1. **Professional Responsibility Basics**
   1. **ABA has zealously v. NYR's "competance"**
      1. Throughough-ness
      2. Preparation
   2. **NYR Preamble and Scope**:
      1. 1.1:
         1. (a) A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
         2. (b) A lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it.
         3. (c) A lawyer shall not intentionally:
            1. (1) fail to seek the objectives of the client through reasonably available means permitted by law and these Rules; or
            2. (2) Prejudice or damage the client during the course of the representation except as permitted or required by these Rules.
         4. Comment:
            1. Legal Knowledge and Skill:[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer’s general experience, the lawyer’s training and experience in the field in question, the preparation and study the lawyer is able to give the matter, and whether it is feasible to associate with a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances. One such circumstance would be where the lawyer, by representations made to the client, has led the client reasonably to expect a special level of expertise in the matter undertaken by the lawyer
            2. Thoroughness and Preparation: [5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client may limit the scope of the representation if the agreement complies with Rule 1.2(c)
      2. 3.3(a): A lawyer shall not knowingly:
         1. (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
         2. (2) fail to disclose to the tribunal controlling legal authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
         3. (3) Offer or use evidence that the lawyer knows to be false. If a lawyer, the lawyer’s client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter that the lawyer reasonably believes is false.
      3. 3.4 Fairness to opposing party and counsel
         1. (a): A lawyer shall not :
            1. (1) suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce;
            2. (2) advise or cause a person to hide or leave the jurisdiction of a tribunal for the purpose of making the person unavailable as a witness therein;
            3. (3) conceal or knowingly fail to disclose that which the lawyer is required by law to reveal;
            4. (4) knowingly use perjured testimony or false evidence;
            5. (5) participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false; or
            6. (6) knowingly engage in other illegal conduct or conduct contrary to these Rules;
         2. (b) A lawyer shall not: offer an inducement to a witness that is prohibited by law or pay, offer to pay or acquiesce in the payment of compensation to a witness contingent upon the content of the witness’s testimony or the outcome of the matter. A lawyer may advance, guarantee or acquiesce in the payment of:
2. (1) reasonable compensation to a witness for the loss of time in attending, testifying, preparing to testify or otherwise assisting counsel, and reasonable related expenses; or
3. (2) a reasonable fee for the professional services of an expert witness and reasonable related expenses;
   * 1. 8.4 MISCONDUCT  
        a lawyer shall not:
        1. (c): engage in conduct that involves dishonesty, fraud, deceit, or misrepresentation
        2. (d): engage in conduct that is prejudicial to the administration of justice
   1. **Lawyer Client Relationship**:
      1. **Summary or Lawyerly Obligations**
         1. Competence
         2. Confidentiality
         3. Conflict of interest rules (loyalty)
         4. Communication
         5. Client Control of Decisions
      2. 1.2: SCOPE OF REPRESENTATION and Allocation of Authority Between Client and Lawyer (**see rule**):
      3. 1.4: COMMUNICATION:  
         a lawyer shall
         1. (1) promptly inform the client of:
            1. (I) any decision or circumstance with respect to which the client’s informed consent, as defined in Rule 1.0(j), is required by these Rules;
            2. (ii) any information required by court rule or other law to be communicated to a client; and
            3. (iii) material developments in the matter including settlement or plea offers.
         2. (2) reasonably consult with the client about the means by which the client’s objectives are to be accomplished;
         3. (3) keep the client reasonably informed about the status of the matter;
         4. (4) promptly comply with a client’s reasonable requests for information; and
         5. (5) consult with the client about any relevant limitation on the lawyer’s conduct when the lawyer knows that the client expects assistance not permitted by these Rules or other law.
         6. *(b)* A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
      4. 1.6: CONFIDENTIALITY OF INFORMATION (**see rule**)
      5. 1.18: DUTIES TO PERSPECTIVE CLIENTS (**see rule**)
      6. *Is there a client here*?
         1. A vast majority of attorney-client relationships are still formed the old-fashioned way. By agreement, which can be applied
            1. When:

(1) a person manifests to a lawyer the person’s intent that the lawyer provide legal services for the person; (2) and the lawyer fails to manifest lack of consent, (3) and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services.

Payment is pretty good evidence, but not required

Giving advice over the phone forms a relationship (via a 900 number that charges)

* + - * 1. Either party can end the representation by informing the other party if there is a reasonable belief in the other party that they are still in a relationship.
        2. Gionis: going through divorce tells friend he wants to kill his wife; friend later becomes attorney; that statement is not privileged because you weren’t the attorney at the time
    1. *What do lawyers owe clients*?
       1. Competence:
          1. Defined: “the legal knowledge, skill thoroughness and preparation reasonably necessary for the representation 1.1”
          2. “about half of the practice of a decent lawyer is telling would-be clients that they are damned fools and should stop”
          3. Incompetence has many parents: ignorance, inexperience, neglect, lack of time
          4. Not every mistake amounts to incompetence
       2. Confidentiality:
          1. Perez Pg. 32: school bus accident. Coke truck driver tries to stop truck at stop sign, the brakes fail, and it collides with a school bus. Kills 21 children by knocking it into a pond.

Lawyers come representing Coke, and telling the truck driver that they are his lawyers and that this is confidential

They end up not repping him and turn his statement over to the DA

They owed him confidentiality because:  *an agreement to form an attorney-client relationship may be implied from the conduct of the parties. Moreover the relationship does not depend upon the payment of a fee, but may exist as a result of rendering services graciously*

Saying they were there to help him was sufficient

*Attorney client r.ship “has been described as one of uberrima fides, which means, “most abundant good faith” requiring absolute and perfecet candor, openness and honesty and the absence of concealment or deception.*

* + - 1. Diligence (doing a good investigation into the facts).
      2. NY Written letter of engagement: shortly after agreement the attorney needs to send a letter to the client describing the fees and scope of service (as long as reasonably determinable). 22 NYCRR Part 1215: Lawyers are responsible for providing clients with a "written engagements"
  1. **Termination Issues**:
     1. 1.9: DUTIES TO FORMER CLIENTS (**see rule**)
     2. 1.14: CLIENTS WITH DIMINISHED CAPACITY (**see rule**)
     3. 1.16: DECLINING OR TERMINATING REPRESENTATION (**see rule**)
        1. When not to accept
        2. When to terminate
        3. When can terminate
     4. *Termination by Client*:
        1. Clients can terminate for any reason or no reason. Even for race
           1. Racial termination is not allowed for employed lawyers (wtf does this mean? Like an attorney at a firm. We theorize it has to do with a single lawyer lobby not wanting to be sued every time they terminate a client of a different race.)
           2. Another court has found that if you can prove it was because of being a jew then 42 USC 1981 should provide a remedy
        2. Indigent criminal defendants may not fire the lawyers who have been assigned to them. They can go pro se or request a new appointment
        3. Litigant with a retained lawyer is not permitted to fire counsel close to or during trial without permission
     5. *Termination by Attorney*:
        1. Lawyer’s right to terminate is circumscribed by rule 1.16, which tells us when a lawyer may or must withdraw. Leaving a client without a good reason can be characterized as abandonment, which is disloyal and has consequences.
        2. In some states a lawyer who abandons is not entitled to any compensation
        3. There are permissive withdrawals for what might be called “professional” reasons.
           1. If a client states his intention to perjure – you can withdraw, and you do not give up your right to unpaid fees.
     6. *Termination by drift*
        1. Some representations end for reasons other than their choice. Usually because work ends. But does that mean the end of the professional relationship?
           1. One firm was deemed current counsel because it stored files from that matter; hadn’t marked it closed; and it was listed on settlement documents from the matter to receive a copy of any notice to the client.
        2. Episodic clients: if you do something small for them two or three times a year
           1. The relationship exists during the intervals. It’s like a dentist. Someone is your dentist even though you don’t see them that often
           2. Some firms send out termination letters.
        3. Lingering question: When is an attorney no longer your attorney
  2. **Interference with the Client-Attorney relationship**:
     1. 4.2: COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL
        1. (a) In representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law.
        2. (b) Notwithstanding the prohibitions of paragraph (a), and unless otherwise prohibited by law, a lawyer may cause a client to communicate with a represented person unless the represented person is not legally competent, and may counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to represented person’s counsel that such communications will be taking place.
        3. Comment [8] knowledge may be inferred from the circumstances and a lawyers cannot evade this requirement by losing their eyes to the obvious
     2. Nieseg v. Team 1 Pg. 115: are they employees of a corporate party also considered parties?
        1. Upjohn says that confidential communications are protected by A/C privilege even in midlevel and lower employees.
        2. However, this is different because it’s about the underlying facts
        3. So, we balance clarity of a blanket preclusion of this contact, with the danger of losing important information
        4. Control group test**:** (a corporations controlling members are protected) also does not serve the policy goals of open access to factual information
        5. So we turn to New Test: we look to employees and whether their actions had a binding authority on the corporation – or if they were acting on behalf of counsel 🡪 if so, then there must be a formal interview…otherwise informal is fine.
           1. (in effect the corporations “alter egos”)
           2. Confidentiality does not attach to not binding individuals who were interviewed informally
     3. How big of a circle?
     4. Testers? Pg. 119 (people coming to a buyer and pretending to be part of the ordinary public) you are seeking information offered to the general public
        1. Not misrepresentation and clearly falls outside the scope of the a/c relationship
  3. **Financing legal services**: **Fee regulation**:
     1. 1.5: FEES AND DIVISION OF FEES (**see rule**)
        1. Section a discusses not charging excessive fees
        2. Section b regards making clients aware of the scope of fees and representation
        3. Section c describes when contingent fees are allowed and how calculated
        4. Section d No contingent fees for family or criminal
     2. *The Role of the Market Place*
        1. Brobeck Phlegler & Harrison v Telex Pg. 144: defines unconscionability for a contingent fee arrangement contract – “in these circumstances the contract between Telex and Brobeck was not so unconscionable that no man in his senses and not under a delusion would make on the one hand, and as no honest and fair man would accept on the other”
           1. Cannot be resolved by hindsight; need to look at the time and circumstances under which it was made
           2. For, as Telex acknowledged, Brobeck’s petition provided Telex with the leverage to secure a discharge of its counterclaim judgment, thereby saving it from possible bankruptcy in the event the supreme court denied its petition for certiorari
           3. \*\*if the court found it unreasonable they could have thrown out the fee and awarded quantum merit based off of a fair hourly rate.
     3. *Unethical Fees*
        1. Cooperman Pg. 162: special non-refundable agreement clashes with public policy. Sure if you render some services and get terminated you should be entitled, and we also don’t want to remove your right to terminate, but you shouldn’t have to pay just for termination when no work has been rendered.
        2. In re Estate of Sylvan: unconscionability of the fee agreement can be determined before or after.
     4. *Contingent fees*: ADD THIS PORTION FOR POLICY
        1. NY Judiciary Law 474(a): explain your fees
        2. 1.5:
           1. Section c: Contingent fees and Conflicts of interest:
           2. Section d Prohibition on contingent fees in matrimonial and criminal cases:
        3. Should they be outlawed or further regulated?
           1. Can create perverse incentives

