Pro Se Boot Camp Workbook

In the end, we only regret
the chances we didnt take….

September 2023

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INTRODUCTION

In the United States, we're very aware, citizens are guaranteed rights, granted by God and the Government only recognizes them.

The major problem we have, is rights don't enforce themselves and people are way to apathetic about defending their rights mainly, because they don't know how to enforce them.

In this course, you're going to learn what it takes to enforce your rights so you don't have to hire a lawyer, pay a lot of fees for retainers ending up forfeiting your rights because the lawyer is actually a “court officer.” A court officer has a duty to the court, not you regardless of what he says.

If you have no enforcement, you have no rights. That's the bottom line. This is why I cannot stress to you enough how important it is for you to learn the basics of defending and enforcing your rights.

You have the power and can protect yourself, your family and hopefully you'll be able to help your friends. You'll also be able to defend yourself against those who would attempt to sue you maliciously.

In this course, I'll be giving you the basic tools you'll need to ensure your ability to confidently stand up for yourself.

In addition, if you're a Secured Party Creditor, I realize many people in this line of information believe you shouldn't have to deal with any of this. The problem is, we do have to deal with court things all the time.

Whether it's a traffic ticket, a lawsuit, a credit issue, whatever it may be, there is a box the other side, the corporate side, has to follow and those are their rules of engagement.

When you know the rules and how to enforce them, you will win. That's what this workbook is all about.

A WINNING MINDSET

There are always winners and losers. Losers think they're going to lose. Winners know they'll win. Winners also have the knowledge they need to win.

The first thing to understand is PAPER IS KING when it's put in the court file.

What's great about this is, most attorneys think they can waltz into court and talk to the judge and the deal is done.

However, reality is, you have to file court documents on paper to ensure your position is clear. You can get all kinds of paper into the court before you go to a hearing before a judge.

In some cases, the other side will drop their complaint just on discovery alone. If they're really stubborn or the lawyer wants more money, they may keep going even when it is clear they will lose the case in the end.

It is up to you to ensure you push as much paper back and forth as you can but in the right way, at the right time and for the right reason.

If you're doing this correctly, you'll hardly have to speak in court. Everything you have put into the court will help you when you have to speak because it's all on paper. You've already filed it in the court record or you have it ready to file at a moment's notice should have to make a motion during a hearing.

You don't have to worry about being particularly articulate in court as most attorneys fail to file their papers and believe they're skilled orators and will be able to talk their cases into winning. Unfortunately for them, when you get your paper in the file on the record, you're in the driver's seat. That's where you want to be.

The only thing that matters in a court case is what is on the record and in the file. That's it.

The reason this is so important is because you're going to be setting the case up for an appeal. Appeals are won on paper. Judges know this and so do lawyers.

You may be thinking about the current position of your case, however, if you're smart, you're going to be thinking ahead to an appeal. You'll be setting up the entire case for an appeal and the Appellate court will be reviewing all the written records of the case.

This is why its super important that you build your case, methodically and on paper so it makes sense to the higher court.

Judges don't like to be overruled. They don't like people appealing the case. If it happens too many times, the judge will have to answer for so many mistakes and most likely, get fired.

The best way to enforce your position and defend your rights is by having a written record. Judges who know there is a written record are going to rule by the book and not go off the deep end and do whatever they want.

This is a great way to control the lawyers and control the judge.

You probably didn't think you could do that, but you can. You can control them and force them to play by the rules they made by written documents and getting those documents into the court record.

What you need to win any case is a written record with admissible evidence and legal arguments that are basically just common sense.

JUDGES AND LAWYERS

There are different types of judges and lawyers. Most judges haven't been trial lawyers, meaning they haven't argued any cases in front of a judge. They were other types of attorneys and in some cases, they weren't attorneys at all.

Lawyers on the other hand, are completely different. Regular desk, paper pushing attorneys who deal with many things that aren't really litigated in court are usually nice, caring people who are trying to do what's right. However, in a court situation, like a traffic ticket, lawsuit that is going before a judge, a trial attorney will be fighting with all their weaponry to win. To them, it's a game that has rules, but if you don't enforce the rules, they don't care and will try their best to usurp the rules.

You will see them constantly violating the rules and, just like any dirty game, if you don't call foul on the play, you just let that lawyer get away with something that could land him in hot water with the judge.

Your job is to watch for the violations and be the referee. You have to speak up and make sure the rules are followed and not think about pleasing the judge. Most judges have never

been trail attorneys so you're going to be guiding them depending on what you want them to do.

In the state of Illinois, they treat traffic tickets like murder and 2nd degree murder like a traffic ticket. This world is backwards and this is a revenue generator for them. They will be aggressive, but you can deter them by following the rules of court.

Regardless of what type of court case you're facing, the rules of the court don't change. They will be the same in all cases.

This means if you're involved in a civil matter or a criminal, the rules are the same. The court still has a set of rules it has to follow. You have to know the rules in order to win your case.

By knowing the rules of court, you can make everyone follow the rules.

THE 5 ELEMENTS OF WINNING

An Introduction to Court Proceedings

There are five parts to winning in court. These are:

- ✓ Pleadings – these are the alleged facts you need to prove to win your case
- ✓ Discovery – making sure your evidence is on the record to prove your pleadings/allegations
- ✓ Memoranda – written arguments
- ✓ Motions – made to require the court to take action
- ✓ Orders – compels people to adhere to the decision by force

No matter what the case is, these are the elements you need to win in court. You allege something through a "pleading" or "complaint," then you prove it with your discovery and admissible evidence. You show that the other side cannot prove what they allege. That's all there is to winning.

In Criminal Cases, if you're accused of a crime, you will allege and prove that the prosecutor can't allege and prove a crime has been committed beyond a reasonable doubt. That's how simple this can be. This is why discovery is important.

All the things people say online and attorneys try to tell you are pretty much a lot of bunk. There are only a few things you need to know for certain to win.

FACTS of your case

LAWS that will apply to the facts – not feelings! FACTS

PROCESS of getting your evidence on the record

PROCEDURES preventing the other side from getting their evidence on the record – remember PAPER IS KING – WRITTEN DOCUMENTS ARE KING!
MOTIONS forcing the judge to sign orders

Everything else doesn't matter. Your opposition crying and whining over something doesn't matter unless it's relevant to the FACTS.

Many times, cases are decided on one law that applies to the facts. The facts determine which law relates or "governs" the case.

You have a set of questions relating to the case and those questions will show you which law will apply. Every case has questions that must be answered by proof. Proof is very important on every question. You can't answer a question with speculation or hearsay.

Many times, people let lawyers and complainants off the hook without requiring proof of their claims. All you need to do is answer the questions with proof.

Most likely, the law governing the case is going to be one statute or principle of Common Law.

The winning side can allege and prove their case with a list of elements essential to every case.

Know Your Rights!

I've been in the courtroom enough to know that judges and attorneys try to push people into hiring attorneys by saying “only a fool would represent himself.” (That's a famous Abraham Lincoln saying) or you don't have a right to represent yourself.

Over and over again, the judge will push people into a Public Defender to represent them in court because they aren't competent to speak for themselves according to the 12 Precepts of Law. That's what they want you to think.

However, in reality you have the same rights as any attorney to defend or present yourself and your case in court. The Supreme Court ruled on this same subject many years ago saying if a man or woman is going to represent themselves in court, the court must give them enough leeway to speak in plain English and not in the legalese of the court.

You have the right to self-representation which means you have the right to know how to represent yourself and you have the right to the same things any attorney would have.

However, if you think you really need a lawyer, at minimum you'll know what the lawyer is doing and be able to hire or fire that attorney based on performance. If they're not doing things in your best interest, you'll know it from the start. I've been witnessing a lot of people getting ripped off by the attorney because that's really the only stake they have in your case. Some might think their reputation is worth something but if people watched these guys in court, you'd probably come to the conclusion they literally don't care that much about winning a case.

You need to force the rules to be followed be everyone including the judge.

PROOF

Evidence is proof your allegations are right and their allegations are wrong. By using the rules of evidence, you can ensure your proof gets into the court record.

You have to make sure good things are put on the record and anything that isn't admissible evidence stays out of the record.

By your evidence you will win your case every time and it's pretty simple to know what would be admissible evidence if you think about the facts only. Many of the questions you'll be asking are common sense. Common sense will be your friend when it comes to evidence.

You can keep hearsay out, speculation out, force people to go by the rules the court has already established.

Key to Keeping Evidence Out of the Record

If you've ever watched any court dramas, you'll hear the attorneys saying, “Objection!” followed by the judge saying, “Overruled!” or “Sustained.” That's the key to making sure the rules are followed in the court.

Grounds for saying, “Objection” in the courtroom are pretty clear cut. If you listen to what the other side is saying, you will be able to say objection and know why you're saying it.

When you do this, you'll force the other side to use the rules of court, rules of evidence and it also controls the judge.

Another reason this is one of your most powerful weapons is the other side probably won't think you know when to object, how to object if they think you'll object at all.

Grounds for Objections

Whenever there’s an objection on the table, the judge has to rule on it. Nothing can go any further until the objection is ruled on. I'll get into this a little more later but keep this in mind.

How Courts take Action

You have to move the court to do something or they don't take action. The court will just sit there and let the other side keep going unless you do either throw up an objection or make a motion.

When you want to move the court, you have to make a “motion.” Making motions isn't really difficult and you can pretty much say or write a motion to do whatever you want. You just can't assume the judge is going to do something unless you put a motion on the table moving the court to take action.

The only thing that will happen when you make a motion is the judge will have to make a ruling on it. The judge will either grant the motion or deny it. One or the other.

ESSENTIAL ELEMENTS OF A CASE

Cases Are Decided on Essential Elements

If you're going to win a case, you have to have essential elements. Without these, you've got nothing and you're going to lose.

Every case is going to have different essential elements depending on what is about. You have to know what it's about in order to find the essential elements.

Cornell Law School says this, *"Elements of a case are the component parts of a legal claim or cause of action that a plaintiff must prove to win a lawsuit. Each legal claim consists of "elements" that the plaintiff must prove in order to prevail. The plaintiff can prevail in a civil case ONLY if each element of the legal claim is proved by a "preponderance of the evidence."*

The Rules of Evidence and the Rules of Procedure are what make up the legal system. That's pretty much it. If you know these, you can find what you need to effectively present your case.

The THREE PARTS of the case are: Essential Elements, Rules of Evidence and Objections.

The formula is:

EE + RE + O = WIN!

Essential Elements are going to depend on the actual issue at hand. Everything is going to be an allegation with proof, an allegation with proof, an allegation with proof.

You may have 1 essential element; you could have 20. Until you review the actual complaint, you're most likely not going to know what these are or how many there are in the case.

That means, if someone accuses you of something, they have to prove it. If they can't prove what they allege, you win. It's the same with you if you're alleging someone else did something, you have to prove what you're saying.

Don't light your hair on fire as soon as you're served. Read what is being said and then take a day to digest it. Our initial reactions are usually panic. However, if you really read through the case, you can usually determine what to do next when you know how court works and the responses you can make. If you're the plaintiff, you should have all your facts straight and be provable before you even file a complaint. Otherwise, you're going to be fighting a losing battle if you're up against a smart attorney.

It really doesn't matter what the case is, if there are allegations, they have to be proven. The burden of proof is on the person making the allegations. Therefore, if you're on trial for murder, dealing with child support, a traffic ticket, etc., they are alleging something. You have to read the allegations and then individually tackle each one of the elements and see if there is proof against you.

Allegations are not always facts. False allegations are definitely not facts. However, facts can be allegations. But facts have to be proven. If you know something is a fact, you have to figure out how to prove that fact. Witnesses? Documents? Video? Audio?

What you're going to do is allege the facts and then prove them using the Tools of Discovery. Through your discovery process, you'll find admissible evidence. Evidence isn't always admissible so it's important to make sure your evidence isn't based on emotions but it's actually something you can use in court. Usually if you're a plaintiff, you're alleging a "cause of action." Defendants are responding to a cause of action and may even counter with their own cause of action. Every case is different. Similar, but different.

Cause of Action

Cornell Law defines "cause of action" as: *"a set of predefined factual elements that allow for a legal remedy. The factual elements needed for a specific cause of action can come from a constitution, a statute, judicial precedent or an administrative jurisdiction."*

If you know the essential elements of your case, then you'll know what facts you have to allege and prove or what allegations were alleged that you can disprove. You can be armed and ready but may never have to use what you've got. I actually have had a huge file on the plaintiff to use against them with all kinds of evidence before I even asked for discovery. I never had to use it at all. The judge dismissed the case before I even had to say anything or prove anything.

He was well aware I was very prepared just by going to the three previous hearings. Objections and discovery are a wonderful thing....

In Civil cases, there are allegations made which are the essential elements of a case which should lead to a "cause of action" meaning there would be a legal remedy. Plaintiffs have to allege something that would have a remedy and they have to prove the allegations of the essential elements. You can go one by one and if you're the plaintiff, suing someone else, remember, you have the burden of proof. The defendant can do the same thing. Take each allegation and prove you're wrong.

If you're the defendant and you know the allegations are false, you can ask for discovery and make the plaintiff prove each allegation. If they can't prove it, you're going to win. Using the court rules, rules of evidence and the essential elements, you can do this by yourself.

Criminal cases have essential elements. The prosecutor alleges something and then has to prove all essential elements beyond a reasonable doubt in order to win. There can be no doubts when it comes to a criminal case. This means, if they can't prove it, they're not going to charge it. If they decide to charge you with something, you have to find out what they're alleging. You'll read that on the indictment and then take each element and ask for discovery.

Many times, prosecutors actually fail to allege all facts and fail to prove all allegations. However, because the opposing attorney didn't object or get proper discovery, a person is convicted of a crime they didn't commit.

Defendants in Civil Cases can win in three different ways:

1. If the plaintiff doesn't allege all the essential elements in the initial complaint/pleading

2. If the plaintiff cannot prove all the essential allegations alleged in the initial complaint/pleading

3. Defendant can prove all of the essential elements on at least one Affirmative Defense.

You'll start figuring out that even Affirmative Defenses have essential elements. As the Defendant, you'll use these defenses to win your case.

Common Law

Common Law cases are cases that are appellate court opinions which are published whether they the case stands or falls. These cases also have essential elements to them. Facts that were alleged and proven or not proven depending on the case and how it was handled.

One of the most used common law cases are those about Breach of Contract since they have been tried and tried over and over again since the beginning of a "court" system and there are literally thousands of cases which have been published.

Common law is obtained from Appellate Court judges' decisions. That is what is now "common law." Because people don't know the system, they don't know what common law is and believe policy rather than what is already established law normally and which was, based on the United States Constitution. That's why it's important to stand up for your rights.

Attorneys are court officers. Trial and intermediate appellate court judges in most states and in the federal judicial system are called judges. Those on the higher courts are called justices. That's where the Supreme Court comes into play. They are justices and decided common law cases.

When you're looking for something to back your proof, you look for statutes, case law, whatever you need so you can read it and prove what you're saying is correct. These cases have essential elements in them just like statutes have essential elements in them.

We know some of these statutes, in fact many of these statutes are unconstitutional and as defendants, we have to be able to prove our position with using essential elements and breaking down the allegations into small bite sized pieces in order to prove what we're saying is true. This can be done through discovery and asking the right questions through interrogatories and depositions.

Remember, the attorney will most likely use one case to stand on. That means you better have three cases to his one. For every case an attorney has, you need two more. You will find cases that support your side and then you'll find more that define it. Try to get as close as you can when you're doing your research. It is most likely someone has encountered the same thing you're encountering now and there will be a case on it in the appellate courts. You may have to dig deep, but don't stop until you find it. Attorneys for the most part are lazy and sometimes they don't even have case law. They make it up and that's not good.

My law professor told us about a case he had where the judge was reading the newspaper while he was talking. He said, "Let the record show the judge is reading the newspaper during court proceedings." He won the case because the judge knew that would be read by the appellate court should they decide to appeal an unfair judgment.

Another time my law professor found out the Prosecuting Attorney and the judge were having an affair. She cited some case law that he knew was false. He called them on it right in court and they had no way out of it. He won that case because she made a false claim on bogus case law.

Don't be foolish. Do your research and find out the essential elements and slam the lid on the case.

Cases in Court of Equity or Cases in Equity are the common law cases that aren't seeking money but want a remedy. A Court of Equity is a type of court with the power to grant remedies and/or monetary damages. These remedies could be in the form of injunctions, writs or require specific performance.

