrying are valid where motive is to provide support during widowhood (e.g. – “Income to my wife for life or until she remarries. Upon my wife’s death or remarriage to my son.”).

III. Revocable trusts and other arrangements:

A. “Pour-over” gift by will to lifetime trust:

- 1. e.g. – on October 11, 1995, X transfers securities worth \$500,000 to Acme Bank as trustee of a revocable lifetime trust that provides: "Income to X for life, and on X's death in further trust for her children." The trust instrument is signed by X and a bank trust officer and is acknowledged before a notary public. The same day, X executes a will that, after making various cash legacies, bequeaths her residuary estate "to Acme Bank, as trustee, to be added to and administered under the terms of the trust that I executed on October 11, 1995."
 - a. This is a valid revocable trust, and is a useful arrangement to provide for management in event of settlor's future incapacity, avoiding expenses and restrictions of a guardianship administration. As long as there is at least one beneficiary besides the settlor, trust is not void as an attempted testamentary disposition (doesn't have to be executed with formalities of a will) even though settlor retains any one or more of the following rights and powers:
 - i. income for life;
 - ii. power to revoke, alter or amend the trust;
 - iii. power to control trustee in the administration of the trust;
 - iv. power to cause life insurance proceeds or employee benefits to be paid to the trust;
 - v. settlor can name herself as trustee, to serve as long as she has capacity to do so.
 - b. The testamentary gift to the trust is called a "pourover" gift by will to a lifetime trust.
 - i. A statutory exception to the “no incorporation by reference” rule of Wills law, the statute provides a mechanism for adding

- testamentary assets to a trust the testator created during lifetime, or to a trust created by another person.
- ii. By statute, such a "pourover" gift is valid even if the trust is subject to revocation and amendment and is later amended.
- iii. But, if the receptacle trust were created by another person, amendments made after testator's death are disregarded.
- iv. To be a valid receptacle for such a pourover gift, the lifetime trust must be in existence before or executed concurrently with the will.

B. Trust settlement of life insurance proceeds:

- 1. Settlor can create an unfunded revocable insurance trust, and name the trustee of the trust as policy beneficiary. Unfunded insurance trusts are validated by statute (and can be the recipient of a "pourover" gift), even though there is no res until after the insured settlor dies and the insurance proceeds are paid to the trustee (this would result in additional legal fees for preparation of a trust).
- 2. Settlor can also create in his will a testamentary trust. He can then name "the trustee named in my will" as beneficiary of the life insurance policy. Such a life insurance beneficiary designation is validated by statute.
 - a. Same procedures are available for payment of savings and thrift accounts, and death benefits under employee retirement plans.

C. Bank account arrangements:

- 1. Totten trust bank account – A deposits money in bank account; signature card provides "A, trustee for B." A can then make deposits and withdrawals throughout her life, on her death, the balance in the account goes to B.
 - a. Depositor continues to have all rights over the account, but the trust is partially revoked when depositor makes withdrawals (beneficiary succeeds only to amount on deposit at death).
 - b. Revocation:
 - i. Depositor can change the named beneficiary, but only by a written, signed and acknowledged (before notary) instrument that names the bank and current beneficiary as well as the new beneficiary, and is delivered to the bank.

- ii. Totten trust can be revoked by will, and the funds on deposit can be bequeathed to another person but the will must make express reference to account in the named institution and the named beneficiary of the account.
- iii. if beneficiary predeceases depositor, trust is automatically revoked (does not pass through deceased beneficiary's estate). Funds belong to depositor free and clear.
- c. If beneficiary survives, amount on deposit belongs to him (subject to claims of depositor's creditors, and subject to surviving spouse's elective share as a testamentary substitute).
- d. Delivery of passbook is not a gift of a totten trust account.

2. joint and survivor bank account –

- a. joint and survivor bank account allows intended beneficiary to access account during life and depositor is deemed to have made a gift of $\frac{1}{2}$
 - i. Example 1 - H deposits \$50,000 in a savings account at Dime Savings Bank that names H and [son] S as owners, "payable to either or to the survivor of them." Some years later, H dies leaving a will that provides: "I have a savings account at Dime Savings Bank that names my son S as joint owner. I bequeath all funds on deposit in that account to my daughter D." There is \$60,000 on deposit in the account at H's death. S takes by right of survivorship (H cannot revoke that right by will)
 - ii. Example 2 – same facts except that, shortly before H's death (H is very ill) S, who is concerned that H may take all of the money out of the account, withdraws the entire \$60,000 in the account. H dies five days later. The executor under H's will brings an action against S seeking to recover the entire \$60,000. H can only recover \$30,000 (the other \$30,000 is deemed gift).
- 3. Convenience account – if there are 2 names on the account, person can challenge the validity of a right to survivorship by offering evidence to prove that no right of survivorship was intended, that the name was put on the account solely for convenience (e.g. S to take care of H if H got sick).

D. Uniform transfers to minors act [UTMA] – provides a convenient means

of making gifts to minors that avoid a guardianship (or the need for creating a trust), and that qualify for the \$11,000 per-donee annual exclusion under the federal (and New York) gift tax.

1. Example - In 1998 J buys securities and has them registered in the name of "J, custodian for S, under the New York Uniform Transfers to Minors Act." (S is his 10-year-old son.) J dies in 2003; the securities are worth \$35,000.
 - a. The \$35,000 gift is not includible in donor's "gross estate" under the New York and Federal estate taxes, where the donor named himself as UTMA custodian (Int. Rev. Code §2038, captioned "Revocable Transfers," applies where decedent made a lifetime transfer in which he retained a power to revoke, alter, amend or terminate). ??? My outline says otherwise.
 - i. While UTMA custodial gifts are irrevocable, the UTMA authorizes custodian to pay to or on behalf of the donee so much or all of the property as is deemed advisable for donee's benefit. This discretionary power is considered a power to alter or amend; and also a power to terminate (because custodianship would terminate if donor distributed all the property to minor).
 - ii. If X bought the securities and registered them in the name of J as custodian for S, value of custodial property is not includible in J's estate b/c there was not a retained power.
2. A UTMA custodianship terminates when donee attains age 21 unless the gift is made in the form, "A, custodian for B until age 18."
 - a. If a beneficiary of an estate or trust is a minor, the statute authorizes distribution by the executor or trustee to a UTMA custodianship on the minor's behalf.
 - i. Purpose – eliminates the need to appoint a guardian to receive the distribution.
 - ii. If the will or trust expressly authorizes such distributions, custodianships established by a fiduciary terminate at age 21, and there is no dollar limit on amount that can be distributed.
 - iii. If no such authorization, custodianships established by a fiduciary terminate at age 18, and court approval is required for distributions over \$50,000.

IV. Charitable trusts, honorary trusts:

- A. Charitable trusts are not subject to Rule against Perpetuities, they may be perpetual. ("The trustee shall pay all trust income to the American Red Cross forever." is valid)
- B. To qualify as a charitable trust, must be for a charitable purpose (health, education, religion, etc.).
- C. A charitable trust must be in favor of a reasonable large class of unidentifiable members of the public at large, and cannot benefit identifiable individuals. A trust "to pay the income to my poor relatives" is not a valid charitable trust.
 - 1. Under the Tilden Act, a valid trust can be created even though no specific charitable beneficiary is named, if the trust is for a charitable purpose (e.g. – "trustee shall distribute all trust income to organizations, as selected by trustee, actively engaged in research on the prevention of polio").
 - a. Trust is enforced by the attorney general (an indispensable party in any action concerning a charitable trust).
- D. Charitable trusts are subject to the equitable doctrine of cy pres ("as near as possible")
 - 1. If stated charitable purpose can no longer be accomplished, trust can be reformed in judicial proceedings, and the funds diverted to a related charitable purpose as near as possible to the stated purpose.
 - a. To apply cy pres, there must be:
 - i. General charitable intent that can still be accomplished (e.g. - to devote her estate for medical research for the prevention and cure of disease).
 - ii. Specific direction that no longer can be accomplished.
 - (A) There is no reason to frustrate general intent so will is reformed to carry out specific intent as near as possible while giving effect to general charitable intent.
 - (B) cy pres applies to outright gifts to charities as well as charitable trusts.

V. Honorary trusts:

- A. The trustee is on her honor in deciding whether to perform the trust (no enforceable duties owed to anyone).

1. E.g. – T's will bequeaths \$25,000 to his brother B as trustee to use income for a polish and wax job to his beloved porsche which is parked as a headstone over his grave.”
 - a. Here there is no enforceable duties owed to anyone so it is not a trust.
- B. In several states, the honorary trusts are valid in the sense that trustee will be allowed to perform if he chooses to do so.
- C. In New York, honorary trusts are unenforceable b/c so called trustee owes no fiduciary duties to anybody (falls into residuary estate).
- D. Trusts for the perpetual care and maintenance of cemeteries and burial plots – in NY, such trusts are classified as charitable trusts and thus are valid notwithstanding indefiniteness of beneficiaries, and are exempt from the Rule Against Perpetuities.
- E. Trusts to pets – in NY, trusts to pets are valid for 21 years (settlor can designate someone to enforce trust in will, or someone will be appointed by the court).

VI. Constructive trusts, resulting trusts:

- A. Constructive trust – not a trust. "Constructive trust" is the name given a flexible equitable remedy designed to disgorge unjust enrichment that results from wrongful conduct. "Trustee's" only duty is to convey the property to the person who, in equity, should have the property.
 1. Example 1 - T has a will that devises all her property to A and B. Now in her last illness, T asks a friend to have lawyer prepare a new will that revokes T's present will and devises her estate to D. The friend and lawyer return several days later, and the lawyer begins to explain the will's provisions to T. A and B are present; as soon as they learn what is happening, they create a disturbance and physically prevent T from executing the new will. Highly agitated, T lapses into a coma; she dies three days later. T is survived by A, B, and D. Applying the law (step 1), the new will cannot be probated b/c it was not signed and witnessed and thus the old will was not validly revoked. Therefore the estate would go to A and B. Applying equity (step 2) there is wrongful conduct plus unjust enrichment therefore a constructive trust should be imposed for D's benefit.
 2. Example 2 - T has two children (S and D) and S has two children.

After a heated family argument, S bludgeons T to death with an axe. T left no will. Donna takes 1/2, of course. As to other 1/2, applying the law, S inherits 12 of T's estate under NY's/intestacy statute. Applying equity, a constructive trust should be imposed against S's share in favor of S's children (treat as if wrongdoer predeceased T).

3. Example 3 - B, named as beneficiary on a life insurance policy, was tried and acquitted on charges of murdering the insured. Yet in a civil action brought to impress a constructive trust, trial court found as fact that B had murdered the insured. Decision should be affirmed on appeal b/c acquittal is irrelevant (different evidentiary standard).
4. Example 4 - S promised his sister M that he would provide a home for her and her daughter A, if M would move in and take care of him. In the presence of witnesses, S handed his brother B a deed naming B as grantee (with no mention of a trust) saying: "Hold this property in trust until M's death, then convey to A. This is in consideration of services rendered by M as agreed." S died; B denies the existence of a trust.
 - a. There is no valid express trust because there is no writing to evidence the trust.
 - b. General rule – if a deed is absolute on its face and an oral agreement to hold land in trust is alleged, the general rule is that no constructive trust will be imposed.
 - i. Exception - a constructive trust may be imposed if one of the following can be proven by clear and convincing evidence:
 - (A) Fraud in the inducement (B orally promised to serve as trustee but had no intention to do so); or
 - (B) Grantee-trustee served in a confidential relationship to grantor-settlor (business associates; father-child; etc.)
 - c. If M can't meet burden for establishing a constructive trust, M might have an action in quantum meruit for the reasonable value of services rendered if performed with reasonable expectation of payment.
 - B. Resulting trust - a resulting trust is not a trust. It is the label courts employ when a trust fails for some reason (e.g. – trust to pay the income to "my best friends").
 1. E.g. - A pays the purchase price for land, but has title taken in B's

name. A and B are not related. A later brings lawsuit seeking to impress a resulting trust in his favor, contending that he did not intend to make a gift to B but had some other reason for taking title in this manner.

- a. Majority rule – B holds on a purchase money resulting trust [PMRT] for A, meaning that A can compel a reconveyance at any time.
- b. New York – by statute, purchase money resulting trusts are not recognized b/c parol evidence rule bars testimony contradicting deed (but if there is clear and convincing evidence that B expressly or impliedly promised to reconvey the land to A, impose a constructive trust to prevent unjust enrichment).