Avoid doing work

* + - * 1. Good incentive: no overbilling
        2. Discourage settlement
        3. Gambling
  1. **Conflicts of Interest**:
     1. 1.7: CONFLICT OF INTERESTS: CURRENT CLIENTS
        1. Don't be a dick
        2. Don't be on both sides of a law suit
        3. Don't represent someone with contrary interests to you or another client
        4. Cured with informed consent
     2. 1.8: CURRENT CLIENTS: SPECIFIC CONFLICT OF INTEREST RULES
        1. White People Problems
        2. Don't use information they give you against their interest
        3. Can engage in settlement for both sides if you have informed consent
        4. Cannot demand sexual relations or employ coercion DON'T BE A RAPIST.
        5. You can fuck your client if you were fucking them before they became your client
     3. 1.18(c): PROSPECTIVE CLIENTS:
        1. Can't use information gained in a consultation
        2. Can't represent a client with interests adverse to prospective clients when substantially related and materially adverse.
        3. These restrictions apply to other lawyers in a firm that are associated with can knowingly take on.
     4. 1.9: FORMER CLIENT
        1. "substantially related"
        2. "materially adverse"
        3. Cured by informed consent
     5. 1.10: IMPUTATION OF CONFLICTS OF INTEREST
        1. Whole departments can be conflicted out
        2. The conflict lies with both the firm and the individual
        3. Can be cured with informed consent
     6. Fiandaca v. Cunningham Pg. 272: lead counsel represents plaintiffs in two conflicting actions. Defendant in one brings suit, reviewing the D.Courts lack of removal of counsel on motion. Apply abuse of discretion. You do not ask, would this result have happened. “would it not have been encumbered”.
        1. You must show the movant strategically sought disqualification for improper purposes. Timing alone is not enough to disqualify a disqualification motion.
        2. Result: no new trial even though P thinks its plain reversible error. This doesn’t taint all proceedings; we will instead look to the ill effects
           1. We just retrial on the issue of what’s the proper remedy since the improper counsel did influence that decision
        3. Take Aways: we have incentives to be careful about conflict rules because apart from discipline you can run the possibility that your liability will accrue. Chase thinks these lawyers were sloppy
     7. Analytica v. NPD research Pg. 310: two law firms appeal orders disqualifying them from representing analytics.
        1. Malec works for analytica. Retains Schwartz for them on certain matters. Then leaves starts his own company and retains shwarts for a suit that his old company wages against him
           1. A lawyer may not represent adversary of his former client if it means the lawyer COULD have obtained confidential information in first representation that would be relevant in the second
           2. Substantial relationship test has its issues, but it’s better than an intense factual inquiry to see if information really was obtained.
     8. Cromley v. Board of Education Pg. 331: Whistle blower - Cromley brings suit saying she has been denied advancement because she has exercised her right to free speech. The D.ct rules against her and denied her motion to disqualify defendant’s attorneys. She appeals and court affirms
        1. She claimed that they were retaliating against her because she complained to a state agency about sexual misconduct [protected speech]. In that case she had a lawyer who was now repping the school
        2. Three step analysis:
           1. Does a substantial relationship exist between the SUBJECT MATTER
           2. Whether the presumption of shared confidences with respect to the prior representation has been rebutted (past)
           3. Has the presumption of shared confidence been rebutted with respect to the present representation (present)
     9. Simpson Pg. 289: if attorney is on both sides in a transaction no necessarily malpractice like in litigation because there are common interest. But this dealer was seller financed which makes it suspicious, he also clearly did not do enough.
  2. **Whistle Blowing:**
     1. The rules require reporting if conduct raises a substantial question as to a lawyer’s honesty trustworthiness or fitness as a lawyer (Does this mean you have to squeal on yourself?)
        1. Subordinate lawyers enjoy a “following orders” defense if directed to do something arguably improper, so long as the supervisor’s conclusion is “reasonable”
     2. 1.6(b)(3): CONFIDENTIALITY OF INFORMATION
        1. A lawyer MAY use confidential information including when you're going to commit a crime and only as much as reasonably necessary.
        2. (3) to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud
     3. 1.13(b)-(d): ORGANIZATION AS A CLIENT (**see rule**)
        1. Don't be a dick – if you know someone's going to do something contrary to the interests of the company the lawyer **may** proceed in the best interests of the company.
        2. 1.13 (c) if the person with authority refuses to act then the lawyer may only reveal confidential information as permitted by 1.6 or resign as per 1.16.
           1. If the lawyer heard false testimony then the lawyer can take remedial measures because under 3.3 false testimony is always a SHALL act.
     4. 8.3(a): REPORTING PROFESSIONAL MISCONDUCT
        1. As a lawyer you SHALL tattle on other unethical lawyers
     5. Wielder v. Skala BB: guy says he was wrongfully discharged by his firm by insisting that they report professional misconduct of another attorney. He hires his own firm to buy a commercial condominium. They assign an attorney who does bad stuff professionally. The partners say don’t report, well reimburse you. He withdrew his complaint eventually because partners threaten to fire him. Kept him on because he was on the firm’s most important case. And once the case was finished they fired plaintiff.

1. D. arg: Not surprisingly, defendants' position here with respect to plaintiff's breach of contract cause of action is simple and direct, i.e., that: (1) as in [*Murphy*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1983120841) and [*Sabetay,*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1987042542) plaintiff has shown no factual basis for an express limitation on the right to terminate of the type upheld in [*Weiner;*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1983102466) and (2) [*Murphy*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1983120841) and [*Sabetay*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1987042542) rule out any basis for contractual relief under an obligation implied-in-law. We agree that plaintiff's complaint does not contain allegations that could come within the [*Weiner*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1983102466) exception for express contractual limitations
2. Moreover, as plaintiff points out, failure to comply with the reporting requirement may result in suspension or disbarment (*see, e.g.,* [*Matter of Dowd,* 160 A.D.2d 78, 559 N.Y.S.2d 365).](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=602&FindType=Y&SerialNum=1990119497) Thus, by insisting that plaintiff disregard DR 1–103(A) defendants were not only making it impossible for plaintiff to fulfill his professional obligations but placing him in the position of having to choose **\*637** between continued employment and his own potential suspension and disbarment. We agree with plaintiff that these unique characteristics of the legal profession in respect to this core Disciplinary Rule make the relationship of an associate to a law firm employer intrinsically different from that of the financial managers to the corporate employers in [*Murphy*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1983120841) and [*Sabetay.*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1987042542) The critical question is whether this distinction calls for a different rule regarding the implied obligation of good faith and fair dealing from that applied in [*Murphy*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1983120841) and [*Sabetay.*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1987042542) We believe that it does in this case, but we, by no means, suggest that each provision of the Code of Professional Responsibility should be deemed incorporated as an implied-in-law term in every contractual relationship between or among lawyers.
3. From the foregoing, it is evident that both [*Murphy*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1983120841) and [*Sabetay*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1987042542) are markedly different. The defendants in those cases were large manufacturing concerns—not law firms engaged with their employee in a common professional enterprise, as here
4. NY has taken the position that even though employment in NY is employment at will law firms may not properly dismiss someone for whistleblowing because it's a code of professional conduct.
5. **DOCTRINE GOVERNING THE CHOICE OF FORUM**
   1. **Introduction**:
      1. CPLR 103: FORM OF ACTION
         1. Don't dismiss because not in proper form. Can order to another court for proper adjudication.
         2. Example of NY being a very liberal when it comes to civil lit
      2. CPLR 105: DEFINITIONS (**see rule**)
         1. Definitions – matrimonial action
   2. **Personal Jurisdiction**:
      1. Intro:
         1. Why New York?
            1. Every lawyer is at an advantage when he practices his art in his area. He is familiar with the local rules, customs and practices, opposing counsel, courts and clerks. He can remain in close contact with his office and staff; necessary resource persons are available at all times.
            2. It has been said that the substantive law applied in NY tends to favor NY residents.
         2. Do we have jurisdiction over the defendant (we are required to have this and subject matter jurisdiction)?
            1. 2 requirements:

A jurisdictional basis

Basis is defined as a relationship between the defendant and the state which is sufficient to justify the exercise of the states judicial power

This relationship must be substantial enough to satisfy the due process clauses of the federal and state constitutions, which mandate that it not be unfair to the defendant – considering “the relationship among the defendant and the forum and the litigation”

Must be shown that the state has, by statute, authorized its court to exercise power over the defendant. Article 3 of the CPLR is the primary source of authority for the NYSC

You need general jurisdiction or specific jurisdiction.

When served in the state this is considered general jurisdiction and you have jurisdictional basis for the matter for which he was served

Specific jurisdiction is when the action arises out of the persons contacts and relations with the state

Proper notice of the commencement of the action.

This is provided by proper service of the summons.

* + - 1. CPLR 301: JURISDICTION
         1. "Jurisdiction over persons, property or status. A court may exercise such jurisdiction over persons, property, or status as might have been exercised heretofore."
    1. Presence of Natural Persons:
       1. 301 preserves the you can have jurisdiction exercised over you if you are in the state. Even if it’s fleeting.
    2. Presence of corporations:
       1. If the corporation is incorporated here or authorized to do business here then the secretary of state of New York is designated to be served on their behalf. But if they are not present or authorized to do work here in this way we have issues
          1. Service is satisfied by the Sec of State if authorized or incorporated
          2. There are a lot of people that fall out of this category
       2. Bryant: trans world airlines person injured as a result of the negligence of finnish national airline, when she was stuck by a baggage cart blown against her by an excessive blast of air produced by one of defendant’s aircraft. Was the defendant doing business sin New York state in order to subject it to personal jurisdiction.
          1. *The test for doing business is and should be a simple and pragmatic one which leads us to the conclusion that the defendant should be sueable in new York. The new York office is one of many directly maintained by defendant in various parts of the world, it has a lease on a new York office, it employees several people and it has a bank account here, it does public relations and publicity work for defendant here including maintaining contacts with other airlines and travel agencies and, while it does not make reservations or sell tickets, it transmits requests for space to defendant in Europe and helps to generate business. These things should be enough.*
       3. Laufer: the volume of business generated may be relevant. The contacts with new York were regular, systematic, and continuous.
          1. \*parent corporation not subject in new York unless it exercised parent-subsidiary control
          2. Plaintiff cannot normally rely on just his own activities in the suggested forum state to subject the corporation to jurisdiction there. There are here substantial activities by others to sustain jurisdiction. So we don’t consider whether the rule against basing jurisdiction on plaintiff’s activities alone applied in CPLR 301 cases as well.
          3. Jurisdiction predicated upon corporate presence “does not fail because the cause of action sued upon has no relation in its origin to the business here transacted” and the supreme court has made several similar rulings (look at total business in forum state not just the one being sued upon).
          4. Ostrow on his own had no connection when not acting in his corporate capacity with NY.
          5. Does not hinge on whether the parent instructed or was responsible for the cause of action – just whether or not the parent is parenting at the time of the cause of action
       4. Goodyear Dunlop Tires: are foreign subsidiaries of a united parent corporations amenable to suit in court on claims unrelated to any activity of the subsidiaries in the forum state. was a recent case in which the [Supreme Court of the United States](http://en.wikipedia.org/wiki/Supreme_Court_of_the_United_States) held that the connection between Goodyear and its subsidiaries with the state of North Carolina was not strong enough to establish jurisdiction over the companies.[[1]](http://en.wikipedia.org/wiki/Goodyear_Dunlop_Tires_Operations,_S._A._v._Brown#cite_note-0) Two 13-year old boys from [North Carolina](http://en.wikipedia.org/wiki/North_Carolina) died as a result of a bus accident outside of Paris.[[2]](http://en.wikipedia.org/wiki/Goodyear_Dunlop_Tires_Operations,_S._A._v._Brown#cite_note-accident-1) The parents of the boys believed the accident was due to a defective tire manufactured by a foreign subsidiary of [Goodyear Tire and Rubber Company](http://en.wikipedia.org/wiki/Goodyear_Tire_and_Rubber_Company) and sued for damages in a North Carolina state court.[[3]](http://en.wikipedia.org/wiki/Goodyear_Dunlop_Tires_Operations,_S._A._v._Brown#cite_note-complaint-2) The foreign subsidiaries asserted that the North Carolina courts lacked jurisdiction over them and moved to dismiss. The North Carolina trial court denied the motion and the [North Carolina Court of Appeals](http://en.wikipedia.org/wiki/North_Carolina_Court_of_Appeals) affirmed.[[4]](http://en.wikipedia.org/wiki/Goodyear_Dunlop_Tires_Operations,_S._A._v._Brown#cite_note-motiondenied-3) The Supreme Court reversed, holding that the foreign subsidiaries lacked a significant connection to North Carolina to warrant jurisdiction.
    3. Contact based jurisdiction:
       1. CPLR 302(a): PERSONAL JURSIDICTION BY ACTS OF NON-DOMICILIARIES (special jurisdiction) .
          1. Section a(1) is the main piece – if you transact business here or seek to supply goods to the state
          2. Commit it in state
          3. Commits a tort out of state + injury in state + contacts (regularly solicits or reasonable foreseeable)
       2. CPLR 313: SERVICE WITHOUT THE STATE GIVING PERSONAL JURISDICTION
          1. If being haled into a NY court even if served out of state, go by NY serving standards and not the standards of the state where you are served.
       3. Fischbard v. Doucet BB: personal jurisdiction was allowed.
          1. Plaintiff lawyer in NY which was retained by defendant a California corporation.
          2. By reaching out to an attorney here and working with him on a consistent basis, they transacted business in this state
          3. (1) jurisdiction is proper “even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted” (*Deutsche Bank Sec., Inc. v Montana Bd. of Invs.*, 7 NY3d 65, 71 [2006], quoting *Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 [1988]). Purposeful activities are those with which a defendant, through volitional acts, “**avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws**” ([*McKee Elec. Co. v Rauland-Borg Corp.*, 20 NY2d 377, 382 [1967];](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=605&DocName=20NY2D377&FindType=Y&ReferencePositionType=S&ReferencePosition=382)*see also* [*Ford v Unity Hosp.*, 32 NY2d 464, 471 [1973]](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=605&DocName=32NY2D464&FindType=Y&ReferencePositionType=S&ReferencePosition=471) [holding that third-party defendant did not engage in “purposeful( ) availment)” because it “purposefully avoided any contacts with New York, limiting its agency agreement . . . to certain States, excluding New York”]).
       4. In cases involving securities the court has been very liberal in granting long arm jurisdiction (Ehlrich-bober). In other cases it has become more difficult when people have not physically entering the state. O’brien: even though a new jersey medical center treated patients from NY and solicited them there was still no personal jurisdiction. And that's because NY is a securities trading center
       5. Johnson v. Ward: is there NY personal jurisdiction over a non-resident holding a NY driver’s license and car registration for a tort claim arising from an out-of-state motor vehicle accident?
          1. We conclude that personal jurisdiction does not lie under CPLR 302(a)(1) because there is an insufficient nexus between personal injury action and any New York transactions.
          2. Transacting business means commercial or financial activities.
          3. The NY license and registration were in no way linked to this transaction.
          4. **Under 302a1: you need two things, that the defendant transacted business within the state – and that the cause of action arose from that business transaction.**
       6. Notes: 302a1 ARISING OUT OF REQUIREMENT
          1. Case 1: defamation suit by teacher against student. Just because student came to this state the defamation didn’t arise out of that.
          2. Case 2: accident on a drive in las vegas by a bus company. Just because the bus company sold tickets to NY that business transaction didn’t result in the bus crash
       7. Lamarca: Personal jurisdiction is granted over a Texas corporation which manufactured a loading truck thingy that malfunctioned and caused injury
          1. They kept an NY agent 3.5 percent of sales were in NY.
          2. Park-mor sold it to its New York distributor which then sold it to the plaintiff in Niagra.
          3. 5 elements to 302(a)(3)

