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TORTS

1. Intentional Torts:

a. **Battery:**

- i. Harmful or offensive contact.
- ii. With P's person

b. **Assault:**

- i. D must place P in (reasonable) apprehension.
- ii. Apprehension must be of an immediate battery.

c. **False Imprisonment**

- i. D must commit act of restraint (Threats are sufficient)
- ii. P must as a consequence be confined in a bounded area.

d. **IIED (Can be accomplished with *recklessness*)**

- i. Outrageous conduct
- ii. Exceeds all bounds of decency tolerated in a civilized society.
- iii. P must suffer severe distress

e. **Trespass to Land**

- i. D must commit an act of physical invasion
- ii. P must be a possessor of land

f. **Trespass to Chattels / Conversion**

- i. Interference with personal property

g. **DEFENSES:**

- i. **Consent** (if P had legal capacity) – has limited scope.
- ii. **Self-Defense / Defense of Third Persons / Defense of Property**
 - a. **NY Distinction:** Retreat, if feasible, before deadly force. Does not apply in own home.
- iii. **Necessity** - *Only if underlying claim is trespass to land/chattels or conversion.*

2. Defamation:

- a. Defamatory statement specifically identifying P.
- b. Tends to adversely affect P's reputation.
- c. D must publish the statement.
- d. Damages if not libel or slander per se
- e. **Defamation Defenses:**
 - i. Consent
 - ii. Truth
 - iii. Absolute Privileges: Spouses/Government Officials
 - iv. Qualified Privilege
 - v. Public Concern: (1st Amendment concerns)

3. Nuisance:

- a. Interference w/ ability to enjoy one's own property to an unreasonable degree. Balance of Equities.

4. Negligence:

- a. **Duty** to foreseeable victims to act like a reasonably prudent person (Objective).
 - i. **Exceptions:**
 1. D's physical characteristics. (e.g., reasonably prudent blind person).
 2. D's special skills or knowledge (e.g., reasonably prudent Nascar driver)
 3. **Children**
 - a. Children under 4 are incapable of negligent acts.
 - b. Children 4-18 held to standard of hypothetical child of similar age, experience and intelligence acting under similar circumstances. **This is subjective.**
 4. **Professionals** owe care of an average member of that profession practicing in a similar community. **This is empirical.**
 5. **Possessors of real estate;** to entrants to the land (Premises Liability)
 - a. Undiscovered Trespassers - No duty owed
 - b. Discovered Trespasser – also includes *anticipated* trespassers
 - i. Duty to protect from known, manmade deathtraps.
 - c. Licensee (e.g., social guest)
 - i. Duty to protect from known traps
 - d. Invitee – confer commercial benefit on property owner, or land open to public generally.
 - i. Duty to protect from reasonably knowable traps
 - e. **NY Distinction:** All entrants treated under reasonably prudent person standard. State that NY has abolished distinction between entrants' statuses, but discuss those distinctions in Breach section.
 - f. **Child Trespassers:** If injured by artificial condition, can demand that D live up to reasonable person standard.
 6. **Statutory Standards of Care (Negligence *per se*)**
 - a. P in **class of persons** statute meant to protect;
 - b. P's injury in **class of risks** statute meant to prevent;
 - c. **Exceptions:** Test satisfied but:
 - i. **Compliance** (w/ the statute) **more dangerous than violation**
 - ii. **Compliance impossible.** (e.g., heart attack)
- b. **Breach**
 - i. *Res ipsa loquitur* (This type of injury typically caused by negligence of someone in D's position)
- c. **Causation**
 - i. Cause in fact (but-for causation)
 - ii. Proximate Cause - Unforseeability analysis.
 1. In Indirect Cause case, ask "what am I worried is going to happen?" and is that what happened to P?
- d. **Damages** – Remember Eggshell Skull Doctrine
- e. **DEFENSES**
 - i. Contributory Negligence ("jurisdiction following traditional negligence defenses")
 1. Last Clear Chance Doctrine
 - ii. Traditional Implied Assumption of the Risk (**Not law in most states, including NY**)
 - iii. Comparative Negligence – Pure (**NY**) or modified (**MA**) (P > 50% fault -> No Recovery)

5. **NIED** – First, D must have breached another standard of care. Damages irrelevant. Physical symptoms req.
- Near-Miss
 - Bystander – P is contemporaneous witness to negligent bodily injury inflicted on close family member.
 - NY Distinction:** NY also requires that P that is distressed must also be in zone of physical danger.
 - Preexisting relationship btw. P and D **AND** where negligent act could foreseeably cause distress.
6. **Privacy Torts (Only appropriation recognized in NY):**
- Appropriation** – D uses P’s name or image for commercial purpose.
 - Intrusion** – Invasion of P’s seclusion in a way that would be objectionable to an average person.
 - False Light** – D makes (Only privacy tort that doesn’t exist in **MA**):
 - widespread dissemination ;
 - of a major falsehood about P;
 - that would be objectionable to an average person.
 - Disclosure** – D reveals confidential information.
7. **Economic Torts:**
- Fraud** (usually re: contractual negotiation)
 - D makes misrepresentation of fact;
 - Misrepresentation made deliberately or recklessly;
 - Misrepresentation intended to induce reliance (materiality issue);
 - Must be reliance;
 - Economic damage.
 - Inducing a Breach of Contract** (some in both Torts and Equity outlines)
 - Contract in existence btw. P & third party (T).
 - D must have knowledge of K.
 - D must engage in persuasion designed to encourage T to breach the K.
 - T breaches.
 - DEFENSE:** Privilege to induce a breach exists when special relationship (advisory relationship) btw. D and T.
 - Theft of Trade Secrets (NY Only)**
 - P has a valid trade secret;
 - D takes secret by improper means
8. **Strict Liability:**
- Animals
 - Domesticated Animals – generally, no strict liability **UNLESS** known vicious **UNLESS** trespasser
 - Nondomesticated Animals – generally, strict liability.
 - Abnormally dangerous activities
 - Products
 - D is a merchant – Includes commercial lessors
 - Evidence that product is defective – Manufacturing or Design Defect
 - Product has not been altered since leaving D’s hands.
 - P making foreseeable use of product at time of injury - Many unintended and mis-uses are foreseeable.

9. Equitable Remedies in Tort:

- a. **Injunction**
 - i. **"No adequate remedy at law"** e.g., money damages no good
 - ii. Tort impinges on property interest or protectable right. Basically a gimme.
 - iii. Injunction is enforceable.
 - iv. **Balance of hardships** tips in favor of P.
- b. **Preliminary injunction** - must also show:
 - i. **Likelihood of success** on the merits.
 - ii. P will suffer **irreparable injury** in absence of preliminary injunction.
- c. **Defenses** to injunctive relief:
 - i. Unclean hands. D can show that P is guilty of misconduct.
 - ii. Laches – Reliance on previous indication of permission by P.
 - iii. First Amendment

10. Other Situations:

- a. **Vicarious Liability:**
 - i. Employer/Employee
 - ii. Employer/Independent Contractor - Generally, no vicarious liability **EXCEPT**: if contractor injures invitee.
 - iii. Car Owners/Drivers
 1. **NY Distinction:** Permissive use state. Vicariously liable for anyone driving your car w/ permission.
 2. Parents/Children
 - a. **EXCEPT in NY:** Statutory liability up to modest amount.
- b. **Co-defendant Remedies**
 - i. Indemnification
 - ii. Contribution
- c. **Loss of consortium**

CONSTITUTIONAL

1. Federal Judiciary Power –

a. Requirement for cases and controversies.

i. Standing – Is P the proper party to bring the case to court?

- 1. **Injury** – Personal injury or likelihood of future harm
- 2. **Redressability** – Opinion must actually have an effect.
- 3. **No Third-Party Standing UNLESS**
 - a. **Close Relationship**
 - b. **Injured party unlikely to be able to assert own rights**
 - c. **Organization can sue for members if** Members would have standing; Interests fit with organization’s purposes; AND Neither claim nor relief requires participation of individual members
- 4. **NO Generalized Grievances** – Cannot sue as “citizen” or “taxpayer”

ii. Ripeness

iii. Mootness – Issue must be live unless

- 1. **Capable of repetition but evades review**
- 2. **D voluntarily stops** but could do again at any time

iv. Political Will Doctrine – Court will not adjudicate:

- 1. **Republican form of Government**
- 2. **President’s Foreign Policy**
- 3. **Impeachment or Removal Process**
- 4. **Partisan Gerymandering**

b. SCOTUS

- i. By Cert: Final Judgment from State High Courts and US Circuit Courts**
- ii. By Appeal: three-judge federal district courts**
- iii. Original & Exclusive Jurisdiction over suits between State Governments**

c. Lower Courts

i. States may be sued if:

- 1. **Waiver** – State expressly consents to suit
- 2. **14th Amendment** (generally, Due Process Clause)
- 3. **Suit by Uncle Sam**
- 4. **Bankruptcy Proceedings**

2. Federal Legislative Power – Taxing/Spending/Commerce

a. General Welfare

b. Can regulate channels & instrumentalities of as well as things w/ substantial effect on interstate commerce

c. Cannot compel state legislation BUT can use carrot approach (condition spending on state action)

3. Executive Power

a. Foreign Policy

	Senate Approval?	State Law Conflicts?	Fed. Stat. Conflicts?	Constitution?
Treaties	Yes.	Treaty Controls.	Last in time controls.	Const. controls
Exec. Agmts.	No.	Exex. Agmt. Controls.	Fed. Stat. Controls	Const. controls

- b. **Domestic Affairs:**
 - i. **Appointment Power** – Ambassadors, federal judges and officers of US require Senate approval.
 - ii. **Removal power** – Congress may limit removal if office w/ independence from pres. (s.a. spec. prosecutor)
- c. **Impeachment** requires majority of House; conviction requires 2/3 of Senate.
- d. **Pres. Immune to civil suits from any actions while in office.**
- e. Can **Pardon Federal Crimes**
- 4. **Federalism** – Valid federal law preempts inconsistent state law
 - a. **Express Preemption** – Congress declares exclusive power over a field
 - b. **Implied Preemption**
 - i. **Cannot Simultaneously Comply** w/ both Fed and State laws
 - ii. State law **Impedes Federal Objective**
 - iii. **Congress Evidences Clear Intent** to preempt state law
 - c. **Dormant Commerce Clause**
 - i. **Burden to Interstate Commerce** unconstitutional unless 1) necessary to achieve important government interest and 2) no less discriminatory alternative
 - d. **Privileges and Immunities Clause**– Applies to natural human citizens only.
 - i. **State cannot discriminate against out-of-staters UNLESS Burden ≤ Benefits of law.**
 - 1. **Discriminates re: right to earn a living**
 - e. **Full Faith and Credit:**
 - i. **Court had personal and subject matter jurisdiction**
 - ii. **Judgment on the merits**
 - iii. **Judgment Final**
- 5. **Individual Liberties**
 - a. **Constitution applies only to government action UNLESS**
 - i. **Congressional statute**
 - ii. **Public Functions Exception** (e.g. company-run town)
 - iii. **Entanglement Exception** - Gov't entangled in the unconstitutional activities.
 - b. **Levels of Scrutiny**
 - i. **Rational Basis Test:** Law upheld unless not rationally related to a legitimate government purpose.
 - ii. **Intermediate Scrutiny:** Law upheld if not substantially related to an important government purpose.
 - iii. **Strict Scrutiny:** Upheld if necessary to achieve compelling gov't interest & no less restrictive alternative.
- 6. **Individual Rights & Due Process**
 - a. **Procedural Due Process**
 - i. **Deprivation of life, liberty or property through (reckless) government action**
 - ii. **If a deprivation, balance:**
 - 1. **Importance of interest to the individual**
 - 2. **Ability of additional procedures to increase accuracy of fact-finding**
 - 3. **Government's interests – efficiency**
 - b. **Substantive Due Process**
 - i. **Does Gov't have an adequate reason?**
 - ii. **Is the Gov't providing just compensation?**
 - c. **Right to Travel** – Domestic, any question usually gets strict scrutiny
 - d. **Right to Vote**

7. Equal Protection (14th Amend.)

a. What is the Classification?

- i. **Race – Strict Scrutiny**
- ii. **Gender – Intermediate Scrutiny**
 - 1. **Need either Facial or Discriminatory Impact AND Discriminatory Intent**
- iii. **Aliens**
 - 1. **Federal laws get rational basis, other laws get strict scrutiny**
- iv. **Non-Marital Children – Intermediate Scrutiny**
- v. **Otherwise – Rational basis Test**

8. First Amendment

- a. **Content-Based (Strict Scrutiny; Subject-matter or Viewpoint Restriction) v. Content Neutral (Intermediate)**
- b. **Prior Restraint – Strict Scrutiny**
- c. **Licensing Speech** requires (i) clear criteria leaving almost no discretion and (ii) procedural safeguards
- d. **Vagueness and Overbreadth prohibited**
- e. **Symbolic Speech** protected unless gov't shows i) interest unrelated to suppression of message and ii) impact no greater than necessary.
- f. **Less-Protected Speech**
 - i. **Incitement of Illegal Activity** can be regulated if directed to causing imminent illegality and likelihood of same.
 - ii. **Obscenity**
 - 1. **Shameful or morbid interest in sex**
 - 2. **Patently Offensive**
 - 3. **No Redeeming Value, National Standard**
 - iii. **Commercial Speech** not protected if (risk of) deceptive or false.
 - iv. **Defamation**
 - 1. **Public Official** – D must know falsity of statement or have acted with reckless disregard for truth.
 - 2. **Public Figure** – Falsity and actual malice
 - 3. **Private Figure, matter of Public Concern** – Only Compensatory Damages by showing falsity and negligence
 - 4. **Private Figure, no Public Concern** – no requirement for actual malice
- g. **Places for Speech**
 - i. **Public Forums** – Regulations content neutral and time, place or manner.
 - ii. **Non-Public Forums** – Rational Basis
- h. **Freedom of Association**
 - i. **Group membership – Strict Scrutiny**
 - ii. **Groups cannot discriminate unless discrimination is integral to the group's expressive activities**
- i. **Freedom of Religion**
 - i. **Laws that restrict religion must SEX**
 - 1. Law has **Secular Purpose**
 - 2. Primary **Effect** neither advances nor inhibits religion
 - 3. No **eXcessive** government entanglement

CONTRACTS / SALES

1. Applicable Law

- a. **Article 2** – Sale of Goods
- b. **Article 2a** – Leases of Goods (**NY Only**)
- c. **Common Law** – Everything Else

2. Formation

a. **Notes:**

- i. **Express** (Created by parties' words) v. **Implied** (Created by parties' actions)
- ii. **Bilateral** (acceptance by any reasonable means) v. **Unilateral** (acceptance only by performance)
- iii. **Advertisements** usually not K's because no **quantity term**.
- iv. **Indefiniteness**
 1. **Open Price Term** – Assumed to be reasonable price **EXCEPT** in sale of real property.
 2. **Requirements Contracts** – Generally enforceable under Art. 2, **can't take other party by surprise**.

b. **Offer**

- i. **Lapse** – Offer is open for a "reasonable time"
- ii. **Revocation** – Effective when received.
 1. **Direct** – revokes directly to Offeree
 2. **Indirect** – i) conduct indicating Offeror changed mind, ii) Offeree aware of conduct
 3. **EXCEPT**
 - a. **Option** – Offeree pays to keep offer open. **NY: Written promise to keep offer open creates option.**
 - b. **Foreseeable Reliance Before Acceptance** (RARE; usually a P making a bid in reliance on D's bid)
 - c. **Start of Performance in Unilateral Contract (MBE Only; NY can revoke until performance complete)**
 - d. **Firm Offer** – Under Art. 2, merchant's signed promise to keep offer open is binding; Max of 3mo.

iii. **Rejection** – effective when received

1. **Counteroffer** terminates offer; mere bargaining does not.
2. **Conditional "Acceptance"** – Not an acceptance at all
3. **Acceptance Varying Offer**
 - a. **Common Law** – Mirror Image Rule – Acceptance must mirror offer.
 - b. **Art. 2** – Battle of the Forms!
 - i. **Offeree's term Not Included UNLESS**
 1. **Both parties are Merchants**
 2. **Term is Not Material** – Industry custom not material.
 3. **No Objection w/i Reasonable Time**
4. **Death of a Party** Terminates revocable offer

c. **Acceptance** – Cannot accept through silence

i. **Starting Performance**

1. **Bilateral Contract** – starting performance is acceptance w/ implied promise to complete the job

ii. **Improper Performance**

1. **CL:** Simultaneous acceptance and breach
2. **Art. 2:** Same, **unless** seller sending goods as an accommodation

- iii. **Timing – Mailbox Rule** – Acceptance effective upon mailing **UNLESS**
 - 1. **Offer provides otherwise**
 - 2. **Irrevocable offer** – Mailbox rule does not apply
 - 3. **Offeror Relies on Overtaking Rejection**
 - 4. **Rejection Sent First**