A “writ” is a written form of command in the name of the court or another legal authority to act or not act in some way.

Many, many times, especially in the world of Secured Party Creditors, they talk about contracts. Contracts are usually some types of equity case. The person suing is seeking a remedy and therefore there are elements of the case that have to be met in order to win.

These 5 essential elements that have to be alleged and PROVEN are:

1. That there is a contract or other legal commitment, with evidence attached to it if it's available.

2. Existence of fraud, a mistake, false representation, the impossibility of performance other equitable grounds for rescission or cancellation of the contract.

3. Petitioner rescinded and notified the other party that he rescinded.

4. If the petitioner received any benefit, he must offer to restore respondent or the “defendant in equity: to the extent of the benefit, if restoration is possible.

5. Petitioner has no adequate remedy at law, money alone cannot restore petitioner to his *status quo ante* meaning his prior status before the contract.

What's great about these types of cases, fairness is taken into consideration as well as the petitioner's good faith.

What if the Petitioner is the one who is seeking remedy from the other party? Then the Petitioner has to prove the above 5 elements and if they can prove these, then the defendant will have to pay restitution or whatever the remedy is to make the equity case right, restoring the Petitioner to “whole.”

I'm thinking about all the social media cases that could be won on the above 5 elements if they weren't stuck on the First Amendment. Of course, the First Amendment is important, but you give up your rights if you are in a contract and this is why social media sites like YouTube and Facebook keep winning. This isn't about rights, it's about contracts.

The fundamental interests of justice must be upheld regardless of the equity case. What will happen when the ruling is made can impact society which is why these cases are very important. Precedent can be set and most likely already is set in many cases.

Alleging Elements

I've seen many people get hung up on feelings and forget facts don't care about your feelings. As a matter of fact (yup I said it) facts are whatever you can prove. They're not your opinion.

It may be most people think that crotchety old man is mean and nasty, however, that's still opinion and subjective. He might be that way because he has a thorn in his paw and if you took it out, he wouldn't be so crotchety. Maybe I know the guy has a thorn in his paw and I'm willing to say, he's in pain and it's not being crotchety, it's just his way of dealing with the pain. I pull out the thorn and

the guy is suddenly super nice to everyone.

The actual facts are:

1. There's a man
2. The man is in pain
3. The man has a thorn in his paw
4. He yells at people when the pass by

Those are facts. There's no emotion in the above factual statements. In a court case, all you have to do is satisfy the elements and then stop writing, stop talking, just don't do anything beyond the facts.

If you can't prove something it's not going to be admissible in court. It's not going to help you in your case.

FACTS vs ELEMENTS

Some people believe facts are the elements. However, facts are things you can prove.

Let me see if I can clear up this mud.

According to Cornell Law, the legal definition of an element is an essential requirement to make a claim or defense in court, as in elements of a civil action or a criminal action. For example, one element of negligence is the existence of a legal duty that the defendant owed to the plaintiff."

Cornell Law defines a fact as an event that actually happened, or a statement presented as objective truth.

For example, a cause of action could be neglected fiduciary responsibility of a unilateral contract. The alleged essential element is the party with the most power has a ***legal duty*** to fulfill its obligation and protect the weaker party to a certain extent. Think about landlords. They have a responsibility to ensure their property remains safe by making repairs with maintenance and upkeep most of the time.

The facts may be, the landlord did not fix a water leak and the floor is now ruined. Another fact, tenants reported water leak to landlord on August 5, 2021. Landlord answered the phone. Landlord said he would be over in 15 minutes. Landlord did not arrive until the next day. Tenants called repeatedly between the initial phone call and the next day. Landlord stopped answering the phone after 9 PM. etc., until you get to the part where the landlord wants the tenants to pay for the damage when the leak could have been dealt with had the landlord been responsible and shown up on time.

You are alleging the facts and you have to prove them. If you can prove them, you'll win.

The essential elements are what creates a cause of action. The facts are alleged then proven which relate to the essential elements.

You prove the facts with admissible evidence.

Everything else is filing motions to get court orders – moving the court to do something and ordering the other side to do it.

Just because you want to tell the judge your opposition is a bad guy doesn't mean it's relevant to the case. If it's not an essential element to the case, don't even bring it up. It will waste your time and

the court's time to deal with things that don't matter. It will also make you look emotional rather than serious about what your case is about.

Whether you're the plaintiff or the defendant, the facts don't care about your feelings.

Use the KISS method and KEEP IT SIMPLE STUPID!

Getting a judgment

Once you've covered all the essential elements have been alleged and proven the facts with the production of admissible evidence you want to move the court to declare what it is you want.

What you want is a final judgment in your favor.

Civil cases can award money damages. Equity cases change the “status quo.” Criminal cases set you free.

You move the court to make a final judgment according to the type of case and what you want the outcome to be.

PLANNING TO WIN

Court Case Strategy

You can't win if you aren't going to plan what you want to do. Having a plan is the first step in making sure you win your case. If you're not used to putting pen to paper, you will want to break that extremely bad habit right now.

I can't begin to tell you how many men, in particular, refuse to pull out a pen and write anything even when their life is hanging in the balance. They would rather lose it all than write something down. I am speaking literally, not figuratively.

I personally know three men, just off the top of my head who are in jeopardy of losing their homes. They are on the verge of foreclosure. They can't afford their homes anymore and still, even when they need to write a letter, even sign a document, they refuse to do it.

They have asked me multiple times to write the letter for them, sign the document for them, fill out the form for them. The answer is, if you are so stubborn you can't help yourself, I am not their secretaries. I don't get paid for this kind of thing and I'm not in business to write people's letters, strategize their cases or speak for them to any entity.

If you can't pick yourself up by your own bootstraps, then this probably isn't the route for you with one exception. At minimum, you won't get ripped off by an attorney from this time forward and you'll be able to knowledgeably assist in your case.

You will write things down and you will file them so you can be totally organized for your case.

What to Put in Your Court File

Just to be clear, this is a physical file you will keep at your home or office relating to your case. This isn't what you will be filing with the court.

You will want to keep anything and everything that is going to impact your case in any way. This includes dates and times of any events or actions, names and contact information of any and all people involved, details about places and people, whatever people say and do, what types of communication were used, emails, bank records, credit card statements, any mail that goes in or out, documents, contracts, EVERYTHING!

Start a diary that is as detailed as possible. It doesn't have to necessarily be every single day but as close as you can get it. This will help you remember events, times, dates, people, etc. I had to do this one time when I was suing a former employer for Breach of Contract and non-payment of the agreed salary. That was so helpful when it came to giving my testimony later.

If you're not sure if you'll need a document or record, save it anyway. You can always weed it out later.

Keep your files organized. I use file folders and hanging files. The major category is the hanging file and the file folders get more detailed. For example, I may have several witnesses I will need to call. I will put a major category labeled “Witnesses” and a sub-category of each of their names with contact information. If the witness has even more information than would fit in a small folder, I may make an entire box of Witnesses, inside are hanging files, in alphabetical order of each witness and the documentation for each, goes in files within the hanging file. You'll need physical evidence and not just digital when you go to court.

If you're trying to do all of this on your phone, you're not serious about what you're doing. An attorney doesn't do all his work on a little cell phone and neither should you.

Be responsible and get your game pants on. You're going to need it.

Organize your files how you can access them the quickest. This is for your notes, your convenience and your access. Make sure information is at your fingertips.

For the Plaintiff

If you're going to be the Plaintiff, you'll need to have a written plan on what you're going to do. That means you'll need a clear view of the case once it's complete. You need to look at it from a point of view that doesn't involve your feelings. Of course, it might later, but for the initial plan, you need to step outside of the personal involvement and think about the legitimacy of the case itself and what you're trying to accomplish.

You will need a written plan.

You're going to list your Causes of Action as headings on a piece of paper. Some examples of this are contractual, statutory, tort-related, fraudulent representation, conversion, negligence, defamation, then there's also anything that would be a precedent setting case and equity cases. Think about why you're bringing a Cause of Action.

Once you've figured that out, list all the essential elements of each Cause of Action under the appropriate heading. Under that, list all the supporting facts you can prove.

For each of the facts, you're going to list the method of discovery you will use to prove it.

Now you're ready to start a case file which is going to be your written plan.

Plaintiff Plan Snapshot

1. List Causes of Action as headings
2. List Essential Elements under the Cause of Action it relates to
3. List the supporting facts under the Essential Element it relates to
4. List the method of discovery you'll use to prove each fact with admissible evidence.

For the Defendant

When you're the defendant, your plan will be similar to the Plaintiff.

You're going to start with Affirmative Defenses, listing the essential elements under that heading. Then, you will list all the supporting facts you can prove under the essential elements. For each fact, you will list the method of evidence discovery in order to prove the facts.

When you do this, you'll need to keep yourself organized as you go.

Defendant Plan Snapshot

1. List your Affirmative Defenses as headings

2. List Essential Elements under the Affirmative Defense related to it

3. List the supporting facts for each Essential Elements

4. List the Method of Discovery under the fact which will prove it with admissible evidence.

For Criminal Defendants

If you've been accused of a crime, there are similar steps you'll take. These are:

1. Write the name of each alleged crime (charge) as a separate heading

2. List the Essential Elements of each charge

3. List the facts related under the Essential Elements that the PROSECUTOR MUST PROVE BEYOND A REASONABLE DOUBT.

4. List the discovery method you will use to prove the fact the prosecutor is trying to prove either doesn't exist or can't be proven.

You could be facing prison time here so I would suggest you take your time and be serious about what you're writing.

As Your Case Progresses

As you progress through your case, your files will not be stagnant. You will be updating and adding to your files as you go. You'll be adding things and you'll need enough file folders to make sure you can organize additional information.

At this point, you should have separate files for:

Pleadings
Motions
Discovery Requests
Legal Research
Names/Contact Information

I've seen many attorneys in court with extremely slim file folders walking into court. The only time it appears as if they have done any type of real work is when there is a serious matter at hand and the party, they represent is paying them a lot of money. Otherwise, they think everything is a plea deal, good ol' boys club, working out a few details and slam dunk, it's done. They're not really concerned with you. They're more concerned with making sure they are in with the other court officers in case they need a favor. It's how they play the game. You're in it, to win it.

You're creating a file box, to take to court where you will be accessing the files at a moment's notice. Judges don't like to wait on you to find what you need. You need to be able to find everything as quickly as possible. The more organized you are, the more intimidating you look to the other side, especially if you're able to respond quickly to whatever is happening in the courtroom.

The saying is, “practice makes perfect.” However, planning makes the practice perfect.

EVIDENCE

This is what wins a court case

What's great about evidence (discovery) is it acts like a filter in order to get a bunch of false, fake, inaccurate, misleading and sometimes even forged documents kept out of the case that could unfairly sway the judge or the jury.

When the rules of evidence are followed, everything that is real, admissible evidence stays in and anything else, is kept out. Most lawyers don't learn the rules of evidence so it's not that hard to force them to produce or to challenge anything they would want to admit as evidence. If you know the rules, you will be able to beat them.

The basics come from the Federal Rules of Evidence. Most people will talk about the Federal Rules of Civil Procedure or the Federal Rules of Criminal Procedure. However, one of the most important books you can read and learn from are the Federal Rules of Evidence.

Most states adopt the Federal Rules as the basis for their own rules and just reiterate what these rules say in one form or another. Each state will have similar rules you'll want to purchase and brush up on. I think studying these will put you far ahead of your opposition.

The reason the rules of evidence are so important is they enforce various aspects that make a case fair. The also eliminate a lot of unnecessary expenses and delays when it comes to trials and hearings.

Best of all, the rules of evidence ensure the truth is on the record.

If you let ridiculous corrupt attorneys run rampant, they will try to choose a fight that has nothing to do with the battle. You can ensure lies are exposed and the truth shines bright.

Without the rules of evidence, you won't be able to get justice. Too many people give up before the fight even begins, lawyers try to make plea deals when in truth, many battles could have been won when putting the burden of proof on the complainant rather than giving in and giving up.

When inadmissible evidence or just plain bad information, misinformation, disinformation gets into the court, it creates confusion and hides the truth.

You use the rules to make sure you convince the court you have the most admissible evidence or that the prosecutor's evidence doesn't meet the “beyond a reasonable doubt” criteria of a criminal case. Your evidence, in a criminal case should create the reasonable doubt.

You will lose if you don't get your admissible evidence in and keep the opposing party’s evidence out. That's how you win.

The rules control what comes in and what stays out. Combined with the Objections you will use, you should be able to practically win the case before you even go to trial.

The basics of any case are:

Evidence Rules
Objections
Elements

When applied correctly, the rules of evidence and the rules of procedure, whether civil or criminal are equal to every person. There is no favoritism if YOU apply them fairly and force your opposition and the judge to do the same.

In every court, regardless of the type, the rules control everything. From small claims court to the United States Supreme Court, the same rules apply. It is up to you to learn them and use them, and enforce them.

You will be enforcing the rules by using Objections.

How Evidence Works in Court

Pleadings are what a lawsuit stands on. The pleadings are run by evidence. You can win the case when you:

Know the facts that can prove what you allege
Know how to get the facts admitted as evidence in your case
Know how to keep the opposing party's facts out of the case

The rules keep your facts in and their facts out.

When you know the rules and how to use Objections, including when and how to make them, you can keep everyone in line. When using the rules and the objections together, you can make sure the opposing party doesn't try to confuse the judge and/or the jury with all kinds of misleading and irrelevant facts and opinions.

Categories of Evidence Rules

Grouping evidence into categories helps to remember the rules. Each of the categories includes a particular characteristic of evidence.

You'll need to read the Rules of Evidence of your State in order to ensure you have the correct categories however, the typical categories are:

Admissibility	Privileges
Presumptions	Authentication
Relevance	Judicial Notice
Witnesses	Tangible Evidence
Opinions and Expert Testimony	Applicability
Hearsay	

Admissibility

What makes evidence admissible is not exactly complicated, however, common sense tells you something would have to be relevant to be admissible. True, but that's not the only rule you have to look at in order to know if something is admissible or not.

If a fact isn't admissible, it's nothing to the case. It means nothing. I might hurt your feelings if you can't say it but this isn't about your feelings. It's about admissible facts.

Many people who want to go Pro Se in court, can't figure out why they can't just rant about this or that so everyone can hear their dirty laundry. Most of the time, what these people are saying has exactly zero to do with the question on the table. The complaint is dealing with something specific or several somethings that are specific. The fact you and your opposition don't like each other doesn't matter unless it meets the criteria of proving something that is alleged. Most of the time it won't matter...

However, in a criminal case, if proven, could be motive.

Let's apply a few of the Admissibility filters to a Testimony:

Relevance – the testimony must tend to prove or disprove a material fact in the case and must have a direct impact on the outcome.

Reliability – the witness must be trustworthy without a reputation or a history of being dishonest.

Competence – the witness must have firsthand knowledge in order to give testimony and must be sane, sober and of legal age to testify. Some age exceptions can apply.

Credibility – the witness testimony must be believable

Prejudice – witness testimony must have the ability to be questioned without being misleading, for shock value or to confuse and waste time

Privilege – the witness testimony must not be a protected confidential communication such as husband-wife, attorney-client, priest-parishioner, doctor-patient, etc.)

The same filter will apply for documents and relative items as they are considered to be admitted for evidence.

Relevance

A fact has to be relevant to the outcome of a case and it has to contribute to the outcome of the case. Cornell Law says, “Relevant means, with regard to evidence, having some value or tendency to prove a matter of fact significant to the case.”

An example for something not relevant is, a news story about a defendant about being arrested on a misdemeanor traffic ticket in a case about unlawful detainer. It's not relevant to the situation at all. Traffic tickets don't have anything to do with a person's rental situation unless the defendant wasn't able to pay their rent on time due to being detained by police. Then proceeded to pay the rent after the detainment. That might be relevant to the defendant but it's not relevant to the plaintiff. It actually makes the plaintiff look like a loser and very greedy.

What will happen during a court case is your opposition will try to get irrelevant facts on the record either through testimony or document.

Your task as a Pro Se litigant is to stop this with objections before anything gets on the record. If the other side starts down that path their irrelevant fact in, you need to object. If it does get in, you should make a verbal *Motion to Strike* right away. If that fails, you can

file a written *Motion to Strike with a Memorandum of Facts* and law backing up your objection.