Tortious act outside the state;

Cause of action arises from that

Act caused injury to a person or property in the state;

Defendant should expected that the act have consequences in the state;

Defendant derived substantial revenue

* + - * 1. **But we also need to check out federal due process.**

2 reqs

Minimum contacts

“connection with the forum state” such that it “should reasonably anticipate being haled into court there”

Satisfied if you purposely avail yourself of the privileges of conducting activities within the state

Not offend notions of fair play and substantial justice

Boils down to reasonableness

“if you purposefully direct your activities at forum residents you must present a really compelling reason to claim nits unreasonable”

* + 1. Jurisdiction based on the location of property:
       1. CPLR 314 (2)(3): SERVICE WITHOUT THE STATE NOT GIVING PERSONAL JURISDICTION: Service may be made outside of the state by any person authorized by section 313 in the same manner as service is made within the state
       2. Banco Ambrosiano: plaintiff is an Italian banking corporation. They used to maintain a representative office in NYC. Defendant artic bank, also a banking corp, is organized under the laws of the Bahamas. And engages in international trans. They use a correspondent US bank called brown brothers. Neither P nor D is authorized to engage in banking in the state.
          1. Allegedly P loaded D 15 million that wasn’t repaid.
          2. All negotiations were made outside new York. And all communications were elsewhere; only connection with NY is that the funds were deposited to the brown brothers NY account.
          3. These funds, which are D property are the basis of quasi in rem because they are in the state still with Brown Brothers.
          4. CPLR 302 does not go as far as is constitutionally permissible. Thus a situation can occur in which the necessary contacts to satisfy due process are present, but in personam jurisdiction will not be obtained within the state because the CPLR does not authorize it.

Quasi-in-rem is legit, but it has been limited by Shaffer by SCOTUS.

The property serving as jurisdictional basis has to have a relationship to the cause of action.

This doesn’t matter in many places, but since NY doesn’t exercise the full power of due process, Quasi-in-rem can be useful here.

* + - * 1. The property is the property in dispute. Sufficient connection.
    1. Matrimonial and related jurisdiction:
       1. CPLR302B: MATRIMONIAL
          1. Defined in CPLR 105(p) Matrimonial action. The term "matrimonial action" includes actions for a separation, for an annulment or dissolution of a marriage, for a divorce, for a declaration of the nullity of a void marriage, for a declaration of the validity or nullity of a foreign judgment of divorce and for a declaration of the validity or nullity of a marriage.
          2. Have jurisdiction over someone you're married to even if they're not here if they once lived here with you.
       2. CPLR 314(1): SERVICE IN MATRIMONIAL ACTION
       3. Carr Pg. 112: Anne Carr in NY is suing Barbara Carr in NY. Each claims to be the spouse of Paul Carr who died. Anne and Paul's divorce happened in Guatemala. in the absence of minimum contacts, new York courts have no jurisdiction over the nonresident second wife of a deceased husband, where the first wife seeks to obtain a declaration as to the validity of the first marriage.
          1. Want to find the answer to whether or not Anne and Paul's Guatemalan divorce was sufficient but can't determine that until answer if Anne can sue Barbara in NY.
          2. Husband is now dead. Old wife is a domiciliary, but the old wife isn’t married to the current wife, so even though it’s a status proceeding, it doesn’t matter. You need one of the spouses to be a resident of the forum.
          3. \*relevant restraints to 302b are discussed below
          4. In a marital dispute only your spouse can hale you back into court. The matrimonial rule doesn't apply here because Ann wasn't married to Barbara so they look to minimum contacts which fails.
    2. Child custody jurisdiction:
       1. Kulko: The issue is whether in this action for child support, the California state courts may exercise in personal jurisdiction over a nonresident, parent of minor children domiciled within the state. We hold that it would violate the due process clause of the 14th amendment.
          1. The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy contact with the forum state…It is essential in each case that there be some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum state.
          2. He agreed to let his kids go to school with mother there, but that certainly should not count.
          3. \*\*\*\*Even prior to Kulko, some NY courts had read restrictively the clause of CPLR 302b which allows jurisdiction when the state was the matrimonial domicile of the parties before their separation”. It was held to apply only when the state was the place where the parties “when last together made their home”
          4. \*\*\*statute will always allow for jurisdiction in NY when plaintiff is in NY and there is a child support issue.
       2. Res judicata does not apply to child custody because circumstances might change in a child’s life. That’s why child snatching might happen. However in 1977 NY enacted UCCJA. Jurisdiction exists if it is the child’s “home state”, or was the child’s home state within six months before the commencement of the proceeding and the child is absent from the state but a parent or person acting as a parent continues to live in the state.
          1. Home state = the state the child lived for at least six consecutive months immediately before the commencement of a child custody proceeding.
  1. **Discretionary limits on jurisdiction**:
     1. CPLR 327: Inconvenient forum
        1. For reasons of "Substantial justice" you can dismiss for inconvenient forum
        2. CANNOT dismiss when cause of action arises out of 5-1042.
     2. Martin Pg. 123: Forum non conveniens should not have been denied
        1. “Forum non conveniens is an equitable doctrine whereby a court in its discretion may decline to exercise jurisdiction of a transitory cause of action upon considerations of justice, fairness, and convenience…By traditional standards, the mere occurrence of an accident within our borders might suffice to insure a new York forum. However these rigid standards have been superseded by more flexible analysis…thus in silver, to counterbalance the expansion of long-arm jurisdiction, we relaxed the principle requiring new York courts to accept jurisdiction when one of the parties was a resident…a parity of reasoning dictates that forum non conveniens even though the accident occurs in the state.
           1. Pretty much stands for just because action happened hear doesn’t mean it’s not convenient
           2. Other cases show that it’s much harder to show a substantial nexus to another state when the accident occurred somewhere else.
     3. There is a presumption in favor of new York plaintiffs, it is often, but not always determinative.
     4. Bewers Pg. 127: some birth control as causing seizures. Produced marketed distributed regulated in the UK. Plaintiffs got them from there took them here, get hurt. Sue in NY. Forum non conveins is valid, just because the law is less favorable to plaintiffs in this case doesn’t make it in convenient. All of the things are in UK so this is an inconvenient forum
     5. Credit Francais Pg. 136: neither plaintiff nor defendant contains any offices in new York. French bank to Venezuelan. And it arguably requires interpretation and application of Venezuelan currency decrees.
        1. It is clear that the residence of the parties is no longer controlling consideration in determining forum cplr 327
        2. The agreement was negotiated in NY that text of the deposit agreement was drafted in NY, the payments under that agreement were to be made to marine midland in NY and that meetings between the parties to agreement were in NY.
        3. \*There was a choice of forum clause that said NY is appropriate. Since they have already agreed it should be prima facie valid unless unless unreasonable under the circumstances.
           1. In fact if in a contract over 250,000 against person anywhere and anyone can agree that NY law is the rule.
        4. CPLR 327 has been amended by subsection B which states that anything under 5-1402 will not be dismissed for forum non conveniens.
           1. 5-1402ny person may maintain an action or proceeding against a corporation in a contract when a choice of forum of NY has been made if it’s worth over 1,000,000
  2. **Subject matter jurisdiction**:
     1. Lacks Pg. 141: The NY SC only has smj over matrimonial actions of **statutory** nature. This divorce was about the residence requirements. If they made the decision on that and that is considered statutory then they are fine
        1. In sum, the overly stated principle that lack of SMJ makes a final judgment absolutely void is not applicable to cases which, upon analysis do not involve jurisdiction, but merely substantive elements of a cause for relief.
           1. In this case jurisdiction was just an element in the cause of a cause for relief and didn’t really involve jurisdiction.
        2. Supreme Court is not the wrong forum because it's not proscribed, and the fact that husband hadn't met residency requirements has nothing to do with the competence of the court.
     2. Kagen Pg. 150: the new constitutional amendment removes all SMJ restrictions (except for sovereign immunity cases)
        1. There is a discussion whether all new causes of action means, new as in brought anew (post 1962) or newly created causes of action (Like trespass on my butt which didn't exist in 1962).
        2. Dissent: “new class of action or proceeding” means an action created by statute post the passage of the amendment in 1962. (like trespass on my butt)
        3. Majority says "Chuck Testa" it means post-1962