3. Defenses Against Formation

- a. **Lack of Capacity** – Only D’s capacity is relevant.
- b. **Economic Duress** – P agrees to D’s increased demand because P can’t cover. Usually at last minute.
- c. **Misrepresentation/Nondisclosure of a Material Fact** – D’s intent/knowledge irrelevant
- d. **Ambiguity/Misunderstanding** – Peerless. No K unless A has reason to know about ambiguity, then on B’s terms.
- e. **Mutual Mistake re: Material Fact** – Usually does not include cost/value.
- f. **Lack of Consideration** – Past consideration not consideration unless in **NY** and in a **writing**.
 - i. **Promissory Estoppel** can substitute for consideration
- g. **Illusory Contract** – “May buy as many as I want”; contrast w. requirements K.
- h. **Modification**
 - i. **MBE: New Consideration Required. Clauses prohibiting oral modification are unenforceable.**
 - ii. **Art. 2:** Must show good faith.
 - iii. **NY:** New consideration required unless a signed writing.
- i. **Partial Payment of Debt**
 - i. **Undisputed Debt** – Does not modify the debt unless in **NY** and agreement to modify **in writing**
 - ii. **Disputed Debt** – Agreement to pay is consideration for modification.
- j. **Public Policy** – Covenants not to compete must be reasonable in terms of scope (duration & geography) and be necessary for the employer.
- k. **Unconscionability:** Substantive (terms unfair) or Procedural (process of reaching agreement unfair)

4. Statute of Frauds – Writing required in case of (agent must have authority in writing as well):

- a. **Transfer of Interest in Real Property** – sale or lease.
- b. **Performance Cannot be Completed w/i One Year** of signing
- c. **Sale of Goods for \$500 or More** (Art. 2)
- d. **Lease of Goods for \$1,000 or More (NY Only; Art. 2a; total cost is what matters)**
- e. **Suretyship** (If X doesn’t pay you, I will) **UNLESS (MBE Only) Main Purpose to benefit Surety.**
- f. **Contract Modification** – only if contract *as modified* is within SoF
- g. **Assignment of insurance policy, finder’s fee etc. *except* to attorney, auctioneer or licensed real estate agent.**
- h. **SATISFACTORY WRITING:**
 - i. **Sale of Goods** (Art. 2): Must contain quantity term and be signed by D.
 - ii. **Lease of Goods (NY; Art 2a):** Must contain quantity, duration, rental payments, and be signed by D.
 - iii. **All others:** All material terms.
- i. **EXCEPTIONS:** (Less of a chance of fraud)
 - i. **Part Performance Exception:** Two of i) Buyer in possession or property 2) buyer made payment for property or 3) buyer made improvements to property.
 - ii. **Merchants’ Confirmatory Memo**
 - 1. **Both parties are merchants**
 - 2. **Writing claims a prior oral agreement**
 - 3. **Writing is signed and has a quantity**
 - 4. **No Written Objection w/i 10 days**

- iii. **Art. 2: Goods Accepted or Paid For**
- iv. **Custom Made Goods** – not suitable for sale and seller made substantial start
- v. **Judicial Admission**

5. Contract Terms

- a. **Parties' Words – Parol Evidence Rule** – A later writing controls over a prior or contemporaneous agreement.
 - i. **EXCEPTIONS:**
 - 1. **Correct a Clerical Error** (typo)
 - 2. **Establish Defense against Formation** (e.g., misrepresentation)
 - 3. **Interpret Vague or Ambiguous Term**
 - 4. **Supplement Partially Integrated Writing**
- b. **Conduct** used to fill in gaps, in descending order of importance:
 - i. **Course of Performance**
 - ii. **Course of Dealing**
 - iii. **Usage of Trade**
- c. **Seller's Warranties (Art. 2)**
 - i. **Express** – Statement of fact that the buyer could have relied on.
 - ii. **Implied**
 - 1. **Implied Warranty of Merchantability** – Seller is merchant who deals in goods of the kind.
 - 2. **Implied Warranty of Fitness for a Particular Purpose** – Seller aware buyer relying on S for special purpose
- d. **Lessor's Warranties in Lease of Goods (Art. 2a; NY Only)** – Same as Seller's Warranties, except for no implied warranty of merchantability by banks acting as lessor.
- e. **Disclaimers** – “as is” or “with all faults” or Clear and Conspicuous.
- f. **Buyer's Remedies can be Limited** except limiting remedy for personal injury in Art. 2 context unconscionable
- g. **Risk of Loss in Sale of Goods (Art. 2)**
 - i. **Risk of Loss Controlled by Agreement.**
 - ii. **If Unstated, ROL goes to breaching party**
 - iii. **Common Carrier** – Shipment Contract, B has ROL upon shipment. Destination Contract, S must get goods to B.
 - iv. **Non-Carrier Cases** – Merchant-S bears ROL until buyer takes possession. Else, S bear ROL until tender.
- h. **Risk of Loss in a Lease of Goods (NY; Art 2a)** – ROL on lessor *unless* Financial Lease.

6. Performance

- a. **Sale of Goods (Art. 2) – Perfect Tender Rule** – Buyer may reject an imperfect tender
 - i. **Option to Cure** if time for performance hasn't expired **OR** Buyer previously accepted imperfect performance
 - ii. **Installment Contracts** – Buyer can only reject for **substantial impairment**
 - iii. **Buyer's Acceptance Implied** if buyer keeps goods after opportunity to object.
 - iv. **Buyer's Revocation of Acceptance** only allowed if 1) Substantial Impairment and 2) Difficult to Discover
- b. **Payment Under Art. 2** – Check or cash. If Seller refuses check, Buyer gets reasonable time to get cash.
- c. **Common Law – Substantial Performance Sufficient**

7. Excuse Based on Later Events

- a. **Art. 2** – If no perfect performance by Seller, Buyer can accept, reject defective, reject all.
- b. **Common Law** – Other party's material breach excuses your duty to perform.
 - i. **Divisible Contract** – if payment on per unit basis, must pay for any unit substantially completed.
- c. **Anticipatory Repudiation** by other party excuses your duty. They can retract repudiation if you haven't relied.
- d. **Failure to Give Adequate Assurance (Art. 2)** Party w/ reasonable grounds for uncertainty can request in writing an adequate assurance that other party will perform.

e. **Later Agreements**

- i. **Novation** – agreement to substitute a party
- ii. **Impossibility**
 - 1. **Destruction of Something Necessary to Performance**
 - a. **CL: Discharges Duty of Performance**
 - b. **Art. 2: Seller excused only if damaged goods identified to the K.**
 - 2. **Death/Incapacity of Essential Person** excuses duty to perform.
- f. **Frustration of Purpose** (buyer's excuse)
- g. **Conditions** (precedent, concurrent, subsequent) binding unless
 - i. **Failure to cooperate**
 - ii. **Waiver**

8. **Remedies**

- a. **Non-Monetary**
 - i. **Specific Performance – Art. 2. Only if goods unique and cannot cover.**
 - ii. **Unpaid Seller's Right to Reclaim** – CL. Not valid; Art. 2 if buyer insolvent at delivery and S demand w/i 10 days.
- b. **Money Damages**
 - i. **Expectation Damages**
 - a. **Art. 2: Buyer's choice of**
 - i. **Cover Damages: Cover Price – Contract Price**
 - ii. **Market Damages: Market Price – Contract Price**
 - iii. **Loss in Value: Value as Promised – Value as Delivered**
 - b. **Art. 2: Seller's damages**
 - i. **Resale Damages: Contract Price – Resale Price**
 - ii. **Market Damages: Contract Price – Market Price**
 - iii. **Lost Profit IF VOLUME DEALER**
 - iv. **Contract Price** if cannot resell.
 - c. **Includes Expectation Damages**
 - d. **Consequential Damages except Art. 2 Sellers:** Special damages reasonably foreseeable for this P.

9. **Third-Parties**

- a. **Entrustment (Art. 2)** Entrustment to merchant dealing in like goods; no rights against good-faith purchaser
- b. **Third-Party Beneficiary** – Only Intended Beneficiaries have rights.
 - i. **Promisor & Promisee can rescind or modify until intended beneficiary knows of K.**
 - ii. **TPB cannot recover if Donor cannot recover.**
- c. **Delegation of Duties** allowed without consent of other party UNLESS
 - i. **Contact Language Controls**
 - ii. **Special Skill or Reputation**
 - iii. **NOTES: Delegating party still liable; only compensated delegate liable**
- d. **Assignment of Rights** requires present (not future) transfer and does not require consideration.
 - i. **Cannot substantially change obligor's duties.**
 - ii. **Multiple Assignments:**
 - 1. **Gift assignments overridden by future assignments.**
 - 2. **First assignment for consideration prevails**
 - a. **UNLESS** later assignee for consideration doesn't know of earlier assignment and first to get judgment

PROPERTY

1. Present Estates

Estate	Creating Language	Duration	Transferability	Future Interest
Fee Simple Absolute	To A [and his heirs]	NA	Devisable; descendible; alienable	None.
Fee Tail	To A and the heirs of his body	Blood line	Automatic only	Reversion (grantor) or Remainder (other)
Fee Simple Determinable	To a until/so long as/while	Until condition subsequent met	Fully, subject to condition.	Possibility of Reverter (grantor)
FS subject to complete defeasance	To A, but if X happens, grantor reserves right of entry	Until CS met and grantor timely retakes	Fully, subject to condition.	Right of Entry/Power of Termination (grantor)
FS subject to executory limitation	To A, but if X happens, then to B	Until future event happens AND Executor acts.	Fully, subject to condition.	Executory Interest, shifting (other) or springing (grantor)
Life Estate	To A for life [for the life of B]	Life of some party	Alienable; devisable during <i>pur autre vie</i> life	Reversion (grantor) or Remainder (other)

2. Future Interests

a. In the Grantor

- i. **Possibly of Reverter** accompanies FS determinable.
- ii. **Right of Entry / Power of Termination** accompanies FS Condition Subsequent
- iii. **Reversion** follows any estate that is less than what the grantor started with

b. In the Transferee

- i. **Vested Remainder** – Tied to a possessory estate in the same conveyance.
 1. **Indefeasibly Vested** – No conditions attached
 2. **Subject to Complete Defeasance** – Subject to condition Subsequent (“to B, but if B dies under 25, to C”)
 3. **Subject to Open** – Class of heirs subject to diminution because could get new members.
 - a. **Rule of Convenience** – Class closes when any member can demand possession.
 - i. **EXCEPT**: Womb rule.
- ii. **Remainder Subject to Condition Precedent**
 1. **Destructibility**: Under CL (but not NY or modern law) contingent remainder is void if contingent at end of preceding estate. (E.g., “to A for Life then, if by has reached the age of 21, to B” and B isn’t 21 at A’s death)
 2. **Shelley’s Case**: At CL but not NY or modern law, “To A for life, then to A’s heirs” would merge into FS
- iii. **Executory Interests** – Springing (Grantor) or Shifting (third-party).

3. Rule Against Perpetuities – Interest is void if **any** possibility it won’t vest w/i 21 years of a measuring life.

- a. **Does not apply to any interest retained by O.**
- b. **Bad as to One, Bad as to All**: gift to open class conditioned on members reaching 21 is void.
- c. **Charity to Charity exception**: “To the Red Cross while used for Red Cross purposes, then to the YMCA.”
- d. **REFORM**:
 - i. **Wait and See Doctrine**: Must vest within 21 years of the measuring life, as determined *at the end of that life*.

- ii. **USRAP:** Cy Pres Doctrine: “As near as possible”; Reduce any offensive age contingency to 21 years.
- iii. **NY Perpetuities Reform Statute:** NY applies the CL RAP, but
 - 1. reduces any age contingency to 21 years;
 - 2. presumes woman over 55 cannot have a child;
 - 3. Restrictions on power to transfer a trust void if violate RAP.

4. Concurrent Estates

- a. **Joint Tenancy** – Unity of Time, Title, Interest, Possession of whole; Right of Survivorship; Disfavored.
 - i. **Straws** (not needed in NY) – A cannot convey from FS to Joint Tenancy w/ A & B w/o straw.
 - ii. **Severance on:** Sale, Partition or Mortgage; mere contract for sale suffices.
 - 1. **Partition by:** Voluntary Agreement, Partition in Kind (e.g., sprawling acreage), Forced Sale (e.g., building)
 - 2. **Mortgage:** Severs joint tenancy in a *minority* of states (title theory). NY does not sever (mortgage theory).
- b. **Tenancy by the Entirety** – Recognized in 21 states including NY; arises presumptively to married couples.
 - i. **Creditors or transferees of one spouse cannot defeat the other’s right of survivorship.**
- c. **Tenancy in Common** – Presumption.
 - i. **Possession of Whole:** Exclusion by another tenant is **wrongful ouster**.
 - ii. **Rent from co-tenant in exclusive possession** no liability absent ouster.
 - iii. **Rent from third party must account to co-tenants based on purchase contribution.**
 - iv. **Carrying Costs and Repairs get Contribution by purchase contribution**
 - v. **Co-tenants must not commit waste**

5. Landlord/Tenant

- a. **Leaseholds**
 - i. **Tenancy for Years** – any fixed period of time
 - ii. **Periodic Tenancy** – Can arise by implication, e.g., monthly rent payments.
 - 1. **Holdover** tenant in implied month-to-month periodic tenancy.
 - 2. **Termination:** At the end of a lease period, by notice at least one lease period earlier.
 - iii. **Tenancy at Will** – Must be express; reasonable demand for vacancy required; 30 days written notice in NY.
 - iv. **Tenancy at Sufferance** – Wrongdoer leasehold estate for holdover T until L evicts or holds over.
- b. **Tenant’s Duties**
 - i. **Duty to Repair:** Maintain premises and make ordinary repairs.
 - 1. **Waste: Voluntary** (overt), **Permissive** (Neglect), **Ameliorative** (Alterations that enhance premises’ value)
 - 2. **Fixtures: T may not remove a fixture, regardless of whether T installed it.** Pass w/ ownership of land.
 - a. Fixture is any once-moveable chattel that shows intent to permanently improve: e.g. heating system.
 - 3. **Risk of Loss:** At CL, ROL on T. Modern (including NY), ROL on L.
 - ii. **Duty to Pay Rent**
 - 1. **If T in Possession, L can either evict or continue & sue. NO SELF-HELP.** NY gives treble damages.
 - 2. **T Not in Possession, L can treat as Surrender, Ignore, or Re-let on tenant’s behalf.**
- c. **Landlord’s Duties**
 - i. **Duty to Deliver Possession:** English Rule requires actual, physical possession.
 - ii. **Implied Covenant of Quiet Enjoyment**
 - 1. **Actual Eviction**
 - 2. **Constructive Eviction** – Substantial Interference, Notice (to L), Goodbye (T leaves).
 - iii. **Implied Warranty of Habitability** – Non-waivable; fit for basic human habitation; consult housing code
 - 1. T may **Move out** & terminate, **Repair & deduct**, **Reduce** escrow, or **Remain in possession** & seek damages.

6. **Assignment v. Sublease** – Assignment is interest in whole, sublease is part of the interest.
- Prior Written Approval can be required. Approval once waive future objection right.
 - NY**: Cannot assign **residential** lease w/o L's written consent. If L unreasonably withholds, T can seek release.
7. **Landlord's Tort Liability** – No liability except for common areas, latent defects, repairs, short-term furnished dwellings or public use (e.g. convention hall)
8. **Servitudes**
- Affirmative**
 - Appurtenant** (Relates to two abutting properties) – **Passes automatically with dominant tenement.**
 - In Gross** (confers advantage not related to holder's land) – **Only passes automatically if commercial.**
 - Creation: Prescription** (adverse possession), **Implied** from prior use, **Land-locked Setting, Express Writing**
 - Termination: Estoppel, Necessity** ends, **Destruction** of the servient land, **Condemnation, Release, Abandonment, Merger, Prescription** by servient owner.
 - Negative** – Express only; Light, Air, Support, Stream water (artificial flow)
 - License** – not subject to SoF, freely revocable unless estoppel applies (substantial \$ or labor required).
9. **Profit** – Entitles holder to enter servient land and take e.g. lumber. Follows all rules of easements.
10. **Covenant** – Promise to or not to do something related to land.
- Covenant v. Servitude** is determined by relief sought: \$\$ -> covenant; Injunction -> Equitable Servitude
 - Covenant Running w/ the Land**: Requires both **Horizontal and Vertical Privity**
 - Vertical (Burdened Side)**:
 - Writing** – Original promise written
 - Intent** for it to run
 - Touch & Concern**
 - Horizontal Privity: Succession of Estate** – Either landlord/tenant or common straw or the like
 - Vertical Privity – Non-hostile nexus between buyer and seller of previously burdened estate.**
 - Notice** – Buyer must know of the burden.
 - Vertical (Benefited Side)**:
 - Writing, Intent, Touch & Concern, Vertical Privity**
 - Equitable Servitudes** (holder seeks **INJUNCTION**)
 - Transferability** requires **Writing, Intent, Touch & Concern, Notice. No privity requirement for transfer.**
 - Implied** if subdivider had general scheme of residential dev. AND lotholder has notice from prior deeds.
 - Notice** can be **Actual, Inquiry** (neighborhood conforms to common restriction), **Record (not NY).**
11. **Adverse Possession**
- Continuous** – 10 years in most jurisdictions including NY
 - Open & Notorious**
 - Actual**
 - Hostile** – MBE: possessor's mental state irrelevant; in **NY** must have good faith.
 - TACKING when privity; not when ouster.**
 - DISABILITY** must be in place at start of adverse possession.
12. **Conveyances**
- Writing Required UNLESS** two of:
 - B takes possession**
 - B pays all/part of price**
 - B makes substantial improvements**
 - Implied Promises: Cannot disclaim.**

- i. **S will provide Marketable Title**
- ii. **S will not make any false statements of material fact**, majority require disclosure of material defects.
- c. **Three Types of Deed**
 - i. **Quitclaim** – Seller promises nothing.
 - ii. **General Warranty Deed**: Seller promises the world. Contains covenants of:
 - 1. **Seisin**: Grantor owns the estate.
 - 2. **Right to Convey**: Grantor can convey. No temporary restrictions.
 - 3. **Encumbrances**: It's free of encumbrances.
 - 4. **Quiet Enjoyment** won't be interfered with by third-party's lawful claim of title.
 - 5. **Warranty**: Grantor will defend against lawful claims of title
 - 6. **Further Assurances**: Grantor will make reasonable efforts to perfect title in future.
 - iii. **Special Warranty Deed**: (In NY, Bargain & Sale Deed) Grantor promises, only on his own behalf:
 - 1. Hasn't conveyed to anyone else
 - 2. Blackacre free of encumbrances made by Grantor.