VII. Creditor's claims and spendthrift trusts:

A. New York's statutory spendthrift rule:

1. A spendthrift provision protects a trust beneficiary's interest from creditors by prohibiting voluntary or involuntary transfer of the beneficiary's interest.
 - a. Example - "No beneficiary shall have the power to assign, transfer or encumber his or her interest in the trust, nor shall such interest be reachable by the beneficiary's creditors by garnishment, attachment, execution, or other legal process."
2. In New York, all income interests in trusts are given spendthrift protection by statute even if the trust instrument does not contain a spendthrift clause.
 - a. Exceptions (these exceptions also apply if trust has an express spendthrift clause):
 - i. Creditor who furnishes necessaries (medicine, food, rent);
 - ii. Child support, alimony;
 - iii. Federal tax liens;
 - iv. Excess income beyond that needed for support and education
 - (A) based on beneficiary's station in life, income from other sources.
 - (B) is a "last resort" remedy (creditor must show he has exhausted all other remedies).
 - v. 10% levy under CPLR 5205(e)

- (A) Available to judgment creditors in all cases (no need to show that all other remedies have been exhausted).
- (B) It's not 10% per creditor; all judgment creditors share that 10%.

b. There is no spendthrift protection as to any interest retained by the settlor (even if the trust contains an express spendthrift clause).

- i. Cannot reach anything S has irrevocably given away (trust principal)
 - (A) exception – fraudulent conveyance (transfer with intent to defeat, defraud or delay creditors).
 - (B) Example 1 - S creates a valid lifetime trust: "The trustee shall pay the income to S (the settlor) during his lifetime; and on S's death, the trustee shall distribute the trust principal to S's daughter D." Two years later Creditor obtains a judgment against S for \$25,000. Creditor can reach S's retained income interest b/c there is no spendthrift protection. Creditor cannot reach the trust principal b/c S did not own it anymore.
 - (C) Example 2 - if the trust were a revocable trust, under which S retained the power to revoke the trust, S's creditors can reach entire trust property not just income interest b/c there is nothing standing between S and outright ownership except his exercising his power to revoke.

VIII. Judicial modification and Termination of trusts:

A. Judicial modification – changed circumstances:

1. Rule – a court will permit deviation from trust terms if, due to circumstances not known to or anticipated by the settlor, compliance with the trust will impair or frustrate the purpose of the trust (reasoning similar to cy pres analysis).
 - a. Cases usually involve restriction on the sale of trust assets by the trustee.
 - i. Example 1 (Matter of Pulitzer) - Joseph Pulitzer's will created a trust for the benefit of his family; included a provision that Pulitzer's stock in the New York World newspaper was not to be sold as long as the trust was in existence. Newspaper suffered heavy losses, and income from other assets was needed to cover

the losses. Trustee petitioned for permission to sell the newspaper stock. The Surrogate authorized the sale b/c primary purpose of trust was to provide for Pulitzer's family. While he gave specific direction that stock should never be sold, to continue to adhere to specific direction would frustrate the primary purpose of the trust.

ii. (ii) Example 2 - T died in 1985, leaving a will that created a trust: "Income to his wife W for life, remainder to his son B. W, 80 years old and 424 suffering from various maladies of old age, wants to move into a retirement home that will cost \$3,000 month. The trust (with a corpus of \$300,000) is producing only \$15,000 of income per year; and that, together with her Social Security, won't be enough to pay the rest home. W petitions the Surrogate's Court to make annual distributions of principal to supplement the income. B objects, pointing out that the trust did not give the trustee any power to distribute principal; and that any such distribution would be taking away "his" money. By statute surrogate has authority to authorize invasions of principal on Mary's behalf if it can be shown it will carry out T's trust purpose (if court doesn't give power, judicial approval is required).

B. Termination of trust by settlor - All New York trusts are irrevocable and unamendable unless the power to revoke and amend is expressly reserved in the trust instrument. However, the settlor can terminate an irrevocable trust if ALL beneficiaries in being consent.

1. committee or guardian of an incompetent or minor person cannot give consent. Thus if any trust beneficiary (even with only a contingent interest) is a minor or incompetent, trust cannot be terminated.
 - a. "persons beneficially interested in the trust" means only persons in being and for purposes of the "trust termination" statute a child in gestation "is 425 not regarded as a person until it sees the light of day."
2. 1951 "trust termination" statute – for purposes of rule authorizing settlor to terminate a trust with the consent of all beneficiaries, a disposition in favor of heirs, next of kin, etc. of the settlor does not create a beneficial interest in the trust.
3. Example - In 1995, S created a valid irrevocable trust: "The trustee

shall pay the income to me for life, then to my daughter D for life; and on D's death the trustee shall distribute the trust principal to my heirs at law." S now wants to terminate the trust; 30-year-old D has consented to the termination. S can terminate the trust b/c under the trust termination statute the heirs have no interest.

C. "Remainder to the grantor's heirs"

1. multistate:

- a. Common-law Doctrine of Worthier Title ("the rule against remainders in the grantor's heirs") – in an inter vivos conveyance, a grantor cannot create a remainder in his own heirs (instead, the grantor takes a reversion).
 - i. Example – in 1670 in England, O conveys land "to A for life, and on A's death to my heirs at law."
(A) if common law conveyance, or if question stem states that "the following events take place in a jurisdiction that applies the common law property law rules and has not enacted a statute affecting the question" A has a life estate; O's 426 heirs have nothing; O has a reversion in fee simple.

2. New York:

- a. EPTL (1967) Doctrine of Worthier Title abolished - where a remainder is limited to the heirs or distributees of the creator of an estate, such heirs or distributees take the remainder interest.
 - i. Example – in 1995, S created a valid irrevocable trust: "The trustee shall pay the income to me for life, then to my daughter D for life; and on D's death the trustee shall distribute the trust principal to my heirs at law." D dies; then S dies leaving a will that gives all his property to his sister X. S, a widower, was survived by A and B (two adult sons) as well as X as his nearest kin. The trust principal goes to A and B (per their remainder as S's heirs).
- b. Bottom line – if on a NY bar exam question a lifetime trust purports to create a remainder in the settlor's heirs
 - i. if the question is whether the settlor can terminate the trust with the consent of all persons beneficially interested in the trust - for this purpose, settlor's heirs do NOT have a beneficial interest, and

settlor can terminate the trust (if all other adult beneficiaries in being consent to the termination).

- ii. if the question concerns who takes on the settlor's death - settlor's heirs (determined as of settlor's death) take by remainder because the Doctrine of Worthier Title has been abolished in New York.

IX. Administration of trusts:

- A. Trustee's powers given by NY Fiduciary Powers Act ("FPA") can be exercised by a trustee (and by an executor or administrator of a decedent's estate) without court order, and without express authorization in trust or will. (The FPA automatically applies to all trusts and estates except as enlarged or limited by the trust or will).
- B. List of "can do" powers too long to summarize (or worry about). Keep in mind, though, that FPA gives very broad powers.
 1. Rule of thumb: If the question is "can he do it?" the answer is YES: "expressly authorized by the New York Fiduciary Powers Act" -- unless it involves:
 - a. Self-dealing; or
 - b. Its on cannot do list
 2. Major "can do" powers – under the FPA, a trustee, executor or administrator has the power (without court order) to:
 - a. Sell real or personal property at public sale [auction] or private sale (unless the property was specifically devised by the will);
 - b. Mortgage property;
 - c. Lease: by trustee, for up to 10 years; by executor, administrator, up to 3 years;
 - d. Make ordinary repairs;
 - e. Contest, compromise, settle claims;
 - f. Where up to \$10,000 is distributable to minor, can distribute to parent or adult who has custody;
 - g. Make distributions on behalf of minor beneficiary to custodian for minor under the New York Uniform Transfers to Minors Act.
 3. Major "Can't do" powers - unless will or trust authorizes, or court approves, a trustee, executor or administrator CANNOT:
 - a. Borrow money;
 - b. Continue a business;

- c. Make extraordinary repairs or improvements;
- d. Abandon, demolish real property;
- e. Employ agents, delegate authority;
- f. Keep funds uninvested;
- g. Pay debts barred by statute of limitations or discharged in bankruptcy;
- h. Lend personal funds to estate, or advance funds to a beneficiary.

C. If named trustee has no powers or active duties to perform no trust arises; trust requires fiduciary duties owed to someone (Remember if there is no valid trust then a spendthrift clause has no effect).

D. Exculpatory clause - "The Trustee shall not be liable for any acts or omissions of itself or its agents except for gross negligence, bad faith, or fraud."

- 1. Testamentary trusts – by statute, exculpatory clauses in testamentary trusts are invalid.
- 2. Lifetime trust – exculpatory (or accounting) clauses are valid but they can only exculpate trustee for ordinary negligence (not gross negligence, bad faith or fraud).

E. Self-dealing – wearing 2 hats in same transaction.

- 1. Trustee cannot buy or sell trust assets to himself.
- 2. Trustee cannot borrow trust funds.
 - a. indirect self-dealing – rules of self-dealing also apply to loans or sales to a relative, or to a business entity of which the trustee is an officer, employee, partner, or principal shareholder.
 - b. Self-dealing rules can be waived by the settlor -- but this rule is rarely tested.
- 3. Trustee cannot loan funds to the trust - any interest earned on such a loan must be returned to the trust. Also, any security interest received in connection with such a loan is invalid.
- 4. Trustee cannot profit from serving as trustee - as by taking advantage of confidential information received in his capacity as trustee (but can be compensated).
- 5. Corporate trustee cannot buy its own stock as a trust investment – but it can retain its stock if a part of the estate received by it as trustee (provided it is a permissible investment - must meet the "prudent

person" investment standard).

6. Duty to segregate trust assets from personal assets; and duty to earmark trust assets by titling them in the trustee's name – trustee cannot commingle trust funds with her own.
 - a. If commingled funds are used to buy an asset and the asset goes down in value, conclusive presumption that (to the extent available) personal funds were used.
 - b. If asset goes up in value, conclusive presumption that (to the extent available) trusts funds were used.

F. If trustee breaches ANY fiduciary duty ("breach of trust") -- self-dealing, speculative investment, or exercises a power not given to the trustee, in addition to bringing action to remove the trustee, beneficiary has option:

1. He can ratify the transaction and waive the breach of trust (e.g. – if trustee invests in treasure- hunting stock but the stock goes up in value, "Thanks for doing such a good job of investing.").
2. He can sue for the resulting loss (name of the action is surcharge). Moreover, if the case involves self-dealing, under the "no further inquiry" rule, breach of a fiduciary duty is an automatic wrong (good faith, reasonableness is no defense).
 - a. Only issue in a self-dealing case – measure of damages.
3. If a trustee borrows trust funds and invests the proceeds, if value of purchased property goes up, beneficiary can "trace" and claim the property for the trust. If trustee purchases an asset and the asset goes up in value, beneficiary can demand that the asset be restored to the trust.

G. Statute of limitations does not begin to run on any action against a fiduciary unless:

1. he repudiates the trust (buzz words used by the courts) by denying existence of trust as to the particular assets in issue;
2. he dies or resigns; or
3. he gives accounting that shows facts on which action would be based (if accounting merely said "loan: \$100,000," statute would not begin to run; but if accounting said "I borrowed \$100,000," then statute would begin to run).

H. Sale of trust assets to BFP cuts off equitable title and beneficiaries only

have an action against the trustee.

1. No protection as BFP if 3rd party purchaser knew or should have known trustee was engaged in self- dealing.
- I. Trustee is personally liable on contracts entered into on behalf of the trust, unless a provision in the contract relieves him of personal liability.
 1. Example 1 – T signs contract: "T, trustee of the Ralph Norton Trust." (T is personally liable, this merely shows T's representative capacity.
 2. Example 2 – T signs contract: "T, as trustee and not individually" (no liability, shows that creditor must look to trust for payment).
 3. Example 3 – T signs contract: "Ralph Norton Trust, by T, Trustee" (no liability, this shows that contract is with the trust, not T). Even if personally liable on the contracts, trustee is reimbursed from the trust if contract was within his powers and he was acting in course of proper administration of the trust.
- J. Trustee is personally liable on all torts of itself and its employees. (That's why a prudent trustee should immediately obtain liability insurance, charging cost to the trust.)
 1. The trustee can be reimbursed from trust estate if
 - a. trustee was acting within his powers when the tort was committed, and
 - b. trustee was not personally at fault.
- K. Trustee's investment power – Prudent investor Rule ("RPM"):
 1. Trustee may make investments "as would be acquired by prudent men of discretion and intelligence ... seeking reasonable income and preservation of their capital."
 - a. Applies to all fiduciaries, including executor, administrator, committee, guardian.
 - b. But trustee with "special skills" (bank) is held to higher standard of prudence.
 2. Example - Trust (current value \$800,000) provides for income to D for life, remainder to G. The trust does not authorize distribution of principal to D. Current investments include 6% corporate bonds (\$200,000) yielding \$12,000 in annual income, and common stocks listed on New York Stock Exchange (\$600,000) producing cash dividends of 2% (\$12,000 433 per year). Trustee sells some common

stock and invests the \$200,000 sale proceeds to buy stock in an IPO ("initial public offering") for Bodacious Inc., a three-year-old Internet start-up company that has lost money every year, has never paid dividends, and is not likely to do so for at least five years. A year later, Bodacious has declined in value to \$80,000. Should the trustee be held liable for the \$120,000 loss?

a. Many states - probably YES.