1. COMMENCING THE ACTION – the surprisingly troublesome formalities of acquiring jurisdiction
   1. **Introduction; conditions precedent**:
      1. You need to file with the county clerk and pay your 210 dollar fee then in a case where the statute of limitation on a relevant cause of action is less than four months you need to serve the other party within 15 days. If the statute of limitations is greater or non-existent than you have 120 days to serve notice. [306b]
      2. In some situations there are legal steps which must be taken prior to commencing the action, on pain of dismissal. Such a requirement, called a condition precedent, can be imposed by statute or contract.
         1. Usually the condition imposed is that notice of claim, a brief but formal description of the claim, be served upon the defendant upon accrual of the cause of action
   2. **How an action is commenced**:
      1. CPLR 304 –
         1. Nitty gritty of filing
         2. Materials submitted, method, numbers, dates, etc...
   3. **Mortgage Foreclosure Notice**:
      1. Foreclosures; required notices
         1. Notice of summons and complaint, must be in bold, fourteen-point type and shall be printed in a color other than the summons and complaint
   4. **Serving Natural Persons**:
      1. CPLR 308: Personal service upon a natural person shall be made by any of the following methods:
         1. In person
         2. Giving to a person of suitable age and discretion AND mail to either home or business
      2. CPLR 312: Service.
         1. More nitty gritty, for when you are serving by mail instead of in person. Has slightly hire requirements for what must go in the mailing
      3. 312-a allows, as an alternative, service by first class mail. An additional alternative is available in certain tort cases pursuant to statutes. Defendants can also agree to be served in order manners. Service on infant must be made on parent. Service must be done by someone not party to the action who has reached the age of 18.
      4. Macchia Pg. 205: delivery of a summons to defendant’s son outside his house, after which son goes into the house and gives the summons to his father is not valid service on defendant because there was no mailing pursuant to CPLR 308(1).
         1. 308(a) says it has to be in the state to the person who is to be served:
            1. And although sometimes the court has made exceptions to improper delivery it sees no reason to do such here
      5. Bossuk Pg. 207: leaving with kid of suitable age is ok. This is constitutionally acceptable as well because the constitution only requires that reasonably calculated, under all the circumstances, to apprise the interested party of the pendency of the action.
         1. 308(2) pretty much says that you can leave it with a person of suitable age if you mail it as well.
         2. In the instant case age 14 and 15 were considered of suitable age and discretion.
         3. You can also leave it behind the door if the person tries to place one between you and them
      6. If you're going to claim defective notice you must do so affirmatively at he beginning
   5. **Corporations and other institutions**:
      1. 311(a): Personal service upon a corporation or governmental subdivision shall be made by delivering the summons:
         1. To basically anyone
         2. Rule has lots of nitty gritty
      2. Colbert Pg. 222: The plaintiffs sue to recover damages for defamation out of a private investigative report commissioned by the defendant Southern Railway Corporation.
         1. Defendant was served in its offices, left a copy of the summons and compliant with Sobel🡪sobel turned the papers over to a responsible officer of the corporation and referred the matter to its attorney.
            1. Sobel was pretty much a secretary
         2. So was the corporation served in the way that would allow for in personam jurisdiction? Court says no
            1. She’s not a managing agent within CPLR 311…courts have defined managing agent as “must be some person invested by the corporation with general powers involving the exercise of judgment and discretion as distinguished from a mere employee who acts in an inferior capacity under the discretion and control of superior authority both in regard to the extent of his duty and the manner of executing it
            2. Also note: The “cashier or assistant cashier” to which the statute refers is a financial official within the ranks of the managerial hierarchy, not a check-out clerk at the counter of a retail store
      3. Foreign Coporations
         1. Bus Corp Law 306: See page 226
            1. Domestic and Foreign corps authorized to do business in state can be served through secretary of state
         2. Bus Corp Law 307: See page227
            1. How to serve unauthorized foreign corporations
2. THE APPEARANCE – a jurisdictional trap for the unwary
   1. **How and when made**:
      1. 320(a): Requirement of appearance.
         1. Within twenty days (30 if served by SoS) through answer or motion, including motion to extend time
      2. 3211(e)(f):
         1. (e) Number, time and waiver of objections;
            1. Before answer each party can only move once without leave
            2. Any service or jurisdictional claims must be put in the answer or they are waived
         2. (f) is a magic time extender for two specified motions.
      3. 3012
         1. If you just serve with summons they have twenty days to ask for complaint and then you have twenty days to ask for it.
      4. CPLR 2004:
         1. Court can extend time as reasonable
      5. CPLR 2005:
         1. Gives court discretion over delays – can excuse them.
   2. **Effect**:
      1. CPLR320(b):
         1. Appearance = personal jurisdiction unless you appear solely to contest personal jurisdiction
      2. 302(c): Personal jurisdiction by acts of non-domiciliary
         1. If the court only has personal jurisdiction because of business, land or transactions appearance does not confer personal jurisdiction
      3. Iacovangelo Pg. 246: even if you are missing your defense based off of lack of personal jurisdiction in your initial answer, as long as you amend it before trial you are alright.
         1. As long as it doesn’t prejudice the plaintiff (day before) then its fine. General principle that we want to decide cases on merits over procedure.
         2. This is probably specific to NY
      4. Gager Pg. 249:Rush v Savchuk is only applied when a specific objection to jurisdiction is made. That means you are allowed to attach someone’s insurance policy in NY. When you get into an accident with them outside of NY and they are a non-NY resident to get quasi in rem.
         1. So defendants now will want to raise an objection to PJ, they will win, and they will only be held there quasi in rem which means they can only lose the property attached.
         2. If you just show up and don’t waive then you are fucked.
         3. Policy point: in NY since you can only win what you attach – this may influence your forum choice. You may want to sue in a state where you can attach more assets if you're after mo' money.
      5. Textile Technology Pg. 253: waive your jurisdictional defense if your counterclaim is unrelated to the original claim. At that point you are seeking relief from the court and waiving your jurisdictional defense. Otherwise you would have simply been making arguments that you did not want to be precluded from making later.
   3. **Retrospective**:
      1. We have seen a number of ways in which the defendant can object to plaintiff’s choice of forum. To recap, they are: move to change venue (CPLR 510-511); move to dismiss because the forum is inconvenient (CPLR 327); seek removal to a different court within the state system (CPLR 325); move to dismiss for a lack of smj (3211a2); and as seen in this chapter move to dismiss for lack of jurisdiction over person or property 3211a8,9.
3. LIMITATIONS OF TIME
   1. **Statues of Limitations** 
      1. In general:
         1. CPLR 201:
            1. Actions must be brought within the SOL
            2. From time action accrues to the time the action is interposed (filing with the clerk)
      2. The applicable Period:
         1. *Tort and Contract:*
            1. *See page 23 of "yellow book"*

CPLR 213(2):

CPLR214(4),(5),(6):

CPLR214(d):

* + - * 1. Chase Pg. 269: are insurance brokers “professionals” as is meant by malpractice in 214(6)? No they are not professionals so it does not apply.

Professional contains qualities including extensive formal learning and training, licensure and regulation indicating a qualification to practice, a code of conduct imposing standards beyond those accepted in the marketplace and a system of discipline for violation of those standards. Additionally, a professional relationship is one of trust and confidence , carrying with it duties to counsel clients.

Need to know what a professional is as per the rule.

* + - * 1. Cubito Pg275: General rule: Accrual of the statute of limitation starts once the injury occurs. Not when the work is complete. “If we are going to depart from this rule we think that it should be accomplished by the legislature, just as the legislature has acted on behalf of the medical profession.

Even if the statute of limitations has run on the injured party to the architect, it is not run on the owner against the architect if it’s an indemnification action and a judgment has been rendered against the owner in favor of the injured party.

You don’t use the malpractice one because there is no client and no professional relationship between the plaintiff and defendant.

* + - 1. *Intentional torts*
         1. CPLR 213(b): Crime victims , refer to rule – generally 7 years
         2. CPLR 213 (c): Sexual Assault Victims 0
         3. CPLR 215(3),(8): The following actions shall b commenced within one year: see rule. For 8 you have a year post the end of the criminal action.
      2. *Products liability*:
         1. UCC 2-725: an action for breach of any contract for sale must be commenced within four years after the cause of actions accrual. By agreement you can limit to no less than 1 year.

For breach of contract and sale of goods we use UCC not CPLR.

* + - * 1. CPLR 214-c: exposure is calculated by the date of discovery not the date of exposure
        2. CPLR 214-d: architects
        3. CPLR 214-e: HIV
        4. Victorson Pg. 280: the period of limitation with respect to strict products liability claims begins to run at the date of the injury and that the duration of such period is found is CPLR 214(4,5).
        5. Blanco Pg. 285: Claims for repetitive stress injuries are now being seen by insurance carriers with increased regularity. RSI can be defined as an injury to the musco skeletal tissues from repeated motions and exertions. Carpal tunnel syndrome is the best known. Use of keyboard working, at what point in time does an RSI claim trigger the applicable insurance policy.

One approach suggests that the court apply an exposure trigger of coverage as RSI claims are similar to toxic tort claims in that the injury is caused by a prolonged exposure to a particular condition.

The approach to RSI is that a manifestation theory should be adopted. If manifestation is not reasonably determinable the date of last use of the injury producing device.

* + - 1. *Malpractice*:
         1. CPLR 214(6): Malpractice is three years if not medical, dental or podiatric
         2. CPLR 214-a: Action for medical, dental or podiatric malpractice should be with 2 years and six months unless discovery of a foreign object in the body which is one year after the date of discovery. If in the case of continuous treatment count from the day of last treatment (not check-ups)
         3. Goldsmith: when a prosthetic device malfunctions, does a cause of action for medical malpractice accrue upon implantation of the prosthetic device or upon injury? Implantation!

Only two exceptions for a doctor’s malpractice which were not met (continuous treatment after the malpractice, and if a doctor leaves a foreign objection)

P. argues doctor should still be in the case because of Martin’s third exception for products; but that’s when there’s a products liability claim and not a med mal case, so there is no third exception.

* + - * 1. Nyorchuck Pg. 303: this action arises out of defendant doctor’s alleged failure to properly diagnose and monitor a lump in plaintiffs breast 🡪 the question is whether this suit, which was commenced more than eight years after the lump was first brought to defendant’s attention and more than four years after plaintiffs last appointment with defendant in connection with another medical condition is barred by the 2.5 years stat of lim in 214a?

P. argues that he gets the benefit of the continuous treatment doctrine. Which, when applicable, toggles the running state of lim till the end of the treatment.

Court says the patient never underwent any treatment for breast cancer 🡪 the facts say that he complained and did a bunch of stuff, and really late eventually he referred her to an oncologist, but did nothing in-between, that’s not really treatment.

They define treatment more like: “continuous treatment must be for the same illness, injury which gave rise to the act or omission, there is no connection here”

Dissent: “where the physical and patient reasonably intent the patient’s uninterrupted reliance on the physicians observations, directions, concern, and responsibility for overseeing the patients progress, the requirement of the continuous treatment doctrine are satisfied.

ANGRY ALI IS ANGRY

* + - * 1. McCoy v. Feinman: lawyers fucked up, didn’t secure her survivor benefits from her husband in insurance policy. She sues. Stat of limit starts running from the moment the divorce judgment was entered.

P wants to extent the representation through continuous doctrine until they closed the file much later.

Continuous representation only applies when there is a mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim.

Times runs from when the judgment was entered doesn't matter that the file wasn't closed

* + - * 1. Note p.314: In a misdrafted stipulation of settlement for a divorce the clock starts when it's filed with the court. P didn't notice until after death of husband, but that is irrelevant.
      1. *Latent harms*:
         1. Latent harms are taken care of in 214 c, these are latent harms that are the result of products, if the result of professionals we use 214
  1. **Conditions Precedent**
     1. General: Note p.368 🡪 some limitations of time are not true statutes of limitations but are conditions precedent. This is because they must be satisfied before a valid action can begin. Sometimes the act is just commencement of an action. They can have origin in statue or contract. Conditions precedent are not subject to tolls or suspensions.
     2. Yonkers: plaintiff sues port authority; action is dismissed for not being filed within the time constraints for commencement of suits against port authority. Issue on appeal is whether section 7107 of McKinney’s uconn’s laws, which states that the filing req for suits against PA may be overcome pursuant to CPLR 205(a) because the action was commenced “within six months of the final dismissal of a previous action involving the identical claim”
        1. The normal 1 year req and the 6 months following the final dismissal of an identical claim are two separate conditions. AND ONE DOES NOT EXTEND THE OTHER.
        2. Right of action is created by the law once a condition is met – that's what a condition precedent is. ASK: Would you have the right of action without meeting this condition?
     3. Notes 371-374. Gen Mun Law 50-e; 50-i: Most common condition precedent:
     4. NEW YORK POT HOLE LAW: condition precedent to a condition precedent. If you want to sue city for a pothole, or street maintenance in general 🡪 you need to show that the defect was reported the city prior to the accident (by somebody)…city says we want individual. Court says you have to accept the map of all of them. Court: little squiggle on map is effective notice.