13. **Recording**

- a. **Notice Jurisdiction** – Last Bona Fide Purchaser wins (can be defeated w/ notice) (**MA**).
- b. **Race Notice Jurisdiction** – First Bona Fide Purchaser to File wins (**NY**).
- c. **BONA FIDE** – (i) purchases for value and (ii) has no notice of previous purchaser
 - i. Notice can be Actual, Inquiry (inspection of property), Record (finding previous deed in registry)
- d. **Fine Points**:
 - i. **Shelter Rule**: One who takes from a BFP will prevail against anyone who the BFP would have prevailed against.
 - ii. **Estoppel by Deed**: If I sell Blackacre to you, a BFP, and then buy Blackacre, you own Blackacre.

14. **Mortgages** – The exchange of debt for security interest in land. Creditor-Mortgagee has a lien. Freely Transferrable.

- a. **Equitable Mortgage** – Creditor-Mortgagee, is given the deed rather than a signed instrument.
- b. **Holder in Due Course** relieves transferee of personal defenses.
 - i. **Original note must be Negotiable, Endorsed, Delivered, Accepted in good faith, and Paid For.**
- c. **Transfer of Liability**:
 - i. **Buyer "Assumes the Mortgage"** – Buyer primarily liable for the debt.
 - ii. **Buyer "Subject to the Mortgage"** – Buyer not liable for debt; lien remains.
- d. **Foreclosure: Proceeds pay off instant and inferior liens in order of priority. Superior liens remain.**
 - i. **Priority determined by First in Time, First in Right.**
- e. **Redemption**: Buyer can pay off debt up to day of foreclosure sale.
 - i. **Statutory Redemption** (Not in NY) Debtor-mortgagor can pay foreclosure price *after* sale and regain title.

15. **Water Rights** – May make any necessary changes to control surface water

- a. **Riparian** – Water belongs to those bordering the water.
- b. **Prior Appropriation** – Priority of beneficial use.

16. **Zoning Variations** if proponent shows undue hardship and no detriment to surrounding property values.

- a. **Exactions** must be reasonably related in nature and scope to the proposed development.

EVIDENCE

1. **Relevance** – Any tendency to make any fact more or less probable.
 - a. **Inadmissible if**
 - i. **Probative Value substantially outweighed by Unfair Prejudice, Confusion, Waste of time.**
 - ii. **Liability Insurance** for purpose of proving fault or absence of same.
 - iii. **Subsequent Remedial Measures** to prove negligence, culpable conduct, product defect, or need for warning
 1. **NY:** SRMs admissible for strict products liability manufacturing defects.
 - iv. **Settlements (Civil)** to prove Settlement, Offer to Settle, Statements of Fact in Settlement Discussions
 1. **EXCEPT** in civil litigation with a government regulatory agency
 - v. **Offer to Pay Hospital or Medical Expenses** to prove liability
 - vi. **Withdrawn Pleas** to show guilt or liability
 1. **NY: Allowed in civil cases**
 - b. **Character Evidence inadmissible to prove propensity.**
 - i. **Civil Cases** inadmissible to prove propensity. End of story.
 - ii. **Criminal Trials** – Character evidence inadmissible until D brings into issue; then P can rebut.
 1. **MBE: Reputation or Opinion. NY: Reputation Only. NO Specific Acts.**
 2. **NY: Prosecution can rebut w/ conviction of crime that reflects adversely on trait in issue.**
 - iii. **Self-Defense Case**
 1. **MBE:** prosecution can rebut w/ evidence of V's good character for peacefulness of D's for violence.
 2. **NY:** V's character inadmissible to prove V was first aggressor.
 - iv. **Sexual Misconduct** – No evidence of V's reputation for promiscuity or prior sexual conduct.
 1. **EXCEPT** to prove **consent** or, **source of physical evidence**
 - c. **Habit** Repetitive response to particular set of circumstances based on frequency and particularity of conduct
 - i. **NY: Inadmissible on issue of due care in negligence case.**
 - d. **D's Other Crimes** (non-character purposes)
 - i. **Admissible** to show **Motive, Intent, Mistake/Accident (absence of), Identity, Common Scheme/Plan**
 - ii. **MBE: Prior Sexual Assaults Admissible to show Propensity**
 - e. **Similar Occurrences**
 - i. **Prior Accidents** admissible to show Fraudulent Scheme/Plan or Causation
2. **Judicial Notice**
 - a. **Matters of Common Knowledge in court's territorial jurisdiction; Civil - Conclusive; Crim - Other must disprove**
3. **Documentary Evidence**
 - a. **Authentication** – Sufficient evidence for reasonable jury to conclude item is what party claims it to be
 - i. **Handwriting** by **Layperson Opinion, Expert Opinion, Jury Comparison**
 - ii. **Ancient Documents** presumptively authentic if no facial suspicion and more than 20 years old (**30 Yrs in NY**)
 - iii. **Self-Authenticating Documents**
 1. **Certified Business Records** certified that doc. made in regular course of business or at time of event.
 - a. **NY:** Only in civil and for records of a non-party.
 - b. **Best Evidence** – To prove contents of a writing, produce the original or copy/oral testimony w/ good excuse.
 - i. If document is **Legally Operative** or **Witness Testifying about facts learned solely from the writing**.
 1. **NY: Duplicate only if made in regular course of business**
 - ii. **EXCEPT** for voluminous records, public records, collateral documents.
4. **Real Evidence – Authentication** – Personal Knowledge or Chain of Custody

5. Testimonial Evidence

- a. **Competency – Personal Knowledge and Oath demonstrating understanding & promise to tell truth**
 - i. **NY:** In Criminal cases, children under 9 who cannot understand the oath may still testify (unsworn testimony)
- b. **Dead Man Statute – (NY Only)** Civil trial, interested witness cannot testify against decedent's estate re: transactions involving the decedent.
 - i. **NY: Full effect, but may testify about facts of an accident in cases alleging negligence.**
- c. **Leading Questions** on cross or when forgetful, hostile, adverse.
- d. **Writings to Aid Oral Testimony**
 - i. **Past Recollection Recorded** – Read to jury if witness once had previous knowledge and now forgets.
 - ii. **MBE: Opposing Party may show to jury. NY: Either party may show to jury.**
- e. **Opinion:**
 - i. **Lay Witness** – Admissible if rationally based on witness' perception and helpful to the jury.
 - ii. **Expert Witness** – Qualified, helpful to jury, proper basis, reliable.
 1. **Proper Basis** – Personal Knowledge, Evidence Admitted through Others (Hypo), Outside Facts.
 2. **Reliability** – Reliable methods reliably applied to the particular facts of the case.
 - iii. **Learned Treatise** MBE: if established as reliable. NY: Direct: show basis. Cross: Impeach. **Take W's answer.**
- f. **Credibility and Impeachment: Impeachment, Rehabilitation**
 - i. **Prior Inconsistent Statements**
 1. **MBE:** admissible to impeach or if part of formal hearing, trial or deposition
 2. **NY:** admissible only to impeach. Witness must be allowed to explain or deny while on the stand.
 - ii. **Bias, Interest or Motive to Misrepresent**
 - iii. **Sensory Deficiencies**
 - iv. **Reputation or Opinion re: Witness's Bad Character for Truthfulness**
 - v. **Criminal Convictions**
 1. **NY: May impeach with conviction for any crime.**
 2. **MBE: May impeach with conviction w/I 10 years of trial relating to dishonesty or false statement**
 - a. **Felonies if w/I 10 years and probative value > unfair prejudice**
 - vi. **Bad Acts**
 1. **MBE: Witness may be asked about bad acts that relate to truthfulness**
 2. **NY: Witness may be asked about any bad act relating to their own moral turpitude**
 - vii. **Contradiction**
- g. **Impeachment of Own Witness**
 - i. **MBE: Anyone can impeach a witness**
 - ii. **NY: Can impeach own witness for prior inconsistent statement in writing or under oath**
- h. **Rehabilitation**
 - i. **Prior Statement of Identification** admissible even if credibility not attacked, **EXCEPT** NY Civil cases.
 - ii. **Methods of Rehabilitation**
 1. **Character for Truthfulness**
 2. **Prior Consistent Statement:** MBE: rehabilitation and truth of statement; NY: rehabilitation only.

6. Testimonial Privileges

- a. **Attorney-Client Privilege** protects confidential communication btw. attorney and client for legal advice
 - i. **EXCEPT Future Crime/Fraud, Legal Advice in Issue, Atty.-Client Dispute, Partial Disclosure.**
- b. **Doctor-Patient Privilege** protects confidential communication/information acquired by doctor from patient targeted at medical treatment/diagnosis
 - i. **MBE: Only psychotherapists protected.**
- c. **Spousal Communications** – May be waived by both spouses; covers confidential communications btw. spouses.
- d. **Spousal Immunity (Not NY)** – Cannot compel spouse to testify; testifying spouse can waive.

7. Hearsay – Any out of court statement offered for its truth

- a. **Verbal Acts** – Legally operative words
- b. **To Show Effect on Person who Heard or Read the Statement**
- c. **Circumstantial Evidence of Speaker's State of Mind**
- d. **EXCEPTIONS:**
 - i. **Party Admission** – Statement of any party offered against the party.
 - 1. **Agent/Employee statement if w/i scope of employ. NY: Only if has speaking authority.**
 - ii. **Former Testimony if Unavailable.**
 - 1. **NY/MBE: Privilege, Absence from Jurisdiction, Illness/Death**
 - 2. **MBE Only: Lack of Memory, Stubborn Refusal to Testify**
 - iii. **Forfeiture by Wrongdoing** – Against party who made witness unavailable w/ purpose of preventing testimony.
 - iv. **Statement Against Interest** – Crim case: must be supported by corroborating evidence
 - v. **Dying Declaration** – Belief of certain death concerning cause/circumstances of same.
 - vi. **Excited Utterance** – Statement about startling event while still under the stress of excitement.
 - vii. **Present Sense Impression** – Statement describing an event made during or immediately after the event
 - 1. **NY: Requires corroboration**
 - viii. **Statement of Then-Existing Mental, Physical, Emotional Condition** statement of actual condition – no belief.
 - 1. **NY: If offered to prove conduct of third person, requires corroboration**
 - ix. **Statement of Purpose of Medical Treatment or Diagnosis** – NY: No protection if said for expert testimony.
 - x. **Business Records** – Made in course of business by employees contemporaneously w/ event.
 - 1. **Public Records:**
 - a. **MBE: Conclusions of official investigation**
 - b. **NY: Only basic observations**
- e. **Confrontation Clause**
 - i. **D must be able to confront testimonial witnesses**
 - ii. **Testimonial: Grand Jury Testimony, Documents, Police Interrogations re: later criminal prosecution**

CRIMINAL LAW

1. Introduction

- a. **Defenses** must be **disproven by the prosecution beyond a reasonable doubt**
 - i. **Insanity** must be proven by D by a preponderance of the evidence.
 - ii. **NY affirmative defenses** must be proven by D by a preponderance of the evidence.
- b. **Classification of Crimes:** Misdemeanors crimes punishable by not more than a year. Felonies by > 1 year.

2. Essential Elements of Crimes

- a. **Physical Act** – Voluntary bodily movement
 - i. **Omissions** require (1) duty (2) knowledge of facts giving rise to duty and (3) ability to help.
- b. **Common Law Mental States**
 - i. **Specific Intent** – Desire to commit the act and achieve the result.
 - ii. **Malice** – Intent or reckless disregard for obvious or known risk.
 - iii. **Criminal Intent** – Generally aware of factors constituting the crime.
 - iv. **Strict Liability**
 - v. **MISTAKE**
 1. **Mistake of Fact** – reasonable is defense to anything but SL; unreasonable only defense to specific intent
 2. **Mistake of Law** – Generally, never a defense.
- c. **NY Mental States**
 - i. **Intentionally (purposely), Knowingly, Recklessly, Negligently, Strict Liability**
 - ii. **MISTAKE**
 1. **Mistake of Fact** – unreasonable defense to all but SL and Neg.; reasonable defense to Neg.
 2. **Mistake of Law** – Generally, never a defense.
- d. **Causation** – Proximate and Actual Cause
- e. **Concurrence** – mental state required at time engaged in act

3. Crimes Against the Person

- a. **Common Law**
 - i. **Battery** – The unlawful application of force to another resulting in injury or offensive touching. (Gen. Intent)
 - ii. **Assault** – Intentional creation of a reasonable apprehension of an imminent bodily harm. (Specific Intent)
 - iii. **Aggravated Assault** – Uses a weapon, has vulnerable victim, or to commit robbery/rape.
 - iv. **Murder** – Causing Death of Another with Malice Aforethought. (CL has Year and a day rule.)
 - v. **Voluntary Manslaughter** – Intentional killing in heat of passion after adequate provocation.
 - vi. **Involuntary Manslaughter** – Killing committed with criminal negligence or during a misdemeanor.
 - vii. **Felony Murder** – Victim cannot be co-felon. Vicarious Liability in effect.
 - viii. **False Imprisonment** (Gen. Intent)
 - ix. **Kidnapping** – False Imprisonment w/ moving or concealing of V. May be aggravated if for ransom/rape/child.
- b. **NY**
 - i. **Menacing** – Same as CL Assault
 - ii. **Second Degree Assault** – Intentionally Causing Serious Physical Injury
 1. **First Degree Assault** – Using a weapon
 2. **Third Degree Assault** – Injury not serious
 - iii. **First Degree Murder** – D 18+ and Intent to kill w/ aggravating factor (e.g., intentional felony murder)
 - iv. **Second Degree Murder** – Intent to Kill, Depraved Indifference, **Accidental** Felony Murder (BRAKES Felonies)
 - v. **First Degree Manslaughter** – Intent to cause serious injury OR Extreme Emotional Disturbance

- vi. **Second Degree Manslaughter** – Reckless homicide.
- vii. **Criminally Negligent Homicide**
- viii. **VEHICULAR** (e.g., Vehicular Man 2) if DWI.
- ix. **AGGRIVATED** (e.g. Aggravated Man 2) if V is cop in line of duty
- x. **Second Degree Unlawful Imprisonment** – False imprisonment w/ knowledge of unlawfulness.
 - 1. **First Degree Unlawful Imprisonment** plus risk of serious injury.
- xi. **Second Degree Kidnapping** – Abducting someone.
 - 1. **First Degree** – 2d Deg. Plus ransom, restraint for 12+hrs w/ intent to rape/rob, or death of V.