Reliability

Introducing a “fact” that any reasonable person would believe is false, untrue, a lie, that wouldn't be admissible in court because it's unreliable.

It's similar to the testimony of Michael Cohen when he was testifying in a case against President Trump. Cohen was convicted of perjury which is lying to the court and in his written affidavits. You can't rely on testimony from a convicted criminal involving dishonesty or even having a reputation of dishonesty especially in the community where they reside/act/work.

Competence

Hearsay objections are a challenge to competency. What happens many times in court is one of the parties tries to testify about a fact they have no firsthand knowledge of; this is inadmissible as incompetent.

If a witness doesn't personally know the fact, it is hearsay and that is inadmissible. You can stop this again, with objections. If this testimony does get into the case, you can make a *Motion to Strike* verbally just like you would in the paragraph above. Also, if this fails, you'll do the same procedure with a written *Motion to Strike with a Memorandum of Facts* and the law to back up your objection to the testimony. It's really that simple. Most of the time the judge would already know this is hearsay, he's just waiting for you to say it.

Credibility

When witnesses are on the stand, you really need to listen closely to what they're saying. If they start trying to offer “facts” reasonable people wouldn't believe, it's not admissible as it would be considered “incredible.”

Here's the deal. Something may exist, but if you can't bring it into the courtroom and prove it exists, the fact would be inadmissible.

Children who are very young might make statements that are incredible which is the reason their testimony is inadmissible on this ground.

You can stop “incredible” testimony from being told by using the power of objections. Again, if this gets past you and it's on the record, you need to make a Motion to Strike and if that doesn't work, continue with a written Motion to Strike with a Memorandum of Facts, using law to make a reasonable and valid argument for your objection. Remember, you're trying to ensure, if you have to appeal, you've done everything in our power to enforce the rules.

Prejudice

Court dramas love to sensationalize their programs by entering prejudice into the case. However, this would be inadmissible in court if it's done merely for theatrics, to confuse, mislead, anger, shock or to waste time.

If someone can offer testimony that is true and is enough to prove a fact of the case, it isn't necessary to prance around bloody photos of murdered or harmed children although it

might be relevant to the case. The photos might be relevant, very reliable, taken by a competent source and credible to the case, however if the sentimentalization and effect on the people in the court outweighs the value of showing it just to prove something that is in controversy, and it's only going to be added for shock value, it's inadmissible as prejudicial.

If there is any other way, like witness testimony, etc., it serves you better to use that rather than the photos as the opposing party will most likely object and the judge will say, “Sustained.” You want to avoid that.

Another example is if a witness starts trying to go off on a tangent to smear a defendant ad it's not relevant, you should object.

You can stop this also with objections and do the same procedure as above. Motion to Strike verbally, followed by a written Motion to Strike if you fail to be heard.

Privilege

Communication between people who are in certain relationships could be considered privilege. For example, communication between husband-wife, priest-parishioner, attorney-client, etc., is inadmissible as privileged communication.

Any notes taken by an attorney in order to prepare for the case is also privileged. It's called “work product.”

Obtaining illegal communication without going through the proper process would also be considered privilege.

If you can stop this before it starts, you'll be further ahead in winning your case. As with all objections in this section, verbally say, “Objection, privilege. Motion to Strike!” and then if that doesn't work, use the written motions.

Whenever your opposition starts trying to go down any of these paths, it is your duty to you case to object immediately so what they're trying to introduce doesn't have a chance at getting on the record. If it does happen to get in, then you have to make sure to verbally state Motion to Strike. And if that doesn't work, file a written Motion to Strike with a Memorandum of Fact, backed by the applicable laws.

You should never let inadmissible facts be heard in court. Unethical lawyers will try to introduce inadmissible facts in court, on purpose in order to taint the record. Sometimes it's a gray area and you're not sure but it's better to object and be wrong rather than let it stay on the record.

Any evidence that is deemed inadmissible should not be heard in court and it shouldn't be allowed to influence the outcome of the case.

However, once it's in, it's hard to take it out.

Once someone says something in the courtroom, you can't unhear it no matter what the people say. The best practice is to make an objection before this happens.

The Motion to Strike removes the testimony, phrase, etc., from the court record so if and when the appellate court reads it, it won't have an influence on the outcome.

Getting a judge to make a ruling on inadmissible evidence gives you big advances in your case. This is why knowing the rules, how to object and knowing when and how to move to

strike inadmissible evidence if anything gets past you is a winning strategy to most court cases.

Slick lawyers try to get inadmissible evidence past you so they can confuse and mislead the judges and juries. It's done on purpose to try and rattle you. It's done on purpose to see if you'll catch it and to get you off your game. The other lawyer has an obligation to the truth but if the lawyer is a scumbag, you can bet the gloves will be off. This is not the time or the place to worry about making him or the judge mad. Your job is to follow the rules, set them up for an appeal and win your case.

You should anticipate the opposition to play tricks on you. Do not let them off the hook with their lies and distractions. They will try to muddy the waters and you can certainly object to anything that is inadmissible.

The saying is, give an inch and they'll take a mile. This is what happens in court. They don it once and get away with it, they'll definitely try it again. Object as soon as you understand what is going and even if you're not sure. If your gut says something is wrong, verbally say, “Objection.” You don't always have to give a reason, especially if you've been hitting the nail on the head and the judge keeps saying, “Sustained.” Then that means you may be able to just say, “Objection.” The judge will know what you mean. I've had it happen to me.

If something does get past you, remember your Motion to Strike and say it verbally. It's ok to interrupt them when they're making purposeful errors to get inadmissible evidence in front of the judge or jury. You have to take action to make sure inadmissible evidence stays out of the case.

Federal Rules of Evidence 1.02 states, “Both lawyer and client have authority and responsibility in the objectives and means of the representation. The client has the ultimate authority to determine the objectives to be served by legal representation, within the limits imposed by law, the lawyer's professional obligations, and the agreed scope of representation.”

The above is the purpose of the rules. These rules secure fairness and eliminate unnecessary expense and delay while providing a means to get to the truth. However, as I said before, some sleazeball attorneys know how to skirt around the truth creating a large dose of inadmissible evidence you'll have to object to during a trial.

You have to be strategic and tactically in application and make sure you are not tired the day of any hearings or trials. You need to be sharp and alert. Always anticipate you're dealing with opposition that thinks the rules only apply to you.

When you control the courtroom, including the opposition and the judge, you will be able to putting together a puzzle of evidence that highly favors you.

That's where you want to be.

Using Offers of Proof

You need to keep this on the forefront of your mind as you're testifying or having your witnesses testifying and facing the oppositions objections.

If the other side objects, you need to immediately, without hesitation make an offer of proof.

When you do this, you can make it clear, on the record, what the evidence was going to be. If there's a jury, they will be excused.

This is when the attorney's usually do a “sidebar” so they can make the “offer of proof” in a location where the court reporter/stenographer who will take note on what you say.

Whether the jury has the information or not, it will be on the record.

If you don't get your evidence on the record and don't make an offer of proof, you won't have anything to appeal if you are ruled against in a trial. The record won't show what your evidence is or might have been.

With an Offer of Proof, you can state what your evidence was going to be and/or what you intended to use the evidence to prove. If you take your case to an appeal on the grounds you were denied your ability to present admissible evidence, the record will show the evidence the court refused to hear. The appellate court will have it on the record.

If a witness is your “offer of proof,” the judge will excuse the jury and you will examine the witness to prove your admissible evidence.

Tricks of the Attorneys/Hearing of the Court

It is absolutely improper for attorneys to ask questions that will result in inadmissible testimony/evidence.

If this happens during the trial, you have to immediately object. In every jurisdiction it is against the rules for lawyers to do this but they still try.

The Federal Rules of Evidence 103 governs the judge. It requires specifics about the criteria of how the judge rules on evidence. It covers the ability to object and controlling the jury in the case of an Offer of Proof and inadmissible evidence.

You must object verbally and loudly and do it as quickly as you can when you realize it's happening. The purpose of being able to object is to ensure inadmissible evidence including testimony is not part of the record. REMEMBER! You are always setting up the court for an appeal. If you think about it this way, you'll want to be very attentive to what the crooked attorneys are doing. OBJECT! OBJECT! OBJECT!

Preliminary Questions Determine Admissibility of Evidence

Courts determine the admissibility of evidence based on preliminary questions, ruling on the qualifications of witnesses and whether they have privilege or not.

The court may consider facts that, without preliminary questions, might not be relevant. These might be facts that are relevant to the qualifications of a witness but not necessarily relevant to a case. They may also consider the relationship between the witness and the party making a determination about privilege (attorney-client, husband-wife, etc.)

Facts that are considered irrelevant are heard by the judge only. The jury doesn't hear these as they are excused during preliminary questions.

Incomplete Writings and/or Recorded Statements

There is a perfect example going on right now with President Donald Trump. The prosecutor in the case regarding January 6, includes a partial quote from the speech Mr.

Trump made prior to the mostly peaceful protest of Patriots going to the Capitol. Because it is referenced in the indictment and most likely part of the prosecutor's case, it can be reasonably deduced, the speech is going to be put into evidence. What is really good about that, the entire speech actually exonerates Mr. Trump from any wrongdoing.

Yes, lawyers are that dumb.

The situation is this: if one party introduces any part of a recording, video, statement, audio, document, letter, etc., in any way, the opposing party can introduce any other piece of that same evidence in whole or in part to be considered fair.

It is against the rules to introduce part of any written, recorded, video, letter, etc., without introducing the rest of it.

This is where you need to be very careful to a point. Depositions, interrogatories, etc., with witness testimony might favor you in the most part and then there are a few things that are not in your favor. If you're going to introduce this, you need to understand the opposition can introduce the rest of the evidence.

Be strategic in your questions as this can be introduced in whole by either party once it is introduced in part.

Judicial Notice

Using a Judicial Notice is a way to enter an order confirming a fact that might otherwise not get on the record. It also is a way to enter an order confirming a fact without trying to spend a lot of time and money working hard to get into “evidence.”

The rules provide a way for you to move the court to “take judicial notice” of various facts. This is great for confirming facts that are generally known and not disputable. The process of judicial notice is to confirm facts for all purposes in a case.

Even if a fact isn't exactly obvious, and may not even be common knowledge to everyone, the judge may confirm it anyway if you present a motion accompanied by an argument that meets the rule's requirements.

Once a judge enters the order taking judicial notice of the fact, there is no more discussion or argument. Your opposition cannot come back and dispute it later. It is a fact, on the record and the judge has made an order which will stand.

This is allowed in all jurisdictions and very few attorneys’ use it. The reason they don't use it is because they don't want to make the judge, who they work with almost daily, upset with them for further trials.

Getting your facts into evidence and keeping the oppositions facts out is how you're going to win your case. You don't need to worry about making judges or lawyers mad. They will try to skate the rules when it is convenient. You are going to make them play by the rules. Judges are not upset if the rules are followed. It is a sign of respect and you will most likely be making the opposition look completely foolish by not following the rules.

You can actually win with using Judicial Notice. It can advance your case forward and eliminate delays while establishing facts that are not disputed evidence.

My law professor told a story of how he had a case where a landlord would not give a deposit back to a woman who had cleaned her apartment thoroughly when she moved out.

She had pictures of what the place looked like when she left and the judge agreed and the landlord agreed it was clean.

However, the landlord said he was really mad because the woman had cut down a tree in the backyard and he refused to give her the deposit back.

He had done his homework and found out the tree she had cut down was considered a "botanical nuisance" to the area where she lived and had no monetary value. The landlord was shocked and the judge was amused.

The judge proceeded to give his own version of the botanical nuisance and then ordered the landlord to not only return her deposit, he had to pay court costs and attorney's fees.

And that was just a Judicial Notice!

Facts that can be noticed by a court order are things that are commonly known within the jurisdiction of the court. The tree incident was within the jurisdiction of the court and well known to the area. Also, the facts have to be established from a reputable source and that don't need proof. For example, a day such as August 8, 2023 which was a Tuesday, isn't disputable and needs no proof. It's common knowledge and easily found.

Judicial notices are not based on opinion, argument or testimony. It is based on independent sources that cannot be disputed or challenged. The fact presented is best served from sources whose accuracy is above reproach and without question.

When Judges May Take Judicial Notice

Judges can take Judicial Notice of any facts that are not disputed or any law that applies to the case. He can do it on his own or in response to a motion. When the judge does this on his own, it's called *"sua sponte,"* meaning "of one's own accord; voluntarily." It's used to indicate that a court has taken notice of an issue on its own motion without prompting or suggestion from either party.

If the fact you're trying to get judicially noticed is one the judge has the discretion to deny, he may refuse to take judicial notice. Judges have the discretion to deny facts that could be disputed. For example, if you submit a fact stating, "The greatest movie ever made was Independence Day," someone else could dispute that because they might disagree. That is not a fact in common knowledge and is disputable.

When Judges Must Take Judicial Notice

The judge doesn't have the ability to refuse judicial notices of facts that are beyond dispute. However, in this day and age, there are some people who would dispute we breathe air but hopefully you'll have a judge who isn't so ridiculous they can't decide what a woman is like Supreme Court Justice Ketanji Brown who couldn't answer that question at her hearing. She was confirmed anyway and you can just be happy, she would be outweighed by judges who can decide what a woman is. (Insert eyeroll here.)

Facts that any reasonable person would agree and cannot disagree on are something the Judge has to take Judicial Notice of. For example, a posted speed limit on a particular road, a rule the court must go by or the location of a particular store. Those are not disputable. They are facts people would agree on. These types of facts are absolutes.

Courts also have to take judicial notice of Congressional Acts or State Legislative Acts, laws of states, laws of foreign nations, anything that's an official act. You could also consider facts that shouldn't be in dispute such as Supreme Court Case Law that is binding precedent on a lower court. This might be the best place to put your case law – as a Judicial Notice that a judge cannot dispute as it's already settled law.

How Judicial Notice Effects a Jury

Any facts which have been Judicially Noticed should be given to the jury. However, the communication reaches the jury, they should be taking these into consideration and not rely on their own personal opinions. Whether they agree or not, the judge has made a decision so whatever is in the Judicial Notice, is already established as fact.

Jurors cannot disagree with facts under Judicial Notice.

Using Judicial Notice

Caution: DO NOT OVERUSE JUDICIAL NOTICE. You're not going to gain anything by trying to get facts into the case that are distantly related. Your feelings and wanting to say something or “make a statement” don't matter to the court.

However, if there is an indisputable fact that is relevant to the outcome of your case and will contribute to your success, submit the Judicial Notice.

For example, there is an ongoing bad track record for people who are trying to submit their Supreme Court Case Law when making motions, filing papers with the court, trying to argue their case. If the case law is rejected, you should make a Judicial Notice with the case law in it. Supreme Court Case Law is binding precedent on lower courts whether the judge likes it or not. You're not there to make friends. You're there to win your case and nothing more.

With Supreme Court Case Law, you can use Justia or WestLaw, etc., downloaded from the site, printed off and submit that when you move the court to take Judicial Notice of the presented fact. When you have documentation, then the court doesn't have a choice but to accept your Judicial Notice and the opposition doesn't have the ability to block or dispute what you're offering as “evidence.”

You can move your case along faster with Judicial Notice but don't abuse it.

Presumptions

There have to be elements to a presumption in order to it to be considered in court. A presumption is something that is essentially, known before it happens. For example, if there are dark gray clouds in the sky and you can hear thunder, you can presume it's going to rain. However, presumptions aren't always a certainty.

It may rain, or it may blow over and you won't get a drop of rain. You would presume it's possible to get rain but it's not a certainty that rain will fall on you. News channels do this when they say you have a 30% chance of rain. They aren't certain where the rain will fall, but they do know that 30% of the area will get rain. And even with all their presumptions, sometimes the weatherman misses this entirely.

The elements of the above presumption are, dark clouds and thunder. If those two things aren't present, you don't have the elements of a presumption. Therefore, if you don't have the elements of the “fact” you're presuming, you have no presumption.

Here's another thing. You could actually win on a presumption if all the elements are there for the fact presumed. Your case can sink or swim with presumptions especially if that presumption is wrong.

In the case where a presumption is wrong, you have to be able to prove the truth. There are many disputes when it comes to inheritance and the intent of the person who died and willed their property to someone other than the presumed inheritor.