1. CLASS ACTIONS AND THE INTERPLAY BETWEEN STATE AND FED PRACTICE
   1. **Certification**:
      1. CPLR 901-903:
         1. 901: Prerequisites to a class action: 4 conditions
         2. 902: Class actions must be "certified" but we don't call it that in NY
         3. 903: the order permitting a class action shall describe the class
      2. CPLR 906: Allows for classes to be maintained or subdivided
      3. Weinberg Pg. 415: class action against hertz for their refueling charges. Originally was dismissed as a class action because it didn’t meet the superiority element of certification. Special term ruled that “economic impracticability renders this proposed class action an inferior form of adjudication”. It would cost more to figure out the exact class size and amount of each class member than this is worth.
         1. That’s bullshit. They have that technology already. In another action against hertz much smaller amount was consolidated into a class so it's no hardship to figure it out.
         2. It’s not only the superior method of action it’s the only one.
   2. **Notice**:
      1. CPLR 904: Notice of class action (**see rule**)
         1. Notice can happen however the court deems ok
         2. P is responsible for cost of notice unless the court determines that justice wants to shift it
      2. Notes 423-424: FRCP requires “the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort”, whereas CPLR 904b mandates that “reasonable notice of the commencement of a class action shall be given to the class in such manner as the court directs”. 904d also lets the opponent bear the cost of notice. The USSC has suggested that when the class has been adequately represented that’s enough to bind its members, even if they don’t even know about it..
   3. **Conduct, settlement and judgment**:
      1. CPLR 907-: Court makes the rulse
      2. CPLR 908: Can't dismiss class action without court approval (we assume this also means settlements also must be approved)
      3. CPLR 909: Attorney's fees can be given to the winner
      4. Woodrow P. 424: Does a Missouri corp with no ties to NY, have a due process constitutional right to opt out of a NY class action in which the relief sought in the complaint was largely equitable in nature. We hold today that when a class action complaint demands predominantly equitable relief that will necessarily benefit the class as a whole if granted, the trial judge is not required to give each class member the opportunity to opt out of the class. We also hold, however, the under the governing principle as applied to the faces of this case, the trial judge erred in approving a settlement agreement insofar as it purported to extinguish the respondents right to pursue a case of action in damages.
         1. If the equitable relief is binding certain parties from pursuing damages and individual rights of action then they need to allow people to opt out.
         2. We hold that the trial court did err as a matter of law by seeking to bind an absent plaintiff with no ties to NY state to a settlement that purported to extinguish its right to bring an action in damages in another jurisdiction.
      5. Klein Pg. 433: On this appeal we are presented with a challenge to the certification of a nationwide, settlement-only class action involving, inter alia, claims of fraud and the violations of section 349 and 350 of the general business law.
         1. Even when a class is certified only for settlement we still need to meet the requirements…indeed they “demand undiluted and even heightened attention”
         2. Trial courts must act as the protector of the right of the absent class members since they will not directly participate in the action, this includes determining whether any settlement is “fair, reasonable and adequate
         3. Because the court stands in for a jury the court has a hire responsibility to absent parties in cases that go to settlement
2. SPECIAL PARTIES
   1. **The poor**:
      1. CPLR 1101: (**see rule**) allows for adjustments in filing fees and other costly issues when you are a poor person
         1. A: Court can grant right to proceed as a "poor person" upon motion
         2. B: Attorney has to certify the "po'person" motion
         3. C: other parties will be notified of "po'person" motion
         4. D: waiver of filing fee
         5. E: No "po'person" motion when represented by legal aid or a non profit
      2. Smiley: the issue on this appeal is whether an indigent plaintiff wife in a divorce action and an indigent defendant wife in a similar action are entitled as a matter of constitutional right to have the county provide tem wit counsel or compensate counsel retained by them.
         1. For private civil matters there is no absolute right to counsel; whether in a particular case counsel shall be assigned lies instead in the direction of the court.
         2. The court does not have the power to decide this
         3. Policy of increased litigation if we start providing for this
         4. It would be unfair to the bar if we told them someone must do it uncompensated
         5. Dissent:
            1. The state holds the exclusive right to dissolve marriages so they must provide. They held in Boddie that they must get rid of filing fee and stuff in matrimonial litigation because otherwise people who are poor will be denied the right to divorce.
         6. Not entitled to in private civil! Possibility of increase legal costs and you can go to a non profit.
      3. Turner v. Rogers BB: Whether an indigent defendant has a constitutional right to appointed counsel at a civil contempt proceeding that results in his or her incarceration?
         1. the year-long incarceration of a South Carolina man for failure to pay child support violated the Constitution because adequate safeguards had not been in place to ensure that his failure to pay was willful.
         2. the Court also ruled that indigent parents did not have a categorical right to a court-appointed defense attorney in hearings to enforce child support orders when the party on the other side is unrepresented.
         3. No categorical right to counsel in civil actions
      4. Mandatory Pro Bono (SG 194-204):
         1. Policy Question?
      5. NYR 6.1: Every Lawyer should aspire to provide at least 20 hours of pro bono legal services, contribute financially to orgs that provide for poor persons. But the rule is not to be upheld with disciplinary procedures and there's no legal consequence.
   2. **Infants incompetents and conservatees**:
      1. CPLR 1201: infants will be represented by guardian or guardian substitute
      2. CPLR 1202: must move if you want a guardian ad litem
      3. CPLR 1203: cannot enter a judgment by default against an infant (or incompetent) unless representation made appearance
      4. CPLR 1206: property awarded to an infant goes to the guardian to be held for the infant (special rule for spouses). Court can rule it goes into a trust
      5. CPLR 1207: Can't settle without the court's leave through motion
      6. Barone: In compliance with the court’s duty protect a person who was apparently incapable of handling her affairs at the time of their service of the summons and complaint and entry of default judgment, the order should be reversed and the motion to vacate the judgment should be granted, without prejudice to plaintiff proceeding in a manner consistent with this opinion.
         1. When a creditor becomes aware the his alleged debtor is or apparently incapable of protecting his own legal interests it is incumbent upon him to advise the court thereof so that the court may make suitable inquiry and in its discretion appoint a person to receive service of a copy of the summons.
         2. DUTY! (other side: to inform/court: to protect)
      7. NYR1.14: Client with Diminished Capacity
         1. Must maintain conventional relationship as far as "reasonably possible"
         2. May take protection action when there's a risk of physical, financial or other harm.
         3. Allows for a loosening or confidentiality within limits
3. PLEADINGS
   1. **In general**:
      1. CPLR 3011: Kinds of Pleadings:
         1. There will be a complaint and an answer (cross claim, interpleader complaint, or complaint against third party). In certain instances there shall be a reply or considered waived. No other pleadings without leave of court.
      2. CPLR 3013: Particularity of statements generally (**see rule**): pleadings shall be sufficiently particular to give the court and parties notice.
      3. CPLR 3014: Statements (**see rule**): "plain and concise statement." Some formatting rules and when you can't combine. Can state causes in the alternative or hypothetically
      4. CPLR 3015: Particularity as to specific matters (**see rule**): Nitty Gritty – don't need to plead conditions precedent, name corporate statute, can cite other decisions without showing their jurisdiction, must show license to do business if cause of action requires it.
      5. CPLR 3016: Particularity in specific actions (**see rule**): lays out specific requirements for libel/slander, fraud/mistake/separation or divorce, law of foreign country, sales and delivery of good, and personal injury
      6. CPLR 3017: Demand for relief. (**see rule**): pleading must contain demand (and sets certain limits)
      7. CPLR 3026: Construction (**see rule**): LIBERAL CONSTRUCTION. Ignore defects if there's no prejudice.
      8. NYR 1.2: Scope of Representation and Allocation of Authority Between Client and Lawyer:
         1. Client is the boss
      9. NYR 1.4: Communication:
         1. Lawyer must communicate things to client
      10. Nichols: Workman's comp suit where P hired a lawyer for worker comp. Lawyer didn't inform him about other claims he would have against third parties. This is malpractice because you should tell your client about all the avenues because you're in the best position to help the client protect themselves in regards to this transaction.
   2. **The Complaint**
      1. CPLR 3020: Verification: gotta have it
      2. CPLR 3024: Motion to correct pleadings: can ask for clarity, or to strike prejudicial matters within 20 days
      3. CPLR 3211(a)(7): motion to dismiss because the pleadings fail to state a cause of action = equivalent to 12(b)(6) "failure to state a claim upon which relief can be granted"
      4. CPLR 3012a(a): A Certificate of merit in medical, dental and podiatric malpractice actions: have to talk to other doctors to know the claim is legit – powerful medical lobby
      5. Foley: appeal of a failure to state a cause of action ruling.
         1. Sufficient pleadings generally depended upon whether or not there was substantial compliance with 3013 providing that “statements in a pleading shall be sufficiently particular to give the court and parties notice of the transaction, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense.” These are at the “heart of the pleading requirement”
         2. “The basic requirement now is that the pleadings identify the transaction and indicate the theory of recovery with sufficient precision to enable the court to control the case and the opponent to prepare
         3. Generally we have a liberal approach;
         4. Burden is on the one who attacks the pleading to prove he is prejudiced
      6. Pludeman: did the plaintiff’s plead properly under CPLR 3016 specificity.
         1. Although plaintiffs have not alleged specific details of each individual defendant's conduct, we have never required talismanic, unbending allegations. Simply put, sometimes such facts are unavailable prior to discovery. Lest we willfully ignore the obvious—or the strong suspicion of a fraud—we have always acknowledged that, in certain cases, less than plainly observable facts may be supplemented by the circumstances surrounding the alleged fraud
         2. Here it is significant that plaintiffs, unrelated to one another, all registered parallel complaints. Moreover, it is the language, structure and format of the deceptive lease form and the systematic failure by the salespeople to provide each lessee a copy of the lease at the time of its execution that permits, at this early stage, an inference of fraud against the corporate officers in their individual capacity and not the sales agents
            1. Agents unique from the corporation as a whole To have a legit claim against agents need more than for the company (allege facts sufficient to infer knowledge of fraudulent scheme)
         3. Here the facts pleaded do not allow for an inference. Even if you wrote this is a four page lease and you should read the other pages on it they probably wouldn’t.
   3. **The answer**:
      1. CPLR 3018: Responsive Pleadings: an answer must include denials and affirmative defenses (that would take the other party by surprise if not pleaded) or they're waived
      2. Bello: man leaves a bag of stuff ticking on a bus; mother notices he was acting weird; other passengers were alarmed and settled in; bus driver comes to a quick stop and lets everyone off; mother sees her kid has been injured as a result of the sudden stop.
         1. Summary judgment is granted to defendants. The issue on appeal was whether the answer should have contained the emergency doctrine as an affirmative defense.
         2. P arg. That since they did not plead the emergency doctrine they should not be able to use it. Court disagrees
            1. “CPLR 3018b “depends on whether it would unfairly take the other party by surprise” in this case all the facts were known
            2. Hypothetically if the aff defense was "my medications made me do it" those facts are not readily apparent and if not plead at the answer they would be barred from bringing it as a aff defense
   4. **Counterclaims**:
      1. CPLR 3019: Counter Claims
         1. (a) Subject of counterclaims.
            1. P v. D or reverse
         2. (b) Subject of cross-claims.
            1. P v. D1 who then goes v. D2
         3. (c) Counterclaim against trustee or nominal plaintiff are barred
         4. (d) Cause of action in counterclaim or cross-claim deemed in complaint: Cross and counters may not get the full judicial treatment. Also, if someone not a party is liable then through a pleading a summons is issued. They get a chance to answer and are now defendants as if they been the whole time.
      2. Chrisholm-Ryder Pg. 610: Dispute between client and its former attorneys is before the court for the second time; in prior appeal they granted attorney’s motion for summary judgment – finding an account stated between the parties for legal services rendered during the eighteen years of the retainer; rights before that judgment plaintiff files against attorney’s for malpractice.
         1. Attorney’s move to bar based on prior judgment and this court grants the bar.
         2. Collateral estoppel or issue preclusion precludes issues which were necessarily decided in a previous matter. Will not foreclose issues that were not raise and not necessarily decided. Burden is on litigant to prove that it is not precluded.
         3. P.arg: not precluded because that action was for an account stated, not an action in contract; that counterclaims are permissive in NY and that it was therefore not obliged to seek damages for malpractice in the prior action; and that at the time of the prior motion it had insufficient knowledge upon which to predicate it claim of malpractice.
            1. *But the account established only the amount of debt it does not create liability where none existed; the creditor’s claim may always be defeated because of failure of considerations; thus prior action was necessarily determined; it’s about the nature of the claim not its form*
      3. Batvia Kill Pg. 613: there is a contract insured by travelers; batvia terminates due to what he calls lack of performance. Deusch sues for damages resulting from breach. Batvia does not counterclaim but they assert affirmative defenses:
         1. That the plaintiff as contractor failed to prosecute the work with such diligence that would insure the completion within the time specified and therefore we terminated
         2. In that trial court found that deusch did incur many costs in reliance, but batvia was justified in terminating.
            1. Batvia then sues seeking damages as a result of deusch’s lack of compliance with contract. Court finds that they failed to counterclaim; Appeal…and court reverses

It does not impair any rights;

Judicial economy is not a consideration since the relevant questions that were determined will be carried over