4. Crimes Against Property

a. **Common Law**

- i. **Larceny** – A (3) trespassory (2) taking & carrying away of (4) another’s personal property. Must intend to steal.
 - 1. **A taking under a claim of right is never larceny**
 - 2. **Continuing Trespass** – if later decide to steal a borrowed thing, trespassory taking is “continued”
- ii. **Embezzlement** - Conversion of another’s property you are **in lawful possession** of with intent to defraud.
 - 1. **Possession more than mere Custody** – Must be able to exercise some control over the thing.
- iii. **False Pretenses** – Obtaining title by intentional false statement (past or present event) with intent to defraud.
- iv. **Larceny by Trick** – False pretenses, only you get possession, not title.
- v. **Robbery** – Larceny of another’s person or presence by force or threat of immediate injury
 - 1. **Future Injury: Extortion**
 - 2. **Embarrassment: Blackmail**
- vi. **Forgery** – Making or altering a writing so it is false with intent to defraud.
- vii. **Uttering** – Offering as genuine a forged document with intent to defraud.
- viii. **Malicious Mischief** – Destroying or Damaging another’s property w/ intent to defraud
- ix. **Burglary**
 - 1. Breaking
 - 2. Entry
 - 3. Dwelling
 - 4. Of Another
 - 5. At Night
 - 6. Intent to Commit Felony Inside (at time of entry)
- x. **Arson** - Malicious burning of a building.

b. **NY**

- i. **Larceny** – CL Larceny, Embezzlement, False Pretenses or Larceny by Trick
 - 1. **First Degree:** > \$1M
 - 2. **Second Degree:** >\$50k
 - 3. **Third Degree:**> \$3k
 - 4. **Fourth Degree:** >\$1k
 - 5. **Petit Larceny:** Lesser amounts
- ii. **Robbery**
 - 1. **Third Degree:** Larceny + Force
 - 2. **Second Degree:** Aided by another, carjacking, or V is injured.
 - 3. **First Degree:** Firearm or V seriously injured.
- iii. **Forgery** – Making or altering a writing so it is false with intent to defraud.
- iv. **Uttering** – Offering as genuine a forged document with intent to defraud.

- v. **Criminal Mischief** – Destroying or Damaging another’s property w/ intent to defraud
- vi. **Burglary: Third Degree**: Entering or remaining unlawfully in a building with intent to commit a crime
- vii. **Arson: Fourth Degree**: Reckless burning of a building.

5. Accomplice Liability

- a. **Accomplice** is one who aides or encourages the principal w/ intent that the crime be committed.
 - i. **NY**: Need not intend the crime. Intent to aid Principal’s conduct and possess requisite mental state.
 - ii. **Guilty for all crimes aided, encouraged, or foreseeable.**
 - iii. **Mere Knowledge Not Sufficient**, must intend the crime to be committed.
 - 1. **NY: Guilty of Criminal Facilitation**
 - iv. **Withdrawal** – prevents prosecution for *future* crimes. Cannot withdraw from a conspiracy under CL.
 - 1. **NY: Called Renunciation** (affirmative defense)
- b. **Accomplice After the Fact** – Assisting a principal knowing they committed a felony w/ intent to avoid arrest etc.
 - i. **NY: “Hindering Prosecution”**

6. Inchoate Offenses

- a. **Solicitation** – Asking someone to commit a crime, intending that the crime be committed
- b. **Conspiracy** – Agreement btw. 2+ people to commit a crime, plus an overt act.
 - i. **Under MPC/NY but not CL, D may be guilty even if others are acquitted or were pretending to agree.**
 - ii. **Vicarious Liability** – Liable for co-conspirators’ crimes if in furtherance of conspiracy and foreseeable.
- c. **Attempt – Requires Specific Intent** (cannot attempt negligence/recklessness crimes)
 - i. **MPC/NY** – Conduct that is a substantial step toward crime and strongly corroborates criminal purpose.
 - ii. **CL** – Conduct is dangerously close to commission

7. Defenses (NY Affirmative Defenses have *)

- a. **Insanity***
 - i. **M’Naughten** – Did not
 - 1. **Know act was wrong**; or
 - 2. **Understand nature of act.**
 - ii. **Irresistible Impulse Test** – Unable to:
 - 1. **Control Action**; or
 - 2. **Conform Actions to the Law**
 - iii. **MPC Test** – D lacked substantial capacity to:
 - 1. **Appreciate criminality of conduct**; or
 - 2. **Conform Conduct to the law**
 - iv. **NY Test: Lacked Substantial Capacity to:**
 - 1. **Understand nature of the Act**; or
 - 2. **Appreciate Wrongfulness of Conduct**
- b. **Intoxication**
 - i. **Involuntary Intoxication** treated like mental illness.
 - ii. **Voluntary Intoxication** can be a defense to specific intent crimes (and knowledge crimes in NY)
- c. **Infancy**
 - i. **CL**: No prosecution below 7, 7-14 rebuttable presumption against prosecution.
 - ii. **NY**: Juvenile Delinquency < 13, 13+ 2d Murder, 14+ serious crimes against person/property, 16+ adult.

d. Self-Defense

- i. **Non-Deadly Force** if reasonably necessary to prevent imminent use of unlawful force
- ii. **Deadly Force** if facing imminent threat of death or serious injury
 - 1. **Aggressor Rule:** Initial aggressor must either withdraw & communicate or other party escalates to deadly.
 - 2. **NY Aggressor Rule:** Initial Aggressor must withdraw before deadly force, even if other person escalates.
 - 3. **NY/Minority Retreat Rule:** Must retreat unless in home or not possible.
- iii. **Mistake**
 - 1. **Reasonable Mistake** gets the defense.
 - 2. **Unreasonable Mistake** No defense in CL/NY. Minority/MPC use imperfect defense (vol. manslaughter)
- e. **Duress*** - Forced to commit under threat or death or serious injury. MPC/MA: No murder defense. NY: Defense.
- f. **Entrapment*** - Criminal design originated w/ Gov't and D not predisposed to commit the crime.

CRIMINAL PROCEDURE

1. Fourth Amendment Search and Seizure

- a. **Conducted by Government Agent?** Includes private citizens acting at direction of police
- b. **Did it invade Reasonable Expectation of Privacy?**
 - i. **Protected Areas** – Person, Houses, Papers, Effects
 - ii. **Challenging the Search/Seizure** – Standing predicated on invasion of *personal* – **NOT** Third Party – rights.
- c. **Is the Warrant Valid?**
 - i. **Probable Cause & Particularity** – Requires “commonsense practical” determination; NY requirements higher. Must include place to be searched and items to be seized.
 - ii. **Good Faith** reliance on defective warrant (not in NY)
 - iii. **Warrant Properly Executed?**
 1. **Compliance w/ Terms & Limitations?**
 2. **Knock & Announce** – Does not bar admissibility.
- d. **Is Warrantless Search Valid? – ESCAPIST**
 - i. **Exigent Circumstances** – Evidence would dissipate or disappear; hot pursuit
 - ii. **Search Incident to Arrest** – Can search wingspan (NY: Containers only if suspect armed) of officer safety. Includes car (not truck).
 - iii. **Consent** – Must be voluntary & intelligent; apparent authority sufficient if reasonably believed
 - iv. **Automobile** – Need probable cause to believe contraband or evidence in car.
 - v. **Plain View** – Lawful access to place, lawful access to item, criminality of item immediately apparent.
 - vi. **Inventory** – Arrestees when booked; cars when impounded.
 - vii. **Special Needs**
 1. **Random Drug Tests** – Not permitted if *primary purpose* to gather criminal evidence.
 2. **Government Employees’ Desks and Files**
 3. **Students’ Effects in Public Schools**
 4. **Border Searches**
 - viii. **Terry “Stop & Frisk” (Reasonable Suspicion; Concern for officer safety)**
 1. **Terry Stops** – Brief seizure for investigating suspicious conduct. “Seized” when reasonable person would not feel free to leave or decline questions.
 - a. **Did Officer Brandish a Weapon?**
 - b. **Officer’s Demeanor?**
 - c. **Police Pursuit seizure if submits to officer or is restrained. (Pursuit always seizure in NY)**
 2. **Terry Frisks** – Pat down for weapons if belief suspect armed.
 - a. **Can seize Weapons and (not in NY) contraband recognized without manipulating the object.**
 - b. **Car Frisks: Can search cabin of car, only where a weapon could fit.**
- e. **Admissibility of Unconstitutional Searches** – Excluded only from prosecutor’s case in chief; can use to rebut.
 - i. **Officers’ Reasonable Mistakes Excused**
 - ii. **Fruit of the Poisonous Tree** – To nullify, prosecutor must show break in causal link:
 1. **Independent Source Doctrine** – Came from different process, etc.
 2. **Inevitable Discovery Doctrine** – Evidence necessarily would have been discovered through lawful means.
 3. **Attenuation Doctrine** – D’s free will restored through passage of time and intervening events.

2. Wiretapping and Eavesdropping

- a. **Wiretapping - Valid Warrant includes Suspected Persons, Crime, Conversations, Time**
- b. **Eavesdropping** – You assume the risk that other party won't keep your conversation private. (not in MA)

- 3. **Arrest** – Occurs whenever police take someone into custody against his/her will for prosecution or interrogation.
 - a. **De Facto Arrest** when police compel someone to go to station for questioning or fingerprinting.
 - b. **Probable Cause Required**
 - c. **Custodial Arrest permissible for ALL CRIMES**
 - d. **Warrant Required to arrest someone in own home. Need Arrest & Search Warrants for home of third party.**

4. Confessions

- a. **Exclusion under Due Process Clause (14th Amend.)**
 - i. **Involuntariness** – Confession not admissible where police coercion overbears suspect's will.
- b. **Exclusion under Right to Counsel (6th Amend.)** – Express, offense-specific protection.
 - i. **Attaches when suspect formally charged**
- c. **Exclusion under Miranda (5th Amend.)**
 - i. **Four Main Warnings:** Right to remain silent, used against you, right to attorney, appointed for you.
 - ii. **Warnings Necessary When:** (except in case of immediate concern for public safety)
 - 1. **Custody** – Viewed objectively, police domination s.t. freedom of action limited in “significant way”
 - 2. **Interrogation** – Conduct police knew or should have known was likely to elicit an incriminating response.
 - iii. **Waiver must be both (1) Knowing & Intelligent and (2) Voluntary; must be proven by a preponderance**
 - iv. **Invocation of Right to Counsel**
 - 1. **Must be sufficiently clear that a reasonable officer would understand it**
 - 2. **All interrogation into all topics must cease unless initiated by the suspect**
 - 3. **Request expires 14 days after release**
 - v. **Result of Miranda Violations**
 - 1. **Statements inadmissible in Prosecution's case in chief (or against third party witnesses)**
 - 2. **Does not require suppression of physical fruits of voluntary statements**
 - 3. **Guilty verdict can stand upon improper admission if harmless beyond a reasonable doubt.**
- d. **Exclusion under Indelible Right to Counsel (NY's 6th Amend.)**
 - i. **Strengthens 6th Amend. Right to Counsel** – when significant judicial activity s.t. D may benefit from counsel.

5. Pretrial Identification

- a. **Right to Counsel (6th Amend.)** in Line-ups and Show-ups after charging. No counsel for photo arrays.
 - i. **NY:** Stronger; Implicated if police aware that you have counsel and you request to have that counsel present.
- b. **Due Process Violated (14th Amend.)** if so unnecessarily suggestive there's a substantial likelihood of mis-ID.
- c. **Remedy for Violation** – exclusion of witness' in-court identification.
 - i. **UNLESS** prosecution proves based on observations other than the unconstitutional line-up or show-up.

6. Grand Juries – Issue indictments through secret proceedings. Most states don't use. (MA and NY do)

- a. **NY** – indictment must establish all elements and provide reasonable cause to believe accused is guilty

7. Pretrial Detention – Gov't needs probable cause both to hold D over for trial and to detain D in jail before trial

- a. **Detention Hearings** (aka *Gerstein* hearing) are necessary w/o grand jury indictment or arrest warrant.
- b. **First Appearance** – Soon after arrest, D must be brought before magistrate to (1) learn rights, (2) set bail, (3) appoint counsel.
- c. **Bail** decisions are immediately appealable.

8. Trial Rights

- a. **Evidentiary Disclosure** – D has right to *all* material exculpatory evidence
- b. **Unbiased Judges** – D has right to judge w/ no financial stake or actual malice.
- c. **Juries** – Right to jury of 6+ jurors when maximum sentence more than six months.
 - i. **NY**: uses 12-juror panels, 11 of which need to participate in deliberations, and convictions must be unanimous.
- d. **Confront Witnesses UNLESS** contravenes public policy
- e. **Effective Counsel** – Performance was deficient **AND** outcome would have been different with effective counsel.

9. Guilty Pleas must be both Voluntary and Intelligent

- a. Judge must address, in court and on the record: nature of charges AND consequences of plea.
- b. **Withdrawal if:**
 - i. **Involuntary**
 - ii. **Jurisdictional defect** (court taking plea didn't have jurisdiction)
 - iii. **Ineffective Assistance of Counsel**
 - iv. **Prosecutor reneges on bargain**

10. Punishment (8th Amend. Prohibition against cruel and unusual punishment)

- a. **Penalty cannot be grossly disproportionate to the crime**
- b. **Death Penalty**: No automatic categories or use on retarded, presently insane, those under 18 at time of crime

11. Double Jeopardy – Requires same sovereign (can prosecute again if different state or country)

- a. **Attaches** when jury is sworn, first bench trial witness sworn or court accepts guilty plea unconditionally
- b. **Two Offenses** not “the same” if each contains an element that the other does not.
 - i. **NY**: Same offense if same transaction unless substantially different elements or vindicates different harm.
- c. **Lesser Included Offense** – Prosecution precludes later prosecution for greater included offense.
- d. **EXCEPTIONS**
 - i. **Hung Jury**
 - ii. **Mistrial for Manifest Destiny**
 - iii. **Successful Appeal** unless reversal based on insufficiency of evidence presented at trial
 - iv. **Breach of Plea Agreement by D**

12. “Taking the Fifth”

- a. **Anyone giving Testimony Under Oath can invoke.**
- b. **Can be Eliminated by:**
 - i. **Grant of Immunity** barring government use of testimony or any evidence derived therefrom.
 1. **NY**: has transactional immunity
 - ii. **Defendant Takes Stand** – cannot take the fifth regarding anything w/i scope of cross-examination
 - iii. **Statute of Limitations** on underlying crime has run.

PARTNERSHIP

1. Formation

- a. **Sharing of Profits** – prima facie evidence of partnership.
- b. **Capacity** – Anyone who can enter a binding K can be a partner
- c. **Writing Necessary Only** if partnership *cannot* be performed within one year.
- d. **Limited Partnerships**
 - i. **Must register**
 - ii. **At least one general and one limited partner**
 - iii. **Limited partners liable only for investment; cannot manage partnership.**

2. Partners' Liabilities to Third Parties

- a. **Incoming Partner** has no liability for partnership debts *prior* to joining, *but* money paid into partnership can be used to pay and debt.
- b. **Outgoing Partner** remains liable until notice given to all known and potential creditors.
- c. **Partnership by Estoppel**
 - i. Holding yourself out as partner makes you liable to those who rely on that.
 - ii. Holding another out as your partner makes them your agent.

3. Partners' Rights and Liabilities

- a. **Duty of Loyalty**
 - i. **Self-Dealing**
 - ii. **Usurping Opportunities**
 - iii. **Undisclosed Profits** at partnership expense
- b. **Rights Against Other Partners** (These are exclusive; cannot sue for breach, etc.)
 - i. **Accounting** – Seek payment from breaching partner
 - ii. **Contribution** – A partner overpaying for debts can get contributions from other partners.
- c. **Partnership Property**
 - i. Ownership vests in surviving partners upon death.
 - ii. **Management right** and **partnership property** *belong to the partnership*, thus cannot be assigned.
 - iii. Interests in **share of profits and surplus** are *personal property*, thus assignable.
- d. **Division of Rights/Responsibility** (Defaults; all modifiable by K)
 - i. **Management** – Equal
 - ii. **Salary** – None, unless winding up the partnership
 - iii. **Profits** – Equally
 - iv. **Losses** – Same as profits

4. Dissolution, Priority in

- a. **Outside Creditors**
- b. **Inside Creditors**
- c. **Capital Contributions** – Must be paid, even if it results in a loss.
- d. **Profits/Losses**

AGENCY

1. Principal Liability for Agent Torts

a. **Principal-Agent Relationship**

- i. **Assent**
- ii. **Benefit**
- iii. **Control**

b. **Scope of Representation – Detour v. Frolic and Intent to Benefit Principal**

c. **Special Situations:**

- i. **Sub-Agents** – Generally no assent or control.
- ii. **Borrowed Agents** – Generally no control.
- iii. **Independent Contractors** – Generally no control.
 1. **UNLESS** ultra-hazardous activity **OR** estoppel

2. Principal Liability for Agents' Contracts

a. **Actual Express Authority** (writing required if interest in land lasting more than 1 year)

- i. Revoked by unilateral act of either party **OR** incapacity/death of principal.

b. **Actual Implied Authority**

- i. **Necessity**
- ii. **Custom**
- iii. **Prior Dealings**

c. **Apparent Authority**

d. **Ratification**

- i. Principal cannot alter terms of K.

e. **EXCEPTION:** If partially disclosed principal, Agent can be liable despite authority.