- i. investing in a company with no investment history or track record too speculative.
- ii. investing 25% of trust in an asset that produces no income violated duty of fairness trustee owed to income beneficiary vis a vis remaindmen.

b. Current NY law - under the Uniform Prudent Investor Act ("UPIA," enacted in 1995), which is based on the modern portfolio theory of investing, the trustee is probably not liable b/c prudence is measured by conduct when investment decision was made (not on hindsight).

- i. Trustee must have established a custom-tailored investment strategy for the trust, taking into account such factors as:
 - (A) general economic conditions,
 - (B) 2. the possible effect of inflation or deflation,
 - (C) the expected tax consequences of investment decisions or strategies,
 - (D) the role that each investment plays within the overall trust portfolio,
 - (E) the expected total return from income and capital gain,
 - (F) needs for liquidity,
 - (G) an asset's special relationship or value to the purposes of the trust or a beneficiary, and
 - (H) any differing interests of the income beneficiaries and the remaindermen.

- ii. But what of the fact that the trustee knew that the IPO stock was unlikely to pay dividends; and that for a \$800,000 (oops! now \$680,000) trust portfolio, the ordinary income (bond interest and cash dividends) to be distributed to Donna will only be about

\$20,000?

- (A) Under UPIA, investment returns are measured by total returns, including growth and capital gain as well as dividend and interest income.
- (B) Under the Uniform Principal & Income Act, trustee can exercise adjustment power and allocate capital to gain income.
 - (1) Starting point: Trustee distributes "income" items (interest income, rental income, dividends on common stocks, etc.) to the income beneficiary; and adds capital gains (part of proceeds of sale of a principal asset) to the corpus of the trust. However, capital gain can be allocated to income where appropriate.
 - (2) Factors to be considered in exercising adjustment power (i.e., power to adjust total return between income and principal, and allocate capital gain to principal):
 - (a) purpose and expected duration of the trust,
 - (b) intent of the settlor as to respective interests of the beneficiaries,
 - (c) the net amount of ordinary income and capital gain available for allocation,
 - (d) circumstances of the beneficiaries,
 - (e) the need for liquidity, regularity of income, and preservation and appreciation of capital,
 - (f) any increase or decrease in value of the trust assets,
 - (g) whether the trust gives the trustee a power to distribute principal, viii. effect of economic conditions and effects of inflation and deflation, and
 - (h) anticipated tax consequences of an adjustment.

- iii. Recap: Under Uniform Prudent Investor Act, invest for total return. Prudence is measured by conduct in making investment decision at time investment is made, not by hindsight based on outcome or performance. Under Uniform Principal and Income Act, trustee can exercise adjustment power in favor of income beneficiary where appropriate, and can allocate capital gains to income. **THIS IS ALL YOU NEED TO KNOW**

L. The Suspension rule:

1. Whenever the suspension rule is tested, it is always part of a Rule Against Perpetuities question.
2. Rule Against Perpetuities - No estate in property shall be valid unless it must vest, if at all, not later than twenty-one years after one or more lives in being at the creation of the estate and any period of gestation involved." [Lives in being plus 21 years]
3. The New York Suspension Rule ("Rule Against Suspension of the Absolute Power of Alienation") - every present or future interest shall be void in its creation if it suspends the absolute power of alienation for a longer period than" lives in being plus 21 years. "The absolute power of alienation is suspended when there are no persons in being by whom an absolute fee or estate in possession can be conveyed or transferred."
 - a. All the "suspension" rule requires is persons in being who could join in conveying a fee simple within lives in being plus 21 years.
 - i. You have to be able to account for "all the pieces" of the fee simple title in ascertainable persons within LIB + 21 years (it's not that they would join in a conveyance, but that they are all ascertainable and they could do so).
4. Example 1 – O conveys land "to A and his heirs for so long as no liquor is sold or consumed on the premises; and if liquor is ever sold or consumed on the premises, title shall pass to B and his heirs."
 - a. Step 1 - classify the interests as though there were no Rule Against Perpetuities
 - i. A: Fee simple determinable (NY calls it a "fee on limitation").
 - ii. B: Executory interest (if there were no perpetuities problem).
 - iii. O: No retained estate (if there were no perpetuities problem).
 - b. Step 2 – Is B's interest valid under the suspension rule? – YES b/c A and B account for all the pieces of the full fee simple title. They could join in conveying the fee simple title tomorrow.
 - c. Step 3: Is B's interest valid under the Rule against Perpetuities? - NO (B's interest will not vest or fail within LIB + 21 years).
 - d. End result after applying Rule against Perpetuities:
 - i. A: Fee simple determinable

ii. B: Interest is void

iii. O: Possibility of reverter (not subject to Rule Against Perpetuities).

5. Example 2 – T's will devises land "to the Albany Methodist Church; but if the premises shall ever cease to be used for church purposes, then and in that event title shall pass to my then living descendants."

- This disposition violates the Rule against Perpetuities, because the vesting period is "ever." The future interest in Tom's "then living descendants" will vest when the Church ceases to use the premises for church purposes, which may be centuries from now.
- This disposition also violates the suspension rule, for the persons who could join the Church in conveying a fee simple estate (Tom's "then living descendants") might not be determined within lives in being plus 21 years.

6. Age Contingency beyond 21 years in an open class - the most frequently tested perpetuities question on the New York Bar Exam

- T dies leaving a will that devises his residuary estate "to my son S for life, then to such of S's children as live to attain the age of 30." At T's death, S has three children: A (age 12), B (age 8) and C (age 5)
 - Step 1 - what interests created?
 - S: life estate 2. S children as live to attain age 30: contingent remainder 3. T's estate: reversion
 - Step 2 - apply Rule against Perpetuities.
 - The remainder in S's children is void (it may vest too remotely)
 - what might happen?
 - After Teddy's death, S could have a child Z (not a life in being);
 - Before Z reaches age 9, everyone else dies;
 - More than 21 years later Z turns 30 and remainder vests.
 - Step 3 - apply the suspension rule.
 - The remainder is valid under the suspension rule. All you need is to account for all the pieces of the fee simple title within lives in being + 21 years. This rule has nothing to do with "vesting."

Here, all of S's children will be born (or in gestation) in S's lifetime (a "life in being"), and they could join in the hypothetical conveyance of the entire fee simple no later than S's death.

- d. Step 4 –apply New York Perpetuities Reform Statute.
 - i. Reduce age contingency to 21 years, where necessary to save the disposition (b/c all Ss kids will reach 21 by S's death).
- 7. Suspension rule is also violated whenever there is a life estate in trust in an unborn person (or in an open class that may possibly include unborn persons).
 - a. If the facts of a Trusts question are along these lines: "Income to Robert for life, then to Robert's children for their lives"
 - b. **YOU HAVE A SUSPENSION PROBLEM!** The remainder income interest in Robert's children violates the suspension rule!
 - c. Rationale – by definition, an unborn person (e.g., Robert could have another child in the future) can't be counted as a "life in being." The person, later born, might outlive everyone now on the scene by more than 21 years; and in the 22nd year would have a trust income interest that could not be transferred because of New York's statutory spendthrift rule that prohibits voluntary or involuntary transfer of a trust income interest. Thus we might not be able to account for all of the pieces of the fee simple title within LIB + 21 years.
 - d. Example - T's will creates a trust: "Income to my daughter A for life, and on A's death to pay the income to A's children for their respective lives." At T's death, A, who is 30 years old, has one child: C.
 - i. The remainder life income interest in A's children is valid under the Rule against Perpetuities. True, the income gift to A's children is to an "open class," because after T's death A could have a child: Z, not a life in being. However, there is no problem under the Rule against Perpetuities, because life estate in A's children (she has to produce them, after all) will vest, if at all, on A's death. (
 - ii. The income interest in A's children is void under the suspension rule. We have a trust income interest in an open class. After T's death, A could have a child: Z. Being born after the testator's

death, Z was not a "life in being." Then A and C die; Z lives on, and is entitled to the income for the rest of his life. BUT in this disposition, A and C are the only relevant "measuring lives." If Z outlives A and C by more than 21 years, in the 22nd year -- more than 21 years after lives in being --Z would have an income interest in the trust subject to the New York statutory spendthrift rule. Z could not transfer his interest; thus there may not be (within LIB + 21) persons in being who can join in the conveyance of a fee simple. Since this might happen, and since we can't account for all the pieces of the fee simple title within LIB +21, the remainder income interest in A's children is void.

iii. Model Answer – the trust income interest in A's children is void under the Suspension Rule [the Rule Against Suspension of the absolute power of alienation], because of the statutory spendthrift rule applicable to New York trusts. A could have a child in the future, and that child might outlive all lives in being by more than 21 years. Because the statutory spendthrift rule prevents a trust beneficiary from assigning her income interest, the child might not be able to join in the conveyance of a fee simple within lives in being plus 21 years. But the New York Perpetuities Reform Statute MAY save the gift, depending on A's age and medical condition. The statute raises various presumptions as to child- bearing capacity, and that a male under age 14 cannot sire a child; that a female under age 12 or over age 55 cannot have a child (the possibility of adopting children is disregarded). Moreover, medical testimony as to child-bearing capacity is 442 admissible. If at testator's death Alice were over age 55, or if Alice (in her 40s) had had a hysterectomy, under the statutory presumption, the class of "A's children" would be closed. There couldn't be that afterborn Z to foul things up.

M. Rule against perpetuities and powers of appointment:

1. First question – is the power itself valid?
 - a. To be valid, a general testamentary power or a special power of appointment (whether inter vivos or testamentary) must be certain to be exercised, if it is exercised, within lives in being plus 21 years.

If such a power of appointment is given to someone who is a life in being at the time the power is created, no problem. However, a general testamentary power or a special power given to an UNBORN BENEFICIARY is void because the power could be exercised beyond LIB + 21.

- i. Example – T's will creates trusts for each of her children: to pay the income to the child for life, and on the child's death to such of the child's issue as he or she appoints by will; with a gift in default of appointment to the child's descendants. The special testamentary powers of appointment are valid. This is a will, and all of T's children will be alive (or in gestation) at the time T dies and the interests are created. Thus the powers will be exercised, if they are exercised, within lives in being.
2. Second question – are interests created by the exercise of the power valid?
 - a. General testamentary powers and all special powers of appointment - the validity of interests created by the exercise of the power is measured from the date of the instrument creating the power of appointment, and NOT from the date of the power's exercise. New York follows the common law rule; it is treated as though the donee (the holder of the power) is the donor's agent, and he is merely "filling in the blanks" in the donor's will or trust
 - b. Example - T died in 1990, leaving a will that created a trust: "income to my daughter D for life, and on D's death to distribute the property outright or in further trust to such of D's descendants as she appoints by will; in default of appointment to D's children." D's power of appointment is itself valid since D was living at T's death, and thus the power will be exercised, if it is exercised, within a life in being. D died in 2002, leaving a will that appointed the property "to such of my children as live to attain age 30." The perpetuities period began to run when T died in 1990. "Filling in the blanks," we read T's will as though it read: "To D for life, then to such of D's children as live to attain age 30." At this point, things look bad.
3. Step 3: Apply the Second Look Doctrine - in cases involving powers of appointment we are further aided by the second look doctrine. In

the ordinary perpetuities case, we don't "wait and see" what happens; validity is determined at the time the interests are created, without regard to what actually happens. But when interests are created by the exercise of a general testamentary power or a special power, although the perpetuities period starts to run from the date the power was created, the courts recognized early on that it would be foolish not to take into account facts existing when the donee "filled in the blanks" by exercising the power.

- a. If at D's death all of her children are aged 9 or over, the remainder appointed to J's children is valid b/c they will all make it to 30 or not within 21 years.
- b. If, however, D has a child under age 9 at her death, the remainder in D's children is void b/c child was not in being when T died and if everybody dies, child will reach 30 in more than 21 years, in which case the age contingency will be reduced to 21 under the NY perpetuities reform statute.