* 1. **The effect of the pleadings**:
     1. CPLR 3017: If you want relief you have to demand it and the type can be at the court's discretion
     2. CPLR 3025(c): Amendment to conform to the evidence. The court may permit the pleadings to be amended before or after judgment to form them to the evidence, upon such terms as may be just including the granting of costs and continuances
     3. CPLR 3026: Pleading shall be liberally construed. Defects shall be ignored if a substantial right of a party is not prejudiced.
     4. Iannone Pg. 625: this is an action to recover for property damage arising out of blasting operations performed by the defendant who entered into contract with the city to construct a subway on second ave. One cause of action is predicated on absolute liability and the second is on negligence. Third is for loss of business and disturbance in the enjoyment of the property. The fourth is based on negligence when they were blasting.
        1. Defendants served a demand for particulars with respect to the alleged plaintiff property damage. The jury considered damage before blasting based on trial court's instructions (to which the defendants objected) which was not in the pleading but the jury thought the it was implied in a fair reading.
        2. CPLR 3013: statements shall be sufficiently particular to give the court and parties notice of the transactions – the primary purpose is to advice of the complaint to allow him to respond without risk of surprise. This one gives no notice of pre blasting stuff.
        3. Vacated to have them do it again.
        4. PJI - Patterned Jury Instructions
           1. Not an official document
           2. Examples of jury instructions that say what the jury must find to find someone guilty
           3. Courts that don't use PJI have been reversed in NY
  2. **Amendments**:
     1. CPLR 3025: Amended and Supplemental Pleadings: Once without leave, after that with permission and good cause, and as is just to conform with evidence
     2. Heller: plaintiff fell in defendant’s elevator and was injured. Gets award of 2.5 million. Trial judge reduces to 1.25 million.
        1. Then plaintiff moves to amend complaint and ask for punitive damages. Court allows. This court reverses.
           1. D.arg: this is only a strategy to enhance bargaining position; all of the facts were known from the very beginning.
           2. Mere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine.
           3. There is prejudice here. This amendment would subject defendants to a far greater and different dimension of liability than would otherwise have been the case.
           4. Punitive damages require gross negligence, whereas the original pleadings only put him on hook for regular negligence
           5. There is no explanation for the delay
  3. **Sanctions**:
     1. CPLR 8303-a: Costs upon frivolous claims and counterclaims in actions to recover damages for personal injury, injury to property or wrongful death. You can award costs and fees and sanction and the shit out of people
     2. NYCRR part 130: authorizes the court in its discretion to impose sanctions on, or award attorney’s fees against, any party or attorney who engages in frivolous conduct.
     3. Matter of Minister: Respondent unsuccessfully prosecuted two appeals and two prior motions in this court. The motion is plainly untimely and, for that reason it should be dismissed. Further because the motion is utterly without legal support and was evidently made for the purpose of delaying enforcement, we conclude that respondent should be fined.
        1. Is nothing more than a same legal theory previously offered, and nothing more than the same evidenced offered in the same light.
        2. Don't be a dick or we'll fine you
     4. NYR 3.1: Non Meritorious Claims and Contentions

Non-meritorious claims and contentions.

(a) A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous. A lawyer for the defendant in a criminal proceeding or for the respondent in a proceeding that could result in incarceration may nevertheless so defend the proceeding as to require that every element of the case be established.

(b) A lawyer's conduct is “frivolous” for purposes of this Rule if: (1) the lawyer knowingly advances a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law; (2) the conduct has no reasonable purpose other than to delay or prolong the resolution of litigation, in violation of Rule 3.2, or serves merely to harass or maliciously injure another; or (3) the lawyer knowingly asserts material factual statements that are false.

* + 1. NYR 3.3: Conduct Before A Tribunal (**See rule important**)

Conduct before a tribunal.

(a) A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; (2) fail to disclose to the tribunal controlling legal authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or (3) offer or use evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

(e) In presenting a matter to a tribunal, a lawyer shall disclose, unless privileged or irrelevant, the identities of the clients the lawyer represents and of the persons who employed the lawyer.

(f) In appearing as a lawyer before a tribunal, a lawyer shall not: (1) fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of the intent not to comply; (2) engage in undignified or discourteous conduct; (3) intentionally or habitually violate any established rule of procedure or of evidence; or (4) engage in conduct intended to disrupt the tribunal

1. THE BILL OF PARTICULARS
   1. CPLR 3041-3044
      1. 41: Bill of Particulars: a party can request a bill of particulars when the claim is not clear (a more detailed pleading)
      2. 42: Procedure for a Bill of Particulars: (**see rule**): Demand must be made (can be amended), if not responded to can compel compliance, there can also be penalties (including preclusion)
      3. 43: Bill of Particulars in personal injury actions (**see rule**): what you can ask for in an injury situation
      4. 44: Verification of Bill of Particulars: If the pleading is verified than the BOP should be too, unless negligence in which case verified no matter what.
   2. Felock Pg. 645: defendant moves to strike certain portions of the bill of particulars. Denied. Appeal
      1. Following her birth Felock was hospitalized at defendant hospital. Suffered burns from where electrodes had been placed on her skin.
      2. Defendants felt that the responses to certain questions were not sufficiently particular in the bill of particulars.
      3. In addition, plaintiffs objected to defendant’s response in saying they were not able to locate nursing notes.
      4. Eventually defendant moved to CPLR 3042 and 3126 to strike certain paragraphs of the verified bill of particulars on the ground that they were not sufficiently particular or were overly broad. Plaintiffs opposed the motion and cross-moved pursuant to CLR 3124 and 3126 for sanctions against defendant’s based upon the failure to produce a complete set of medical records.
         1. Court denies defendants
         2. Grants plaintiffs conditionally if notes are not produced in 90 days. If they do not they will be precluded from rebutting any evidence regarding the material contained therein.
      5. The purpose of a bill of particulars is to amplify the pleadings, limit the proof, and prevent surprise at trial.
         1. The responses to a demand for a bill must clearly detail the specific act of negligence attributed to each defendant. However they don’t need to provide evidentiary material or information. Especially in a med mal case, as any for personal injuries, the bill of particulars requires only a general statement of the acts or omissions constituting negligence.
            1. Plaintiffs did not need to allege anymore specifically. They said that there were insufficient medical knowledge and that they kept insufficient medical records.
   3. Northway Pg. 648: Defendant contracted to have plaintiff perform work. In its answer defendant’s asserted two counterclaims. Plaintiff sought a bill of particulars with respect to the counterclaims. But defendant’s failed to furnish any information, and they were unitliamtely dismissed under a preclusion order. Defendant’s nevertheless sought to use facts underlying the counterclaims as defenses against plaintiff’s claim.
      1. Court had ruled that they cannot use proof from the underlying counterclaim in defending the plaintiffs claim since they are inextricably connected.
         1. The purpose of the preclusion is to make the party whole; they are whole. The fact that it is interwoven doesn’t matter at all. Reverse.
         2. Dissent;
            1. Plaintiffs request for bill was no addressed merely to defendant’s counterclaims, as the majority misportray. Instead plaintiff’s request was directed to specific paragraphs of the answer which defendant itself had denominated counterclaim and defense.
      2. Like Cricket (darts!) once it's closed out other side can't profit but can close it tout as defense
   4. Finkel Pg. 654: Order denied defendant motion for preclusion, directed plaintiff to serve a further bill of particulars when plaintiff acquires additional information.
      1. The bill that was provided was so general as to be useless to defendant. Thus, as defendant had suggested, the bill should be amended stating that they have no further knowledge, but, that if any were obtained, it would be supplied to the defendant. You are entitled to the particulars demanded when and if plaintiff acquires the necessary information
2. DISCLOSURE
   1. Scope In General
      1. CPLR 3101(a)(e)-(i): Scope of Disclosure
         1. Generally (a)
         2. Privileged matter (b)
         3. Attorney work product (c)
         4. Trial Prep (d)
         5. Party statements (e)
      2. CPLR 3102(a): Method of Disclosure include information, depositions, interrogatories, and document (etc... reviews), and requests for admissions
      3. CPLR 3102(c): You can engage in disclosure before an action has started but only with the leave of the court.
      4. CPLR 3103: Protective Orders: gives the court authority to limit disclosure through protective orders when moved or by its own initiative. Can suppress if something was supposed to be protected
      5. Devices available:
         1. CPLR 3102(a): Disclosure devices:
         2. CPLR 3106: Priority of depositions; witnesses; prisoners; designation of deponent.
            1. If you want to depose before the response time is over you need a court order
            2. Witnesses must be subpoena
            3. Can depose prisoners with leave
            4. Can ask to depose by title or role
         3. CPLR 3117: Use of Depositions: Can use to impeach
         4. CPLR 3120:Discovery and production of documents and things for inspection, testing, copying, or photographing: Bottom line – you can get shit.
         5. CPLR 3121:Physical or Mental examination applies when in controversy.
         6. CPLR 3123: How to use Admissions as a disclosure tool
         7. CPLR 3130-33: Use of Interrogatories; Service of interrogatories; Service of answers or objections to interrogatories.
      6. Unique from the federal system that has the required disclosures.
         * 1. Andon: Case where damages were sought for an infant who had ingested lead based paint, defendant moved to compel plaintiff-mother to submit to an IQ test. The injuries allegedly sustained by the infant included “learning disabilities, developmental delays in speech and language skills”.

The disabilities might be genetic. Doctor testifies that maternal IQ is relevant.

This court feels mother’s condition is not in controversy.

The decision in the lower court to say it’s not in controversy rested on balancing:

Defendant’s need for information

Relevance of information

The burden on mother

Potential for unfettered litigation

In the end all of that reveals that it will raise more questions than answer.

It will turn this into a series of mini trials on what does and doesn’t contribute to the disabilities.

IQ test Is violation of the mother’s privacy as well.

There's a strong wall against someone putting their opponent's mental state in issue.

* + - * 1. Bertocci Pg. 665: Plaintiff seeks to recover damages resulting from the purchase of a fiat. Plaintiff asks for in interrogatories, the number of fiats sold and the number of replacement clutch cables fuel pumps and timing belts for the models sold during that period of time.

Special term granted the motion for a protective order striking the interrogatories as irrelevant 🡪 this court disagrees

The inquiries bear upon the central issue in dispute.

This is a property damage case, but if parts are defective then it is relevant.

\*However the court limits the amount of information that they are allowed to have to the exact model that the injured party had. If this was a products liability case maybe the others would be relevant too

* + - * 1. Lipco Pg. 704: the dispute arose out of a failed joint venture formed for public works contract work. Material sought pursuant to the CPLR 3120

The only way that it can be verified that the material sought is genuine is by receiving the raw data in computerized form.

New issues arise with e discovery. Are the docs still on the hard drive or are they on some form of back up; have the docs bee deleted, what software was used to create and store the docs; and is that software commercially available or created for this user

Regardless first ask is this material and necessary in the prosecution or defense of the action.

ASG admits it is discoverable only issue is that it is extremely difficult, time consuming and expensive.

So who should bear the costs?

Normal files are kept because they have value, computer files are kept because it doesn’t really cost anything.

Federally, The party from who electronic discovery is sought should be required to produce material stored on a computer so long as the party being asked to produce the material is protected from undue burden and expense and privileged material is protected.

Federal courts have spoken about cost shifting; **however, in NY under the CPLR, the party seeking discovery should incur the costs incurred in the production of discovery material.**

Since the software is available commercially, and the cost is substantial. The seeking party will bear the costs.

* 1. Background- The Duty of Confidentiality and the Attorney-Client Privilege Compared
     1. Upjohn: The AC privilege is huge. It is the oldest privilege of communication known o common law. Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice,
        1. Although the managers of a corp can be said to possess an identity analogues to the corp as a whole, this would overlook that the lawyer needs information from others to amenable him to give sound information and advice.
        2. Normally a client will provide lawyers with all the info they need, but now it is officers and their agents who provide that information
           1. Thus the control group test frustrates the purpose of privilege in the corporate context, because we want agents to be willing to openly share information with attorneys.
           2. So we extend to lower level employees. Work-product doctrine protects oral statements made to attorneys, but not the facts underlying hem.
        3. Upjohn construed the privilege under fed law. States are free to define however they want.
     2. What's the difference between confidentiality and privilege(CPLR 4503 and NYR 1.6(a))
        1. The source of the information. Privilege is just with the client and Confidentiality is anything about the client.
        2. Attorney Client Evidence Privilege
        3. Confidentiality - there are exceptions in the rules.
     3. CPLR 3101(b): Upon objection by a person entitled to assert the privilege, privileged matter shall not be obtainable.
     4. CPLR 4503(a)(1): Sanctity of A/C **Privilege** – NO disclosure sans waiver, no compulsion to disclose
     5. NYR 1.6:**Confidentiality** No revealing of confidential information without informed consent. Implied waived for best interest (negotiation)
     6. NYR 1.9(c): duty to keep things confidential doesn't expire with the relationship
     7. NYR 1.18(b): even prospective client communications are to remain confidential.
  2. Confidentiality in entity representation:
     1. Spectrum Pg. 669: in an action to recover fees for consulting services, plaintiff demanded that the defendant produce certain documents pertaining to the bank’s internal investigations of fraud.--> defendant says that they are protected by A/C privilege. Is the report prepared by D’s specially retained outside counsel privileged and thus immune from discovery.
        1. This report went through and detailed that there were possible fraud by its employees and that it had X, Y, Z potential actions against P.--> coincidently law suit is filed later. Lower court decides not privileged because an independent investigation cannot obtain privileged status merely because it may have been communicated to an attorney. They were not material prepared in anticipation of litigation.
           1. This court disagrees:

The communication must primarily be of legal nature, and for the purpose of facilitating the rendition of legal service

The appellate division thought this report was aimed at assisting D in its business and prevent future corruption. However this court disagrees

It is not narrowly confined to the repetition of confidences that were supplied to the lawyer by the client.