3. Agent's Duties to Principal

a. **Exercise Reasonable Care**

b. **Obey Reasonable Instructions**

c. **Duty of Loyalty**

- i. self-dealing
- ii. usurping opportunity
- iii. secret profits

NY PRACTICE**1. Statute of Limitations****a. The Statutes**

Period	Claims	Comments
20 Years	Action on judgment	
10 Years	Action to recover realty Action by victim against convicted D, serious crime	Same as Adverse Possession From date of conviction
7 Years	Action by victim against convicted D, any crime	From date of crime
6 Years	Contracts (other than UCC art. 2) Indemnity/Contribution Fraud Equity Action	From date of breach From date payment made Or w/i 2 yrs of discovery if longer
5 Years	Action by rape-related victim.	From later of date of crime or end of criminal proceeding.
4 Years	UCC art. 2 Contracts	Accrues on tender
3 Years	Negligence/Strict Products Property damage (conversion/replevin) Toxic Substances Malpractice (except med-mal)	Accrues on actual or constructive discovery
2 ½ Years	Med mal	From injury or end of continuous treatment; 1 yr from discovery of foreign object
2 Years	Wrongful Death	From date of death IF underlying personal injury claim valid; also one year from end of criminal proceedings against D.
1 Year 90 Days	Claims against municipal defendants	Notice of claim w/i 90 days, else failure to state cause of action
1 Year	Intentional torts to the person	
4 Months	Art. 78 proceedings	

b. Tolls and Extensions

i. **D's Absence** – tolled if absent at accrual or for 4 mo. UNLESS P has PJ s.t. D could be served elsewhere

ii. Infancy or Insanity

1. Original SoL \geq 3yr, longer of 3yr from end of disability or original SoL.
2. Original Sol < 3yr, original SoL from end of disability.
3. EXCEPT – Med-mal must be commenced w/i 10yr of accrual.

iii. Death**1. Potential Ps**

- a. **Survival Claim** – Longer of SoL or 1yr from death.
- b. **Wrongful Death Claim** – 2yr from death if decedent had timely cause at TOD.

2. Potential Ds – 18mo added

iv. **P gets 6mo from date of dismissal UNLESS** res judicata, discontinued by P, neglect to prosecute, lack of PJ

c. Borrowing Statute

i. Non-NY Ps gets shorter of NY SoL and SoL of jurisdiction where claim arose.

2. Subject Matter Jurisdiction

- a. **Supreme Court** – Can handle anything other than suits against the state.
- b. **NY Court of Claims** – Claims against NY State. Bench trial only. No impleaders.
- c. **Family Court** – CANNOT do matrimonial action

3. Commencement – non-compliance results in jurisdictional defect.

- a. **Filing of Process** – w/ court clerk (Supreme Court clerk = county clerk)
 - i. **Summons & Complaint**
 - ii. **Summons & Notice** – Brief statement of nature of action, relief sought, amount if \$ unless med-mal.

4. Service of

- a. **Process** w/i 120 days of filing process. Can extend w/ (i) good cause & (ii) justice warrants extension.

i. **Who/When**

1. **Served by** anyone 18+ and not a party
2. **Served any day except Sunday** or Sat if P knows D observes Sabbath

ii. **Service on Individual or Corporation**

1. **Personal Delivery** – refusal irrelevant
 - a. **If Corp**, service on officer; director; designated agent; managing agent; cashier or assistant cashier.
2. **Agent Specifically Designated**
3. **First-Class Mail + Acknowledgement** effective if D signs and returns form w/i 30 days.

iii. **Service on Individual Ds**

1. **Leave & Mail** –w/i 20 days of each other; both w/i 120 day period. Must file proof of service.
 - a. Deliver to person of *suitable age and discretion* (need not be D or an adult) at actual dwelling or actual place of business.
 - b. Mail to last known dwelling or actual place of business.
 - c. **Service Complete** 10 days after filing proof of service. Can file after 120 days.
2. **Affix & Mail (Nail & Mail)** –w/i 20 days of each other. Must file proof of service.
 - a. Affix to door of actual dwelling or actual place of business
 - b. Mail to last known dwelling or actual place of business
 - c. **BUT** must have tried both Personal Delivery and Leave & Mail before using this method.
 - d. **Service Complete** 10 days after filing proof of service. Can file after 120 days.
3. **Expedient Service (Court Invented Service)** – Reasonable alternative method (e.g. email) if necessary
4. **Service on Infants and Mentally Incapacitated**
 - a. **Parent; Guardian; Custodian; Adult spouse**
 - b. **If infant 14+ or incapacitated w/ court appointed guardian**, serve both infant and adult
5. **Service outside NY** (NY action, use NY methods; irrelevant if that juris. recognizes nail & mail etc.
 - a. **Service by 18+ NY resident non-party;**
 - b. **Service by anyone authorized to serve in that jurisdiction; or**
 - c. **Any licensed attorney in that jurisdiction.**

iv. **Service on Corporations**

1. **Service on Secretary of State**
 - a. **Domestic Corp or Licensed Foreign Corp** – Personally deliver 2 copies to NY Secretary of State.
 - b. **Unlicensed Foreign Corp** – Personally deliver 1 copy to NY Secretary & certified mail 1 copy to D.
- v. **Non-Resident Motorist Statute Service** – 1 copy to NY Secretary of State, 1 copy to foreign D by certified mail

b. **Interlocutory Papers**

- i. **Regular Mail** – Must use Post Office or Depository in NY, under USPS Control

- ii. **Personal Delivery**
- iii. **Fax, if consented; must mail as well**
- iv. **Overnight Courier**

5. Personal Jurisdiction

- a. **General Jurisdiction** (Place of claim irrelevant; Can sue for accident in NJ w/ NJ parties)
 - i. **Presence in NY** – Personal delivery to D while D in NY.
 - ii. **Doing Business in NY** – NY or licensed foreign corps, as well as unlicensed corps w/ agents doing systematic, ongoing commercial activity in NY. *Can probably be used to get jurisdiction over individuals or partnerships.*
 - iii. **Domicile in NY** – NY domiciliaries at time action commenced
- b. **Specific Jurisdiction** (Claim specific to D's NY activity, P's NY Injury or Contract)
 - i. **Long-Arm Jurisdiction** – Minimum Contacts standard of jurisdiction
 - 1. **NY Transaction** gave rise to claim. Numerous phone/email/etc. can suffice
 - 2. **Contract to Provide Goods/Services in NY** – One-shot phone call or promise to pay insufficient
 - 3. **Tort in NY**
 - 4. **Tort Outside NY Causing NY Injury w/ Add'l Link** (solicits business in NY, derives revenue from NY, or should expect an act to have consequences in NY **AND** derives revenue from interstate/nation commerce)
 - 5. **Use or Possession of NY Real Property**
 - 6. **DUE PROCESS CONCERN:** conduct purposefully directed to NY s.t. D should reasonably expect suit in NY
 - ii. **Non-Resident Motorist Statute**
 - 1. **Service** - 1 copy to NY Secretary of State, 1 copy to foreign D by certified mail
 - 2. **Jurisdiction over Operator & Owner** if gave permission, regardless of owner's connection w/ NY
 - iii. **Consent** – Can consent to jurisdiction in a Contract
- c. **Matrimonial Jurisdiction**
 - i. **Divorce** – P-Spouse **NY Domiciliary** – NY has *in rem* jurisdiction over other spouse
 - ii. **Support** – P-Spouse **NY Resident** – Matrimonial Long Arm Statute; requires **Personal Service** w/o permission
 - 1. **NY Matrimonial Domicile**
 - 2. **D abandoned P in NY**
 - 3. **D's Monetary Obligation Accrued under NY Agreement**
 - 4. **D's Monetary Obligation Accrued under Laws of NY**
 - iii. **Residency Requirement** – Failure to satisfy -> Failure to State a Cause of Action
 - 1. **Both Spouses NY Residents at Commencement & Action has NY Grounds** – No requirement
 - 2. **Either Spouse 1 Year Resident AND NY Marriage, NY was Matrimonial Domicile, OR NY Grounds**
 - 3. **Either Spouse 2 Year Resident**

6. Venue

- a. **Proper Venue**
 - i. **Action Affects Real Property** – County of that property
 - ii. **All Other Actions** – NY County where a party resides. If no residents, any county.
- b. **Improper Venue** – Jurisdictional Defect. D's recourse to demand change of venue.
 - i. **P Consents to Change** – Automatic
 - ii. **P Objects or Fails to Respond** – D must make motion
- c. **Other Reasons to Change Venue**
 - i. **Forum Non Conveniens**
 - ii. **Impartial Trial** in that County

7. **D's Response** – Due in? NY personal service, 20 days; Mail & Acknowledge, 20 days from ack., else 30 days
- a. **Response to Summons & Complaint**
 - i. **Answer** – waives Lack of PJ defense
 1. **Denials** – omission of denial is implied admission
 2. **Affirmative Defenses** – omission waives defense if not in Motion to Dismiss list
 3. **Cross-Claims** – need not relate to primary claim
 - ii. **Pre-Answer Motion to Dismiss – DOWNFALL** (using any of these bars a later Lack of PJ motion)
 1. **Documentary Evidence** – must stand alone, e.g., mortgage, deed, contract, etc.
 2. **Other Action Pending** – same parties & cause of action
 3. **Want of Capacity of P**
 4. **Non-Joinder of Necessary Party** – e.g. joint property owner – cannot be waived
 5. **Failure to State a Cause of Action** – think 12(b)(6) – cannot be waived
 6. **Affirmative Defenses – SPARERIBS**
 - a. **SoL**
 - b. **Payment**
 - c. **Arbitration & Award**
 - d. **Res Judicata** – Claim Preclusion
 - e. **Estoppel**, Collateral – Issue Preclusion
 - f. **Release** – (partial) payment for release of obligation
 - g. **Infancy of D**
 - h. **Bankruptcy Discharge**
 - i. **Statute of Frauds**
 7. **Lack of Jurisdiction** – Improper commencement, filing, jurisdictional basis; Lack of PJ waived upon answer
 - a. Pleading improper service requires SJ motion w/i 60 days
 8. **Lack of Subject Matter Jurisdiction** – cannot be waived
 9. **SUGGESTION**: make pre-answer Lack of PJ motion and no DOWNFALL defenses
 - b. **Response to Summons & Notice**
 - i. **Must Serve P with Notice of Appearance & Demand for Complaint**
 - ii. **P's Complaint w/i 20 days** – Can extend if (i) reasonable excuse and (2) affidavit of merit of P's claim
 - iii. **D has 20 days to serve Answer or Pre-Answer Motion to Dismiss**
 - c. **Amendments to Pleadings**
 - i. **One as Matter of Right for each party w/i 20 days of D's answer**
 - ii. **Motion for Leave to Amend** generally granted unless adverse party shows prejudice due to change in position
8. **Third-Party Practice – Contribution & Indemnification**
- a. **Third Party Practice (Impleaders)**
 - i. **Procedure:**
 1. D joins TPD by filing and serving third-party complaint and all prev. filings on TPD w/i 120 days of filing
 2. TPD must serve third-party answer on all appearing parties. Same response time as normal D.
 3. P may amend complaint to include TPD w/i 20 days of service of third-party answer unless permission
 - ii. **Relation Back** – P's SoL valid if i. same transaction as interpleader claim, ii. P's claim valid when interpleaded if w/i 3 years of accrual.
 - b. **Indemnity – Contract or Implied-in-law** (Products retailer indemnified by mfr.; car owner by driver; etc.)
 - c. **Contribution** – J&S Liability – In NY available in all torts, irrespective of intentional wrongdoing
 - i. Each D liable to P for whole amount, can collect from other Ds up to that D's % of total by:

1. Cross-Claim
2. Impleading
3. Separate Action
- ii. TDP may be held liable for contribution if no direct liability to P if committed tort that contributed to damages
- iii. **Settlements:** Non-settling Ds' liability reduced by larger of settlers' equitable share **OR** settlement amount
 1. **Settling party cannot get contribution from non-settler AND VICE VERSA. Can get indemnification.**
- iv. **EXCEPTIONS**
 1. **Employment:** no contribution from D-Employer for TPD's liability to P-Employee **UNLESS** grave injury
 2. **Can get contribution from D where SoL on underlying tort has run** (e.g. from negligent doctor)
 3. **CPLR Art. 16** (Modifies J&S Liability)
 - a. **Joint tortfeasor not liable for others' non-economic damages if 50% or less at fault**
 - b. **EXCEPT** if tortfeasor has/does
 - i. **Intent or Recklessness**
 - ii. **Released Hazardous Substance into Environment**
 - iii. **Drivers & Owners of Motor Vehicles OTHER THAN Police or Fire Vehicles**

9. Motion Procedure

- a. **Motions on Notice** – Most notices qualify; Notice of motion + Affidavits of entitlement + Memo of law
 - i. **Motion Made upon Service**
 - ii. **Papers presented to court (and hearing, if applicable) on Return Date or Hearing Date**
 - iii. **8 days between Service and Return Date**
 - iv. **Order to Show Cause** – preliminary *ex parte* order directing other party to show cause why should not grant
 1. Judge can specify **Earlier Return Date**
 2. Judge can grant immediate **Stay of Proceedings** or **TRO**
 3. **Statute may require it**
- b. **Deciding Order** – Prevailing party must serve other parties w/ order to give effect to order
 - i. **Appeal** from interlocutory order or judgment, file and serve notice of appeal w/i 30 days
- c. **Ex Parte Motion** – Requires express statutory authorization, e.g. expedient service
 - i. **Non-Appealable** – aggrieved party must make motion to vacate; refusal to vacate can be appealed

10. Summary Judgment – No genuine issue of material fact; filed w/i 120 days of note of issue w/o good cause

- a. Usually must be after answer **EXCEPT**
 - i. **Conversion of Motion to Dismiss**
 - ii. **Motion for SJ in Lieu of Complaint** (small dunk; based on instrument for cash payment or foreign judgment)
- b. Can be partial (on single issue)
- c. Must be supported with affidavits (of personal knowledge), documentary evidence or discovery materials
- d. Other party opposed by producing evidence of triable issue of fact

11. Provisional Remedies – Court order required for all but Notice of Pendency

- a. **Attachment** – Lien on real or personal property in NY
 - i. **Actual Seizure OR Constructive Seizure** – Garnishee (e.g. bank) locks account
 - ii. **Preliminary Requirements**
 1. **P seeking \$\$ damages**
 2. **D is unlicensed foreign corp or [non-domiciliary AND non-resident] OR P about to conceal/remove w/ intent to defraud or frustrate judgment**
 - iii. **Requirements of Motion**
 1. **Affidavits showing grounds above**

2. **P Demonstrates probability of success on merits**
 3. **Undertaking** – Bond to indemnify D against damages
 - a. D entitled to damages if attachment wrongfully obtained or D wins on merits.
 - iv. **If Ex Parte:**
 1. **Due Process requires Prompt Hearing**
 2. **P must make Notice to Confirm Ex Parte Order of Attachment** by order to show cause
 - a. **D unlicensed foreign corp. or non-domiciliary AND non-resident: 10 days** from ex parte motion
 - b. **D defrauding/frustrating: 5 days** from ex parte motion
 - b. **Preliminary Injunction**
 - i. **Preliminary Requirements**
 1. **P seeking Permanent Injunction; OR**
 2. **D threatens to Harm P's Interest in Subject Matter of Action** (need more than \$\$ damages)
 - ii. **Requirements of Motion**
 1. **Affidavits showing grounds above**
 2. **P Demonstrates probability of success on merits**
 3. **Undertaking**
 - iii. **Temporary Restraining Order** can be requested ex parte if P demonstrates significant prejudice if notice to D
 - c. **Temporary Receivership** – Person appointed to manage D's property pending outcome; must be on notice
 - i. **P's claim for Specific Property AND Danger D will Destroy Value of that Property**
 - d. **Order to Seize Chattel (replevin)**
 - i. **P must be Seeking Replevin**
 - ii. **Requirements**
 1. **P Demonstrates Likelihood of Success**
 2. **Undertaking**
 - iii. **Can be made Ex Parte if**
 1. P demonstrates immediate threat of loss of chattel
 2. Follows up w/ Order to Show Cause to Confirm Ex Parte Order w/i 5 days of impoundment
 - e. **Notice of Pendency (lis pendens)** – Notice that secures timing of lien pending outcome
 - i. **Requires Action to Affect Title/Possession of Real Property** – statutorily required for mortgage foreclosure
 - ii. **Completed by Filing with County Clerk where Property is** – provisional remedy w/o court order
 - iii. **Effective for 3 years; May extend for 3 yrs before expiration.** If foreclosure, can move to extend after expiry
- 12. Trial Procedure & Res Judicata**
- a. **Trial Procedures**
 - i. **Matter on Court Calendar** when either party serves & files notice of issue, which invokes 120 day SJ rule
 - ii. **Obtain jury** by demanding in note of issue, or serving and filing demand w/i 15 days of note of issue
 - iii. **Jury has 6 Members. Need 5 votes for a verdict.**
 - iv. **Right to Jury Trial When**
 1. **Action seeking solely \$\$ damages**
 2. **Replevin**
 3. **Claim to Real Property**
 4. **Annulment of Marriage**
 5. **Divorce, on Issue of Grounds** – not on support or custody
 - b. **Res Judicata** (Claim Preclusion) – barred if arise from same transaction *unless* one suit marital status related
 - c. **Collateral Estoppel** (Issue Preclusion) – **Same Issue, Necessarily Litigated, Full & Fair Opportunity to Litigate**