I. Federal judicial power

- A. The requirement for cases and controversies (four justiciability requirements)
 - 1. Standing 0 the question of whether the Pl. is the proper party to bring a matter to the court for adjudication
 - a. Injury – Pl. must allege and prove that he has been injured or imminently will be injured
 - i. Types of injuries – many different kinds are sufficient for standing (torts, break of K, violations of constitutional rights, violations of statutory rights, and any other harm that is sufficiently important)
 - ii. Pl. only may assert injuries that she has personally suffered
 - iii. Pl. seeking injunctive or declarative relief must show a likelihood of future harm
 - b. Causation and redressability – the Pl. must allege and prove that the Def. caused the injury so that a favorable court decision is likely to redress the injury (co court won't be issuing an advisory opinion)
 - c. No 3d party standing – a Pl. cannot assert claims of others, 3d parties, who are not before the court.
 - i. Exception 1 – close relationship between Pl. and 3d party (e.g. dr.-patient – drs bring suits against laws prohibiting abortion on behalf of their patients; bartender/customer)
 - ii. Exception 2 – injured party is unlikely to be able to assert his own rights (e.g. criminal Def. have 3d party standing for jurors for discrimination)
 - iii. Exception 3 – an organization may sue for its members if:
 - (A) The members would have standing to sue;
 - (B) interests germane to the organization's purpose;
 - (C) Neither the claim nor relief requires participation of the individual members
 - d. No generalized grievances – the Pl. must not be suing solely as a citizen or as a taxpayer interested in having the government follow

the law

- i. Exception – expenditures violating the Establishment clause (no standing to challenge fed. Gvt's grants of property to religious organizations)
- 2. Ripeness – the question of whether a federal court may grant pre-enforcement review of a statute or regulation (exam tip – when Def. asks for declaratory judgement, think ripeness)
 - a. 2 criteria for pre-enforcement judgment:
 - i. The hardship that will be suffered without
 - ii. The fitness of the issues and the record for judicial review
- 3. Mootness – if events after the filing of a lawsuit end the Pl.'s injury, the case must be dismissed as moot.
 - a. Exception 1 – wrong capable of repetition but evading review (Ex – Roe v. Wade – no longer pregnant when case decided)
 - b. Exception 2 – voluntary cessation (if Def. voluntarily halts the offending practice but is free to resume it at any time)
 - c. Exception 3 – class action suits (even if named Def.'s claim becomes moot, as long as one member has ongoing injury)
- 4. The political question doctrine – refers to allegations of constitutional violations that the federal courts will not adjudicate
 - a. Cases that are non-justiciable under this doctrine:
 - i. "Republican form of government" clause
 - ii. Challenges to president's conduct of foreign policy
 - iii. Challenges to impeachment and removal process
 - iv. Challenges to partisan gerrymandering

B. SCOTUS review:

- 1. Virtually all cases come to SCOTUS by writ of certiorari (discretionary review – 4 justices must vote to hear the case)
 - a. All cases from state courts come to SCOTUS by writ of cert
 - b. All cases from U.S. Courts of Appeals come to SCOTUS by writ of cert
 - c. Appeals exist for decisions of 3-judge federal district courts (go straight to SCOTUS – obligated to take case)
 - d. SCOTUS has original and exclusive jurisdiction over suits between state governments

2. Final judgment rule – Generally, SCOTUS may hear cases only after there has been a final judgment of the highest state court, U.S. CoA, or a 3-judge federal district court; no interlocutory appeals
3. Adequate and independent state grounds – for SCOTUS to review a state court decision, there must *not* be an independent and adequate state ground of decision. If a state court decision rests on state law and federal law, then if SCOTUS reversal of the federal law ground will not change the result, then SCOTUS cannot hear it.

C. Lower federal court review

1. Federal courts (or state governments) may not hear suits against state governments
 - a. The principle of sovereign immunity
 - i. The 11th A bars suits against states in federal courts
 - ii. Sovereign immunity bars suits against states in state courts or federal agencies
 - b. Exceptions – states may be sued under the following circumstances
 - i. Waiver by state – must explicit
 - ii. States may be sued pursuant to federal laws adopted under s 5 of the 14th A. Congress cannot authorize suits against states under other constitutional provisions
 - iii. The federal government may sue state governments
 - c. Suits against state officers are allowed
 - i. State officers may be sued for injunctive relief
 - ii. They may be sued for money damages to be paid out of their own pockets
 - iii. They may not be sued if state treasury will be paying retroactive damages
2. Abstention (federal court has jurisdiction but must abstain) – Federal courts may not enjoin pending state court proceedings

II. Federal Legislative power

A. Congress' authority to act:

1. There must be express or implied Congressional power
 - a. No general police power
 - b. The only cases where it is proper to say that Congress is

operating under police power is when it is legislating for the military, Indian reservation, lands or new territories, or D.C. (MILD)

2. Necessary and proper clause
 - a. Congress can enact all laws necessary and proper to carry out its authority (may choose any means not prohibited by the Constitution to carry out its authority)
3. Taxing/spending power and commerce power
 - a. Congress may spend for the general welfare
 - b. The Commerce power:
 - i. Congress may regulate the channels of interstate commerce (places where commerce occurs: highways, waterways, the Internet)
 - ii. Congress may regulate activities that have a substantial effect on interstate activity
 - (A) In the area of non-economic activity, a substantial effect cannot be based on cumulative impact
4. 10th A as a limit on Congressional powers – all powers not granted to the US nor prohibited to the states are reserved to the states or the people
 - a. Congress cannot compel state regulatory or legislative actions
 - b. Congress may prohibit harmful commercial activity by state governments (e.g. state DMVs cannot publish lists of names and addresses of registrants)
5. Congress power under s 5, 14th A – Congress may not create new rights or expand scope of rights under this section. Congress may act only to prevent or remedy violations of rights recognized by the courts and such laws must be "proportionate" and "congruent" to the remedying constitutional violations

B. Delegation of powers

1. No limit exists on Congress' ability to delegate legislative power to executive agencies or even to the judiciaries
 - a. No delegation has ever been declared unconstitutional
2. Legislative vetoes and line-item vetoes are unconstitutional
 - a. For Congress to act there always must be bicameralism (passage by

both House and Senate) and presentment (giving bill to President to sign or veto). President must sign or veto bill in its entirety

i. Legislative veto – Congress tries to veto an executive action (unconstitutional without bicameralism and presentment)

3. Congress may not delegate executive power to itself or its officers

III. Federal executive power

A. Foreign policy

1. Treaties – agreements between the U.S. And a foreign country that are negotiated by the President and are effective when ratified by the Senate

a. Treaties prevail over conflicting state laws

b. If treaty conflicts with federal statute, then last in time

c. If conflict with US Constitution then invalid

2. Executive agreements – between US and foreign country, effective when signed by President and other head

a. Can be used for any purpose (anything a treaty could do)

b. Prevail over conflicting state laws but never over federal laws or Constitution

c. President has broad powers as Commander-in-chief to use US troops aboard (so broad, such action has never been declared unconstitutional)

B. Domestic affairs

1. The appointment and removal power

a. The appointment power

i. The president appoints ambassadors, federal judges, and officers of the US

ii. Congress may vest appointment of inferior officers in the President, the heads of departments, or the lower federal courts

(A) Inferior officers includes independent counsel (because may be fired by AG)

iii. Congress may not give itself or its officers appointment power

b. Removal power

i. Unless the removal is limited by statute, the President may fire

any executive branch official

ii. For Congress to limit removal

(A) It must be an office where independence from the President is desirable (e.g. - independent counsel, not Presidential cabinet)

(B) Congress cannot prohibit removal; it can limit removal to where there is good cause

2. Impeachment and removal – the President, VP, federal judges, and officers of the US can be impeached and removed from the office for treason or other high crimes and misdemeanors

a. Impeachment does not remove a person from office (conviction in the Senate results in removal)

b. Impeachment by House of Reps requires a majority vote; conviction in the Senate requires a 2/3 vote

3. The President has absolute immunity to civil suits for money damages for any actions while in office

a. However, not for actions prior

4. The President has executive privilege for presidential papers and conversations but such privilege must yield to other important government interests (overriding needs for the information)

5. The President has the power to pardon those accused or convicted of federal crimes (only for criminal liability)

a. Exception – when a President is impeached by the House, he cannot be pardoned for incidents leading to impeachment

IV. Federalism (limits on state and local government power):

A. Preemption – The Supremacy Clause of Article VI provides that the Constitution and laws and treaties made pursuant to it are the supreme law of the land

1. Express preemption – if a federal law explicitly says that Federal law is exclusive in the field, then state or local law preempted.

2. Implied preemption – even if a federal statute is silent about preemption, it can arise in the following ways:

a. If federal and state laws are mutually exclusive – state law wins

b. If state law impedes achievement of a federal objective, federal law preempts

- c. If Congress evidences a clear intent to preempt state law (even though statute is silent – e.g. history, etc.)
- 3. States may not tax or regulate federal government activity (it is unconstitutional to pay a state tax out of the federal treasury)
 - a. No regulations that put significant burden on federal activity (e.g. stricter state environmental laws)

B. Dormant Commerce Clause and the Privileges & Immunities Clause of Article IV

1. Definitions
 - a. DCC – the principle that state and local laws are unconstitutional if they place an undue burden on interstate commerce
 - i. Also referred to as the "negative implications of the commerce clause"
 - b. The P&I clause of Article IV – provides that no state may deny citizens of other states the privileges and immunities it affords its own citizens (limits ability of state to discriminate against out-of-staters)
 - c. P&I clause of 14th A – always wrong answer unless involves right to travel
2. Formulas for answering questions involving above:
 - a. Does the state law discriminate against out-of-staters?
 - b. Analysis if the law does not discriminate
 - i. P&I clause of Art. IV does not apply
 - ii. If the law burdens interstate commerce, it violates the DCC if its burdens exceed its benefits
 - (A) E.g. - Illinois law requiring curved mud flaps on all trucks
 - c. If law discriminates against out-of-staters
 - i. If law burdens interstate commerce, then it violates the DCC unless necessary to achieve an important government purpose (only purpose ever upheld – preserving natural resources)
 - (A) Exception 1: Congressional approval
 - (B) Exception 2: The market participant exception – a state or local government may prefer its own citizens in receiving benefits from governmental programs or in dealing with government-owned business (e.g. - higher tuition for out-of-

state students in state schools)

- ii. If law discriminates against out-of-staters with regard to their ability to earn their livelihood, it violates the P&I clause of Art. IV unless it is necessary to achieve an important governmental purpose.
 - (A) The law must discriminate against out-of-staters
 - (B) The discrimination must be with regard to civil liberties or important economic activities
 - (C) Corporations and aliens cannot use P&I clause
 - (D) Discrimination must be necessary to achieve an important government purpose

C. State taxation of interstate commerce

- 1. States may not use their tax systems to help in-state business
- 2. A state may only tax activities if there is a substantial nexus to the state
- 3. State taxation of interstate business must be fairly apportioned

D. Full Faith and Credit

- 1. Courts in one state must give full faith and credit to judgments of courts in another state so long as:
 - a. The court rendering judgment has subject matter and personal jurisdiction
 - b. The judgment was on its merits
 - c. The judgment was final

V. The structure of the Constitution's protection of individual liberties:

A. Is there government action?

- 1. The Constitution applies only to government action. Private conduct need not comply with the constitution.
- 2. Congress, by statute, may apply Constitutional norms to private conduct:
 - a. The 13th A protects race discrimination
 - i. Discrimination never violates the 13th A itself but can violate federal statutes created under the 13th A (which Art 2 of the amendment allows Congress to do)
 - b. The commerce power can be used to apply Constitutional norms to private behavior

3. Exceptions (when private conduct must comply with the Constitution):

- a. Public function – if a private entity is performing a task traditionally done exclusively by the government (.g. - company-run town tries to prohibit free speech; Tx lets political parties run their own primaries and those parties won't let blacks vote)
 - i. Narrow exception – not running a utility
- b. Entanglement – if the government affirmatively authorizes, encourages, or facilitates unconstitutional activity
 - i. Courts cannot enforce racially restrictive covenants on land because courts would be authorizing behavior
 - ii. There is state action when the government leases space to a restaurant that racially discriminates
 - iii. State action: free books to discriminatory schools
 - iv. There is not state action when private school fires teacher because of free speech (government subsidy is insufficient to finding of state action)
 - v. Not state action- NCAA orders suspension of coach at state university
 - vi. State action – private entity regulates interscholastic sports in one state
 - vii. Not state action – private club with liquor license racially discriminates

B. Application of the Bill of Rights

- 1. Only applies to the federal government
- 2. Applied to the state and local through incorporation of the Due Process clause of the 14th A. Except:
 - a. The 2d A right to bear arms (thus states could adopt any gun control laws they wanted)
 - b. The 3d A right not to have soldiers quartered in one's home
 - c. The 5th A right to grand jury indictment in criminal cases
 - d. The 7th A right to jury trial in civil cases
 - e. The 8th A right against excessive fines

C. Levels of scrutiny

- 1. Rational basis test – a law is upheld if it is rationally related to a

- legitimate government purpose
- a. Need not be least restrictive means
- b. Burden of proof on challenger
- 2. Intermediate scrutiny – a law is upheld if its substantially related to an important government purpose (any legitimate, conceivable purpose)
 - a. Need not be least restrictive means
 - b. Burden of proof on government
- 3. Strict scrutiny – a law is upheld if it is necessary to achieve a compelling government purpose (court will only look at government's actual purpose)
 - a. Must be least restrictive means
 - b. Burden of proof on government

VI. Due Process

A. Procedural due process

- 1. Has there been a deprivation of life, liberty, or property?
 - a. Definitions
 - i. Deprivation occurs if there is the loss of a significant freedom provided by the Constitution or a statute
 - (A) Except in emergencies, before an adult can be institutionalized, there must be a notice and a hearing
 - (B) When a parent institutionalizes a child, there must be a screening by a neutral fact finder
 - (C) Harm to reputation by itself is not a loss of liberty (there must be a tangible loss)
 - (D) Prisoners rarely have a loss of liberty
 - ii. Deprivation of property occurs if there is an entitlement and that entitlement is not fulfilled
 - (A) An entitlement exists if there is a reasonable expectation to the continued receipt of a benefit
 - (1) Ex 1 – person is told he will have a job for a year, then taken away mid-year
 - (2) Ex 2 – teacher has a K that might be renewed – no expectation
 - b. Government negligence is not sufficient for a deprivation of

due process. Generally, there must be an intentional government action or at least reckless action for liability to exist.