If a lawyer is hired to do non lawyer work then the communication isn’t necessarily privileged. But we think this report was very legal in character.

* + 1. Tekni-Plex, Ind SG 535: fist, can long time counsel for a seller company continue to represent the shareholder in a dispute with buyer? Second, who controls the A/C privilege as to pre-merger communications?
       - 1. And that the buyer controls the privilege as to some, but not all of the pre-merger communications. The things relating to the merger that the attorney represented both sides are not privileged because shared attorney means no priv.
         2. Normally if you share an attorney there is no expectation of privilege.
       1. Counsel should step aside (THREE PRONGS: 1. New tekniplex is a former client of M&L; There is a substantial connection between the current and former representations; Are the interests of M&L’s representation material adverse to the interest of its former client)
          1. When a business is taken over or is transferred somewhere else and tries to maintain all of its shit the A/C carries over.
          2. Merely a transfer of assets with no attempt to continue does no transfer AC
    2. In re Grand Jury Subpoena:
       1. Grand jury subpeonas interviews of former employees of AOL conducted by a law firm that AOL hired. AOL explicitly waived its privilege. Former employees move to quash and district court rejects the motion. Court here affirms because:
          1. Investigating attorneys told them that they represented the company
          2. The investigating attorneys told them "we can" represent you which is different from "we do" represent you
          3. The could not show that the investigating attorneys agreed to represent them, and
          4. The investigating attorneys told them that the A/C privilege belonged to the company and the company could choose to waive it
    3. NYR 1.13: Details the specific confidentiality provisions when the client is an organization and not a person.
  1. Material Prepared for Litigation and Other Privileges applicable to Disclosure
     1. CPLR 3101(c): Work product is not obtainable
     2. CPLR 3101(d): Have to reveal experts and other relevant trial prep stuff
     3. CPLR 3101(g): accident reports are obtainable
     4. Hoffman: Plaintiff, was robbed in her apt building by a person who obtained unauthorized access. Sues landlord for negligence in securing the premises.
        1. Defendant wanted witnesses to any acts or omissions that may have resulted in the occurrence🡪P refuses
           1. Revealing the names of witnesses would not violate the general policy against invading the privacy of an attorney’s course of preparation; is in accordance with the trend towards greater disclosure. The names of these witnesses is not material prepared for litigation, even though it involves his investigative efforts, it is limited to those that are uniquely within his professional skills
           2. Results of a lawyer's investigations are not always "work product" just because s/he did the leg work
     5. Miranda Pg. 680: sues for injuries sustained while operating a shredding machine owned and operated by D. there is a witness makes a statement to some officers of the corp and an attorney. The D claims that this guy barely spoke English so he didn’t understand the questions, but the P wants it disclosed. This court says that it is not protected, and should be disclosed
        1. CPLR 3101(g) provides for the disclosure of any written report. (d) conditionally exempts anything prepared for litigation.
        2. *Taken together, the effect is to authorize the disclosure of an accident report made in the regular course of business even if it is made solely for the purposes of litigation.*
           1. It is only when an accident report has not been made in the **regular course of business** that it may be exempt if it is made solely for the purposes of litigation. Burden of showing everything is on the party seeking to prevent disclosure
           2. **Issues in the accuracy of the transcript is not reason for exempting disclosure, but may affect its usefulness.**
     6. Gilly Pg. 686: The substance of a report prepared by a physician employed by a defendant to examine plaintiff, and furnished to her, can be elicited b plaintiff as part of her direct case. The trial court erred in precluding his testimony
        1. A disinterested expert cannot be forced to testify, but he can be if he is at the trial as a party to the action.
        2. In this case, the Dr. examined the plaintiff and relayed his finding to both parties in litigation, so he should not be barred from relating the substance of the report when called as a witness like in those other scenarios.
           1. Permitting such evidence furthers truth-seeking objectives without engendering the concerns expressed in those other cases

First, disinterested persons need not fear being drawn into litigation because of their distinctions, However this doc voluntarily involved himself in the case when he examined and reported his findings. He is not being compelled to express an opinion, but only to relate conclusions already formulated and disclosed.

* + - 1. Because he's a voluntary witness, it doesn' t matter that he's the defendant's doctor – talking about his report on the stand furthers truth seeking and is good for everyone.
  1. Improper receipt of Confidences
     1. Lipin: Sexual harassment and discrimination action. Action dismissed as sanction for plaintiff’s taking and use of privileged defense documents. This court holds ruling to dismiss as sanction
        1. Claimed the boss’s unwelcome sexual overtures presented her advancement at red cross. Eventually lead to her termination.
        2. At deposition steals a memorandum from the other side about her issue.
        3. *The highly improper manner in which plaintiff obtained the documents, coupled with their subsequent use (threatening) warrant dismissal.*
        4. Realized docs were private; still read them; made notes; copied
        5. CPLR 3103 gives courts broad discretion in protection “court can issue any order”. Whether or not that doc was privileged they could do this.
     2. NYR 4.4(b): When a lawyer gets something s/he reasonable should know s/he shouldn't have the sender must be notified promptly
     3. FRE 502(b): covers the same issue but for the federal rules and when disclosure is not a waiver

1. ACCELERATED JUDGMENT
   1. Overview:
      1. CPLR 3211(a): motion to dismiss (pleading fails to state a cause of action)
      2. CPLR 3211(b): motion to dismiss a defense
      3. CPLR 3211(c): After a motion to dismiss/or motion to dismiss defense evidence can be submitted that is considered a motion for summary judgment (court has leeway to treat it as such)
      4. CPLR 3211(d): when facts are missing, court can deny motions and allow for more fact finding
      5. CPLR 3211(e): limits on how often you can more
   2. Failure to state a cause of action or defense:
      1. CPLR 3211(a)(7):
      2. Rovello: seeking specific performance of an agreement where defendant agreed to sell plaintiff her late husband’s insurance business and related real estate. Moved to dismiss for failure to state a cause of action. The issue is whether a motion court may grant judgment under cplr 3211(a)(7) without treating the pleading motion as one for summary judgment, when the complaint is sufficient on its face, but the affidavits submitted indicate, not quite conclusively, that purchaser may have no cause of action. This court feels the action should not be dismissed
         1. Under modern pleading theory, a complaint should not be dismissed on a pleading motion so long as, when the plaintiff is given the benefit of every possible favorable inference, a cause of action exists.
         2. Summary judgment can be used later on if the plaintiff cannot prove a necessary inference.
         3. You can consider the defendant’s affidavits, but if not conclusive then continue trial
         4. Dissent: the plaintiff provides no proof that he had the down payment, other than saying that he stood ready and able to make the down payment.
            1. A motion to dismiss for failure to state a cause of action is no longer, as it once was, limited to the face of the complaint CPLR 3211 subd (c). The question now is whether he has a cause of action, not simply whether he has stated one. Thus, the court may consider affidavits and other extrinsic proof to determine whether a fact essential to the plaintiff’s cause of action is lacking.
   3. Summary Judgment:
      1. CPLR 3212: Summary judgment etc...
      2. CPLR 3213: How you serve and timing of service for summary judgment
      3. CPLR 3214: Judge is the master of Disclosure, and if a Motion to Dismiss (3211), or motion for SJ (3212/3213) is filed Disclosure is stayed unless court rules otherwise.
      4. Ugarriza: is plaintiff in automobile negligence action entitled to summary judgment on the issue of liability or whether there exist genuine and substantial trieable issue of fact which serve to preclude summary judgment
         1. Although there once were significant limitations upon the type of action in which summary judgment was available this is no longer true. The trend of the law is to allow it in more cases. (now allowed in matrimonial and negligence).
         2. Still is drastic since it allows one party res judicata effects and denies another party their day in court
         3. Negligence cases by their very nature do not lend themselves to summary judgment since often even if all the parties are in agreement as to facts, because negligence is a jury question.
            1. Only if it can be concluded as a matter of law that defendant was negligent may summary judgment be granted in a negligence case. This is not such a case.
            2. There is a question in the case as to whether the defendant acted reasonably. We will not allow summary j on liability
         4. Bottom Line: Negligence and SJ don't really work unless it's concluded as a matter of law which didn't happen here.
      5. Brill: this appeal puts before us a recurring scenario regarding the timing of summary judgment motions that ignores statutory law, disrupts trial calendars, and undermines the goals of orderliness and efficiency in state court practice.
         1. City filed for summary judgment without excuse after the 120 day limit specified in CPLR 3212(a) simply arguing that it did not have prior written notice. Supreme court determined that in the interests of judicial economy, and since Mrs. Brill did not manifest any prejudice from the delay, it would decide the summary judgment motion on the merits. The court granted the city’s motion (because no prejudice)
         2. We reverse, motion should not have been considered
         3. Summary judgment is valuable when something involves no questions of fact and only questions of law.
         4. We conclude that “good cause” extensions in CPLR 3212a requires a showing of good cause for the delay in asking the motion – a satisfactory explanation for the untimeliness rather than simply permitting meritorious non prejudicial filings, however tardy. No excuse, or perfunctory excuse, cannot be good cause
         5. Cannot move for SJ any later than 120 days after the filing of the note of issue except with leave of the court for good cause. The Note of Issues is what puts you in line for trial. (You can also vacate a note of issue (P will typically file the note of issue and the D will likely move to vacate)).
2. SETTLEMENTS
   1. CPLR 2104: Settlements not made in open court are not binding unless in writing, put into an order and entered. Stips will be filed with the county clerk
   2. CPLR 5003-a(a): When an action is settled the D will pay the costs (unless under b or c) within 21 days
   3. CPLR 5003-a(b): When D is a municipality or public corp. not indemnified by the state they pay with in 90 days
   4. CPLR 5003-a(c):When D is a state, or officer or employee of the state payments will be made within 90 days after the comptroller has signed off.
   5. CPLR 5003-a(d): P will file with the court for approval of the stip
   6. CPLR 5003-a(e): No payment by D can = entering judgment for the P
   7. Hallock: a stipulation of settlement made by counsel in open court may bind his clients even where it exceeds his actual authority.
      1. Plaintiff was ill on trial date; attorney makes agreement; he is unsatisfied.
      2. Even if his attorney didn’t have actual authority he had apparent authority to bin the plaintiff.
         1. Essential to the creation of apparent authority are words or conduct of the principal, communication to a third party that gives rise to the appearance and belief that the agent possess authority to enter into a transaction.
         2. Must show that relied upon the misrepresentation of the agent because of some misleading conduct on the part of the principal – not the agent.
            1. The principal vested the agent by letting him represent plaintiff through the lit, engage in prior settlement negotiations, and let him appear at the final pretrial conference.
            2. If we do require detrimental reliance to use apparent authority, plaintiffs silence for more than two months after the agreement, and the lengthy litigation that has ensued is detrimental reliance.
   8. NYR 1.2(a); 1.4; 1.8(g); 4.2; 8.4(b):
3. TRIAL
   1. Candor to the Tribunal and Related ethical issues:
      1. Nix v. Whiteside\*: someone claims ineffective assistance of counsel when an attorney refuses to let someone lie on the stand. Wants to lie about seeing something metal in guys hand before shooting him. Attorney says I will report perjury
         1. There are limits to the sixth amendment guarantees of an effective trial
         2. Having a lawyer who will allow you to commit perjury is not effective counsel
      2. NYR 1.16(b)(c);
         1. Lawyers terminating clients only as per the limitations of 1.16
            1. Illegality
            2. Harassment
            3. Malicious
            4. Violation of PR rules
      3. NYR 3.3(a);
      4. NYR 8.4(a)-(d):
   2. The law governing Trials:
      1. CPLR 4011: Court is the master of the circuit
      2. 4016: Nitty gritty
      3. 4018;
      4. 4019:
      5. Matter of DES Pg. 807: We agree with the appellate division that plaintiffs have a constitutional right to a jury in the market share trial and consequently affirm.
         1. You are entitled to a trial by jury in cases in which it was heretofore guaranteed in the NY constitution.
         2. Well this is a modification of a current existing cause of action, this is not a whole new cause of action altogether.
         3. Courts of law and courts of equity.
      6. DiMenna: Is a jury trial a matter of right in this case?
         1. Plaintiff’s cause of action is not entitled to a trial by jury as a right. We do not doubt that a defendant by timely demand may preserve his right, in the event of failure of the lien, to trial by jury of other issues.
         2. The fact that the plaintiff has combined with a prayer for equitable relief an alternative claim for a money judgment, cannot deprive defendant of the jury trial assured to him by defendant, but it is different when the form of action if of the plaintiffs own selection
         3. One cannot be heard to urge as a breach of one’s constitutional right the concession of a remedy which one self has demanded
      7. Siriano: During jury selection the six-codefendants have used their peremptory challenges to excuse all nine minority venire persons (6 black and 3 Latino) who have to date been examined. Plaintiff asserts that this exclusion has been impermissibly based on race.
         1. Judge determines there is a prima facie case of racial discrimination, and asks defendants to provide race neutral explanations for the exercise of their challenges. You can find a prima facie case based solely on the exercise of peremptory challenges.
            1. Burden then shifts to the jury to come up with race neutral explanations
            2. This was originally just for crim, but was extended to civil.
            3. The exclusion of even a single juror for racial grounds is constitutionally impermissible
   3. Motions for Judgment during and after trial:
      1. CPLR 4401: Motion for judgment during trial, how to, etc...
      2. CPLR 4404: Motion practice post trial (both jury and non)
      3. CPLR 4405: Motion practice before the same judge even if after trial
      4. CPLR 4406: You get one motion after decision regarding the verdict or discharge and this include oral motions.
      5. Santana: Case involving a Spanish speaking plaintiff. Says something translator translates. One member of the jury tells the judge that the translator misspoke. This is an error, and could in some circumstances “prevent a trial by a fair and impartial jury”.
         1. In this case, it raised little possibility that he had forfeited his impartiality or that the entire panel was prejudiced. The juror had not spoken to any other jurors. And eventually we brought the witness back and the juror was right. She did mean crash and not bump.
         2. Question regards the impartiality of the panel as a whole
      6. Cohen: Question presented on appeal is whether the appellate division was correct in concluding as a matter of law that the jury verdict awarding punitive damages to plaintiffs was based on insufficient evidence. Reverse.
         1. Trial court grants verdict of punitive; appellate reverses saying that the ruling was based on insufficient evidence.
         2. They could have made a decision that it goes against the weight of the evidence and examine all the evidence on both sides, but they didn’t
         3. Instead they said that the P did not provide sufficient evidence to warrant that the pictures were knowingly taken.
            1. This court (Court of Appeals) definitely feels that there was sufficient evidence because they continued selling after they were notified, and they contacted the photographer; so there was sufficient evidence…..might have been against the weight of the evidence though.
      7. Nicastro: Resolution of these appeals involves the proper standard to be applied by a court in deciding a motion to set aside a jury verdict as contrary to the weight of the evidence
         1. Trial court granted motion to set aside jurys verdict in favor of appellants in a medical malpractice action. Since the victim died the jury relied mostly on medical records.
         2. The jury said not negligent, and the proximate cause issue was never reached. Plaintiff moved to set aside verdict pursuant to cplr 4404(a). We conclude that the trial court did not abuse its discretion in finding that the verdict was against the weight of the evidence.
         3. Few things to consider when setting aside verdicts:
            1. For sufficient evidence you need “no valid line of reasoning and permissible inferences which could possibly lead rational men to reach that conclusion on the basis of the evidence at trial”
            2. BUT, the criteria for setting aside a jury verdict as against thewegh of the evidence are necessarily less stringent, because it only results in a new trial and does not deprive the parties of their right.