- 13. Special Proceedings** – Accelerated proceeding resulting in judgment ASAP; Requires statutory authorization
- a. **Petitioner (P) files petition**
 - b. **Service as above w/i 15 days**
 - c. **Notice of Petition advises Respondent to Answer and Appear on set Date, not less than 8 days from service**
 - d. **Affidavits from both parties**
- 14. ADR – Public Policy of NY Strongly Favors Arbitration** and other ADR
- a. **ONLY these issues go to court:**
 - i. **Did Parties Agree to Arbitrate?**
 - ii. **Is Dispute w/i Scope of Arb. Clause?**
 - iii. **Is Arb. Clause Valid?** Invalid if fraud, duress, or coercion related **specifically** to agreement to the clause
 - iv. **Has Express Condition Precedent been Satisfied?**
 - v. **Statute of Limitations** (Note: This is not true in Federal Practice)
 - b. **Move to Stay Arbitration w/i 20 days of Receipt of Notice of Intention to Arbitrate**
 - c. **Bound by Arbitrator’s Decision EXCEPT** for cases of
 - i. **Corruption/Fraud/Misconduct in Arbitration;**
 - ii. **Partiality or Bias of Arbitrator Chosen to be Neutral**
 - iii. **Arbitrator Exceeded Powers**
 - d. **Other Forms of ADR s.a. Mediation, Neutral Evaluation and Summary Jury Trial not binding by definition**
- 15. Art. 78 Proceedings** – Review of action or inaction of (quasi-)governmental officer or body (includes corporations)
- a. **Procedure similar to special proceeding, only requires 20 days notice**
 - i. **Must be brought in Supreme Court**
 - ii. **4 mo SoL from receipt of decision challenged**
 - iii. **Declaratory or Injunctive Relief or Incidental Monetary Damages**
 - b. **Mandamus to Compel** – Order to perform non-elective act required by law
 - c. **Prohibition** – Stop judicial office from exercising power that **grossly exceeds** jurisdiction
 - d. **Certiorari** – Review of “trial-type” hearing – one w/ testimony under oath w/ right of cross-exam
 - i. **Was agency’s determination supported by substantial evidence in the record?**
 - e. **Mandamus to Review** – Review of admin. actions not covered by previous 3 categories; usually non-trial type
 - i. **Was agency’s determination arbitrary and capricious?**

CORPORATIONS

1. Formation

- a. **At least one adult human incorporator** delivers certificate to the Dept. of State & hold organizational meeting.
 - i. **Organizational Meeting** adopt bylaws (considered shareholder bylaws) and elect initial directors.
- b. **Certificate of Incorporation** is a contract between the corp and both shareholders and the state.
 - i. **Corporate Name** must include "Corporation, Limited or Incorporated"
 - ii. **Address** – only the NY county where office is located.
 - iii. **Agent** – must specify NY Secretary of State as agent, along w/ address to forward process to.
 - iv. **Name & Address of Incorporators**
 - v. **Statement of Duration** (Optional; default is perpetual)
 - vi. **Corporate Purpose** (usually very broad; *ultra vires* acts -> invalid Ks, shareholder injunction, manager liability)
 - vii. **Capital Structure** – Authorized Stock, # of shares per class, info on par value, rights, preferences & limitations
- c. **Corporate Identity**
 - i. **Corp's Internal Affairs** governed by NY law.
 - ii. **Legal Powers**
 1. **Contributions:** Political of \$5,000/year/candidate; Unlimited charitable.
 2. **Guaranty loans** not in furtherance of business w/ 2/3 shareholder vote.
- d. **Defacto Corporation was thought to be dead in NY. NY rejects Corporation by Estoppel.**
- e. **Bylaws** are optional. Set by incorporators and modified thereafter by shareholders unless cert. says otherwise.
- f. **Pre-Incorporation Contracts**
 - i. **Corporation** only liable if it expressly or impliedly adopts (knowingly accepts a benefit)
 - ii. **Promoter** always liable.
- g. **Secret Profit Rule** – Promoter may not make secret profits in dealing w/ corporation
 - i. **Property Acquired Before Becoming Promoter:** Profit = Price Paid by Corp – FMV.
 - ii. **Property Acquired After Becoming Promoter:** Profit = Price Paid by Corp – Price Paid by Promoter.
- h. **Foreign Corporations** must qualify, and cannot sue in NY until qualifies and pays back fees, taxes, etc.

2. Issuance of Stock

- a. **Subscriptions** – Written, signed offers to buy stock from the corporation
 - i. **Pre-Incorporation Subscriptions Irrevocable for 3mo.**
 - ii. **Post-Incorporation Subscriptions Revocable until acceptance.**
 - iii. **Subscriber Default**
 1. **If Subscriber paid less than half**, corp. keeps payment and shares become authorized and unissued.
 2. **If Paid > Half**, corp. must try to sell. If unable, same as 1 above. If able, subscriber gets excess less costs
- b. **Consideration** must be \$\$, services already performed, binding obligation to do either in future, or property
 - i. **Cannot issue for less than par** if not treasury stock
 - ii. **Board determines value** – cannot involve fraud.
 - iii. **Payment with improper form or for less than par creates watered stock**
 1. **Directors liable if knowingly authorized**
 2. **Watered Purchaser liable**
 - iv. **Preemptive Rights** – When a shareholder has right to maintain their percentage upon new issuance
 1. Covers only issuance of common stock for money (cash/check)
 2. By default, includes only authorized (not treasury) shares issues >2 years after formation

3. Directors & Officers

a. Directors

- i. **Number** set by i. Bylaws, ii. Shareholder act or iii. Board, if shareholder bylaw allows. **One director** by default.
- ii. **Classified Board** – up to 4 classes, one class elected per year. Means 4-year turnover.
- iii. **Removing Directors** - Default, only shareholders and only with cause.
 1. **Vacancies** filled by Board unless removed by shareholders with cause.
- iv. **Board Actions** – Any action not properly taken is void unless ratified by proper act.
 1. **Unanimous Written Consent**
 2. **Board Meeting**
 - a. **Notice** to all directors not required for regular meetings if time & place set in bylaws; Special meeting must state place & time, but need not state purpose.
 - i. **Failure of Notice** can be remedied by signed writing or by the dir. attending w/o objection.
 - b. **Quorum** of a majority *of the seats on the board required for the entire meeting*.
 - i. **Passes by at least half of quorum.**
 - ii. **Modifications:**
 1. **Quorum** can be modified but never less than 1/3. Must be in cert. to increase.
 2. **Passing** can be raised only, and only in certificate.
 3. **Committees** can be created if cert. or bylaws allow to do anything except:
 - a. **Set Director Compensation**
 - b. **Fill Vacancies**
 - c. **Submit Fundamental Changes to Shareholders**
 - d. **Amend Bylaws**
- v. **Directors' Duties**
 1. **Duty of Care** – discharge duties in good faith as a reasonably prudent person
 - a. **Nonfeasance** requires corporate loss.
 - b. **Misfeasance** uses BJR – decision reasonably informed and has rational basis.
 2. **Duty of Loyalty** – Fiduciary Duty – Conflicts of Interest
 - a. **Duty:** Must act in good faith with the fairness, morality and honesty required of fiduciaries
 - b. **Transaction Set Aside Unless:**
 - i. **Deal was Fair & Reasonable**
 - ii. **Interest was known and deal approved** by shareholders or disinterested board.
 - c. **Competing Ventures not allowed**
 - d. **Corporate Opportunity** – Corp's board has right of first refusal.
 3. **Directors Liable Unless Dissent** – dissent in minutes, writing to secretary @ meeting, or prompt reg. letter.
- b. **Officers** – Selected by Board **unless** cert allows shareholder election.
 - i. Owe Duties of Care and Loyalty
- c. **Indemnification of Officers & Directors** – Indemnified by corp. for official actions **unless** liable to corp, or no judgment in officer's favor (latter is permissive; requires good faith and reasonable belief acting in best interest)
 - i. **Cert. may eliminate liability UNLESS:** Bad faith, intentional misconduct, improper financial benefit, approved unlawful distribution/loan.

4. Shareholders

- a. **Cannot manage the corp.** unless provision in cert. close corporation and VERY clear notice to shareholders.
- b. **Courts protect minority shareholders in close corps** b/c they have no protections – can't sell.
- c. **Liability for Corporate Actions**
 - i. **Piercing the Corporate Veil** in NY is moot if corp. has any mind, existence, or will of its own.
 1. **Valid if corporation is undercapitalized**
 - ii. In close corp., **10 largest shareholders liable for corp. employee wages.**
- d. **Derivative Suits** – Shareholder as P; Could the Corp have brought suit?
 - i. **Corp. gets any recovery** unless would return money to the “bad guys”
 - ii. **Requirements:**
 1. Stock ownership *when claim arose* unless through operation of law (inheritance, divorce, etc.)
 2. Shareholder adequately represents interests of corp. and shareholders
 3. May have to post bond unless owns > 5% or \$50k in stock.
 4. **Demand** must be brought unless futile
 - a. **Futile** if (i) majority of board interested, (ii) board did not inform itself of transaction or (iii) fails BJR
 - i. **Despite refused demand, can sue if** majority interested or procedure incomplete or inadequate.
- e. **Shareholder Voting**
 - i. **Vote goes to owner on record date**, which is 10-60 days before meeting.
 1. Estate Executor or Proxies can vote instead. Proxy must be written and signed (email OK)
 2. A new proxy revoke an old one unless proxy has an interest (e.g. bought the shares)
 - ii. **Shareholder Action through:**
 1. **Unanimous written, signed consent.**
 2. **Meeting**
 - a. **Notice** 10-60 days before meeting specifying time & place, and whether appraisal rights invoked.
 - b. **Quorum required to start but not continue meeting.**
 - c. **Default: Majority of quorum wins.**
 3. **Restrictions on Transfer** are generally upheld unless unreasonable. (undue restrain on alienation)
 - iii. **Right to Inspect & Copy Books**
 1. Shareholder Meeting – 5 days written demand, corp can refuse unless you furnish affidavit of intent
 2. List of Directors/Officers – 2 days notice
 - iv. **Distribution** – dividend, repurchase, redemption of shares
 1. **No shareholder right to a distribution until it is declared**
 2. **Dividends**
 - a. **Preferred** – Pay first, but not more than. Pay back unpaid if *cumulative*.
 - b. **Preferred, Participating** – treat as preferred, then participates in remainder from scratch
 3. **Funds for Distributions**
 - a. **Surplus** = Assets – Liabilities – Stated Capital
 - b. **Stated Capital** = Excess upon issuance less par.
 - i. If par not declared, board has to set it above zero w/l do days of issuance.

5. Fundamental Corporate Changes

- a. **Dissent** – Right of appraisal if not publicly traded
 - i. **Written Objection before vote**
 - ii. **Don't vote for the proposal**
 - iii. **Written demand to be bought out**
- b. **Substantial Changes to Certificate**
 - i. **Board and approval by Majority if Shareholders *entitled to vote*.**
 - ii. **If changing supermajority *shareholder quorum or vote*, need 2/3 shareholder approval.**
- c. **Merger** – Requires both board and shareholder approval from both corps. unless short-form (A owns 90% of B)
- d. **Transfer of Substantially All Assets** – Board and shareholder approval of selling corp.
 - i. Buyer has no liability w/o fraud, express agreement, or mere continuation of seller.
- e. **Dissolution** – Voluntary requires majority of shares entitled to vote. No board approval required.
 - i. **Involuntary** if board/shareholder action declares insolvency, inability to elect directors for 2 years.

6. Controlling Shareholders

- a. **Close Corp** controlling shareholders owe fiduciary duty to minority shareholders
- b. **Can sell shares w/ control bonus, unless:**
 - i. sold to looters w/o reasonable investigation
 - ii. sells defacto corporate asset
 - iii. sells a position on the board
- c. **Freeze Outs** if merging corp w/ another that they own, must show:
 - i. **Fair Price**
 - ii. **Fair Dealing**
- d. **Insider Trading** – Corp can sue to disgorge profits, as can purchaser/seller of disputed shares.

PROFESSIONAL RESPONSIBILITY

1. Regulating Lawyers

- a. **NY Rules of Professional Conduct** – Modified ABA Model Rules, NY can discipline firms.
- b. **Investigations** by Departmental Disciplinary Committee or and Department of Appellate Division
 - i. **Complaints are Privileged**
- c. **Types of Discipline**
 - i. **Letter of Admonition** from disciplinary committee
 - ii. **Public/Private Censure** by Court
 - iii. **Suspension**
 - iv. **Disbarment**
- d. **Disclosure in Bar Application**
 - i. **You:** Truth and full disclosure
 - ii. **Others:** Good Applicants – Aspirational. Bad Applicants – must report on moral turpitude, dishonesty, etc.
- e. **Regulation After Admission:** When you know of violation, must (i) report and (ii) be available to testify.
 - i. If lawyer is client, confidentially trumps duty to report.
- f. **Choice of Law:** State of principal office, or place of primary impact.

2. Practice of Law

- a. **MUST Reject** if client's position obviously frivolous from start or lawyer impaired.
- b. **MAY Reject** if turns out frivolous, criminal, fails to pay, client best served by withdrawal.

3. Practice Establishment

- a. **Firm Name** must be appropriate. Only current or dead members – permanent absence disqualifies use of name.
- b. **Specialists** must be approved by private certification organization. Must name org. in any ads.
- c. **Advertisements** must include Name, Address, Phone Number, Label of Attorney Advertising
 - i. **May NOT** include undisclosed endorsements/actors, promised outcomes
 - ii. **TV/Radio** must be stored for 3 years; **Internet** stored for 1 year.
 - iii. **Contingent Fees** may be included if terms & basis clearly stated, as well as whether client pays costs.
 - iv. **Solicitations may not target a specific person or group** unless prior relationship w/ lawyer.
 - v. **Targeted Mailings** may be used if include "Attorney Advertising"
 - vi. **Wrongful Death/Personal Injury** – No solicitation for 30 days, unless filing deadline < 30, then 15 days.

4. Lawyer/Client Relationship

- a. **Maintain Confidences UNLESS** required, prevents crime/death/harm, to obtain counsel
- b. **Client Property** must be stored in a separate account or a **bonded warehouse**.
- c. **Trial Publicity**
 - i. **No Prejudicial Information BUT** have **Right of Reply**
 - ii. **May State Dry Facts**, warn of **Danger**, give info to apprehend accused.

5. Conflicts of Interest

- a. **Conflicts** – Prudent lawyer would take after all (i) agree after (ii) lawyer explains risks & (iii) written agreement.
- b. **Testimony** on behalf of client only if matter uncontested, re: atty fees, or substantial hardship if atty withdraws.
- c. **Interest in Publication Rights Prohibited** but can take interest after all appeals.
- d. **May not Mortgage Client's Property UNLESS**
 - i. **Retainer agreement provides for security interest UNLESS consenting spouse remains there & holds title**
 - 1. **Notice of Security Interest must be given to other spouse**
 - 2. **Court Approves**
- e. **No Loans to Clients** unless indigent or pro bono.
- f. **Doing Business w/ Clients** must advise client to get independent counsel and get informed, written consent.
- g. **Representing Corporations** – You represent the corp, not the officers/employees.
 - i. Must take steps reasonably necessary to protect the corp.'s best interests.
 - ii. **Report Securities Violations up to CLO.**

6. \$\$ Handling Money

- a. **Separate Accounts! No Comingling!**
- b. **No Contingency Agreements in Criminal Cases or Domestic Cases**
 - i. **Collection of past due alimony IS a domestic case in NY**
- c. **Written Letter of Engagement if Fees \geq \$3k** containing scope, explanation of fees, right to arbitrate.
 - i. **Domestic Relations Matters Stricter**, no non-refundable fees.
- d. **Referral Fees Unethical**
- e. **Retainer**
 - i. **Advance on Fees** (belongs to client)
 - ii. **Availability Retainer** (belongs to attorney)
- f. **Fee Disputes Subject to Arbitration at Client's Option**

7. Litigation Conduct

- a. **Communication**
 - i. **Jury:** Nothing outside courtroom during trial.
 - ii. **Judge:** De minimum unless emergency or settlement conference.
 - iii. **Adverse Party:** Only through lawyer.
 - iv. **Witnesses:** No issue unless corp. witness who may lead to corp. liability.
- b. **Adverse Authority** – duty to disclose contrary authority from only controlling jurisdiction.