- i. However, in emergency situations, the government is liable under due process only if its conduct "shocks the conscience" (e.g. kid killed during police chase – not likely)
- c. Generally, the government's failure to protect people from privately inflicted harms does not deny due process (only if government does the actual harming)

2. What procedures are required

- a. The test – balance the following
 - i. The importance of the interest to the individual,
 - ii. The ability of additional procedures to increase the accuracy of the fact-finding, and
 - iii. The government interest in administrative efficiency (cost of additional procedures to the government)
- b. Examples
 - i. Before welfare benefits can be terminated, there must be notice and a hearing
 - ii. When SS disability benefits are terminated, there need only be a post-termination hearing
 - iii. When student is disciplined in public school. There must be a notice of the charges and a chance to explain
 - iv. Before a parent's right to custody of a child can be permanently terminated, there must be notice and a hearing
 - v. Punitive damages awards require instruction to the jury and judicial review to assure reasonableness (grossly excessive violate due process)
 - vi. Except in exigent circumstances, pre-judgment attachment and government seizure of assets must be preceded by a notice and hearing
 - (A) Due process does not require an innocent owner defense to government seizure

B. Substantive due process

- 1. Ask whether the government has adequate reason for taking away a person's life, liberty, or property

2. The Constitution provides only minimal protection for economic liberties

- a. Only rational basis test for laws affecting economic rights
- b. The takings clause – the government may take private property for public use if it provides just compensation
 - i. Is there a taking
 - (A) Possessory taking – government confiscation or physical occupation of property is a taking
 - (B) Regulatory taking – when government leaves a property no reasonable economically viable use
 - (1) Reduction in property value – not a taking
 - (2) Government conditions on development of property must be justified by benefit that is roughly proportionate to the burden imposed (otherwise it is a taking)
 - (3) A property-owner may bring a takings challenge to regulations that existed at the time property was acquired
 - (4) Temporarily denying an owner use of property is not a taking as long as the government's action was reasonable
 - ii. Is it for public use?
 - (A) If not, government must give property back
 - (B) For public use as long as government acts out of a reasonable belief that taking will benefit the public good (very broad)
 - iii. Is just compensation paid?
 - (A) Measures in terms of loss to owner of reasonable market value (value to taker is irrelevant)
 - c. The contracts clause – no state shall impair the obligations of Ks
 - i. Applies only to state or local interference with existing Ks (doesn't apply to federal government)
 - ii. Such interference must meet standard like intermediate scrutiny
 - (A) Does legislation substantially impair a party's right under and existing K?
 - (1) If so, is the law reasonably and narrowly tailored to promote an important and legitimate public interest
 - iii. State or local interference with government Ks must meet

strict scrutiny

iv. The ex post facto clause (which invalidates laws that criminally punish conduct that was lawful when committed or increases the punishment for that conduct) does not apply in civil cases

(A) Retroactive civil liability only need meet a rational basis test. (A bill of attainder is a law that directs the punishment of a specific person without a trial)

3. Privacy is a fundamental right protected under due process and laws restricting requiring strict scrutiny; rights:

a. To marry

b. To procreate

c. To custody of children

i. However, state may create an irrebuttable presumption that husband is father of child

d. To keep family together

i. Must be related to each other

e. To control upbringing of children

i. Parents have the right to choose to send their kids to parochial schools

ii. Due process violation – to order grandparent's visitation rights over the objection of parents

f. To purchase and use contraceptives

g. To abortion – SS not used

i. Current law

(A) Prior to viability, state may not prohibit abortions but may regulate so far that they do not create an undue burden on the ability to obtain

(1) 24-hour waiting period requirement – not undue burden

(2) Only licensed physicians requirement – not undue burden

(3) Prohibition on "partial birth abortions" – impermissible undue burden

(B) After viability, state may prohibit abortions unless necessary to protect a woman's life or health

(C) The government has no duty to subsidize abortions or

provide them in public hospitals

- (D) Spousal consent laws are unconstitutional
- (E) Parental notice and consent for unmarried minors – as long as alternative procedure wherein minor can go before a judge who can decide abortion is in her best interest or that she is mature enough to decide for herself.

- h. The right to refuse medical treatment – no level of scrutiny attached
 - i. Competent adults have the right to refuse medical treatment, even if it is life-saving
 - ii. A state may require clear and convincing evidence that a person wanted treatment terminated before it is ended
 - iii. A state may prevent family members from terminating treatment for another
- i. There is no right to physician assisted suicide – thus rational basis test
- j. The right to privacy does not protect private, consensual homosexual activity (thus rational basis review)

VII. Equal protection

- A. An approach
 - 1. What is the classification?
 - 2. What level of scrutiny should be applied?
 - 3. Does the law meet this level of scrutiny?
- B. Constitution provisions concerning equal protection
 - 1. Equal protection clause of the 14th A applies only to state and local governments
 - 2. EP is applied to federal government through due process clause of the 5th A
- C. Classifications based on race and national origin
 - 1. Strict scrutiny
 - 2. How is existence of race classification proven?
 - a. The classification exists on the face of the law
 - b. If the law is facially neutral, proving racial classification requires demonstrating both discriminatory impact and discriminatory intent

- i. Ex – discriminatory peremptory challenges
- 3. How should racial classifications benefiting minorities be treated?
 - a. Strict scrutiny applied
 - b. Numerical set-asides require clear proof of past discrimination
 - c. Educational institutions may use race as one factor in admissions decisions to help minorities (*check currentness)
 - d. Seniority systems may not be disrupted for affirmative action
- 4. Gender classifications
 - a. Intermediate scrutiny (maybe more: exceedingly persuasive justification)
 - b. How is existence of gender classification proven?
 - i. Exists on the face of the law
 - ii. If law is facially neutral, proving gender classification requires discriminatory impact and intent
 - (A) Ex – discriminatory peremptory challenges
 - c. How should affirmative action be treated
 - i. Gender classifications benefiting women that are based on role stereotypes will not be permitted
 - ii. Those designated to remedy past discrimination – ok
- 5. Alienage classification
 - a. General strict scrutiny used
 - b. Only rational basis test for alienage regulations that concern self-government or the democratic process
 - i. Voting, serving on a jury, being a police officer, teacher, or probation officer
 - c. Only rational basis for Congressional discrimination against aliens
 - i. Congress has plenary power to regulate aliens
 - d. Intermediate scrutiny against undocumented children
- 6. Discrimination against non-marital children
 - a. Intermediate scrutiny used
 - b. Laws that deny benefit specifically to non-marital children are unconstitutional
- 7. Rational basis review for all other types of discrimination
 - a. Age

- b. Disability
- c. Wealth
- d. Economic regulations
- e. Sexual orientation

8. Fundamental rights protected under equal protection
 - a. The right to travel
 - i. Laws that prevent people from moving into a state must meet strict scrutiny
 - ii. Durational residency requirements must meet strict scrutiny
 - (A) For voting, 50 days max
 - iii. Restrictions on foreign travel – only rational basis
 - b. The right to vote
 - i. Laws that deny some citizens the right to vote must meet strict scrutiny
 - (A) Poll taxes are unconstitutional
 - (B) Property ownership requirements are almost never allowed (only once in water district election)
 - ii. One person, one vote – for all state and local elections
 - iii. At-large elections are constitutional unless proof of discriminatory purpose
 - iv. The use of race in drawing election district lines – strict scrutiny
 - v. Counting uncounted votes without standards in presidential election violates equal protection
 - c. There is no fundamental right to education

VIII. The 1st A

- A. Free speech methodology
 1. Content-based vs. content-neutral restrictions
 - a. Content-based – strict scrutiny, generally, two types:
 - i. subject-matter
 - ii. viewpoint
 - b. Content-neutral laws – intermediate scrutiny, generally
 2. Prior restraint – a judicial or administrative order that stops speech before it begins
 - a. Gag orders on the press to prevent prejudicial pre-trial publications are not allowed

- b. Court orders suppressing speech must meet strict scrutiny. Procedurally proper C.O.'s must be complied with until they are vacated and overturned
 - i. If violate C.O., then barred from challenging constitutionality
- c. The government can require a license for speech only if important reason and clear criteria leaving almost no discretion to licensing authority
 - i. Procedural safeguards – prompt determinations and judicial review

3. Vagueness and overbreadth

- a. Vagueness – a reasonable person cannot tell what speech is prohibited and what is allowed
- b. Overbreadth – if regulates substantially more speech than constitutionally allowed
- c. Fighting words laws – vague and overbroad (even though fighting words not protected by 1st A)

4. Symbolic speech – the government can regulate conduct that communicates if it has an important interest unrelated to suppression of the message and if the impact on communications is no greater than necessary to achieve the government's purpose

- a. Flag burning is Constitutionally protected speech
- b. Draft card burning is not
- c. Nude dances – non; cross-burning and swastika painting is
- d. Cross-burning/swastika painting
 - i. Government may punish destruction of other's property
 - ii. or when cross-burning used as a threat
- e. Punishment enhancements for hate motivated crimes are constitutional
- f. Contribution limits in election campaigns are constitutional; expenditure limits are not (*check currentness)

5. Anonymous speech is protected

- a. Don't have to disclose identity to be able to speak

B. What speech is unprotected or less protected by the 1st A?

- 1. Incitement of illegal activity – if substantial likelihood of imminent illegality and if speech is so directed

2. Obscenity and sexually-oriented speech

a. The test

i. Material must appeal to prurient interest (shameful or morbid interest in sex – local or communicate standard)

ii. Patently offensive

iii. Lacking serious redeeming artistic, literary, political, or scientific value (on a national scale)

b. The government may use zoning ordinances to regulate the location of adult bookstores and movie theaters

c. Child pornography – can be completely banned even if not obscene

i. Must be actual children (not virtual or adult look-alikes)

d. The government may not punish private possession of obscene materials (except child pornography)

e. The government may seize the assets of businesses convicted of violating obscenity laws

f. Profane and indecent speech generally protected by 1st A

i. Exception – broadcast media

(A) It is uniquely intrusive in the home

(B) Applies to public broadcast, but not cable which people voluntarily bring into their homes

(1) Exception – in schools

3. Commercial speech

a. False and deceptive ads not protected by 1st A

b. True commercial speech that inherently risks deception can be prohibited

i. The government may prevent professional from practicing or advertising under a trade name (i.e. bad doctors who change their name)

ii. Government may prohibit attorney in-person solicitation of clients for profit

(A) Not free representation

(B) Letter is ok

iii. Government may not prohibit accountants from doing the same

c. Other commercial speech can be regulated if intermediate scrutiny

is met

- d. Narrowly tailored but not least restrictive

4. Defamation

- a. If Pl. is public official running for office or a public figure, Pl. can recover for defamation by proving falsity of the statement and actual malice (Def. knew false or acted with reckless disregard)
 - i. Public figures are those who thrust themselves into the limelight
- b. If Pl. is a "private figure" and the matter is of "public concern," that state may allow the Pl. to recover compensatory damages for defamation by proving falsity and negligence by Def.
 - i. However, the Pl. may recover presumed (automatic damages – preset by law) or punitive damages only by showing actual malice
- c. If Pl. is "private figure" and "private concern" then presumed or punitive damages without showing actual malice

5. Privacy

- a. The government may not create liability for truthful reporting of information that was lawfully obtained from the government
 - i. E.g. - can't punish reporter for publishing name of rape victim obtained through public court records
- b. Liability is not allowed if media broadcasts a tape of an illegally intercepted call if media didn't participate in illegality and it involves matter of public importance
- c. Government may limit its dissemination of information to protect privacy
 - i. Nothing requires that the government turn info over to the press (what about FIA?) (Public and press only have right to attend criminal trials)

6. Other government restrictions based on content of speech must meet strict scrutiny

C. What places are available for speech

- 1. Public forums – government properties that government is required to make available for speech (sidewalks, parks, etc)
 - a. Regulations must be subject matter and viewpoint neutral (otherwise strict scrutiny)

- b. Regulations must be a time, place, or manner regulation that serve an important government purpose and leaves open alternative places for communication
- c. Government regulation of public forums need no use least restrictive alternative
- d. City officials cannot have discretion to permit fees for public demonstrations

2. Limited (designated) public forums – government properties that the government could close to speech

- a. Ex – school (generally, non-public) that opens doors to community in the evening
- b. Rules are the same as for public forum

3. Non-public forums – government properties that government constitutionally can and do close to speech

- a. Government may regulate speech in non-public forum so long as the regulation is reasonable (meets rational basis test) and viewpoint neutral (need not be subject-matter neutral)
 - i. Ex
 - (A) Military bases (even parts usually open to the public)
 - (B) Areas outside prisons or jails
 - (C) Advertising space on city buses
 - (D) Sidewalks on post office property
 - (E) Airports
 - (1) Government may prohibit solicitation of money but not distribution of literature (fails RB test)
 - (F) Candidate debates sponsored by government-owned stations

4. There is no 1st A right of access to private property for speech purposes

- a. Privately-owned shopping centers, etc

D. Freedom of association

1. Laws that prohibit or punish group membership must meet SS. To punish someone it must be proven that

Torts:

I. Intentional Torts:

A. Two overview observations:

1. The hypersensitivity of the Pl. does not count in determining if Pl. has a claim.
 - a. Always analyze as if dealing with a person of average sensitivity.
2. There are no incapacity defenses for intentional torts (even a child can commit a tort).