There have been cases where children expected and presumed, they are the people going to inherit the assets of their parents. Then, upon the death of their mother or father, they find out the assets are willed to a beloved animal, non-profit or caregiver. Many times, these shocking realizations come after long periods of tension between family members who are no longer speaking. Presuming the inheritor, finding out the assets are going elsewhere makes people extremely angry and they pursue legal action. If this is the case, make sure you have all your ducks in a row if you're going to challenge a will or are facing a challenge to your inheritance.

Legal presumptions are not just speculation, they come about because of law.

There are certain facts that can be presumed as a matter of law with a degree of reasonable certainty if the essential fact elements are present and not challenged.

If in the above inheritance example, the children come forward with the last will and testament that they know of, show the document to a judge and it is never challenged, it is reasonable to presume there is no other document after this will. This would be a “reasonable degree of legal certainty.”

Presumptions cannot be created via argument itself. The law creates presumptions as long as the essential fact elements are met. Presumptions also arise from legal doctrine. Legal doctrine is a single important rule, a set of rules, a theory or a principle that is widely followed in the field of law. (Remember that!)

Presumptions are also a product of standing appellate court opinions, Supreme Court decisions/opinions and legislative acts. They declare and command certain facts are firmly established if there is admissible evidence of the essential facts in a case and no dispute or rebutting evidence has been entered.

Any evidence of a fact which is contrary to the essential facts negates the presumption, destroying it and puts the parties in the case on an even level once again.

A presumption shifts the burden of proof to the party seeking relief. They now have to prove the essential elements required for the presumption to continue to exist. For example, in the inheritance scenario, once a presumption is challenged like a will, and the opposing party produces another will that is dated and executed after the previously submitted will, the proof that their will is superior to the last will and testament is on them. If the party who has the latest will and testament remains silent, he loses the case.

When the burden of proof is shifted it doesn't mean the party has to prove the entire case. It only means he is required to offer admissible evidence to meet the presumption, not

overcome it necessarily and then the burden shifts back to the other party.

A presumption can also help you to establish unprovable facts. If the essential elements trigger a presumption and can be shown with a reasonable degree of legal certainty, there are “facts” that can't be proven but are indeed facts.

For example, the Supreme Court established that the “government” is a fiction. It is not real. It is really an unprovable fact because there is not substance to fiction. The government cannot sit in a chair and be examined or cross-examined. The idea of fiction is a fact but it is not provable.

If the presumption is conclusive and cannot be rebutted there is really nothing for the court to decide.

One single presumption could actually decide the outcome of a case. Meaning, it might be a reasonable conclusion the government is “fiction.” As such, a fiction cannot be harmed. It isn't real to begin with.

The Inference

An inference is just a guess. It's not a presumption because there is not legal certainty in an inference. It is just what a person thinks. An inference shouldn't be included in court cases but many times they are allowed because people including lawyers don't object to their entrance into the record.

Many times, something completely idiotic is said during a testimony that is wild and outlandish, has no basis in fact and no proof of existence. However, it is thrown out into the courtroom deliberately to prejudice a judge and/or a jury. You can't put the lid back on something that's already exploded in the courtroom.

The best practice is to not allow an inference when you start to hear it.

Circumstantial evidence is inference. It is not fact. Real evidence isn't circumstantial. Circumstantial evidence actually proves nothing at all.

In order for inference to even be valid, it would have to be based on established facts and no other inferences and regardless, an inference is still an inference and not a fact.

The only thing inference can do is suggest that a fact is more likely or not more likely. It doesn't prove anything. I repeat – CIRCUMSTANTIAL EVIDENCE IS NEVER GOING TO BE A FACT NO MATTER HOW HARD THEY TRY TO MAKE IT BE A FACT.

Don't fall in this hole.

I can tell you from experience, inference is extremely hurtful and shouldn't be allowed but people do it every day and assume things that aren't true. President Trump is going through this right now with some of the lefty lunatics out there who fail to do their own research, light their own hair on fire and stand in the bully pulpit preaching the evils of the common-sense society that existed before CoVid and the stolen election.

>Insert a major sigh right here. <

Relevance

Relevant facts connect things and is the first filter you'll use in your court case. These facts are connected to the outcome of your case and are admissible. If something isn't relevant

it's not admissible in court. Any fact you want to admit into the court record must be relevant or there's really no point to it. It must be connected to the outcome of the case in a way that determines the result.

If a fact is something that will affect the outcome of the case it is relevant. However, just because a fact is relevant doesn't necessarily mean it's admissible when you apply the other filters your opposition might use to keep it out. But, the first and most important element here is it must be relevant.

The Federal Rules of Evidence Rule 401. Test for Relevant Evidence states: "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action."

There is no exception to this rule. None. This rule says relevant evidence will tend to prove or disprove a material fact.

A "material fact" according to Wikipedia as of this date, *"is a fact that a reasonable person would recognize as relevant to a decision to be made, as distinguished from an insignificant, trivial, or unimportant detail."*

An example of relevant material facts versus something that is a fact but not relevant is like this. Let's say you have a car accident while in a leg brace which covers your leg and foot on the foot that you use to push the break while wearing a red shirt.

The relevant fact is your foot and leg are in a leg brace. The red shirt has nothing to do with the accident. Of course, the other question is, why are you wearing a leg brace and driving? What kind of leg brace and did it contribute to the accident in any way? Then you would have to take all these questions into consideration as to whether the leg brace was a contributing factor to your inability to push the brake.

If the leg brace is just a stretch type bandage over your foot and you can still move it around, then it may not even be relevant at all to the situation of the car accident. It could also be of minimal importance. If the leg brace is a big huge apparatus attached to your foot with a boot and makes your leg stiff and you can barely walk without crutches, most likely that big boot hindered your ability to push on the brake in time to stop the car.

In either case, the red shirt is completely irrelevant to the accident. Therefore, the fact you had on a red shirt is inadmissible evidence although it's a fact.

Some facts influence the outcome as they tend to prove or disprove something in the case. Other facts aren't even relevant to the situation at all.

When irrelevant facts are offered as evidence, it can confuse the judge and jury, wasting time and money. Everything they say that is irrelevant should be objected to immediately by saying, "Objection, relevance!"

Prejudice

Something that is considered prejudice can exclude relevant evidence. For example, if something is definitely evidence and can be prove something one way or another, it could be deemed prejudice. If the proof is likely to cause confusing issues, misleads the jury, wastes time or is "cumulative evidence," meaning it is redundant or repetitive and you could have established the same conclusion with something else, it could be taken as prejudicial.

Here's an example, a perfect example.

A witness against a politician is scheduled to give a deposition at the Court Reporter's office. Right before he is set to go inside, he dies from a gunshot wound. He falls by his car in a pool of blood in the parking lot where he was just about to go inside and give his deposition. The police declare this a suicide.

The jury can make up their own mind what to make of the situation. Just from those facts alone, there seems to be relevant evidence somewhere in there. The jury doesn't really need any horrific photos to prove their point if they can use something like a diagram to point out wear the shots hit him. If it's in the back of the head, pretty sure you can come to a conclusion suicide was not the instigator of the death. And your next question should be, why would the police say it's suicide?

When testimony is given that a witness has died right before a scheduled deposition in the parking lot where it was to take place, photos are unnecessary and would be declared "prejudicial."

Shocking the jury isn't a good idea unless you're filming a drama for movies or television.

Repetitive Evidence

You shouldn't allow the opposing lawyer to offer the same evidence over and over again from different witnesses or documents. This is repetitive and redundant.

The maximum you'd want to use are 3. Three times you can bring the same evidence, two is better. However, if you have it in your back pocket, keep it there. Chances are you won't need it but just the fact you've got thousands of documents saying the same thing, you could use one or two witnesses to the fact that thousands of letters expressing the same thing were received. You could also have one witness testify for a car issue that is an expert, "We've tested over 3,000 of these brakes in new cars and two-thirds failed." That's enough from an expert especially if they have the documentation.

One fact can be proven by a witness or a document. Try to keep it to a dull roar and don't overuse your evidence. The number is maximum 3.

The evidence rules are on your side so you don't have to beat a dead horse.

Character Evidence

There are a lot of television and movies set in court which love to use the "character evidence" angle. This deals with a person's reputation. Reputation evidence or Character Evidence deals with what a community's opinion about the person is, what they know about the person's honesty or lack of honesty.

Whatever a witness has done in the past is not "character" as far as the law is concerned. Prior bad acts of a witness are not considered in court.

However, it is different in Criminal Cases.

Character of Parties

In a criminal case, "evidence of character of a party" is inadmissible as it doesn't prove the

case if a person's reputation of the **defendant** for being a nosy busy body, always meddling, now charged with stealing or theft. (Stealing is the intent to take something, theft is the actual act of taking something.) Just because a person is a watcher and knows everything going on, doesn't prove that person is also a thief. However, that person might make a great witness and know who took the item at hand if the police/cops were really trying.

You have to be careful with this also. If a defendant offers their own reputation as "proof," then the opposition is able to cross-examine or bring proof to the contrary of the statement. The opposition isn't allowed to bring one's reputation into the courtroom unless the door is opened and then they can bring in witnesses to the contrary of the testimony.

Character of Victims

Surprisingly, the character of the victim is admissible if it is offered by the accused. This is used a lot in trials that have to do with rape victims if the "victim" has a reputation of sleeping with a lot of people, a prostitute or something similar.

However, if Mr. Do-Gooder is hit by a trash truck and his arm gets cut off as a result, the fact that Mr. Do-Gooder has a beautiful wife, 2 pristine children and attends church regularly sprinkling good deeds throughout the community, it has no bearing on the fact there's an accident and there are injuries.

The issue at hand is who is at fault for the accident and what are the degree of injuries suffered. Everything else is just fluff. Not admissible.

If a party does offer Mr. Do-Gooder's good deeds into the testimony, then the other party can bring in something contrary to the testimony. What if Mr. Do-Gooder goes down to the local bar every Friday night and watches the strippers dance on a pole, giving them fistfuls of cash, and this was what he was doing at the time of the accident? Hmm... food for thought!

Character of the Witnesses

Credibility is extremely important when it comes to witnesses and their character is usually admissible only to show they are trustworthy. If a witness was convicted of a crime and goes to their credibility, you can only use that under certain conditions.

If a witness was arrested for something but wasn't convicted, that would be considered inadmissible evidence. However, if the witness was convicted of a crime that was punishable by death, more than a year of incarceration for a felony or involved in some type of dishonesty regardless of how long they were in jail/prison, that could be admissible.

Prior Bad Acts

Interestingly enough, a person's prior bad acts are most likely not admissible when trying to prove the character of the defendant, witness or plaintiff. It's even inadmissible if the behavior is in line with the current issue on the table. (I know – yes. I agree with you.)

Proof of Character

As long as you stick to the rules, you may offer via opinion testimony or testimony of reputation within the community in order to prove character regardless whether it's good or bad.

Habit and Routine

If habit and routine are used, it is to prove the practices of the individual or organization are generally the same. Habit and routine are based on general information of what an individual is known to do. For example, “Everyday, for the past 3 years, Monday through Friday, Howard goes to the cafe across the street from his work at 12:00 noon, orders a turkey sandwich with a bottle of water and sits at the table near the window.” That could be something that you'll need as proof of habit and routine. When someone acts outside their normal routine, as the defendant, that could be suspicious, as the victim, it might raise an eyebrow of “why today of all days would he miss this routine and what was different?” These are facts, they don't have feelings. Facts don't care about your feelings. They just are. This is not speculation or opinion.

Character is based on the reputation of the person. Character is based on opinion.

Both of these may be considered admissible as long as they follow the rules of evidence.

Subsequent Remedial Measures

A repair or a change made after an accident has happened which could have prevented the accident in the first place is Subsequent Remedial Measures. According to Cornell Law, Rule 407 of the Federal Rules of Evidence incorporates conventional doctrine which *excludes* evidence of subsequent remedial measures as proof of an admission of fault.

It isn't admissible to prove negligence, culpable conduct; a defect in a product or design or a need for a warning or instruction.

For example, my friend just tried to go to her massage therapist and before she could get in the building, she tripped over the concrete parking stopper/bumper and fell headfirst into the side of the brick building. She suffered a concussion; her entire head and neck are black and blue and she has a large bandage on the area where the skin was scraped. Her eyes are all bloodshot and she can't even fix her hair or anything like she usually does.

If the concrete parking stopper/bumper is removed, repainted in a bright neon pink or some other absurd color, it doesn't mean the owner of the parking area is at fault necessarily. It might just be that she actually tripped and it was purely an accident. Therefore, if the business makes an effort to make the concrete parking stopper/bumper more visible, that's great, but it really doesn't prove anything other than, they thought this might happen again.

Causation is something that has to be proven. For example, the plaintiff would have to prove with evidence that the concrete parking stopper/bumper was already not bright enough or hidden and others had complained or suffered the same fate therefore it was already a dangerous situation before the accident. That would prove subsequent repairs should be made.

What could happen in the first scenario where the business has done everything in its power to ensure safety and an accident still happened, a crooked lawyer could try and skirt the rules or throw them out to try convincing a jury that the repairs are evidence of a

previously dangerous condition. There may be a situation where an owner has no codes, rules or laws forcing repairs other than the regular building codes. He may be keeping everything up to a safety standard beyond what is required. This effort to maintain a safe environment does not equate to liability. If it did, a lot of landlords would decide it's not worth making repairs, so they'll let it go.

As a matter of public policy, subsequent remedial measures are inadmissible as evidence to show negligence or culpability.

Interestingly enough, these same inadmissible facts for liability, could be admissible to prove ownership of a building. Most people aren't going to go around making repairs on things they don't own.

A crooked lawyer may try to get something into evidence that isn't allowed by using the repairs to get a judge or jury to hear the evidence even if it's not admissible as negligence or liability. If this happens, you'll need to really watch this carefully so they can't sneak in evidence that would be inadmissible on one hand and admissible on the other. Follow the Rules of Evidence and know them well.

Public Policy

Because of public policy, the law tries to encourage people to do what's right rather than throw their hands up and walk away from dangerous situations needing repairs. If people were punished for trying to do their best, most people would stop making repairs as it won't do them any good when they'll get sued either way and lose.

Also, someone who doesn't carry liability insurance doesn't mean a person is acting wrongfully. With or without insurance, people do their best, try their best and if an accident happens, it doesn't necessarily mean they were negligent or liable.

Offers of Settlement

As we can see in today's legal system, an offer to settle also doesn't mean someone is liable or negligent. Someone who is innocent could decide to settle a case because if they don't, the expense of a long-drawn-out case could be more than it's worth. It would end up costing the defending party more than just settling a lawsuit.

Settlement offers are off the record and confidential. They are not admissible in hearings or court. They are not admissible in any way when it comes to a case unless the settlement is going to be offered on the record, in writing and will trigger a default judgment without going any further. If the written agreement isn't accepted, the party who made the offer could use the settlement offer as evidence and move the court to order the opposing party to a specific performance.

Otherwise, settlement offers are not admissible in court.

Privilege

Privilege belongs to the person who claims privilege. It is the right of the person not to testify and can prevent a person from testifying.

Privilege is created by law and not by a party regardless of the status of that party.

Examples of privilege are husband-wife, client-attorney, parishioner-priest, doctor-patient, etc. The staff of these organizations have the same privilege and must maintain the privilege.

Lawyers, however, are different. A client has privilege with the lawyer which he has communicated to the lawyer in confidence. Clients can actually testify against their attorneys because the client owns the privilege. If the client breaks the privilege, that's up to them. Similar to a priest or doctor. The client owns the privilege.

But a lawyer is forbidden by the BAR association to testify about confidential communications. It's not part of the "privilege" rules, it's literally a BAR rule.

It may be in the client's best interest to have his lawyer testify about privileged communications but the lawyer cannot testify against the client. Michael Cohen is a perfect example of a bad lawyer who was not only disbarred, he attempted to testify against his client, President Trump. Those types of lawyers are what you should be aware of. If a lawyer is willing to compromise his position at any time, you can bet, he will compromise you at some point.

The same confidential "privilege" applies to priest, religious leaders, doctors, financial advisors, therapists, and various other professions. In order to know which professions, apply, you will most likely want to look at a list in your area.

However, it's pretty much common sense and therefore common law. You'll want to check the official Rules of Evidence for your area.

The main question you should ask yourself is, "Who owns the privilege?" When you answer that, you'll know what you can and cannot do.