CONFLICTS OF LAWS

1. **Recognition & Enforcement of Judgments** – Rendering v. Recognizing State
 - a. **Sister State Judgments** – Satisfies **Full Faith & Credit** and **No Valid Defenses**
 - i. **Full Faith & Credit Requirements**
 1. **Valid Rendering Jurisdiction** over both parties and subject matter.
 2. **Final Judgment** – Pretty much anything except *future* (not owed) alimony or child support.
 3. **On the Merits** including default and consent judgments
 - ii. **Defenses**
 1. **Judgment is Penal** – criminal sanction or civil fine *given to the government*.
 2. **Extrinsic Fraud** – Could not have been dealt w/ during prior proceeding (e.g., bribed judge)
 - iii. **Non-Defenses** worth knowing to talk about:
 1. **Tax Judgment**
 2. **Judgment Contrary to Public Policy** of recognizing forum.
 3. **Judicial Mistakes**
 4. **Inconsistent Judgments** – Enforce the most recent judgment.
 - b. **Foreign Country Judgments** must have proper **Jurisdiction** and use **Fair Procedures** as measured by the recognizing state law.
 - c. **Family Law Issues**
 - i. **Divorce** – At least one spouse domiciled there. Person attacking domicile has burden; later evidence OK.
 1. **Estopped from Attacking Divorce** if (i) bilateral divorce, (ii) active role, (iii) privity (children), (iv) remarried.
 - ii. **Property Awards** (Alimony/Child Support) – Personal Jurisdiction over party to make payments.
 - iii. **Child Custody** can only be determined – by child’s home state.
2. **Domicile** – **Presence** in the state with **intent to remain indefinitely**. Actions speak louder than words.
 - a. **Death** – Domicile determines law of intestacy, which state gets taxes,
 - b. **Spouses with different domicile** currently allowed – Used to be that woman had domicile of the man.
3. **Choice of Law** – **Significant Contact giving Legitimate Interest**
 - a. **Vested Rights Approach** – Deprecated. Bright-line rule for each area of law, e.g.:
 - i. **Torts** – Place of injury or the wrong (not the place where negligence occurred)
 - ii. **Contracts** – Place of formation
 - b. **Interest Analysis Approach** – On a tie, the forum state wins.
 - i. **Factual Contacts** w/ each state
 - ii. **Different Laws in Issue**
 - iii. **Policy** – Determine which law favors which party
 - iv. **Relate Facts to Policy** – Does party being favored reside in the state w/ beneficial law?
 - v. **Greatest Interest** – If forum disinterested, apply the law that is either the (i) closest or (b) best.
 - c. **Specific Areas of Law**
 - i. **Torts** – Neumeier Rules: Apply law of the place of the injury unless both parties live in the same other state
 - ii. **Contracts** – Can choose place of construction. Validity choice OK if not contrary to public policy of more interested state, there is a substantial relationship to the parties or transaction, and no adhesion.
 1. **NY Large Contracts**: Can bring suit in NY if > \$250k, regardless of contacts. Can specify NY courts if > \$1M.
 - iii. **Real / Personal Property** – Situs (Place) of the property.
 - iv. **Divorce** governed by place of P’s domicile.
 - d. **Do not apply Borrowed Procedural Law: Burden of Proof (unless determinative), Statute of Limitations**

TRUSTS

1. Requirements of an Express Trust

- a. **Settlor** – Anyone over 18 with capacity to contract
- b. **Delivery** – Titled assets must be formally transferred
- c. **Property** – Must be actual property; not just a mere expectancy
- d. **Trustee**
 - i. **Lifetime Trust** – Anyone
 - ii. **Testamentary Trust** – Anyone except those:
 1. **Under 18**
 2. **Judicially Declared Incompetents**
 3. **Convicted Felons**
 4. **Those Incapable b/c of Drunkenness, Dishonesty, Want of Understanding**
 5. **Non-Resident Aliens only if Related to Decedent, with a Co-Fiduciary**
- e. **Beneficiary** must be definite and ascertainable (“Family” and “Next of Kin” sufficient)
- f. **Intent** – Must intend to create enforceable obligation; precatory (wishful) language not enough.
- g. **Lawful Purpose** – Not for crime, property, or contrary to public policy (cannot unduly restrict marriage)
- h. **Validly Executed** – In Writing, Signed by Settlor & Trustee AND Notarized or Signed by 2 Witnesses

2. Types of Trusts

- a. **Revocable Lifetime/Inter-Vivos Trusts** – Avoids guardianship proc. & probate; not taxes if interested settlor
 - i. Settlor cannot be the **sole** beneficiary **AND** the **sole** trustee.
- b. **Pour-Over Gifts** – Testamentary gifts into existing revocable trust, if trust in existence or executed w/ the will.
- c. **Life Insurance** – Either unfunded Ins. Trust w/ trustee as policy beneficiary or testamentary trust w/ “trustee in my will” as beneficiary.
- d. **Bank Accounts**
 - i. **Totten Trust** – Bank account in depositor’s name as trustee (“ITF”) for a named beneficiary
 1. Depositor makes deposits/withdrawals and remainder goes to beneficiary upon depositor death.
 2. **Revocation/Change by notarized writing naming beneficiary & financial inst. delivered to later.**
 3. Depositor’s **creditors** can freely access the trust.
 - ii. **Joint Bank Accounts With Right of Survivorship**
 1. Goes to survivor unless **clear and convincing evidence** of intent not to make a trust.
 - iii. **Uniform Transfers to Minors Act** – Custodian manages as prudent person, paying to minor as deems advisable
 1. Pay remainder when turn 21 (gift post-1996) or 18 (gift pre-1996)
- e. **Charitable Trusts**
 - i. **Beneficiaries must be indefinite and a reasonably large group** (Masses Exception or “orphans in Syracuse”)
 - ii. **Charitable Purpose** – e.g. Health, Education, Religion
 - iii. **Cy Pres** – Trust can be reformed if unable to accomplish initial goal.
 - iv. **Atty. Gen. is indispensable party to and suit and has standing to sue to enforce trust’s terms.**

f. **Non-Trusts**

- i. **Honorary Trusts** – Non-Charitable non-Human trust – Invalid
 - 1. **EXCEPT** for **Pet Trusts** (valid for life of pet) **OR Cemetery Trusts** (considered Charitable)
 - ii. **Constructive Trusts** – Equitable remedy to disgorge unjust enrichment from wrongful conduct.
 - iii. **Resulting Trust** – Equitable remedy
 - 1. **Purchase Money Resulting Trust (NOT in NY)** A buys property, puts in B's name who refuses to return it.
 - a. **NY: No PMRT, but will get Constructive Trust if Clear & Convincing evidence the grantee promised.**
- g. **Statutory Spendthrift Clause** – protects all Income Interests from creditors.
- i. Spendthrift protection for remainder must be explicitly stated.
 - ii. **EXCEPTIONS:**
 - 1. **Necessities**
 - 2. **Child Support/Alimony**
 - 3. Excess Income over necessary for **Support & Education** (scales w/ lavishness of lifestyle)
 - 4. Creditors can get up to **10% Levy** total under CPLR § 5205(e).
 - 5. **Settlor's Interest** is unprotected.

3. **Modification & Termination**

- a. **Modification by Trustees/Beneficiaries** – Modification allowed if Settlor's instructions frustrate Settlor's intent
- b. **Termination by Settlor** – All trusts are irrevocable and unamendable unless right expressly reserved
 - i. **UNLESS consent from all beneficiaries** (<18 or incompetent cannot consent) or "Heirs/Next of Kin"

4. **Trust Administration**

- a. **Trustee's Powers** governed by **NY Fiduciary Powers Act (FPA)**: Can do pretty much anything **EXCEPT**
 - i. **Self-Dealing** absolute rule; includes trustee's family and associated businesses
 - ii. **Borrow Money** from or for the trust; absolute rule
 - iii. **Continue a Business**
- b. **Remedies for Breach** – Beneficiary can **Sue to Remove** (and recover losses in **Surcharge Action**) or **Ratify**
- c. **No Further Inquiry Rule** – **breach of rule against self-dealing is automatic wrong; no defenses.**
- d. **Exculpatory Clauses cannot shield Trustee in Testamentary Trust** (but can in a lifetime trust)

5. **Trustee's Liability in Contract and Tort**

- a. **Contact** – Trustee liable unless explicitly signs *as the trust*.
 - i. If liable, trustee reimbursed if **acted w/i power** and in **course of proper administration** of the trust
- b. **Tort** – Trustee liable for all torts by the trustee or employees
 - i. If liable, trustee reimbursed if **acted w/i power** and not personally at fault.
- c. **Investment Power** governed by Uniform Prudent Investor Act: Modern portfolio theory allows trustee to create a custom-tailored investment strategy.

6. **Rule Against Perpetuities**

- a. **RAP applies to capital interests. Recall RAP Reform Statute, which reduces age contingencies to 21 years.**
- b. **NY Rule Against Suspension of Power of Alienation** – Must be some combination of people who can alienate the property w/i Life in Being + 21.

WILLS

1. **Governing Law: Estates Powers and Trusts Law (EPTL); Surrogates Court Procedure Act (SCPA)**
2. **Intestacy**
 - a. **Priority (Administrator and Distributee)**: Surviving Spouse, Children, Grandchildren, Parents, Siblings, Others.
 - b. **Rule: Spouse gets \$50k + ½ of the residuary. Issue take the remainder.**
 - i. **Distributed by representation (per capita) at each generation** to children of predeceased children
 - ii. **Escheats** if not survived by grandchildren of the decedent's grandparents.
 - c. **Adopted Children lose the birth relationship** for purposes of intestacy **unless**
 - i. **Adopted by spouse** of birth parent, can inherit both from adopting parents and **either** birth parent.
 - ii. **Adopted by relative** (e.g., aunt/uncle) inherit under birth relationship unless decedent was adoptive parent.
 - d. **Non-Marital Children** have full inheritance rights from mother and her family. **Can inherit from father IF:**
 - i. **Legitimation by Marriage, Paternity Suit**, Father files witnessed and acknowledged (notary) affidavit w/ **Putative Father Registry**
 - ii. **Clear & Convincing Evidence AND father openly and notoriously acknowledged the child.**
 - e. **Spouse Share Invalidated** IF Divorce, Abandonment & Lack of Support. – Treat surviving spouse as predeceased.
 - f. **Advancements on Distributions** valid only if (i) contemporaneous w/ gift and (ii) signed by donor or donee
 - g. **Disclaimer** (Can also use in testate situations). Treat disclaiming party as having predeceased the testator.
 - i. **Written and notarized.**
 - ii. **Accompanied by separate affidavit stating no consideration received for disclaimer**
 - iii. **Irrevocable**
 - iv. **Filed w/ Surrogate's Court w/i 9 mo of death.**
 - v. **NOTE: You can disclaim to avoid taxes, creditors, etc. but NOT Medicaid.**
3. **Validity of Wills**
 - a. **Requirements:**
 - i. **Testator 18+**
 - ii. **Signed by Testator** or someone at testator's direction **IN TESTATOR'S PRESENCE**
 - iii. **Signed "at the end thereof"** – anything after the signature is void.
 - iv. **Testator signed or acknowledged signature in presence of each witness.**
 - v. **Publication** – Testator informs each witness that it is T's "last will and testament"
 - vi. **At least TWO witnesses**
 - vii. **"Execution Ceremony"** complete w/i 30 days; begins when first witness signs.
 - b. **Burden of Proof** on person offering will into probate
 - i. **Witness Testimony:**
 1. **One Witness Unavailable** – Other witness can testify
 2. **No Witnesses Available** – proponent must **prove signature of testator and one witness.**
 3. **Will not Self-Proved** – both witnesses must testify
 - ii. **Attestation Clause** is prima facie evidence of facts presented therein. **Must still call the witness.**
 - iii. **Self-Proving Affidavit** – Ws sign sworn statement in presence of atty attesting to relevant facts. Suffices for testimony **unless** an interested party (party adversely affected by will's admission into probate) objects.
 - c. **Interested Witnesses'** bequests are void unless:
 - i. **Two Disinterested Witnesses** exist
 - ii. **Interested Witness would be Intestate Distributee** but for the will – then W gets "whichever is least"

- d. **Foreign Wills Act:** Foreign (non-NY) wills valid in NY if valid:
 - i. **When and Where Executed**
 - ii. **Under NY Law**
 - iii. **Under law of Testator's Domicile at Death or Execution**
- e. **Holographic (T's handwriting; no witnesses) and Noncupative (Oral) Wills generally not Recognized in NY**
- 4. **Revocation** by Subsequent Testamentary Instrument or Physical Act with Intent to revoke
 - a. **If Revoked by Implication** both valid if not at odds; latter will controls
 - b. **Presumption** that missing or damaged will is due to Testator's intentional act.
 - c. **Revival** of previous document by Re-Execution or Codicil
 - d. **Dependant Relative Revocation (DRR)** can revive latter will if not at odds with earlier one
 - e. **Lost Wills Statute** must prove lost or DRR will's provisions by two witnesses
- 5. **Death of Beneficiary During Testator's Lifetime** voids the gift to the beneficiary **UNLESS**
 - a. **Anti-Lapse Statute:** Gift survives if: (**consider interplay w/ Disclaimer**)
 - i. Predeceased was **Testator's issue or sibling**
 - ii. **Predeceased leaves issue** who survive the Testator
 - 1. An adopted-out child who is specifically named by the Testator can still recover.
- 6. **Class Gifts** – Rule of Convenience – Class closes whenever someone can demand the benefit.
 - a. **Class Closes** on end of relevant life: Testator or later life tenant (e.g., "to A for life, then A's children")
- 7. **Simultaneous Deaths** – **Revised Uniform Simultaneous Death Act** - If a beneficiary dies up to five days (120hrs) after the Testator, treat the beneficiary as having predeceased.
 - i. **Joint Property** of two people dying w/i 120 hrs passes as though it were a tenancy in common.
- 8. **Changes in Testator's Family after Will is Executed**
 - a. **Marriage** of the Testator does not affect validity, but may affect distribution through the right of election.
 - b. **"Unmarriage"** of Testator: if **final decree** of divorce, annulment or separation, treat ex-spouse as predeceased
 - i. **Appointment as Child's Guardian not Affected;** Only affects that ex-spouse, not that person's issue.
 - c. **Child after Execution (Pretermitted Child)** that **does not receive through will or settlement**
 - i. **No siblings: Intestate Share**
 - ii. **Siblings: I f nominal amount to siblings, takes as in intestacy. If non-nominal amount to siblings, child takes as if in class w/ siblings (add their gifts, divide by siblings + 1, contribute to pretermitted child pro rata)**
- 9. **Negative Bequests**
 - a. **CL:** Words of disinheritance do **not** apply to property passing by intestacy.
 - b. **NY:** Words of disinheritance **apply** to property passing by intestacy.
- 10. **Variations to Testate Distributions**
 - a. **Satisfaction of Legacies** – equivalent to advancements in intestacy. You need:
 - i. **Contemporaneous writing at time of gift;** AND
 - ii. **Signed by donor or donee**
 - b. **Incorporation by Reference** not allowed. Must be a validly executed codicil.
- 11. **Changes in Distribution of Testamentary Gifts**
 - a. **Abatement (Reduction)** of Legacies – e.g., if T has creditors. Order is:
 - i. **Intestate & Residuary Property**
 - ii. **General Legacies** (\$50k to X; pro rata)
 - iii. **Demonstrative Legacies** (\$50k to X from my B bank account; pro rata)
 - iv. **Specific Legacies** (Greenacre to X)
 - v. **Items Qualifying for Estate Tax Marital Deduction**

- b. **Ademption** (Failure of Gift) – Gifts of specific assets no longer owned fail. **Except:**
 - i. **Property Insurance Proceeds paid after death**
 - ii. **Executory Contract Proceeds paid after death**
 - iii. **Proceeds from Guardian/Conservator’s sale of specifically bequeathed goods**
- c. **Specific Gifts of Encumbered Property** does not exonerate (lift) the lien unless specifically stated in the will
- d. **Bequests of Stock and Securities**
 - i. **Public Company Stock** is a general gift and does not adeem (100 Shares of X Corp to A)
 - 1. **Use of possessive language** (My 100 shares of X corp to A) make it specific, and it can adeem
 - ii. **Close Corp. Stock** is a specific gift and adeems.
 - iii. **Stock Split** makes that stock a specific bequest for purposes of the gift; adeems.
 - iv. **Change in Form but Not Substance** (e.g. A buys B and issues A stock instead) does not affect beneficiary’s gift.
- 12. Non-Probate Assets** – Probate estate is anything owned in T’s name only at TOD, disposed pursuant to will/intestacy
 - a. **Property Passing by Survivorship**
 - b. **Property Passing by Contract** (e.g., Insurance Proceeds, Employee Benefits)
 - c. **Property Held in Trust**
- 13. Elective Share Statute** – **Greater of \$50k or 1/3 of estate** (net probate estate plus all testamentary substitutes)
 - a. **Testamentary Substitutes** (TS LEG UP; **does not include life insurance**)
 - i. **Totten Trusts**
 - ii. **Survivorship Estates** – w/ 3P: Consideration furnished test ($\frac{1}{2}$ if before marriage); w/ Spouse: $\frac{1}{2}$ in, $\frac{1}{2}$ out rule.
 - iii. **Lifetime Transfers** (w/ strings attached)
 - iv. **Employee Pension/Profit-Sharing/Deferred Compensation Plans** (if “qualifies”, only $\frac{1}{2}$ is a T-Sub)
 - v. **Gifts w/i 1yr of death (i) over \$13k and (ii) causa mortis.**
 - vi. **US Gov’t Bonds**
 - vii. **Powers of Appointment** (presently exercisable)
 - b. **Other Beneficiaries Contribute Pro Rata.**
 - c. **Elective Share Trusts** (life estate to spouse)
 - i. **Death before 9/1/1994** – Trust + \$50k outright satisfies elective share.
 - ii. **Death after 9/1/1994** – Trust does not satisfy. Read it through to the residuary.
 - d. **Exempt Property** – Spouse gets up to \$56k “off the top” in addition to elective share.
- 14. Powers of Appointment** – Authority enabling Donee to designate persons who shall take Donor’s property
 - a. **Varieties**
 - i. **General** – Donee can appoint to **anyone**.
 - ii. **Special** – Donee **cannot** appoint to him/herself
 - iii. **Presently Exercisable** – Donee can exercise immediately
 - iv. **Testamentary** – Donee can appoint only by will
 - b. **Presently Exercisable General Appointment is a T-Sub**
 - c. Creditors can only access appointments if (i) donor and donee are the same or (ii) donee or estate can access
 - d. **Recall: RAP** (power must vest, not be exercised), **Suspension Rule** (must be able to transfer in FS in LIB 21), **Statutory Spendthrift Rule** (Income beneficiaries cannot assign by default)
 - i. **Identify the Appointment**
 - ii. **Is the Power Valid?** (RAP (Wait & See Doctrine (**special and testamentary only**); Reformation))
 - iii. **Is the Interest Valid?** (Suspension Rule, Spendthrift Rule)