B. Intent:

1. An element of all of the intentional torts.
2. Def. must have acted deliberately or on purpose with the desire to produce the forbidden result.

C. Seven intentional torts:

1. Battery:

a. Elements:

- i. Harmful or offensive contact;
 - (A) offensive – in analysis, can substitute the word “unpermitted,” bearing in mind we are speaking of a reasonably sensitive person (e.g. – tapping on shoulder would not be offensive; stroking someone’s hair would be).
- ii. with the Pl.’s person.
 - (A) Not limited to skin and flesh; includes anything connected to the Pl. (purse, suitcase, dog on lease).

2. Assault:

a. Elements:

- i. Def. places Pl. in apprehension;
 - (A) “apprehension” – means knowledge or awareness (not fear)
 - (B) Always analyze from the point of view of the Pl. (thus even if gun is unloaded, still an assault).
- ii. of an immediate battery.
 - (A) Words alone lack the necessary immediacy (thus mere words not an assault).
 - (B) Need threatening physical conduct

- (1) E.g. - Def. displays a firearm, waives fist, etc
- (C) Even where there is threatening conduct, accompanying words may neutralize the immediacy.
- (1) conditional words – negate threatening conduct (e.g. – “I’ve you weren’t my best friend....[while waiving a baseball bat].”
- (2) Words in the future tense, not an assault.

3. False Imprisonment:

- a. Elements:
 - i. Act of restraint;
 - (A) Threats can be an act of restraint.
 - (B) An omission can be an act of restraint if had a Pl. previous obligation to assist Pl.’s movement.
 - (1) E.g. – criminal sentence for 30 days, on day 31, sheriff won’t let the criminal out; flight crew purposefully leaves a wheelchair person on plane.
 - (C) Only counts if Pl. knows about it or is harmed by it.
 - ii. Confinement in a bounded area.
 - (A) Keeping someone out of a place is not confinement in a bounded area.
 - (B) An area is not bounded if there is a reasonable means of escape that Pl. could reasonably discover.

4. Intentional Infliction of Emotional Distress:

- a. Intent – can be satisfied by reckless behavior as well as deliberate.
- b. Elements:
 - i. Outrageous behavior;
 - (A) Mere insults (w/o any plus factors) are never outrageous.
 - (B) Four hallmarks of outrageousness (plus factors):
 - (1) When conduct is in public rather than private.
 - (2) When conduct is continuous or repetitive.
 - (3) When Def. is a common carrier or innkeeper.
 - (4) When Pl. is a member of a fragile class of persons:
 - (a) Fragile classes: children; elderly; pregnant women
 - (C) It is outrageous to target someone’s psychological Achilles heel.

(1) Thus an act that normally would not be considered outrageous may be considered outrageous if Def. knew about Pl's phobia in advance.

ii. Severe emotional distress.

(A) Not mildly annoyed.

c. NY – in NY there is a separate cause of action for intentional mishandling of a corpse.

5. Trespass to Land:

a. intent – only need intent to get to challenged location on purpose

b. Elements:

i. Act of physical invasion;

(A) Two methods:

(1) can enter the property (on foot, vehicle, etc.).

(2) Propelling physical objects onto the land.

(B) A non-physical invasion (shining light on neighbor's property; playing loud music) is not a trespass.

ii. Land.

(A) Pl.'s interest in tort is not limited to surface of Pl.'s property, it includes the air above and soil below (out to a reasonable distance).

(1) Thus throwing a ball over a neighbor's property would be trespass, while a plane flying high overhead would not be.

6. Trespass to Chattels and Conversion:

a. Both remedy interference with chattels (everything you own except land and buildings).

i. Ways to interfere:

(A) damage to chattels (vandalism).

(1) e.g. – slashing tires

(B) depriving you of possession of chattels (theft)

b. These two torts are private remedies for theft and vandalism.

i. Trespass to chattels – if amount of interference with chattel is relatively slight.

ii. Conversion - if amount of interference with chattel is extensive.

(A) Conversion gets special remedy of full market value of

the chattel.

(B) A mistake to ownership of the property is not an excuse to conversion.

D. Affirmative Defenses to Intentional Torts:

1. Consent – a defense to all intentional torts
 - a. Only a person with capacity can give a valid consent.
 - i. E.g. – a drunk can't say “go ahead and hit me.”
 - b. Types of consent:
 - i. Express consent – literally “words” allowing Def. to behave in the challenged fashion.
 - (A) exception – not valid if given under circumstances of fraud or duress.
 - (1) fraud example – one night stand; give someone an STD; consent to have sex is not the requisite consent to acquire an STD.
 - ii. implied consent:
 - (A) Can come into play through custom and usage.
 - (1) If Pl. goes into a place or is engaging in an activity where certain invasions are customary (playing sports; subway at rush hour), implied consent.
 - (B) There can also be an implied consent based on Def.'s reasonable interpretation of Pl.'s observable conduct (e.g. – Pl. circumstances make it appear that it was ok to try to kiss her).
 - (1) Pl.'s subjective mental thought processes are irrelevant.
 2. The Protective Privileges:
 - a. Includes three defenses:
 - i. Self-defense;
 - ii. Defense of other persons;
 - iii. Defense of property.
 - b. To invoke a protective privilege, Pl. must prove two things:
 - i. Proper timing;
 - (A) A demonstration that the threat to which you are responding is in progress or imminent.

- ii. A reasonable belief that the threat is genuine.
 - (A) Need not be accurate, just reasonable.
- c. Can only use the force necessary under the circumstances.
 - i. Excessive force will subject Def. to tort liability.
 - ii. What's excessive? – a rule of symmetry
 - iii. Deadly force – allowable to preserve human life
 - (A) NY distinction – duty to retreat before using deadly force.
 - (1) Exception:
 - (a) No duty to retreat in your own home.
 - (b) Police officers do not have a duty to retreat.
 - d. No deadly force is allowed (spring traps, etc.) to protect personal property only.
- 3. Necessity – only a defense to the property torts (trespass to land, trespass to chattels; conversion).
 - a. Public necessity – exists when Def. invades Pl.'s property (land, building or chattels) in an emergency to protect the community as a whole or a significant group of people.
 - i. Def. has absolute defense – no liability.
 - b. Private necessity – arises when Def. interferes with Pl.'s property in an emergency to protect an interest of his own.
 - i. A limited defense: 3 consequences
 - (A) Private necessity Def. has to pay for actual damage caused.
 - (1) e.g. - D has to make emergency landing; lands in P's corn field; destroys corn; Def. must pay for corn.
 - (2) Def. never pays nominal or punitive damages.
 - (a) e.g. - D goes hiking; chased by bear on P's property; D hides in shed; P sues for trespass (no actual damages; P won't get nominal or punitive damages).
 - (3) So long as emergency continues, P property owner may not throw Def. off his land (during emergency Def. has a of sanctuary).
 - (a) e.g. – same as above except bear waits outside shed for D; if P forces D to leave and D is injured by bear, P must pay damages to D.

II. Tort of Defamation:

A. Three elements (traditional common law definition):

1. Def. made a defamatory statement specifically identifying the Pl.
 - a. Can be written or oral; formal or informal.
 - b. Defamatory – if adversely effects the Pl.’s reputation (causes others to think less highly of Pl. re: good traits).
 - i. A mere name calling declaration is generally not defamation.
 - ii. Need an alleged statement of fact (e.g. – X embezzled \$).
 - iii. Opinions can be defamatory (depends on the context, tone and purpose).
 - c. Can only defame a living person.

2. Publication:

- a. Requires that statement be made to one person other than Pl. (can’t hurt reputation by saying only to Pl.)

3. Damages (maybe):

- a. Libel (damages are presumed) – any situation where defamation is permanent.
- b. Slander per se (damages are presumed) – a spoken statement that falls into one of four itemized categories
 - i. A statement concerning Pl.’s business or profession.
 - ii. A statement accusing the Pl. of a serious crime.
 - iii. A statement imputing unchastity to a woman.
 - iv. A statement by the Def. that the Pl. suffers from a loathsome disease.

(A) Two loathsome diseases:

- (1) Leprosy;
- (2) Venereal Disease (VD);

v. imputation of homosexuality is also slander per se.

4. Any party suing for slander not per se, is the only defamation that Pl. must show damages.
 - a. Mental distress or social injury is not enough to get to the jury.
 - b. NY – Rules for Damage
 - i. Look at damages rule in outline.

B. Affirmative Defenses:

1. Consent;

2. Truth – by demonstrating that the words spoken or written are factually accurate.
3. Privileges:
 - a. Absolute privileges (2):
 - i. Exists for communications between married persons – there is an absolute privilege for spouses to communicate (thus can never commit slander by saying something about a third- party to your spouse);
 - ii. Given to officers of all 3 branches of gov't engaged in their official duty – with regard to the judiciary, includes lawyers; things said in court cannot be the basis of a defamation claim.
 - b. Qualified privilege:
 - i. Arises when we have a socially valuable occasion for speech (letter of recommendation, credit report is issued; other occasions where we want to encourage candor).
 - ii. Can't be liable for defamation:
 - (A) if limit yourself to relevant material, and
 - (B) you speak in good faith.

III. First Amendment Defamation (a separate tort):

A. Two word test – public concern

1. If the subject matter at issue deals with something of public concern, the only available cause of action is first amendment defamation.

B. Elements:

1. Three above + two extra elements:
 - a. Pl. must prove falsity;
 - b. Pl. must prove fault (relates to awareness or mental state concerning the falsity).
 - i. If Pl. is a public figure - must demonstrate that Def. knew or was reckless with regard to the truth
 - ii. if Pl. is a private figure - sufficient to show that Def. was negligent.
 - (A) Can be a private figure re: a matter of public concern.

IV. Privacy Torts:

A. Appropriation – the use of Pl.'s name or picture for commercial purposes

1. E.g. – put Tiger Woods picture on cereal box w/o his permission (TW

can get injunction and damages).

2. Newsworthy exception – Sports Illustrated, etc. can put TW on cover with TW's permission
3. NY – this is the only privacy tort that exists in NY.

B. Intrusion - the invasion of the Pl.'s seclusion by means objectionable to an average person.

1. E.g. – wiretapping, secret video surveillance, eavesdropping, peeping
2. will only prevail if Pl. in a secluded place.
3. Can commit intrusion w/o trespassing (e.g. - peering through a telescope).

C. False light – consists of the widespread dissemination of a major misrepresentation about the Pl. that would be objectionable to the average person.

1. Widespread dissemination requirement distinguishing this from the publication requirement of defamation.
2. The representation can be defamatory or non- defamatory.
 - a. Example of defamatory – “P is embezzling money.”
 - b. Example of non-defamatory – “P is a devout Catholic,” when in reality P is a practicing Jew.
 - i. Same for mischaracterization of political beliefs.
3. An honest mistake is no defense.

D. Disclosure – the widespread dissemination of confidential information about the Pl. that would be objectionable to the average person..