Fifth Amendment Privilege

Dramatic courtroom scenes and congressional testimonies over the past few years have made "I'm invoking my 5th Amendment right not to testify on the grounds that it might incriminate me," very popular.

I believe it was Peter Stzrok and Lisa Page who both used this same defense over and over again in their Congressional testimony about their involvement in the Russia Hoax. Yes, I am Conservative and know a hoax when I read it and hear it. It's not rocket science.

That being said, this is not always an iron clad defense.

The Fifth Amendment is the most powerful privilege you have and it means you do not have to self-incriminate. The Constitution doesn't protect you from testifying but it does protect you from testifying about something that would incriminate yourself. Embarrassment or "because I don't want to" isn't a good excuse to refuse to testify. If you refuse to testify under a subpoena, and you don't, you could be held in a jail for contempt of court.

Privilege comes with qualified conditions. You can refuse to testify if a law enforcement agency would be able to charge you with a crime if you do testify. They would take your testimony and use it in a criminal charge followed by a criminal proceeding.

In a breach of contract case, refusing to testify could lank you in jail until you decide to start answering questions.

Immunity comes into play when someone has information needed to convict or prove something and the witness would be charged with a crime except for making a deal to testify in exchange for immunity. At that point, privilege isn't even considered as there is no danger of prosecution for self-incrimination.

If you do refuse to testify and do not have a clear right to refuse, your refusal could be used against you as evidence of guilt in a trial against you.

Those who are on probation or parole are automatically not eligible for privilege and cannot refuse to testify using the argument, by testimony, whatever the incident or testimony is would lead to a violation of their terms of release.

There are many reasons why there are exceptions to the Fifth Amendment, and as a Secured Party Creditors, we should be fully aware of what the Constitution says and what the opposing party intends to do should be comply with their requests.

Most SPCs would be able to determine what circumstances would warrant testifying however, I would ask for an immunity deal without a contract prior to testifying just in case they're looking for something you didn't think was a problem. These people are slick.

Generalities of Privilege

None of us has a right to privilege unless there is a law stating otherwise. Contrary to popular belief, you can't refuse to be a witness, disclose personally known facts, produce documents or objects you control or prevent anyone from testifying, disclosing or producing any of the above.

It is true we have rights and we need to understand when and how to use them.

Opinion Testimony

In court, there are two types of testimony. Lay opinions and expert opinions. The Rules of Evidence treat both of these differently.

Lay Testimony

Regular witnesses are lay testimony. They have firsthand knowledge of an aspect of the case either by personal observation or experience. They can only testify about what they actually know as fact. They are not experts and have no expert knowledge and are not offered as expert witnesses.

They are strictly for firsthand knowledge of pertinent/relevant facts of the case. Their feelings don't matter. However, although what they testify to is their opinion, it is an opinion based on admissible facts.

For example, a lay witness could say he saw an adult walking a child across the street. The child had on a blue jacket with a hood, the adult had on a similar jacket with no hood. The adult was the child's mother but this was not known to the witness at the time of the observation therefore, the witness cannot testify to who the adult or the child are or what their relationship is or was. The blue hooded jacket is offered as evidence in a case of child abduction. The mother was innocently walking her child across the street and the father is trying to say she is unfit and kidnapped the child from him.

If the witness is asked to offer an opinion, you need to object right away before the witness

speaks. This witness is not an expert and shouldn't be treated as such. Objection!

If the opinion is admitted and you didn't catch it in time, then move to strike the opinion from the record.

Lay testimony is never admissible if it requires special skills, an education, special training or any advanced training.

In cases of the elderly, a lay witness can testify about his observances of regular routines and habits of the individual because they have first-hand knowledge, but cannot testify to a diagnosis such as Alzheimer's. He may also testify in his opinion, the elderly individual needs supervision. That kind of testimony doesn't need special education or skill to offer in court.

Expert Testimony

Expert witnesses are not fact witnesses in a case. They are not allowed to testify about facts. They wouldn't have first-hand information in a case. That's not why they are called to testify.

The expert only offers opinions based on the special skill or expertise they have in an area of training or education relevant to the case. They don't know the facts or which side should win and shouldn't be asked who should win.

For example, you can offer a scenario, similar to the situation and ask if your version is possible. “Looking at the devastation in the area of Maui, with charred remains, and eye-witness testimony that a flash of light was seen prior to the fires, would it be reasonable to conclude a DEW weapon was the possible cause of the fires in Maui?”

An expert can answer this question without knowing the facts. A lay witness can't answer the question because they have no knowledge of the way a DEW weapon is used.

If the expert answers affirmatively, the next question should be, “Can you describe how a DEW weapon is used and how it is deployed?”

To qualify your expert, he'll have to go through what is called “*voir dire*” questioning by both sides to make sure he's actually qualified as an expert. *Voir dire* is *“a preliminary examination of a witness or a juror by a judge or counsel.”*

When everyone is satisfied then you can proceed with your expert.

When hiring an expert to give testimony in your case, make sure you understand what the expert knows, how you're going to use him and if his testimony would help you win.

If you're not sure your expert is going to be telling the truth or is trustworthy, you can have your expert answer your questions prior to court, under oath with a court reporter/stenographer recording the answers before trial. Then, when completed, you can have your expert sign the transcript so you know that this guy is going to tell the truth in court. You don't want to have a bunch of surprises and some of these “experts” will testify for a ham sandwich if they think they'll pay more money than you do. Testimony for sale is very sad but necessary in some cases.

Hearsay

One of the most misunderstood aspects of evidence is hearsay. It is out of court information received from other people that cannot be proven. This is not admissible in

court as evidence. In court, hearsay is an offer to prove something that cannot be proven as it is not first- hand knowledge and cannot be substantiated.

It's really pretty simple, if someone says, “Sally told me that Janet said …. ” there you go. That's hearsay and many witnesses think this is proof. If you can't ask Sally or Janet, it's not admissible as evidence and Sally and Janet can speak for themselves.

It's one thing that Sally tells you she is going to Janet's house. It's another thing if Sally says Janet told me she's going over the Billy's house. Really? Ok, how are we going to prove that? We go to Billy. Therefore, Sally's statement doesn't even matter.

There are some exceptions to the hearsay rule but most of these are common sense and easy to figure out.

Here's another example of hearsay. If the plaintiff offers a letter from Sally saying that Janet went to Billy's house on August 11, that would be hearsay. It's inadmissible and you should object. Sally isn't in the courtroom and cannot be cross-examined.

Letters can't be cross-examined and neither can the elusive “government.” They're both incapable of speaking. A letter is not an admissible offer of proof.

You can't move the court to compel a letter to answer a question or hold a letter in contempt. It's not a living being.

The letter is an “out of court statement” offered to prove the truth of what the letter says. Therefore, it's not admissible as evidence.

Affidavits

Affidavits are nice but not admissible as they cannot be cross-examined. Having a Notary sign the bottom of a statement or declaration doesn't prove anything other than the person who signed it made the statement.

It is not able to be held in contempt either.

Affidavits are only worth something if they're proving something other than what it says. Also, if the person who signed the affidavit is available for cross-examination, it may be admissible evidence.

Exceptions to Hearsay

Extreme or unusual circumstances sometimes make hearsay admissible as evidence. For example, a statement against self-interest may be admissible. For example, a witness can testify about something that would normally be considered hearsay if that statement would be harmful to themselves.

Most people aren't going to lie on the stand about something that could get them in trouble. That is why it is admissible if it's against themselves.

The rules of hearsay allow witnesses to say what someone else said if that statement would damage the witness and not the plaintiff or the defendant. It's directly related to themselves, is relevant to the case and therefore admissible.

The hearsay rule is important to ensure people don't like and the evidence presented is reliable.

Dying Declarations

Most courts will allow a dying declaration. When a person believes he is going to die immediately, they may make a statement that is directly related to the case. The courts assume the person who believes they are in immediate jeopardy of dying; uttering statement aren't going to lie.

If the person doesn't die, his statement is not admissible in court and therefore you should object to the statement. The survivor can be cross-examined and they can make their own statements. Anyone testifying for the person, now alive, is inadmissible.

Make sure you don't fall for this trap. You should remind the jurors that any person, regardless of being sworn in or not, may be lying. That's what happens.

Excited Utterances

When a person is under extreme stress or excitement/duress, they may make an excited utterance. A witness can testify what an out of court person said under these circumstances.

For example, Billy is across the street and sees a woman yelling, “Stop, that's my purse!” Billy runs over to the scene and a man comes up to the lady and says, “I saw a man run away around the corner really fast with the purse. He was wearing a red cap and had a blue jacket with a baseball on it.” Nobody knows where the man ran to, they also can't find the man who saw the purse snatcher. Later, at trial, the prosecutor is saying a man with a limp he's had for many years, can't run but has a red cap and a blue jacket with a baseball on it, is at the defendant's table. Billy is on the stand and says, “I heard a man say, 'I saw a man run away around the corner really fast with the purse.'”

The other side yells out, “Objection, hearsay!”

You should immediately say, “Excited utterance,” and with any kind of reasonable common sense, the judge should say, “Objection overruled.”

The hearsay statement will be admitted under this exception.

An excited utterance may be thrown out if the statement was made with a long lapse in time from the time an event took place to the time the statement is made. The closer the statement is to the event, the better it will be. The more exciting the event was, the more likely it is that the statement would have been made in the chaos of the happenings.

The statement must be relevant and have added impact to the outcome of the case itself. If it isn't relevant there's no point to it and it should be excluded for that reason.

The general rules of hearsay are pretty much common sense and therefore shouldn't be too difficult. However, you'll need to refer to your own Rules of Evidence in your own jurisdiction to know what is allowed and what isn't. Rules sometimes change so always check to make sure you know what they are.

Authentication

Documents, receipts, certificates may be evidence but they can't be cross-examined. All tangible evidence must be authenticated in order to get it into the record. Otherwise, it shouldn't be put on the record.

Copies of documents are not evidence. They cannot be verified on the day of trial.

You can't show up with a copy of a document and say that it is genuine. The opposition should say, “Objection, Authentication” and the judge should say, “Sustained.”

Letters, certificates, checks, money orders, contracts, deeds, declarations, etc., must be authenticated otherwise it means nothing.

The authenticity of something is more important than he content because without authenticity it's just fluff. It's not evidence.

Whether something is a piece of paper or a piece of evidence, it must be authenticated. For example, a bullet, a shoe lace, a piece of glass, a knife, etc., all must be authenticated to be the real item and not an imposter.

Federal Rule 901 says, *“to satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.”* When this rule is satisfied, then it can become evidence.

Self-Authenticating Documents

“A self-authenticating document, under the law of evidence in the United States, is any document that can be admitted into evidence at a trial without proof being submitted to support the claim that the document is what it appears to be,” according to Wikipedia (not the most reliable but it is the best definition.)

This means there are documents that can be used as evidence and just by the nature of the document itself, it would be considered authenticated. For example, a transcript sealed in an envelope that is tamper resistant in the original envelope it came in with the logo and address of the school. A sealed document from a government agency with the signature of a public officer.

Certified copies of documents with a clerk's seal and signature such as your Birth Certificate with the raised seal or the stamped seal. Regardless of objections from the Peanut Gallery (your opponent) these will be admitted into evidence.

Any documents that are sealed are always admitted as long as the information contained inside is relevant to the case.

Copies of documents or official papers without the original seal or original signature of an officer who is AUTHORIZED. Not some random desk jockey. YOU SHOULD ALWAYS WATCH FOR RELEVANCE AND BE PREPARED TO OBJECT! If you're not, they'll go off track with a bunch of crap that doesn't belong.

A copy of something is just a copy. A copy of a seal is just a copy. A copy of a signature is just a copy. Similar things are not the exact things.

Some examples of self-authenticating documents are books, pamphlets, publications, etc. issued by the government. Printed newspapers, magazines and periodicals, tags, labels and signs on buildings which are original, show ownership and/or control of such things. There are a lot more but there's no way to list them all here. You need to use your best judgment when dealing with this category of evidence.

Non-self-Authenticating Documents

Most of the time, documents are not self-authenticating. Most documents will require an in-person testimony of a credible witness to speak to the truth of signatures, originals, origin, chains of custody, letters, etc.

Although something may not be self-authenticating it still may be admissible because it will be authenticated by testimony of a credible witness who has first-hand knowledge. If there is no testimony of first-hand knowledge the document is inadmissible as evidence.

You can also challenge any document, with or without a seal as fraud. You may also be able to impeach an authentication witness.

For example, I know someone who I witnessed lie on the stand, under oath and didn't blink an eye. I have proof she was lying. She also lied to her own lawyer about her whereabouts at the time she was supposed to be in court. I have proof and witnesses where she was and what time she was at her own house which is just 15 minutes away from the courthouse. I saw her, I had someone take a picture of her and she is an established liar in the community where we are. I would have no doubt she would forge a document and submit it as real. I also have no doubt she would cause someone else to create a document and submit it as real. I believe she will get up on the stand and, under oath, lie to the court and authenticate any forged document as real. She is not beyond this at all and has proven to myself and others anything that benefits her, she will do.

Calling her as a witness to authenticate anything or to testify on anything would be ridiculous as she is a proven liar. Her lawyer also knows this as he was told by the prosecuting attorney that he was aware of where she was during a court hearing she skipped. It would be idiotic for her attorney to call her as a witness in any court proceeding as she could be easily impeached with admissible evidence as soon as they open the door by putting her on the stand in a relevant matter.

Therefore, impeaching the testimony of a known liar trying to authenticate anything should be fairly easy. Of course, it does depend on the judge, but this is why you should be setting the entire case up for an appeal.

Authentication of Things

There is such a thing as “things” which have to authenticated. I was surprised they couldn't come up with a better solution to calling this category “things” but that is the actual term. I didn't make it up.

To authenticate things, you have to have a live testimony by a witness with first-hand knowledge of the “things” to be authenticated, attest to the chain of custody or whatever is being presented as evidence.

For example, if there is a complaint that someone put a dent or scratched a vehicle and the dent or scratch is being considered as evidence, the dent/scratch has to be under the constant possession, protection and control.

Requirement of Originals

Unless unavailable, originals are required. You may have to get a court order to compel the other side to provide original documents. If a court order can't even make the other side cough up the goods, then a copy can be used.

If you receive copies because of your discovery request, the opposing party can't really object when you say you want to them to produce the originals. They are the ones who provided them.

You may have had the request for production (discovery) submitted via a *Subpoena Duces Tecum* which is a fancy way of saying the witness has to produce a document or documents relevant to the proceeding. Because the opposing party caused the subpoenas to be served there's no way they can object to the challenge of their authenticity when you bring it up.

If the opposing party tries to bring up an objection to the authenticity about copies, he has provided, you'll be able to show the attorney/opposition is either a liar, an idiot or possibly both.

If it is imperative the opposing party produce originals, you have to demand they give them to you. You shouldn't be taking “no” or “I don't have them,” for an answer, especially if the opposing party has brought a suit against you and made allegations that are false. Force them to produce the original evidence.

If you are the one that has to produce originals and they are critical to the case, such as deeds, mortgages, receipts, whatever it is, have a Notary or a stenographer make copies of the documents and attach his seal and signature to the documents as “true copies.” They are not going to be able to complain because TRUE COPIES are just as good as originals.

The other side may try to argue the Notary's signature is forged or somehow invalid. Highly doubtful but it depends on just how crooked the other side may be.

They will try to lie and distract the judge. They'll try to cheat and this is normal practice. Stay calm and insist you have the originals and they better be authenticated.

Applying the Evidence in Your Case

You'll need several things to apply the evidence: you'll need to know what evidence you'll need, how to allege the facts (not feelings), how to force the opposing side to produce evidence and how to keep their evidence from getting on the record, how to acquire evidence from those who are not party to the complaint.

Look at the first item on the list. You have to know what facts are being disputed. Facts, are not feelings so there has to be something that is not emotional and is disputed in order to know how to tackle the issue at hand.

You're only going to deal with alleging what matters and leaving everything else out of the equation. Most cases that can be won fail to allege and prove the essential facts of the case. Necessary evidence will prove or disprove the essential fact elements which are alleged in the pleadings/complaint.