15. Will Contests

- a. **Mistake** – absent suspicious circumstances, plain meaning of the will will not be overturned.
- b. **Latent Ambiguity** (not obvious; e.g. unclear beneficiary) can be resolved by any extrinsic evidence
- c. **Patent Ambiguity** (obvious; e.g. text and number values don't agree) can be resolved by evidence except testator declarations to third parties.
- d. **Conditional Wills** (If anything should happen to me on this trip...) **argue both:**
 - i. **Conditional Will. Did event happen?**
 - ii. **Non-Conditional will. Statement of what induced creation of will.**
- e. **Contract to Make a Will** requires express statement that B cannot change will after death of A.
 - i. **If contract and B makes new will, probate both & impose constructive trust in favor of 1st will.**
- f. **Testamentary Capacity** – the lowest standard possible. Allows periods of lucidity; requires understanding.
- g. **Insane Delusion**
- h. **Undue Influence can be shown by proving:**
 - i. **Existence & Exertion** of influence
 - ii. **Effect of Influence** was to overpower will of testator
 - iii. **Product** is different (but-for test)
 - iv. **INFERRED FROM** Gift to one in a confidential relationship (e.g. Attorney) ALSO involved in will's preparation
- i. **Attorney-Executor** must provide disclosure that (i) anyone can be executor, (ii) executor gets commission, (iii) estate will also pay any legal fees. Failing that **attorney-executor** only gets **half commission**.
- j. **No Contest (In Terrorem) Clauses given full effect EXCEPT**
 - i. **Claim of Forgery or Subsequent Revocation**
 - ii. **Contest on behalf of infant/incompetent**
 - iii. **Construction Proceeding**
 - iv. **Objection to Court's Jurisdiction**

16. Power of Attorney generally does not extend into grantor's incapacity.

- a. **Durable** extends into incapacity. **General** does not.

SECURED TRANSACTIONS / COMMERCIAL PAPER

1. **Secured Transactions** – **UCC Art. 9** applies to consensual security interests in personalty (goods) or fixtures.
 - a. **Attachment** (Enforceability) requires: VCR
 - i. **Value** be given by the creditor. Can be past value.
 - ii. **Contract** called a security agreement. If debtor in possession of collateral, must have **record** authenticated by debtor that reasonably identifies the collateral.
 - iii. **Rights** in the collateral. Debtor must have rights in the collateral.
 - b. **Perfection of Security Interests**
 - i. **Automatic if creditor possession** of collateral or case of **Purchase Money Security Interest** (retained collateral interest in the thing that is sold)
 - ii. **Filing** gives constructive notice. Need only name & address of debtor and creditor, and desc. of collateral.
 1. **Individual Debtor** – File w/ Sec. of State of principal residence
 2. **Corporate etc. Debtor** – File in state of organization/incorporation
 3. **Realty** (timber, minerals, fixtures, etc.) – File in county realty is in.
 - c. **Priority**
 - i. **Buyer in Ordinary Course** – e.g. buying a guitar from a music store
 - ii. **Perfected Attached Creditor** – Can file early and relate back.
 1. **Purchase Money Security Interest-holder** takes priority over a PAC if, in the case of equipment, the PMSI files w/i 20 days, or in the case of inventory, file and notify the PAC
 - iii. **Lien Creditor**
 - iv. **Non-Ordinary Course Buyer** – e.g. buying a guitar from a mechanic
 - v. **Attached Unperfected Creditor**
 - vi. **General Unsecured Creditor** – Creditor who never takes a security interest.
 - d. **Default**
 - i. **Self-help** so long as you do not breach the peace
 1. Entering debtor's home requires voluntary & contemporaneous consent.
 - ii. **Judicial Action – Writ of Replevin**
 - iii. **Strict Foreclosure** – Creditor retains the collateral, satisfying the debt.
 1. **Consumer Goods that are 60% paid for** must be sold by creditor w/i 90 days, else conversion.
 - iv. **Sale** – everything must be **commercially reasonable**.
 1. **Notice must be sent to debtor and secondary obligors AND** if not consumer good, to all known creditors
 2. **Right of Redemption** until sale or strict foreclosure

2. **Commercial Paper** – UCC Art. 3 applies to negotiable instruments
- a. **Promissory Note** (requires affirmative promise to pay) or **Draft** (think bank check)
 - i. Draft has Drawer (person paying), Drawee (the bank), Payee, Indorser (who signs)
 - b. **Negotiable Instrument** – WOSSUPP
 - i. **Writing**
 - ii. **Order** (to pay). Payable to Order (must say “order” or “assigns”) or Bearer.
 - iii. **Signed** – Very low bar. Initials somewhere on the face qualify.
 - iv. **Sum Certain**
 - v. **Unconditional**; no additional promises. Incorporation by reference of document relating to something ancillary is OK. Also, cannot specify *source* of fund.
 - vi. **Payable on demand or at defined time**. Default is payable on demand. Acceleration clauses are OK.
 - vii. **Payable in Currency** – Cash or equivalent. No goods.
 - c. **Suit**
 - i. **Contract (Signature) Liability** – Liability for signing it.
 - 1. Liable for bounced or assigned check that you signed if you’re notified.
 - 2. “Without recourse” removes liability for assigning a check.
 - ii. **Warranty (Transfer) Liability** – By signing an instrument, you promise that:
 - 1. **You have good title**
 - 2. **Signatures Genuine and Authorized**
 - 3. **Instrument has not been Materially Altered**
 - 4. **Instrument is Enforceable**
 - 5. **No knowledge of bankruptcy or insolvency of maker/drawer**
 - d. **Negotiation: Transfer of an Instrument**
 - i. **Indorsement Required** for transfer if payable to order
 - ii. **Types of Indorsements**:
 - 1. **Special Indorsement** – Specifies an indorsee (e.g., “Pay to X”)
 - 2. **Blank Indorsement** – No specified indorsee (e.g., signed check)
 - 3. **Restrictive Indorsement** – Contains a restriction (e.g. “for deposit only”)
 - e. **Holder in Due Course**
 - i. **Requirements**
 - 1. **For Value** – Analogous to consideration, but cannot be a mere promise and prior value OK.
 - 2. **In Good Faith** – Honesty in fact.
 - 3. **Without Notice** of any defect in the instrument.
 - a. **Constructive Notice Suffices** EXCEPT that actual notice required for breach of a fiduciary’s duty.
 - ii. **Shelter Rule applies**. E.g., a donee can “take shelter” in the Holder in Due Course status of the donor.
 - iii. **HDC takes instrument free of claims and personal defenses**. Still subject to Real Defenses:
 - 1. **Material Alterations**
 - 2. **Fraud in the Factum** – e.g., signor thought he was signing something else.
 - 3. **Incapacity**
 - 4. **Illegality** – Does not include unconscionability.
 - 5. **Infancy**
 - 6. **Insolvency**

FEDERAL JURISDICTION

1. **Personal Jurisdiction** –use state PJ rules.
2. **Subject Matter Jurisdiction**
 - a. **Diversity / Alienage** – must be satisfied when case is filed. Subsequent change does not invalidate.
 - i. **Fails if any Plaintiff has same citizenship as any Defendant.** An (non-resident) alien has no citizenship.
 1. **Natural Person** – is a citizen of their state of domicile.
 2. **Corporation** – is a citizen of its place of incorporation **and** its principal place of business (nerve-center)
 3. **Partnership, etc.** – is a citizen of every state that its members are citizens of.
 - ii. **Amount in Controversy is more than \$75,000.** Failure to win over \$75k may result in P paying D's costs.
 1. **Aggregation** allowed only in case with one P and one D.
 - b. **Federal Question Claim** – is P enforcing a federal right?
 - c. **Supplemental Jurisdiction** – When a claim arises from the same “**common nucleus of operative fact**” (read: **transaction or occurrence**) as a claim with valid jurisdiction, the court can exercise supplemental jurisdiction.
 - i. **UNLESS it is i) Asserted by a P ii) in a Diversity case and iii) would violate diversity.**
 - ii. Discretionary factors: Fed. Q dismissed early in proceedings, complex state law, state issue predominate
 - d. **Removal** by D only if could have been filed in fed. court, w/i 30 days of service. Remove to the local district.
 - e. **Choice of Law** – Use state substantive law unless it is preempted (supremacy clause)
 - i. **Substantive** things include: elements, SoL, tolling, conflict/choice of law rules.
3. **Venue**
 - a. **Local Actions:** Any case involving ownership, possession, injury to land must be filed in the local district.
 - b. **Transitory Cases:** In other case, may be in the district where:
 - i. **All Ds reside.** If all Ds from same state, can use any district that a D resides in.
 - ii. **A substantial part of the claim arose.**
 - c. **Transfer of Venue** can be done to another district with both PJ and Venue.
4. **Service of Process** – Summons and complaint, together called Process, w/i 120 days
 - a. **Method** – FRCP (below), law of state in which court sits, or state in which service is effected.
 - i. **FRCP: Personal Service** or **Substituted Service** on someone at D's usual abode of suitable age & discretion who resides there.
5. **Joinder**
 - a. **Proper Parties:** issue arises from **same transaction/occurrence** and raises at least **one common question**.
 - i. **Necessary/Required Parties** must be joined.
 1. **If Cannot be Joined, court must either i) proceed w/o that party or ii) dismiss the case.**
 - b. **Counterclaims**, if compulsory, must be filed with answer.
 - c. **Crossclaim**
 - d. **Impleader**
 - e. **Intervention** – Intervener's interests may be harmed and are not being adequately represented.
 - f. **Interpleader** – Person holding money or property seeks to force all potential claimants into single case. Does not matter which you use:
 - i. **Rule Interpleader:** Stakeholder diverse from every claimant. Controversy over \$75k. Normal service.
 - ii. **Statutory Interpleader:** Stakeholder diverse from at least one claimant. Controversy over \$500. National service.

6. Motions

- a. **Jury Trial** available only for issues of law (not equity) in Federal civil cases. (Seventh Amend.)
- b. **JMOL** – Reasonable people could not disagree on the result
- c. **Renewed JMOL** – Same standard. Failure to file JOML waives right to file for this.
- d. **Motion for New Trial**

7. Pleadings

- a. **Defensive Responses (FRCP 12)** – Answers are pleadings. Motions are not.
 - i. **Lack of Subject Matter Jurisdiction** – Never Waived
 - ii. **Lack of PJ, Venue, Process, Service** must be raised in first defensive response.
 - iii. **12(b)(6) and Failure to Join Indispensible Party** can be raised throughout trial.
- b. **Notice Pleading** – Complaint must contain statement of subject matter jurisdiction and short and plain statement of the claim.
 - i. Must only plead “facts supporting a plausible claim” unless Fraud, Mistake or Special Damages, which require specificity and particularity.

DOMESTIC RELATIONS

1. Marriage

- a. **Preceding:**
 - i. **Cohabitation** can now be subject of agreements with consideration *other than sex*.
 - ii. **Prenups usually tested in context of validity. Must be:**
 1. **In writing and signed by both parties**
 2. **Couple must have married**
 3. Cannot contain agreement for later divorce etc., be product of duress or unconscionable.
- b. **Marriage Process:** Requires capacity, as described in next section
 - i. **License**
 - ii. **Ceremony** requires Officiant, Witness (usually best man and maid of honor), Solemn Declaration.
- c. **Termination:**
 - i. **Declaration of Nullity** – Marriage simply void.
 1. **Bigamy**
 2. **Incest**
 - ii. **Annulment** – Not void, but voidable. Can waive by remaining in marriage after finding out. SoL of 6yr.
 1. **Too Young**
 2. **Mental Incapacity**
 3. **Duress**
 4. **Fraud** – misrepresentation/concealment of an essential aspect of the marriage s.a. religion/sexual pref.
 5. **Physical Incapacity** – Incurable physical condition preventing consummation.
 6. **Incurable Insanity** after the marriage.
 7. **TESTIMONY RULES:** Spousal Testimony requires corroboration; Jury trial for all but physical incapacity.
 - iii. **Separation** No jury trial. Can be permanent or temporary
 1. **Cruel & Inhuman Treatment**
 2. **Abandonment** – Voluntary departure of one spouse without the other's permission without justification or intent to return. No set time threshold.
 3. **Adultery** – Must be voluntary, not confined to intercourse, and with a human. SoL of 5yrs. DEFENSES:
 - a. **Recrimination** – unclean hands
 - b. **Condonation**
 - c. **Connivance** – Entrapment
 - d. **ISSUES:**
 - i. **Spousal Testimony** limited to proving the marriage, disproving *own* adultery, denying a defense.
 - ii. **Proof by Circumstantial Evidence**, consisting of **opportunity** and **disposition** (love letters, etc.)
 4. **3 Years of Consecutive Imprisonment**
 5. **Failure to Provide Economic Support**
 - iv. **Divorce** – NY is presently implementing no-fault divorce.
 1. **Cruel & Inhuman Treatment**
 2. **Abandonment** for at least a year
 3. **Adultery**
 4. **3 Years of Consecutive Imprisonment**

5. **Conversion** – Couple first separate, then convert after 1 year. Cohabitation w/ intent to reconcile resets.
 - a. **Court Ordered Separation**
 - b. **Consensual Separation that is**
 - i. **Freely Made**
 - ii. **In Writing**
 - iii. **Acknowledged (notarized)**
 - iv. **Filed w/ Court (for review)**
 - c. **Dissolution** – your spouse disappeared for 5 years. Presumed dead.
 - i. **Diligent Search**
 - ii. **Publish request for spouse to return in English-language newspaper for 3 weeks**
 - iii. **P must be NY resident for 1-yr or NY was matrimonial home at time of disappearance**
2. **Economic Issues**
 - a. **Maintenance (Alimony)** – Can be temporary to meet needs of weaker party and preserve status quo
 - i. **Rebuttable Presumption that less-monied spouse should get counsel fees**
 - ii. **Modification if substantial change in circumstances**
 - iii. **Cease if recipient remarries or lives openly w/ another.**
 - b. **Property Division** – Husband/Wife separate property, Marital Assets
 - i. **Professional Degree earned after marriage is marital asset**
 - ii. Divided per by judge in equity. Doesn't usually consider fault. Cash/check called "distributive award."
3. **Children**
 - a. **Fatherhood** – husband presumed if married.
 - i. **Filiation Proceeding** determines fatherhood. Brought by mother, child, state, putative father by 21st bday.
 1. Can be proven by clear and convincing evidence:
 - a. Mother's claim of intercourse need not be corroborated.
 - b. D's claim other men had sex with mother must be corroborated
 - c. DNA testing OK. 95% certainty gives rebuttable presumption of fatherhood.
 2. **Equitable Estoppel** if non-biological father holds himself out as and behaves as such.
 - b. **Adoption – Best Interest of the Child.**
 - i. **If child under 18, need consent from both biological parents w/o excuse**
 - ii. **Match religions if possible**
 - iii. **3mo trial w/ minors**
 - c. **Termination of parental rights** requires clear & convincing; same grounds as adoption
 - d. **Support Payments** may be required after termination of marriage, filiation proceeding, petition for divorce.
 - i. **Step parent to avoid public assistance and equitably estopped parents both owe support.**
 - e. **Standing** is given to parents, siblings, and grandparents only.
4. Heart Balm actions (torts questions for married or unmarried people) have been abolished. So disfavored that it is a felony to file a complaint alleging one:
 - a. Breach of Promise to Marry
 - b. Seduction of an Unmarried Female (action goes to father)
 - c. Alienation of Affections – action by one spouse against a 3p for convincing other spouse to not like P
 - d. Criminal Conversation – Adultery (civil cause of action)
 - e. Jactitation of Marriage – Representing yourself as one's spouse when you aren't