1. Unlike defamation and false light, this information is truthful.
2. E.g. – someone discloses your academic record, accounting records, medical information.
3. Newsworthy exception – applies here as well (e.g. – ok to publish Dick Chaney's medical records)
4. Dual life fact pattern –when Pl. operates in two spheres, both public, but tries to keep them separate; no liability for spreading information from one sphere to the other.
 - a. E.g. – P is gay, he is out to his friends and in gay community, but not out at work; co-worker discovers that P is gay, tells everyone at work.
5. Affirmative defenses:

- a. Consent;
 - i. Defense to all four privacy torts.
- b. Privileges (see above).
 - i. Defenses to false light and disclosure.

V. Economic Torts:

A. Fraud:

- 1. Five elements:
 - a. Def. makes an affirmative misstatement in connection with a commercial transaction (silence can't be fraud).
 - b. scienter (intent) – Def. must know that statement is false;
 - c. Def. must intend to induce reliance (statement must be important to the transaction).
 - d. justifiable reliance – Pl. must use the information as a component in the decision-making process.
 - i. It is justifiable to rely on the Def.'s opinion if Def. has superior info or knowledge re: the subject matter of the statement.
 - e. Damages.

B. Intentional Infliction of Pecuniary Harm (prima facie tort):

- 1. Deliberately economically harming someone in a way that doesn't fall into any other tort category.
- 2. Elements:
 - a. Intent to do economic harm;
 - b. Resulting harm.
- 3. E.g. – deliberately selling products below cost to put a commercial rival out of business.

C. Inducing a breach of contract:

- 1. Def. interferes with contract between two other people.
- 2. Four elements:
 - a. There must be a valid contract not terminable at will.
 - b. Def. must have knowledge of the contract.
 - c. Def. must then persuade a party to abandon the contract.
 - d. A subsequent breach.
- 3. Defense:
 - a. privilege - if you stand in some kind of advisory relationship with the breaching party.

- i. Includes parents, lawyers, accountants, spiritual advisors.

D.Theft of a trade secret:

1. Two elements:

- a. There must be a valid trade secret.

- i. Three attributes of a valid trade secret:

- (A) Pl. has some information that provides it with a business advantage.
- (B) Information is not generally known.
- (C) Owner of information must take reasonable measures to keep it a secret.

- b. Def. must take the secret by improper means:

- i. two alternative scenarios that constitute improper means:

- (A) the traitorous insider – Def. initially learned of the secret appropriately and with the consent of owner, but uses the information for his advantage.
- (B) the industrial spy – the unethical outsider who learns the secret inappropriately.

2. Remedy – injunction

VI. Negligence:

A.Four elements:

- 1. Duty;
- 2. Breach;
- 3. Causation;
- 4. Damages;

B.Duty:

- 1. To whom do you owe a duty (an obligation to take precautions)?

- a. You owe a duty to foreseeable victims.

- i. unforeseeable victims always lose negligence claims (those outside the zone of danger)

- (A) Two exceptions:

- (1) Rescuers – rescuers are always owed a duty
- (2) Fetuses:

- (a) When Def. causes an impact on the body of the mother, the fetus will have a cause of action if born with injuries (if dies in utero – no cause of action).

- (b) Medical malpractice – doctor misreads tests results and says child will be fine, but child is born with birth defects (can recover costs of caring for child, but nothing for mental anguish).
- (c) If doctor botches sterilization procedure, no recovery against doctor if have child.

2. How much of a duty do you owe?

a. General duty in negligence cases

- i. You must be as careful as a hypothetical reasonably prudent person acting under similar circumstances (an objective standard).
 - (A) Even a person with a mental defect must meet the reasonably prudent person standard (even if that level may be unobtainable for that person).
 - (B) Exceptions:
 - (1) If Def. has superior knowledge, the standard becomes “a reasonable prudent person with the that superior knowledge.”
 - (a) Even a stupid person can have superior knowledge (e.g. – D knows that stop light is broken).
 - (2) We will incorporate physical characteristics of the Def. if they are relevant.
 - (a) E.g. – if Def. is blind, and the blindness is relevant, we will ask how a reasonably prudent blind person would have acted under the circumstances.

b. Other standards:

i. For children:

- (A) Children under four are incapable of negligence.
- (B) Children four and over are held to the care of a hypothetical child of similar age, experience and intelligence (very subjective – thus difficult to hold children liable for negligence).
 - (1) Exception – when a child engages in an adult activity (operates something with a motor), held to a reasonable person standard.

ii. For professionals:

- (A) Professionals provide services to the public and have special skills and training (often licensed).
 - (1) E.g. – accountants, architects, lawyers, doctors
- (B) standard – professionals owe the standard of care that is given by average members of that profession practicing in similar communities (an empirical standard – a test of conformity; custom is the standard of care).
 - (1) similar communities – big city doctors (NY, Chicago, etc.) owe a similar duty of care; rural doctors owe a similar duty of care.
 - (2) Pl.'s in malpractice cases generally need an expert to establish what the standard of care is.
- (C) Doctors:
 - (1) In addition to above duty, a doctor has a duty to explain the risks of a medical procedure to a patient (informed consent).
 - (a) Four exceptions:
 - (i) If the risk is commonly known (infection).
 - (ii) If patient declines the information.
 - (iii) If patient is incompetent.
 - (iv) If disclosure would be harmful to the patient.

iii. Duty owed by occupants of land to entrants:

- (A) Occupant may be but is not always the owner.
- (B) To determine duty, must answer two questions?
 - (1) What is the cause of the injury?
 - (a) Some entrants will get hurt by activities carried out on the land.
 - (i) e.g. – entrant injured by harvesting equipment on farm.
I
 - (b) Other entrants will get hurt b/c of dangerous conditions on the land.
 - (i) e.g. – shelf at supermarket collapses, cans fall, you are injured.
 - (2) What is Pl.'s legal status on the land?

- (a) undiscovered trespasser – no permission to come on land and occupier doesn't know that they are there.
 - (i) standard for activities – no duty owed
 - (ii) standard for dangerous condition – no duty owed
 - (iii) Undiscovered trespassers always lose.
- (b) discovered trespasser – includes not only trespassers that the occupant knows about, but anticipated trespassers as well.
 - (i) Trespassers can change their status from undiscovered to discovered in the middle of a fact pattern.
 - (ii) standard for activities - reasonable prudence under similar circumstances (regular negligence standard).
 - (iii) standard for dangerous conditions – four part test
 - Only a duty if the condition is artificial in nature (construed by humans);
 - Condition must be highly-dangerous (can cause severe injury or death);
 - Condition must be concealed from the Pl.-entrant; and
 - The occupier knew about the condition in advance of the injury.
 - in sum – occupier must protect discovered trespasser from known man-made deathtraps on the land.
- (c) Licensee – social guests
 - (i) standard for activities - reasonable prudence under similar circumstances (regular negligence standard).
 - (ii) standard for dangerous conditions - must protect from any condition:
 - that is hidden from the licensee; and
 - the condition is one that the occupier knew about in advance
 - in sum – occupier must protect the licensee from all known traps on the land.
- (d) Public Invitees – people who enter land that in

generally open to the public.

- (i) People that visit supermarkets, etc. (includes going to office building where need to show credentials).
- (ii) standard for activities -reasonable prudence under similar circumstances (regular negligence standard).
- (iii) standard for dangerous conditions – must protect from those conditions:
 - that are concealed; and
 - occupier knew about the condition in advance or should have discovered through a reasonable inspection.
 - in sum – occupier must protect invitee from all reasonably knowable traps on the land.

(e) Footnotes:

- (i) Firefighters and Police officers – can never recover for an injury that is an inherent risk of their job.
- (ii) Child trespassers – a child trespasser injured by an artificial condition is owed a higher duty of care (regular negligence standard).
 - Would a reasonably prudent person expect that child would enter the land?
 - If so, must take reasonable steps to protect the children (that which a reasonable person in similar circumstances would take).
- (iii) If an occupier owes entrant a duty of care concerning a dangerous condition, there are two ways to satisfy that duty:
 - Fix the problem;
 - Give a warning (e.g. – warning sign: “wet floor”).

iv. For Automobile Driver's in NY:

(A) No-Fault Insurance:

- (1) In some accident cases, we are going to ignore ordinary negligent rules and tell people simply to look to their own insurance companies.

- (a) For people free from fault, this eliminates the need to meet the burden of proof (but limits recovery).
- (b) People who injure themselves and are at fault still can recover under no-fault.

(2) NY makes automobile insurance mandatory (liability insurance and no-fault coverage).

(3) The no-fault scheme in NY only applies to personal injuries.

(4) Who has claim to the no-fault insurance after an accident?

- (a) the owner of an insured vehicle;
- (b) any authorized driver of an insured vehicle;
- (c) any authorized passenger of an insured vehicle;
- (d) any pedestrian hit by the insured vehicle.

(5) Who can't claim under no-fault?

- (a) drug drivers;
- (b) car thieves;
- (c) drag racers;
- (d) fleeing felons.

(6) When can you get out of the no-fault framework?

- (a) If you suffer more than basic economic loss or serious injury (then can litigate).
 - (i) basic economic loss - \$50,000 over the course of a year, in summing:
 - medical expenses;
 - 80% of earning [up to \$2000/month];
 - \$25/day miscellaneous expenses.
 - (ii) serious injury – death; disfigurement; dismemberment; serious fracture; or permanent or total loss of a bodily organ or function.
- (b) No-fault insurance recovery never includes pain or suffering (this is why people want to get out from under no fault).

(7) No-fault insurance travels with you.

v. Statutory Standard of Care:

- (A) borrows a statutory requirement to provide the Pl. requisite standard of care.
 - (1) To do so:
 - (a) Pl. must establish that he falls within the class of persons that the statute seeks to protect; and
 - (b) Pl. must establish that the accident is in the class of harm that the statute seeks to prevent.
 - (2) Example – Pl. falls down elevator shaft; Pl. finds statute that says that anyone repairing an elevator must put yellow tape on the elevator door or is subject to a \$500 fine.
 - (a) Since this meets the two-part test, the statute can be borrowed. Thus when the Pl. sues the elevator repair company, the Def. is negligent per se (thus Def. can't argue that he was reasonable under the circumstances).
 - (3) Two cases when can't you don't borrow statute (even if two- part test is met):
 - (a) Where compliance is more dangerous than the violation.
 - (i) E.g. – driver's swerves to avoid child, crosses yellow line, hits other car; statute says must stay on own side of road (don't borrow statute - analyze under reasonable person standard).
 - (b) Where compliance is impossible.
 - (i) E.g. – D rolled through stop sign; statute says must stop at stop sign; D rolled through stop sign b/c he had heart attack (don't borrow statute – analyze under reasonable person standard: did he take has warning signs, etc.).

3. Affirmative Duties to Act – there are none

- a. E.g. - when drive, must drive as a reasonably prudent person, but you don't have to drive.
- b. Thus you have no duty to rescue.
 - i. Exceptions:
 - (A) If put the Pl. in the peril in the first place, there is a duty to rescue.
 - (B) If there is a pre-existing relationship between the parties.

- (1) What type of relationship (not exclusive list)?
 - (a) Family member (not limited to blood relatives);
 - (b) Common carrier/innkeeper and customer;
 - (c) Land occupier and invitees
- ii. Once you have a duty to rescue, you must rescue as a reasonably prudent person (don't have to risk own life).
- iii. If you choose to rescue (even w/o a duty), and you mess up, you could be liable (you have to rescue as a reasonably prudent person).
 - (A) Some states have Good Samaritan statutes to prevent such liability.
 - (B) NY – Good Samaritan statute only applies to those with professional training (doctors, nurses, and veterinarians).

4. Negligent Infliction of Emotional Distress:

- a. Def.'s negligent act does not leave Pl. with physical injuries, but leaves mentally distressed.
- b. Pl. can get damages if:
 - i. Pl. was in a zone of danger (Pl. was almost injured by the negligent conduct); and
 - (A) e.g. – almost hit by a car
 - ii. there are subsequent physical manifestations of the distress.
 - (A) e.g. – heart attack, miscarriage, rash
 - (B) This element insures against fraud.
- c. Second theory of recovery:
 - i. Bystander theory – seeks recovery for the emotion of grief (as opposed to fright above).
 - (A) Pl. witness an injury on a family member.
 - (B) NY – the distressed person must also be in the zone of danger.
 - (1) Thus can recover for own fright, and grief when family member was injured.
 - (2) E.g. – parent is standing next to child, who is hit by a car.
- d. NY duty footnotes:
 - i. Land occupiers – NY does not calibrate the duty owed based on

the categories mentioned above.

- (A) Only must act as a reasonably prudent person under the circumstances.
- (B) However, in determining how a reasonably prudent person would act under the circumstances, the circumstances include what type of an entrant we are dealing with.

- ii. NY case – attempted rape; assailant tries to drag women into building; building door faulty.
 - (A) Court – don't owe duty to passersby to keep door in good repair. (
- iii. NY case – subcontractor did not owe duty to motorist whose injuries were exacerbated by subcontractor's negligence (he only owed a duty to perform under the contract).