The two main parts are:

Plaintiff's Causes of Action/Complaint

Defendants Affirmative Defense(s)

Non-essential and irrelevant arguments can lose a case because they have nothing to do with the cause(s) of action. The pleadings or complaint are the only things that matter. You only have to prove one way or the other the complaint or pleading is either true or

false. That's all there is. Everything else doesn't matter. The best way to do this is to get a piece of paper and list the facts you need to prove the work on those items and have the admissible evidence submitted to prove your case or position.

Simultaneously, you'll be working to keep out the opposing party's “evidence” he needs to prove his side.

The complaint/pleading is your guide. You might want to tell the judge all kinds of things but that will only delay and distract the judge from making the right decision. Each side is going to allege facts they need to prove in order to win their case whether you're the plaintiff or the defendant.

All the facts that must be proven are in the pleadings.

Discovery

This is what you'll use to get your evidence in before the trial starts. If you use the 5 Tools of Discovery before you go to trial you should be able to get everything you need on the record without waiting until the actual trial. These are used during Pre-Trial BEFORE you get to the trial.

Here are the 5 Tools you'll use for ***Pre-Trial Discovery***:

Requests for Admissions
Requests for Production
Interrogatories
Depositions
Subpoenas and Court Orders

During the discovery process, you may ask for things that aren't admissible as evidence but they will lead to relevant admissible discovery.

Lawyers Who Testify

Lawyers try to testify for their clients in court and this should never be allowed. As soon as you hear it, you should be objecting. They are not parties to the suit, they aren't witnesses, they have no first-hand knowledge of anything. They have hearsay.

Lawyers are also banned by the BAR and the rules of evidence from testifying. The reason lawyers get away with it is because other lawyers and judges let them do it. They all work together and pro se litigants don't know to object. They let them testify and it's not allowed in any way.

The only facts a lawyer knows is what his client told him. He is not a competent witness and therefore can't testify. This is one of the main factors that make a witness credible is their competence.

Do not let a lawyer tell the judge or the court what happened, who did what or who said what. They have no knowledge and it's something you should object to. If you don't stop it, the other side will win.

If the attorney insists on testifying, you'll need to move the court to put him under oath and he will be cross-examined. You'll question him about everything he says and he will be ruled as hearsay and incompetent to testify.

The only exceptions to this would be the opening and closing statements which should be a summary of what is going to be heard.

At the beginning, the lawyer will most likely start by telling the judge and/or jury the evidence they're going to hear/see will prove ….

At the end, the lawyer will sum it up be saying something about the evidence that was heard proves….

You do not allow a lawyer to testify beyond that scope. If they do, throw an objection and say, “Objection, the lawyer is testifying! He has no first-hand knowledge of the events!” OR whatever is the reason you're in court.

In the opening statement if the lawyer starts testifying, you should say objection. You don't have to let the lawyer start telling the story. He should be saying THE EVIDENCE WILL SHOW or THE EVIDENCE WILL PROVE…if he doesn't, he's testifying.

What you need to remember is the lawyer's testimony is inadmissible as he doesn't have the competency to testify about things, he doesn't have first-hand knowledge of and therefore he needs to stick to proving his case with evidence.

If he does the same thing during the closing, you should be objecting also. This is inadmissible testimony from an incompetent witness. He has no first-hand knowledge of what was going on or happened. He is not allowed to testify.

If you allow it, it will happen and the lawyer should already know he's not allowed to do this but he will certainly try.

It's unfortunate but judges let lawyers get by with a lot of things that they shouldn't. I've had it happen when I'm standing right there. In fact, judges will allow the lawyers to start talking when you're not even nearby. They'll just think they own the place and you're a mere distraction. Make sure to object.

It's possible your objections will be overruled because the judge and the lawyer have a relationship. This is where you're setting them up for an appeal. If you're overruled, renew your objection by saying, “I'm renewing my objection!” Renew every objection that is overruled. Don't cave and absolutely don't worry about making the judge mad when you're following the rules.

If you renew your objections and they are overruled because the lawyer keeps testifying, and you lose your case, you can appeal because the lawyer is testifying. If you renew your objections, you can let the appellate court know that the judge had every opportunity to do what was right and decided to go against the rules. You tried to stop the error and correct the record but were overruled by a court that refused to change their course and allowed the attorney to break the rules.

Remember to listen very carefully and object as soon as you hear something wrong. Even if you don't know what the objection is, do it so you can quickly think about what he said and call it Testifying or Hearsay or something.

As soon as the lawyer starts talking about facts he can't possibly know as if he was standing right there, it's time to object. Do whatever you have to do to distract the court from him going any further. The word “OBJECTION” should be on the tip of your tongue the entire time.

You need to prevent any kind of evidence from getting on the record as soon as you know that it's not admissible and can be damaging to you.

Judges are not in the courtroom to fight for your rights. They are merely people who sit in a chair and make decisions based on what's happening and what's not happening. If you're not objecting, he's not going to say anything about it. He will let you sink in the hole that is being dug for you by the other guy.

Once you let any type of bad evidence into the record, it will be like a scar. The wound might be healed but the scar still remains. You can't put the cat back in the bag once it's out.

Perjury

This is a really tough one because most of the time, perjury is brushed under the carpet and ignored. Perjury is making a false statement, under oath, either in writing or verbally, that one knows is false and that is material to the proceedings in which the statement was made.

Perjury is a felony also. It is a false statement about a material fact, intentionally made and under oath.

To qualify as perjury, the 4 elements I just mentioned have to be met. It has to be 1) a false statement 2) about a material fact of the case 3) made intentionally and 4) under oath.

If these four criteria are met, it is perjury.

A witness will get away with lying in court if nobody objects and proves the testimony is a lie.

If a witness lies about you, you'll need to file a separate suit that seeks monetary damages for defamation, slander and/or libel. If you file a suit against a lair, chances are they'll never do it again and you'll be rewarded money. People think twice when they are going to lose money because of their own lies.

You should be absolutely trying to prove truth. That's what court is for, proving the truth.

To start the proceedings with a lair, you can make a *Motion for an Order to Show Cause* and have the perjurer held in contempt.

You can make this motion either at a hearing or at trial.

You should always make sure the witness is under oath and if they aren't, you need to insist. If a witness starts to lie and you know it, you need to remind the witness it is a criminal offense to perjure one's self under oath.

The deal is, if there's no oath, there's no perjury. You should look at the complaint. Is that perjury? If it is and the evidence, they supply proves they are perjurious statements, that would equate too liable.

Judges are constantly not doing anything about perjury. They will try to sweep it under the rug and what's even worse, it just gives power to the liar.

The witness commits a felony when they lie meeting that four criteria. You need to stand up for yourself against the liar and force the judge to deal with it.

Direct Examination and Cross-examination

Being able to cross-examine a witness is a very effective tool. Doing this correctly will be a boost to you and you'll get really good at digging up the truth while cross-examining a witness.

When the opposing party puts their witness on the stand, then you will have the opportunity to tell the witness what you already know is truth and have the witness confirm that truth.

The witness should get very nervous when you start hitting the truth and they're lying. You can ask questions like, isn't it a fact that you visited the property in February of this year?

“Before this year, when was the last time you visited the property?” “Isn't it a fact that you haven't been to the property in the past 4 years?”

“Here's a document marked Exhibit 2. Do you recognize this document?”

“What is it?”

You can see the idea behind the cross-examination but you have to be strategic about the questions.

If the witness starts dodging questions, don't worry about it. People are able to tell when someone is lying because they get emotional, start getting red in the face, their hands start trembling and if pushed enough, they'll make some outbursts. Liars always trap themselves if you know how to ask the right questions.

The power to extract the truth is in your hands, you just have to use it and not be intimidated by the judge or the lawyer. The lawyer might pipe up and try to say “Objection!” so try to word your questions so this doesn't happen. If it does, just reword the question.

Your cross-examination must be a fact that the witness will either confirm or deny. You'll be able to get an answer either pro or con.

With witnesses you can mix cross-examination with direct examination because some of the things you'll ask will be related to what was already said. Some things you'll ask are new and you have to introduce them via your witness. Depending on what is going on and how the witness answers, you'll be able to gauge what to ask next.

You're not allowed to cross-examine your own witness as they are the key to your position. However, if the witness turns against you, they will be considered a hostile witness and they'll need to be dealt with on that level.

When you're questioning your own witness, you can't use leading questions. You have to have a strategic line of questioning which will direct them through the evidence, one fact at at time, one element at a time until you get to the conclusion you're looking for. You're going to lead the witness to what you want without leading them there with a leading or storytelling question. You want the witness to tell you what you want to know in the order in which you want to know it to get to the conclusion you're looking for.

You will use your questions to lay a foundation to get what you want from the witness.

On cross-examination, you can question the witness until you get the truth regardless of how mad the judge gets. Making the judge mad because he wants to get to the golf course isn't your problem. It's his problem. Therefore, you need to get the truth from the witness in order to ensure your case is given its best advantage to win. Remember, you're setting this judge up and the case for an appeal.

When using direct examination, you can't lead the witness with hints about what the answer is. You can't say things like, “There was a color on the dress that appeared to match a cardinal. Do you know what that color is?” Of course, the answer is red. That's a leading question.

You have to ask questions that don't tell what the answer is. For example, “What color was the dress?” does not lead the witness in any particular color direction. He is free to answer the question on his own.

If you've played the game 20 Questions, you can practice with this. Finding out the answer without leading questions and setting up direct questions narrowing down the answer to the truth.

If the attorney tries to cross-examine his own witness you need to object. He is not to be leading his witness. You can do it on cross but not on direct. Say very loudly, “Objection, leading!”

Here's the difference between Direct examination and Cross-examination. In direct examination you can't hint at the answers, you have to ask questions. In Cross-examination you can tell the witness something and demand the witness either admit the fact or deny the fact.

Direct Examination of a Witness

Some judges make you feel like they're pressed for time and they hate to be in the courtroom in the first place. This makes it stressful when you go into the courtroom knowing the judge is already impatient with what is happening. I hate that myself.

I always feel like I have to hurry up. But it is your prerogative to take the time you need to ask the questions you need to get to the truth.

Leading is something you want to avoid so you will need to set a foundation before you get to the answer you're really looking for.

Practice with your witnesses before you go to court and let them know what you intend to ask.

Don't put witnesses on the stand who won't make it through cross-examination because that could damage you more than it would help you.

Cross-examination of a Witness

With a witness on the stand, you're going to try to get to the truth. That's the job of having a witness at all. Therefore, if it's not going to be good for you, then let the witness go however, if you know the witness is lying, then you can extract the truth.

As I'm an investigative journalist, I use this all the time to tell whether someone is lying or not. It's really not that hard because you don't always want the witness to know that you're as smart as you are or have all the answers.

They have a saying; lawyers never ask a question they don't already know the answer to. And that's pretty much true. If you've done your homework, you should know right away if the witness is lying before they get the entire answer out of their mouth.

Ask you questions in a strategic way to extract the truth. Don't let the witness know what you're doing or where you're going. You don't want to reveal the reason for your questions before you get the critical pieces of the puzzle in place. Once you get those pieces in place, you can start asking the actual questions you need to answer which hold the key to winning your case.

Regardless of the distress of the witness spiraling out of control, you will need to get the truth in order to win. You don't have to be mean and look violent, but asking strategic questions in a specific order will help you reach your goal and bring out the truth. Work your plan and plan your questions.

Just like with fruit flies, you lure them in with something sweet and then you push them into the dish soap if necessary. LOL just kidding but it does work.

Circumstantial Evidence

There is no such thing as circumstantial evidence. LET ME REPEAT. THERE IS NO SUCH THING AS CIRCUMSTANTIAL EVIDENCE.

There's no reality in scenarios that might be. It's a guess at best and that does not create admissible evidence.

Motion in Limine

A Motion in Limine (lim-on-ee) can be brought about at any time during the hearing or trial. The Motion in Limine is made to exclude evidence the other party might try to bring in.

This is best done before the other side can offer the evidence and before something bad happens you can't reverse. You don't want to get things on the record that are against the Rules of Evidence. You can't allow it. If you have to play by the rules, so do they.

This will block anything they try to put in that doesn't fit, is not relevant, shocks the jury, isn't permitted.

Before the other party can get something on the record “accidentally,” you need to stop it with the Motion in Limine.

Make these motions as quickly as possible before you get blind-sided by a crooked lawyer trying to pull last minute dirty tricks that are against the rules.

Crooked lawyers will try to put inadmissible evidence on the record when they know it's false. They do this because sometimes it's worth the risk. Getting yelled at by the judge because you “accidentally” submitted something that wasn't admissible is a very small price to pay when the amount of money on the table is extremely large. Also, it will force you to make a *Motion to Strike* after it's already been out of the bag. You really don't want

that to happen. It's not your problem if a judge is mad because you made a Motion in Limine. You're paying his salary and he can sit there and deal with it. You are trying to win your case and not pussyfoot around with a judge that has better things to do. Do NOT be afraid of the judge. It's nice if they're happy but it's better if they're doing what you want them to do.

The Rules of Evidence allow a Motion in Limine and as such, you should use it. I have and I will continue to do so.

This will keep inadmissible evidence from getting in and that's exactly what you want to happen.

Your job, should you choose to accept it is to be confident, assert yourself, don't be shy and enforce the rules. You need to demand the rules be followed and you need to ensure they are obeyed by always thinking about the appeal. Judges really hate that!

The truth is on your side and that's what you need to win plus a strategy to get it on the record, destroy their evidence and ensure you stay on the offense.

OBJECTIONS

Use Objections to Preserve Your Rights!

This is one of the main tools you'll use to ensure you are not being railroaded by crooks called lawyers and their judge advocates. You need to understand what the various objections mean, when to use them, why you're using them and what the “grounds” are for using them.

Failure to state the grounds you've got to invoke the objection mean you will most likely get overruled by the judge. You want to know what the reason is you're objecting. Although you know you're supposed to object and where to object, if you don't know the reason and you don't state it, it really has no bearing on the case. If you apply objections properly, you can win your case.

What you do when you object is assist the judge in making decisions. Many judges have never tried a case before and therefore don't actually know the rules, don't know how to apply the rules and most likely are only familiar with the regular laws they see every day in their courtroom. They may not have many lawyers making objections so you're going to be not only educating by helping the judge by knowing what your objection actually is. This way, they'll ponder what they just heard, the same thing you just heard and when you apply it properly, they should say, “Sustained.”

Judges aren't supposed to be saying a whole lot until someone makes a move. They sit by and let the drama play out unless something gets out of hand. In fact, one day, when I was at the court, all the people at the bench started talking at once. I haven't seen this happen very often in the courtroom but finally this judge said, “Woah, woah, woah! One person at a time please!” It was odd because it seemed to happen many times that day.

However, you can help the judge by saying, “Objection, irrelevant,” or whatever. It's like throwing a flag on a play and the referee calls out the foul and the penalty.

When you throw out the objection the judge makes a call, either “Sustained” or “Overruled.” Either way, without the objection, you're not going to be able to keep the portions of the “evidence” and “testimony” out of the record if you don't do something.

Whether the other attorney breaks the rules or the judge breaks the rules, you have to object. Do it as early as possible before the judge or jury hears what's going to be said. You can stop the proceedings in its tracks immediately before anything detrimental is heard. Remember, you're setting your case up for an appeal in case you lose and are overruled after you've done everything right. The higher court won't be happy with the lower court if you've done what you're supposed to and the Good Ol' Boys' network railroaded you.

Don't object if it's not going to help you with your case. Judges can get angry when you're just throwing stuff out and it doesn't help. Sometimes you might want something the opposition is saying on the record. It's not hurting you; it's actually hurting them. I did

that once when a plaintiff was under oath and lied on the stand. I knew there was going to be another case and since she was on the record, I knew I could get the court record and use it against her in the next case.

You might not think so but you will be controlling the court with objections and the result is you're also controlling the judge and the attorneys when you are properly objecting.

I can tell you I have sat in a lot of courtrooms and rarely do I hear any attorneys object to much of anything. They've usually worked out deals before they get to the trial stage so the "trial" is just a formality for the record. It's really kind of disgusting because people take the advice of a lawyer although they are innocent. They plead to a lot of things they didn't do just to get it over and the amount of the retainer goes up and up the longer a trial takes.

Retainers can kill you especially if the case is serious.

Using objections forces the judge to rule and it keeps the cheating out of the courtroom. Lawyers will absolutely cheat if they can get away with it. It's why you will use your objections to ensure the other side is honest.