This doesn’t mean you set aside everything you disagree with. You need signs of substantial injustice.

The jury verdict should not be set aside unless the “jury could not have reached the verdict on any fair interpretation of the evidence”.

Fair means free from fraud, injustice, prejudice, or favoritism.

If reviewing an order set aside you review for abuse of discretion

* + 1. CPLR 5513: You have a right to appeal but only within a certain amount of time
    2. CPLR 5601: In order to appeal to CoA there has to be a dissent in the Appellate Div or Constitutional Grounds
    3. CPLR 5602: Permission to appeal
    4. CPLR 5701: Lists when you can take something to App Div
    5. CPLR 5501: When you can appeal a final judgment.

1. RES JUDICATA

|  |  |
| --- | --- |
| Restt. Of Jments 2d | New York |
| Res judicata | Res judicata? |
| Claim preclusion | Res judicata |
| Issue preclusion | Collateral estoppel |

* 1. As for chart see CPLR 3018(b); 3211(a)(5) – the wording comes from the rules. Because the statutes itself refers to those doctrines, NY has kept the old wordings.
  2. Rstt of Judgments 2d Sec 17: A valid and final persona judgment is conclusive between the parties except on appeal or other direct review to the following extend
     1. If J for P: the claim is distinguished and merged in the judgment
     2. If J is for D: the claim is extinguished and subsequent action on the claim is barred.
  3. Where does NY come out on "does the judgment have to be on the merits?" to be barred –
     1. NY has applied **preclusive** effects on SoL cases which it totally not on the merits. But a later case says a judgment on SoL is sufficiently close to the merits
     2. But many of the statutes say "on the merits"
     3. NY straddles the Rstmt position and the NY implication of 5013
  4. Claim Preclusion:
     1. CPLR 5013:
        1. What does it mean to refer to the proponent's(the party subject to preclusion) evidence
     2. Gowan: can petitioners escape the doctrine of res judicata by tendering an additional basis for finding their dismissals illegal, namely, that the dismissals were patronage dismissals made in bad faith in contravention of the supreme court’s intervening decision.
        1. Once a cause of action has been finally adjudicated, tender of an additional legal issue not raised in the original action does not avoid the bar of res judicata merely because the supreme court of the us had not fully articulated the additional issue until after the cause of action has been adjudicated
        2. The only question of even marginal substance involves the purposed unavailability in the Bolan proceeding of a legal issue tendered in this proceeding. Petitioners contend that since the issue in Elrod was not resolved in time to raise the unconstitutionality of patronage dismissals, they should not be barred from raising that issue now
           1. It is settled law however that the conclusive effect of a final disposition is not to be disturbed by a subsequent change in decisional law. Just because the change is a constitutional one does not change anything.
     3. Xiao Yang Chen: Divorce action on the ground of cruel and inhuman treatment, Chen counterclaims for the same. Also included a fraudulent inducement claim. Eventually the parties stipulate to remove everything but the fraudulent inducement and get a joint divorce, and equitable distribution order. Chen then brings a claim of personal injury in a separate action, but the court rejects it because the tort claim could have been litigated with the divorce action and chen did not expressly reserve the right to bring that claim when she withdrew her fault allegations for purposes of this stipulation.
        1. RJ definition: once a claim is brought to a final conclusion all other claims arising out of the same transaction or series of transactions are barred even if based upon different theories or seeking different remedy.
        2. However can’t be too harsh because “in seeking to prevent a litigant from having two days in court, we cannot deny them of one”
        3. We can look to whether the claims are related in “time, space, origin, motivation, whether they form a convenient trial, whether their treatment as a unit conforms to the parties expectation or business understanding or usage.
           1. This was not a convenient trial because tort action and divorce actions require very different things, types of proof, remedies, one is decided by a jury the other typically by a judge.
  5. Issue Preclusion
     1. Kaufman v. Eli Lilly p. 974
        1. Action 1: Bichler case (DES product liability)
        2. Action 2: Kaufman wants to use findings from Bichler as preclusive in her case. Pg. 977 interrogatory to the jury
        3. Court allows it – shouldn’t have to relitigate. So the facts that were decided in Bichler that led to Eli Lilly’s liability can be applied here
        4. NY takes an extreme view of non-mutual defensive preclusion
     2. O’connor v. State of NY p 982:
        1. Cyclist kills a pedestrian. And the pedestrian’s family sues the cyclist in Supreme Court, and sues the State in Court of Claims. The state tries to say that because there was already a decision in Supreme Court and Decedent’s negligence was 60% there, that decedent’ s family cannot sue the state over the same issue and the issue of decedent’s negligence (which the jury found to be only 50% in Court of Claims) cannot be relitigated.
        2. Holding: These are two very separate issues. Decedent’s negligence can be different as to the cyclist v. as to the state. And the state shouldn’t have been party to the supreme court action, so the decedent’s family did all the right things.

1. RANDOM
   1. Article 78 and the control of government activity:
      1. CPLR 7801; 7803; 7804:
      2. CPLR 103(c): 217(1):
      3. New York Health Hosp Corp:
         1. issue:  what statute of limitations should be applied to declaratory judgment actions brought to challenge promulgated medicaid reimbursement rates on the grounds that they are irrational or affected with error of law
         2. holding:  the four-month statute of limitations for proceedings against a body or officer are applicable (CPLR 217).
            1. when there is no clear situation specific statute of limitations then you can use catch all limitaitons
            2. you cannot just change the form of your action to get one thats not time barred yet, once it has been started.
            3. Article 78  statute of limitations.does not apply to legislative acts.
            4. BUT IT DOES to quasi legislative acts - like rate setting by an administrative agency.
   2. Arbitration: an alternative to litigation:
      1. Arb agreements and their enforcement
         1. CPLR 7501-7503:
         2. God’s Batallion of Prayer 1055:
            1. Two parties begin working together.  One sends over a contract containing a arbitration agreement.  The church never signs or sends it back, but acts as a contract has ensued.  They must go to arbitration!

Although the Church did not sign the Miele agreement, it is evident that it intended to be bound by it. The Church has not successfully refuted Miele's claim that, after Miele forwarded the contract, both parties operated under its terms. Most tellingly, the Church's complaint alleges that Miele breached their agreement, thereby acknowledging and relying on the very agreement that contains the arbitration clause it seeks to disclaim. Moreover, the Church does not assert that the arbitration clause would be unenforceable even if the agreement were signed. That being so, it may not pick and choose which provisions suit its purposes, disclaiming part of a contract while alleging breach of the rest. A contract "should be read to give effect to all its provisions"...The lower courts therefore correctly ruled that the case go to arbitration

* + 1. The proceeding
       1. CPLR 7505-7507:
       2. Siegel:  does the arbitrators former position and account for one of the parties, along with their knowledge of the underlying facts, ban them from being arbitrators?
          1. these relationships don’t warrant disqualification.  if the relationship was fully known at the time of agreement, everything is kosher
          2. you waive your right to object once you know the relationship and agree to enter into the agreement
    2. Enforcing and attacking the award
       1. CPLR 7510-7514:

1. Judicial Ethics:
   1. NY State Board of Elections v. Lopez Torres: BB
      1. The State of New York requires that political parties select their nominees for Supreme Court Justice at a convention of delegates chosen by party members in a primary election. SCOTUS answers whether this electoral system violates the First Amendment rights of prospective party candidates.
      2. The constitution doesn’t require states to give people a “fair shot” at the judiciary. NY’s system meets the constitutional baseline so it’s legitimate.
   2. Capperton v. A.T. Massey: BB
      1. A “bought” judge refused to recuse himself
      2. Justice Kennedy, writing for the a 5-4 majority of the Court, reversed the judge’s decision in favor of the coal company on federal due process grounds.  The Opinion for the Court noted that the Due Process Clause incorporates the common law rule that requires recusal if a judge has “a direct, personal, substantial, pecuniary interest” in a case.  Tumey v. Ohio, 273 U.S. 510.  And in a line of cases that developed in the context of criminal contempt, due process also requires recusal where “the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.”  Winthrow v. Larkin, 421 U.S. 35.  Applying these principles, Justice Kennedy concluded that the possibility of temptation for Justice Benjamin was dispositive even without proof of actual bias:
   3. Think about the differences between the NY and the Federal Court systems.  What occurs to you?  Would they affect your choice of forum?