C. Breach:

1. Breach is the point where the Pl. points out exactly what the Def. did wrong.
2. Essay tip – “Here, the Def. was unreasonable in that he.....”
3. Res Ipsa Loquitor:
 - a. If Pl. can't tell us exactly what Def. did wrong (can't fill in the blank above), he must turn to the doctrine of res ipsa loquitor.
 - i. Pl. must show that the accident that occurred is of the type that does not normally occur in the absence of negligence.
 - ii. Pl. must also show that the Def. being sued was probably the negligent party (Def. must be in exclusive control).
 - b. If Pl. satisfies the two prongs, he gets to the jury.

D. Causation:

1. Factual causation – Pl. must demonstrate a cause and effect linkage between the breach and the ultimate damage.
 - a. “but for” test – but for the carelessness of the Def., Pl. would be free from injury today.
 - i. “But for” test not used in two specific multiple situations:
 - (A) Multiple Pl.s and mingled causation – A and B go camping (separately); A fails to extinguish his campfire; B fails to extinguish his campfire; Both fires become forest fires; the combined fires destroy P's house. P sues A and B.

- (1) “But for” test doesn’t work well b/c each could argue that if they put out their fire, the other fire would have still have burned down the house.
- (2) Instead use substantial factor test (with respect to each did each contribute in a substantial way?).
 - (a) If yes, both are jointly liable.
- (B) Unascertainable Cause – hunting accident; one hunter shot when other two fired at the same time; it is unascertainable to know who actually shot the hunter.
 - (1) This is problematic: Pl. can’t show that any one of the other hunters shot him by preponderance of the evidence (most likely than not).
 - (2) Thus burden of proof is shifted to Def. (each must show that it was not his bullet).
 - (a) If neither can meet this burden, both are jointly Pl. liable.

2. Legal causation – Pl. must show that liability is fair under the circumstances.

- a. Liability is not always fair.
 - i. E.g. – J gets vasectomy, doctors botches procedure; J has baby boy; at age 7, the boy burns down the neighbor’s house; neighbor sues the doctor; it does not seem fair for that doctor to pay damages to that neighbor.
 - ii. Test – it is fair to make people pay for the foreseeable consequences of their carelessness.
 - iii. How tested?
 - i. Direct cause fact pattern – Def. acts; Pl. immediately suffers injury (almost always a legal cause – unless seems ridiculous). (
 - ii. Indirect cause fact pattern – Def. commits the breach; time passes; something else happens; then Pl. suffers the harm.
- (A) Four well-settled cases where liable): Pl.
 - (1) Intervening medical negligence – Pl. suffers a broken leg when Def. runs a red light; doctor puts on cast too tight; leg has to be amputated (def. liable for the amputation).
 - (2) Intervening negligent rescue – Pl. suffers a broken leg

when Def. runs a red light; rescuer negligently dislocates Pl.'s shoulder (is liable for both injuries).

- (3) Intervening reaction-protection forces - Pl. suffers a broken leg when Def. runs a red light; other pedestrians stampede to get out of the way; one steps on the Pl. (Def. is liable for both injuries).
- (4) Subsequent disease or accident – Pl. suffers a broken leg when Def. runs a red light; Pl. put on crutches; Pl. falls the next day when trying to use the crutches and breaks his arm (Def. is liable for both injuries).

(B) Analysis when the case doesn't fall into the four situations above:

- (1) Look at the breach, and ask yourself “what is it about this conduct that causes me to label the Def. negligent in the first place (what were you afraid of)?”
- (2) Then look at the what happened and see if there is a match.

E. Damages:

1. For Multistate:

- a. eggshell skull doctrine – a rule about the scope of recoverable damages.
 - i. If the Def. has committed all of the other elements of a tort, that Def, pays for all harm suffered by the no matter how great.
 - (A) 1. e.g. – you accidentally cut the Pl. but he is a hemophiliac and dies. Def. has to pay for the 's death.
 - (B) This applies to all torts, not just negligence.

2. For NY:

- a. NY has abandoned the collateral source rule (rule that says we ignore payments from other sources in calculating damages).
- b. In NY, damage award will be reduced by the money you receive from your own insurance company, etc.

F. Equitable Remedies:

1. Injunctions:

- a. Issue – when can Pl. in a tort claim get an injunction for a tort?
 - i. First must have a tort.

ii. Once there's a tort, Pl. must show:

- (A) There is no adequate remedy at law (money would be inadequate).
 - (1) When might money be inadequate?
 - (a) Def. has no money.
 - (b) the harm is impossible to measure in monetary terms (good is one of a kind – Def. is threatening to commit conversion and destroy it)
 - (c) Conduct is repetitive.
- (B) A protectable interest in the subject-matter of the tort.
 - (1) e.g. – someone encroaching on your land; someone threatening to reveal a trade secret; someone threats to invade your privacy.
 - (2) This requirement has been reduced to a mere formality.
- (C) Injunction must be enforceable.
 - (1) Easy with negative injunctions (preventing Def. from doing something)
 - (2) Positive injunctions (forcing Def. to do something):
 - (a) The more complex the conduct, the harder it will be to enforce the conduct, and the more nervous a court will be about issuing an injunction.
 - (b) The longer the time necessary for the task, the more nervous a court will be about issuing an injunction.
 - (c) Harder to enforce if the conduct is going to take place outside NY.
- (D) the balance of hardships tips in the Pl.'s favor. P
 - (1) The benefit to the Pl. outweighs the burden on the Def.

b. Defenses to injunctions:

- i. Pl. has unclean hands. Pl.
- ii. Laches (unreasonable delay) – Pl. has been so tardy in seeking an injunction and the Def. has incurred expenses such that it is no longer fair to issue an injunction.
- iii. 1st Amendment – prior restraints

c. Preliminary injunction - issued at the beginning of a trial to maintain the status quo

- i. Pl must show:
 - (A) a likelihood of success on the merits;
 - (B) he would suffer irreparable injury if the injunction is not given.

G. Affirmative defenses to negligence:

- 1. Comparative fault:
 - a. Pl. failed to exercise the proper degree of care for his own safety
 - i. e.g. - Pl. was hit by a drunk-driver but was jaywalking.
 - b. Jury will have to make a comparative weighing and come up with percentage numbers that will reduce the Pl.'s damages.
 - c. This is the scheme in the majority of states.
 - d. Two schemes:
 - i. pure comparative fault – always go strictly by numbers even if the Pl. is more at fault than the Def.
 - (A) This is the default rule on the multistate.
 - (B) This is the NY rule.
 - ii. modified (partial) comparative negligence – Pl.'s fault of more than 50% is an absolute bar on recovery.

H. Counterclaims:

- 1. We will get one allocation of fault, but then apply the numbers to their separate damages numbers.

I. Strict Liability:

- 1. Injuries caused by animals:
 - a. Domesticated animals – general rule is that you are not strictly liable for your dog (can be liable on a negligence theory).
 - i. exception – if you have knowledge that your dog has vicious propensities, you are strictly liable.
 - (A) You have knowledge if your dog has bitten someone before.
 - (B) Can be liable on negligence theory for the first bite.
 - ii. Trespassing cattle – owner of the cattle is strictly liable.
 - iii. Wild animals – if you keep wild animals, strict liability.

2. Ultrahazardous Activities:

- a. Three criteria for an ultrahazardous activity:
 - i. It can't be made safe given existing technology;

- ii. Exposes a severe risk of harm;
- iii. The activity is uncommon in the community where it is being conducted.

b. Examples:

- i. Explosives;
- ii. Dangerous chemicals or biological agents;
- iii. Nuclear energy or radiation (not x-rays, etc.)

c. A party engaged in an ultrahazardous activity is strictly liable (safety precautions are irrelevant).

3. Tort of Nuisance:

- a. Involves inconsistent land uses (when one landowner annoys another by way he uses his property).
- i. Def. is liable for a nuisance if 's activity interfere with Pl.'s ability to Pl. use or enjoy his land to an unreasonable degree (a strict liability tort – “unreasonable” here means to an excessive degree).

4. Product-related injuries:

- a. When a party is injured by a defective product, he likely has many claims (negligence, breach of warranty, fraud, etc.).
 - i. Analyze a question based on the theory that the Pl. sues on Pl.
- b. Three key elements for strict liability claim:
 - i. Def. is a merchant (someone who routinely deals in goods of that type).
 - (A) Casual sellers are not merchants.
 - (B) Service providers are not merchants of items incidental to the service.
 - (C) The commercial lessor is a merchant (e.g. – rental car company).
 - (D) Def. need not be party with whom Pl. dealt directly (can be asserted against people remote in the distribution chain – no requirement of privity of contract).
 - ii. Pl. must show that the product is defective.
 - (A) 2 types of defects:
 - (1) manufacturing defect – exists when the item that hurt the Pl. differs from all the others that came off the same

assembly line in a way that makes it more dangerous than you would expect (safety precautions are irrelevant).

(2) design defect – exists when there is another way to construct the product and that hypothetical alternative design meets three tests:

- (a) it would be safer than the version marketed;
- (b) it would be cost-effective;
- (c) it is practical (doesn't make the product difficult to use or defeat the purpose of the product).

(d) Product Information is also considered part of a product's design:

- (i) Instructions;
- (ii) Warnings;
 - If sell without a warning, could make design defective (if would make safer).
 - Not all warnings are equal (some are more conspicuous than others).

iii. Pl. was making a foreseeable use of the product.

(A) A misuse may be entirely foreseeable (and thus not defeat recovery).

(1) e.g. – standing on a chair to get someone off a shelf is foreseeable.

5. Strict Liability Defenses:

a. Comparative fault principles also apply to strict liability claims (see above).

VII. Vicarious Liability:

A. Victim sues party other than tortfeasor b/c of that party's relationship with the tortfeasor.

1. Relationships:

a. Employer/employee – an employer is liable for the torts of the employee if they are made in the scope of employment.

i. Scope of employment:

(A) Frolic or detour distinction – minor departures (mere detours) do not take you outside of the scope of employment.

2. Intentional torts – generally an employer is not liable for the

intentional torts of the employee.

- a. Can come back into the scope of employment if foreseeable or designed to serve the boss's purpose (e.g. – bouncers).
- b. Hiring party/independent contractor – general rule is no vicarious liability
 - i. exception – a land occupier is vicariously liable if an independent contractor hurts an invitee.
- c. Automobile owner/authorized driver – an automobile owner is not liable for the torts of a driver.
 - i. exception – if owner lends car so driver can do an errand for him.
 - ii. If give keys to drunk driver, not vicariously liable, but liable for negligent entrustment.
 - iii. NY distinction – the owner of the car is always vicariously liable if the driver gets in an accident (permissive use doctrine).
 - iv. There is a presumption that anyone driving an owner's car does so with the owner's permission (owner must prove otherwise).
- d. Parents/children – parents are not liable for the torts of their children.
 - i. NY – statutory liable for parents but liability amount is very low.
 - ii. Be careful: leaves a gun out
- e. In NY a bar owner is liable for torts committed by a customer that is served alcohol unlawfully (not vicarious liability b/c negligent to serve).
 - i. When unlawful:
 - (A) serving minors;
 - (B) serving intoxicated person.

VIII. Workers Compensation:

A. A statutory insurance scheme serving as the exclusive remedy for workers who get injured on the job.

- 1. Employee does not have to prove any fault, but can't bring a tort claim against the employer.
- 2. No pain and suffering or punitive damages.
- 3. Who is covered?
 - a. Employees, not independent contractors.
 - i. Three types of employees outside worker's comp. scheme:

- (A) Teachers and other non-manual laborers at non- profit organizations;
- (B) Part-time domestic employees or household servants;
- (C) Clergy.

4. Generally can claim for any job related injury

a. NOT:

- i. If injury is solely due to employee's intoxication;
- ii. If employee intentionally injures himself or others;
- iii. If injury occurs in a voluntary out-of-work athletic activity

- b. Illegal Acts - will be covered if injury doing these illegal acts
- c. Horseplay – can go either way (depends on how closely-related to work)

5. What do you get?

- a. Medical expenses;
- b. 2/3 of weekly wages
- c. if die, funeral expenses and a lump sum death benefit;

6. Workers comp supplants claim against the boss, but employee is free to sue anybody else.

IX. Joint Tortfeasors:

A. Comparative Contribution – if one joint tortfeasor pays in full, Pl. can get percentage contribution from a joint tortfeasor based on that tortfeasor comparative fault.

- 1. A vicariously liable party gets full reimbursement from the tortfeasor (indemnification).
- 2. A non-manufacturer held strictly liable for a defective product can get full indemnification from the manufacturer.

X. Loss of Consortium:

A. Whenever a married person is the victim of a tort, the non-injured spouse has a separate cause of action against the tortfeasor to recover for three causes of action:

- 1. Loss of services;
- 2. Loss of society (my closest companion is no longer with me);
- 3. Loss of sex.