Good judges will try to do what's right but you can't just assume that will happen. Especially if the judge is colluding with the attorney or allows a lot of rules breaking to go on. Remember, the judge isn't supposed to interfere with the proceedings until something compels him to do so. You have to give the judge a legal chance to take action. You do that with motions and objections.

One well-placed objection, skillfully stated can win a case that most would think is not winnable.

Objections are a great tool to enforce the rules. Without them, your opposition will lie, cheat and break the rules, the judge will let them and the jury will be taken down the wrong path leading them to the wrong conclusion.

Everything stops when an objection is tossed out. The judge is forced to rule and nothing can proceed until the objection is ruled on.

If you know you're correct and the judge overrules you, you will need to state your objection again but saying, "Objection renewed." The judge may change his mind and if he sustains the objection the appellate court will see on the record what went on. That's why you want to have it on the record. The appellate court will see he made an improper ruling and you gave the judge a second chance to correct the record and reverse his previous position. The appellate court may also send the case back to the lower court to correct their own mistakes and that is going to be how you'll win your case.

Objection Renewed

If you're overruled on an objection, renew it. All you have to say is, "I'm renewing my objection" or "Objection renewed," and the judge will have a second opportunity to do the right thing.

If all of this happens and the judge ignores your objections, the first and second times, it will be on the record, the judge will be in the spotlight for the appellate court to deal with.

What judges should do is enforce the rules especially when you give them the opportunity to do so.

The way to win your case is to always remember, you're setting up your case for an appeal. Judges are not Gods and they should not be breaking the rules regardless of their relationship with the attorneys and their biased towards you or anyone else. If they're going to be a judge, they need to be enforcing the rules.

It's possible the judge will say, “Duly noted,” or “So noted,” meaning he's actually ignoring you again and that is a defiant judge. You'll want to appeal and the appellate court will correct the mistake.

What are the Rules that Rule?

The Rules of Evidence and the Rules of Procedure are what rule the court. They can be state or federal. They can be jurisdictional.

The rules also are statutes, provisions contained in the Constitution, decisions by appellate courts and what their opinions have been about the statutes and the Constitution.

Many times, those claiming “sovereign” status don't understand that the rules that govern the courts are really their friend and they should make those that are playing in that sandbox, under those rules, live by them. They made the rules, make them play by them.

What often happens is the “sovereign” tries to argue a case, doesn't know the rules governing the courts and then loses wondering what just happened. When you know the game, you can play it. If you think you know the game but didn't study it, you're going to lose.

We need to be winning and the only way to win is to know the rules that are followed in that courtroom and the limitations of the attorneys and the judges. When you know this, you can control the entire situation. They will try to cheat and lie.

We haven't been controlling the corruption. We've let it go because we didn't know the rules. Ignorance of the “law” is no excuse and that is true especially when each and every person in the United States has the ability to study the law without a degree and present their case in the court and WIN!

You can control the situation in the court by knowing what the law says, know the rules of the court, filing proper complaints/pleadings, using the evidence/discovery tools to your advantage and moving the court to do what the law requires them to do as well as using objections properly.

That's pretty much it.

You can't trust officers of the court to do what's right. They will not do what's right on their own without you pushing them to do it. You must be able to be unafraid to move forward with objections and making sure you stop inadmissible evidence before it's injected into the case as well as using the rules of the court in your favor.

If you see a judge doing anything other than paying attention to the case, you should also call attention to this by using the statement, “Let the record reflect.... blah, blah, blah.... ,” whatever the judge is doing. Such as using the computer, talking to people, missing what you're saying because he just doesn't care. You're paying him to care and so are the rest of the people in your community. You have the right for the judge to pay attention to what you're saying. You're not there to make friends. You're there to get your case heard properly and the correct judgment applied.

If you want to win your case, you must set it up for an appeal. There are lawyers who know this and these are the ones with win after win. They know what to do and they know when the judge allows the rules to be broken, mistakes to remain, they have a case for appeal.

Someone who wants to win their case isn't concerned with the judges "feelings." They are more concerned with making sure the rules are enforced and setting the case up for appeal.

This is how important objections can be. The United States Supreme Court made a ruling in a Miranda warning case on appeal. Miranda warnings are supposed to be given before a law enforcement officers question suspects. However, many times they do not do this and say they don't have to.

> *"In the Miranda case this Court promulgated a set of safeguards to protect the constitutional rights of persons subjected to custodial police interrogation. The Court held that unless law enforcement officers give specified warnings before questioning a person in custody and follow specified procedures during the course of interrogation,* ***any statement made by the person in custody cannot, over his objection, be admitted in evidence against him at trial.****" Michigan v. Tucker, 417 U.S. 433, 443 (1974.)*

This is extremely important. It is clearly saying that objecting is going to save you from having something admitted into evidence that shouldn't be. Cops trick people and people let it happen because they don't know the rules and don't know how to object.

If you're not sure if you're right, go ahead and object anyway. It would be better than sitting there letting them break the rules. Also, if you don't object, you might not be able to do so later.

You don't need to know the grounds before you object. It's better to object and not know the grounds rather than let your opportunity pass. You have to do it before it's too late, however it's better late than never.

Practicing before you go to court is a really good idea even if you're playing it over and over in your head, thinking of all the possible questions and if those questions are hearsay, irrelevant, scandalous, whatever...you can go over and over and over the list of objections in your handbook on evidence from your State or from the Federal Rules of Evidence. Read it. Mark it up and book mark the key things you think you might need in case you have to read it to them at the time of your hearing or your trial.

The biggest issue is you have to be able to say it as quickly as possible, think quickly and go through your memory index and pull up the objection that fits.

If you don't do it, something will slip by and be on the record or blurted out and you could have stopped it and didn't.

My State of Missouri Rules of Evidence has a great list of common objections and this page can be bookmarked before a hearing or trial so as they're talking, I can flip through and find the right objection if necessary. There are some objections that will be used a lot and others not so much. Read them over and over again and memorize them if you can.

I usually read things over and over at least 50 times then memory is really no problem.

If an objection is obvious (especially after you've done this enough) the judge may just say “sustained” without you having to stat the grounds. However, if you have a lawyer who you're dealing with who gets arrogant, he may ask for the grounds so hopefully, you won't just rest on your sustained decision and figure out what the real grounds are for your objection.

Another thing that could happen is, you know there is an objection but you don't remember what the name of it is. At least say, “Objection” and if the judge asks you to state the grounds and you can't think of it, you should at least tell him you want your objection on the record and you'll state the grounds later. It's better to get your objection bookmarked on the record than to just let something go because you can't think straight when things are moving fast.

It's possible the appellate court will be able to read the transcript and see the objection was proper regardless of the grounds and will not be happy with the judge not correcting the error. There are cases on appeal that have stated it's better to make an objection regardless of the grounds so you don't lose your ability to object later. You don't want something that is a material error – an error that could affect the outcome – to go by without stating your objection.

Most of the time a judge will sustain the objection anyway because he already knows that it is proper when it's made. It's up to the other guy to ask for grounds. If he doesn't, that's his loss, however, remember, you can do the same to him!

On the other hand, objections might not be something you want to do. For example, are you really sure you don't want that tidbit on the record? I told you earlier, I didn't object to one statement which the witness/plaintiff made because I knew with that statement on the record it would help me with another case where I could trap her in her lies. At that moment, it wasn't that important that I object because she was already hurting her own case and her lawyer wasn't helping at all. I wanted her perjurious statements on the record and now, I can use those against her later.

If you're sure the testimony won't hurt you, don't object to the statements. If you think it will help you, don't object to the statements. These will be very quick decisions whether you're in a situation of a deposition, hearing or trial. You'll need to decide within a second or two if you should object or hold your tongue.

Here's what Cornell Law School says about Objections: *objection* is a formal protest raised during a trial, deposition or other procedure indicating that the objecting attorney wishes the judge to disallow either the testimony of a given witness or other evidence that would violate the rules of evidence or other procedural law. At trial, these are typically raised after the opposing party poses a question of the witness, but before the witness can answer, or when the opposing party seeks to enter an exhibit into evidence.

Once an attorney makes an objection, the judge then makes a ruling. If a judge sustains the objection, it means that the judge agrees with the objection and disallows the question, testimony or evidence. If the judge overrules the objection, it means that the judge disagrees with the objection and allows the question, testimony or evidence. The judge may also permit the attorney to rephrase the question to correct whatever was objectionable.

Objections may also occur in response to the conduct of a judge.

Some common objections include:

1. Irrelevant. That the testimony pursuant to a question asked or the particular item of evidence is not relevant to the case.
2. The witness is incompetent.
3. Violation of the best evidence rule.
4. Violation of the hearsay rule.
5. Speculative. That the question calls for the witness to speculate about something.
6. Leading. When the question posed by the attorney seeks to lead the witness to make an assertion.
7. Violation of the parole evidence rule.
8. Repetitive. (Also Asked and answered). The question has already been asked and answered.

Speculation

One thing that seems to creep into the hearings and trial a lot through questioning is speculation. A witness cannot testify to their opinion on anything that would ask for a conclusion on something they don't have first-hand knowledge of. They can't testify what something else or someone else is thinking or feeling. They can only testify to what they, themselves saw, heard, experienced in their first-hand capacity.

Speculation is inadmissible testimony and should not be allowed. Raise your objections quickly as soon as you think this is about to happen. You can usually tell by the phrasing of the question before the question is fully articulated.

If you pull the trigger too late on your objection, you'll want to make a Motion to Strike right away but as per normal, once the judge or jury hears the testimony, it's going to remain in their heads regardless of the instructions to “forget it.”

Also, if you're listening to a testimony or questions being asked, you'll want to watch for anything that isn't right. If an attorney is trying to intimidate you, if the judge is looking at his papers or whatever, you will want to say, “Let the record reflect that the judge is reading his files and isn't paying attention to the testimony in order to make a fair and impartial judgment.”

Watch for privileged communication, hearsay, irrelevant facts, repetitive questions and answers, there is no limit to the number of tricks the attorney will play in order to ensure he wins. You have to stand up for yourself because the judge isn't going to do it.

Although Pro Se litigants are supposed to have some leeway in court, don't expect it. The more prepared you are, the better off you will be and don't think they are going to like you representing yourself.

Angering the judge is not your concern. Your main concern should be ensuring the rules are followed and you setup the case for an appeal if the judge doesn't do his job after you've given him every opportunity to do what's right.

Objecting During Depositions

For the record, during depositions, you should object to anything that is inadmissible, leading, inappropriate, just like regular objections however, in many jurisdictions, you might not have to state the grounds like you would in court.

You'll need to refer to your own state's handbook on evidence to see if objecting during a deposition is specifically banned and, if you are able to object, do you have to state grounds?

Because there's no judge involved in a deposition, some people will skip making objections or they'll make an objection without stating the grounds. They'll wait for the review by the judge to state the grounds. Don't do this unless your state evidence rules are against it. State the objection with grounds for the record during the deposition.

This is your record and it's a fresh record while you're there. Just because there's a dirty look or two from the opposition's lawyer is not a reason not to get it on the record at the time, you're in the deposition.

Object, state the grounds and if someone gets upset, don't worry about it. If the other side starts getting upset, tell them to show you the rules forbidding your objections.

If emotions are rising high and the two parties can't be in the same room, you can request a session with the judge for questions and answers in the Judge's Chambers.

Make sure, during depositions you have a stenographer/court reporter present to swear in the witnesses and record the procedure and testimony.

Always anticipate a fight with the other side during anything you do but especially during depositions. Even when the other side's attorney knows the rules, they will continually press, push and argue. Remember, they're used to being in charge of anyone who isn't an attorney and they will resent you from the start. Know it and don't be scared or fooled by them.

Always have your Rules of Evidence with you – both state and federal – and do not let the other side get by with intimidation or coercing you into stopping what you're doing. They also will try to go beyond the “scope of discovery” and you should object.

Make objections whenever they break the rules and make sure it's on the record. This is a good record for an appeal.

If the opposing attorney starts doing anything ridiculous during the deposition including making noises, threatening you, making faces or gestures at you, mumbling under his breath, or whatever, get it on the record by saying, “Let the record show, Mr. Magoo is making threatening faces at me during the testimony of his client.”

If the attorney keeps it up and you feel as if this is going to continue, you can stop the deposition, tell the Court Reporter/Stenographer to record, “Let the record show, Mr. Magoo has made the deposition impossible to continue with his constant threats and interruption and this deposition is terminated pending a court order which I will file immediately.”

It's possible that the mere threat to terminate the deposition and talk to the judge may curb the attorney's behavior. If it doesn't, don't hesitate to follow through with your plans.

When the law is on your side, the rules are being followed by you, the attorney knows he won't win trying to bully you.

You do not have to put up with ridiculous and childish games from anyone.

Renewal of Objections

When you renew an objection, it's possible the judge will get really mad. That is not your concern. You need to remember, you have to have your objections on the record and when you're right, you're right.

You've got to ensure your objections are on the record for the appellate court which is your proof you tried to get the judge to do what is right.

You can be firm without being mean about it but it's still possible the judge will start fuming at you. If he does, you don't need to apologize, he's in the wrong and these people aren't used to Pro Se litigants being correct.

As long as you get everything on the record, stick to the rules and use your objections with grounds, when possible, there's nothing that can be done by a judge to hurt you unless you're going to allow it.

Examples of when you should renew your objections are at the close of the opposition's presentation, anytime your objections are overruled or ignored during jury selection *(voir dire,)* if any of your objections are overruled during or at the close of an expert witness qualification hearing, at the end of a trial before the jury deliberates. These are when you should renew your objections.

You want to do this in front of the jury so they understand you objected and you are serious about the objection, you're not going to let it go. When you renew an objection, it gives the judge another opportunity to make the right decision. If he still doesn't, at least you have the ability to appeal and the appellate court will read it in the documents.

The judge might get angry but this isn't about the judge. It's about you and your case. You have to have everything on the record for an appeal. Without it, you could lose – you will lose on appeal.

Renew all objections you make during interrogatories, depositions, hearings, whatever – renew, renew, renew!

In order to appeal, you have to object. If you haven't objected, you have no appeal power. If the judge has an issue with you objecting, you need to say something like, "Let the record show the judge appears agitated by my objections." If he knows you're putting that on the record, he might change his tune and do what's right. He knows he will lose and the appellate court will make him fix it if they don't fix it themselves.

Your job is to set everything up for an appeal, assist the judge in making the right decisions and give him every opportunity to do it correctly.

IMPORTANT: JUDICIAL ERRORS ARE A SINGULAR BASIS FOR AN APPEAL!

Get everything on the record because this is how you'll appeal.

What if the Judge won't make a ruling on an objection?

If you object and the judge just sit there, you need to make your objection again, and again. If he still sits there not doing anything, you need to make a motion to rule on the objection. State it clearly and articulate your words saying something like, "I make a motion to rule on the objection. Objection. Mr. Magoo is leading the witness."

What you're doing is making sure the court reporter gets your words on the record and can write them down as you speak. That is what you'll need when you go to appeal the case

should the judge refuse to make a ruling. Nothing should move forward if there is an objection on the table.

If the judge still refuses to make a ruling on the objection, the appellate court will know the judge did it deliberately and that needs to be on the record. You can be forceful, articulate and clear so there is no mistake about what you're saying.

The point of your objections is to make sure there are no judicial errors. If there are, you need to get them on the record. Move the court to make a ruling on the objection if the objection hasn't been ruled on.

Avoid saying things like, “I wish” or “I'd like.” Just state it clearly, “I move the court to make a ruling on the objection.” Done. Make statements and don't be shy about it. They're not shy to plow right over you so you needn't be shy about making sure you get their errors on the record if necessary.

Classifications of Objections

The four general classifications of objections are:

Violations on Evidence Rules
Violations on Procedural Rules
Violations of General Law
Violations of Civility and Common Sense

Violations of Evidence Rules

The most common violations are breaking the Rules of Evidence. That means the objections on hearsay, leading, attorney is testifying, authentication, etc. You'll want to read up on the Objections above and you'll understand them when you hear them.

The main thing is, you have to make sure you object before the witness answers. Interrupt the sentence regardless of what it is. Then push for a ruling on the objection.

Read and re-read the official rules of evidence of your jurisdiction/state. Have someone study with you and ask you questions so you can get the rules in your head. This is going to be your biggest area that you'll win on if you know the rules.

Understanding the proper grounds for your objection will most likely stun the other side and make the judge get the clue, you're not joking around.

Violations of Procedural Rules

When the rules are broken, it's time to object. There are forbidden actions most attorneys will try to get by with and so will judges. If you don't speak up, they'll just let things go. You have to enforce the rules via your objections.

If you put in a motion to dismiss and the judge hasn't ruled on it, but sets a trial date, those are procedural errors and the judge is in the wrong. The judge has broken the rules and the other side will be happy about it. What should happen, is your motion to dismiss should be ruled on first and if it succeeds, then there's no reason for a trial. Frequently, judges like to set trial dates and they haven't even ruled on the motions before them. This type of violation is not permitted and violates the rules of procedure. No trial can be set until all the motions directed to the pleading/complaint have been ruled on.

Your objection is,” Objection, Pending Motions.”

If the judge still won't listen, renew the objection. Follow it up in writing. If you don't object when you should, don't put it in writing, you may find yourself being without procedural due process being honored and a crooked attorney and his friend of a judge, tag teaming you.

If the judge sustains your objection, the trial will be delayed until your motion has been heard and ruled on.

If the judge overrules your objection or won't rule at all, you need to secure the record so you can appeal if the judge decides to set the trial date prematurely and you lose. These are grounds for an appeal and the judge should already know this.

Another violation is if you have objected because the other side hasn't met the deadline for turning over evidence and you have already made the objection, the judge says, “I'll allow it,” you renew your objection and he still won't listen. Make a Motion to Renew Objection in writing and force the issue. Procedural violations are grounds for an appeal.

Violations of General Law

As soon as you are aware an ordinance, statute, appellate court decision or any other provision of a law controlling the jurisdiction has been violated, you need to object.

You'll need to state the law and how it was violated in your objection. You want this on the record. I REPEAT – YOU WANT THIS ON THE RECORD!

If the other party claims you can't see requested documents because there is some sort of secrets contained in them, then the judge has to examine those documents, on camera, in his chambers without the parties in the room to see if the documents are actually secret. That's what the law states.

If the judge refuses to do this, you need to object!

A judge’s refusal to obey the law is a violation and violations are grounds for an objection. You need to put this on the record to preserve the error and for the appeal by using OBJECTIONS!

Violations of Civility and Common-Sense

It should seem like attorneys and judges should already be doing their job with some sort of civility and professionalism. It also seems as if the attorney would prepare his client with what to wear, how to act and what not to do or say. That isn't always the case because they're main mission is to derail and throw off the Pro Se litigant on purpose. Expect this to happen.

The judge is not supposed to be tag teaming with the attorney and everyone is supposed to be following the rules but they won’t' do that unless you make them do it. You make them follow the rules by objecting.

If one of the women is wearing a super low-cut top on purpose to try and sway the judge, the jury or the attorney in their direction, you should object, get it on the record and say the woman is wearing inappropriate clothing which will distract the witnesses and the jury.

The problem with NOT objecting is the appellate court won't be able to see what happened during the hearings and proceedings if you don't get it on the record. The rudeness,

intimidation, disrespect and disruptive behavior is only going to stop if you make it stop. You have to object and get it on the record. If this behavior causes you to lose and you didn't get it on the record, you can't use it in an appeal.

No clothing in the courtroom should have sayings on it that are distractions are grounds for objection and an appeal. Judges have to apply the rules to all things including evidence, procedure, general laws and civility. You should be able to conduct a proceeding in a professional manner in order to get to the truth and ensure justice is served.

When the rules are not being enforced as the judge is duty bound to do, you need to object or you won't have an appeal. Get it on the record.

The breaking of the rules, the opportunity for the judge to fix it with objections, the ignoring of the rules and the disarray in the courtroom must be objected to on the record otherwise you will not have the ability to appeal the case. Any errors on the record make a case appealable.

MOST USED OBJECTIONS

Asked and Answered

When the opposing side wants to make sure there is special emphasis on one thing over another and there is more consideration given to that testimony, it may be that the attorney will repeatedly ask the same exact question in different ways.

In that case, you need to object by saying, “Objection! Asked and answered!”

It is sufficient to have the answer one time, maybe twice, but anything beyond that is overkill and you can stop it with an objection. The attorney will most likely try this.

Lawyers like to dwell on things and try to hammer them into the heads of the jury. This is ridiculous and they try to do it with testimony they think will be damaging to you.

You might think this guy is just innocently asking questions. Do not be fooled. This is not the time to be “nice” and not object when you know you should.

The questions might differ slightly and the answers also, but this is done to make the jurors think you don't have any evidence. If you let it keep going, then they'll think the opposition has all the answers and you've got nothing when in truth, they are saying the same thing over and over again.

If you object, the judge should tell them to move on.

Under the Federal Rules of Evidence, No. 403 – it clearly states, *“The court may exclude relevant evidence it its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury,* ***undue delay, wasting time, or needlessly presenting cumulative evidence.”***

State rules of evidence usually follow the Federal rules of evidence. If you can cite both as your grounds for objection, that's even better.

The attorney has the right to ask questions, however, there comes a point of abuse of the rules and you can stop it with your objections.

Badgering

Some attorneys will try to be abusive and rude to you or other witnesses. This is called ***badgering*** and it's an abusive interrogation of a witness. Insults and intimidation are not

allowed in the court and you need to object.

You can act questions matter-of-factly as you're cross-examining a witness but to do it with rudeness and intimidation isn't going to be allowed in court.

For example, saying something like, “It's been proven you're a drug dealer and you're also facing a murder charge for shooting your girlfriend, correct?” isn't necessarily badgering.

If those are facts relevant to the case, the questions aren't badgering. However, if the statement isn't relative, it's delivered rudely and hasn't been proven, you need to object. The only reason an attorney would say this is to discredit whatever the witness is going to say. You should jump at an objection before it's even out of the attorney's mouth.

During cross-examination you can kindly lead a witness to answer questions but there will be times when you might have to start playing hardball. Some witnesses don't want to answer the questions and you might need to get tougher.

Putting witnesses at ease to begin with is better if you can do it. You'll get better answers if the witness doesn't feel intimidated by you. If this doesn't work, you'll have to get more aggressive without badgering.

In addition, don't let the other side badger a witness unless it's helping your case.

Badgering is done by the tone of your voice, facial expressions, body language or questions that are threatening or intimidating rather than trying to interrogate for evidence.

When you're asking questions, try to be friendly and calm. Don't get angry or act aggressively. You have to know what you already want the witness to say and try to get them to say it without being repetitive or angry.

Although your questions might lead to some mental breakdowns, uncover dirty laundry, reveal secrets or talk about the criminal background of the witness, try to do it in a tone that would be as if you're a friend to the witness rather than a threat.

Typically, on cross-examination questions can become aggressive and may border on assault but before it gets that far, raise your objection.

No witness should be insulted, intimidated, unnecessarily embarrassed, called names or anything else. The only thing that should be done is bringing forward evidence as easily, calmly and respectfully as possible.

Best Evidence Rule

According to the Federal Rules of Evidence, Rule 1002 states, *“An original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise.”*

This means in order to prove the content of documents, recordings, photographs and anything similar requires an original. Copies are not admissible evidence.

If your opposition isn't providing originals, you should object immediately. You should be saying, “Objection, best evidence rule.”

If the other party says they, have it, you have to insist on the production of the original.

F.R.E. Rule 1003 says a copy is admissible unless you object that the production of a copy is unfair to use during the case.

In F.R.E. Rule 1004 copies can be used only if:

the original was not lost by an act of the person offering the copy
the original cannot be acquired even with a court order
the person who the copy is used against isn't involved in the destruction or loss of the original
the copy doesn't offer any controlling material in the case

If the original isn't offered, you need to object. Copies can be forged very easily and regardless of how the copies are entered, there is never the same weight carried as an original.

When dealing with security instruments and negotiable papers like promissory notes and deeds, a copy is worthless except to show what the original looked like or what the document said.

If the original is entered into the record, you must object and make the jury aware the copy can easily be forged on a home computer. Wills and contracts can be made up on the spot and photos can be photoshopped.

The “best evidence rule” ensures there is no fraud but the issue will only be raised if you object.

Regarding photos, unless a negative or metadata is produced to accompany a photo, it's not possible to authenticate it. This makes it inadmissible evidence.

If you genuinely suspect fraud, you must object.

The best evidence rule doesn't exclude copies but it does apply if the copy offered is done to prove a material fact of the case.

Your objection should be sustained if the original is needed for an expert to authenticate it. The expert examiner can't render a definitive conclusion based on a copy of an “original.” Your objection will gain more credibility if you're saying it could be a forgery than if you're challenging the content.

In a 1953 ruling the United States Supreme Court said, *“The elementary wisdom of the best evidence rule rests on the fact that the original document is a more reliable, complete and accurate source of information as to its contents and meaning.” Gordon v. United States, 344 U.S. 414 (1953.)*

Speaks for Itself

When the other party's attorney starts asking the witness what a document says, you need to object. You say, “Objection, the document speaks for itself.” Then you ask for the document again.

An original is required and it can speak for itself. A witness cannot tell you what a document says and the original must be produced. There are some courts who will require the production of an entire document if there is a portion of a document admitted as evidence. The document has to be produced and the witness's recollection of the document isn't good enough.

If you fail to speak up, you waive the right to object. You cannot raise this type of objection at an appeal. It has to be on the record prior to the appeal in order to send it to the appellate court.

If the other party or their attorney tries to prove the content of any document, writing, recording or photo by offering a copy or trying to use testimony of a witness trying to "say" what the original says, object and then if you're overruled, renew your objection and get it on the record.

Competence

In order to testify, witnesses must have first-hand knowledge of what they're saying and also be mentally sufficient to understand what they're testifying about otherwise, they're not competent to be a witness.

Anyone who has been deemed incompetent, insane, senile, or any type of mental condition or is placed in a court ordered guardianship, isn't competent to testify.

Children are not considered competent to testify either because of their age. If there is a child you think needs to testify because they are a witness crucial in your case, you need to research what makes a child competent to testify and under what circumstances they can testify. Depending on the case, age may not be a factor. In some cases, teens are able to testify, in some cases they are not. Very young children may not testify in just about every case.

You'll need to research case law and anticipate the objection if you need to use a child in your situation.

Checking the official rules and citing cases is the best way to ensure you are able to use a child as a witness.

If you are aware of a witness who is mentally incapacitated, you need to object and state your grounds as "Competence."

You can also raise this objection if someone is on any kind of prescription or illegal drugs altering their mind or mood. You can ask the witness if they have had any medications or mind-altering drugs in the past 24 hours.

Normally, the witness will say no, but if they do admit it, then you have an objection that will be sustained by the judge (most likely – nothing is ever written in stone.)

Raise the objection and the judge will ban the witness from testifying.

Most of the time, attorneys will try to use witnesses or entice testimony from people who have no first-hand knowledge of a material fact. You can object based on competence or whatever objection you raise. During cross-examination you can show the jurors/judge the witness has either limited or zero knowledge of anything material to the case and using talking points given to them by the attorney.

Obviously, relevance should be your first objection, but if you need more, than you can use competency.

Physical Competency

The physical location of a witness is key to whether someone is competent to testify in court. There are many times in the course of testimony, witnesses will say something they couldn't have possibly seen and will swear in court they are correct. However, upon further

testimony and cross-examination, the witness can be proven to be wrong as they couldn't possibly have seen what happened, who a person is or what they were doing from their location in relationship to the event that took place.

In the movie *My Cousin Vinny*, Vinny the attorney points out a witness is incapable of seeing what she says she saw because the distance she can actually see is greater than his demonstration in court. Watch the movie, you'll see it when he gets out the tape measure.

Witnesses who were drunk at the time, smoking weed or on some other drugs are not competent witnesses. Object. Make it on the record.

Attorneys will try and trick you and the judge may allow the trickery. They will also try to trick the jury. Make sure you're alert and get your objection on the record.

Counsel Testifying

A lawyer will start testifying for their client or the witnesses if you let them. Cheating is what they do when they can get away with it. It's up to you to object as soon as you hear it.

Lawyers are supposed to be arguing their case based on evidence already in evidence or in the actual pleadings.

They will try to tell the judge what the evidence is rather than call witnesses or show original documents. Their own bar forbids them to testify but they will try and the evidence rules don't allow it.

Lawyers will do it and you need to expect it.

You can object and state the attorney lacks the competency to testify. If the lawyer insists on testifying then you need to move the court to swear the attorney in and take the stand so you can cross-examine him.

Only competent witnesses should testify. As soon as you think the lawyer is testifying OBJECT.

When an attorney has no evidence, they will attempt to testify and as such you should be objecting. He will lose his case and he should. The case was about him making money before he penned the complaint.

You can't allow the attorney to get any testimony out of his mouth for the jury to hear. You have to object because you can't put the cat back in the bag.

This is deceitful and the lawyer needs to be stopped before he damages your case.

Facts Not in Evidence

This is another tactic of crooked lawyers. They will try to jog the memory of the jury and the judge by trying to introduce facts that don't exist or evidence that isn't introduced.

Lawyers will start talking and there is no evidence to support what they're saying. They have no documentation of the thing they're stating and can't prove it. It's also immaterial to the case. Not relevant.

This happens at hearings, depositions and at trials. They will repeatedly try to do this.

Be prepared to see it and hear it. They will attempt to do this in written notices, motions, memorandas, and orders they have drawn up for the judge to sign thinking they're going to get away with alleging facts that don't exist.

This is called “facts not in evidence.” Some are facts that have no evidence. You can't just allow them to make things up and pretend they are “facts.”

Lawyers will do it. Pro Se litigants may try it. Whatever happens, stop it with an objection – facts not in evidence.

They will do this when they've got nothing and they'll also try to draw out a case until they can think of evidence. Cheating is not allowed.

Lawyers may also try to get a witness to do the same thing and start testifying to things not in evidence or that don't exist. Object.

What should happen is the judge should tell the attorney to stick to the facts already in evidence and tell the jury to disregard the statements made by the lawyer.

As soon as the attorney tries to give the backstory to whatever is going on, object. This would be facts not in evidence and the attorney is also testifying to things he can't possibly know and has no first-hand knowledge. OBJECT!

The lawyer will try to say things derogatory to you and in favor of their client. Make sure you recognize it and object immediately before he can get out the sentence.

A lawyer can remind a jury/judge about what a witness previously said as long as he sticks to what was already said and doesn't start adding a bunch of garbage that was never proven or heard before.

As long as whatever is being said or introduced is relevant to the case, it is admissible however if it's not relevant, then you need to object.

Hearsay

This is probably one of the most misunderstood types of objections. You need to recognize it and stop it immediately.

According to Cornell Law School, hearsay is *“an out of court statement offered to prove the truth of whatever it asserts, which is then offered in evidence to prove the truth of the matter.”*

Crooked lawyers may cloak the hearsay in a question and you won't hear it until they are into their long spiel. For example, “When the coffee was spilled on the floor and Mrs. Jones walked by, did you hear what she said?”

That is hearsay. That is inadmissible. You need to object right away because the attorney is asking a witness what someone else said who isn't in the courtroom and can't be cross-examined.

Reread the chapter on evidence.

If you are trying to get an out of court statement on the record or a document signed out of court by someone not in the court and doesn't need cross-examination, you might be able to get it in as it's not being offered to prove the truth of what the person or the document says.

If the other party offers it, you have to object and ask to approach the bench to have a little out of earshot conference so you know what is being offered and figure out whether it is admissible. If it's inadmissible, object and state your grounds.

Evidence tends to prove or disprove something. It's either truth or it isn't.

Impeachment

If you know someone is lying during their testimony and can prove it, you can't just shout out that they're a liar. What you can do is impeach the witness.

If you've taken a deposition or an interrogatory before court and you asked a question, under oath and the witness gets on the stand and says something totally opposite, you can use the deposition or the interrogatory against them.

You can ask the witness, while on the stand, if they remember the deposition or interrogatory. They should say yes. If he doesn't, he's been coached by the attorney.

Then you can proceed to ask if they remember you asking them that very question that they are now lying about.

Now you're going to be able to talk about the deposition which is marked as an exhibit in your evidence. Ask the witness if they recognize the transcript. Then ask them to read the page you have marked with their testimony that is sworn on penalty of perjury.

After the witness reads the testimony directly contradicting the testimony on the stand, you can ask if they're lying then or now.

This is not exactly an objection but it is a way to get the testimony impeached when you absolutely know the witness is lying.

Outside of Pleadings

This objection is when one party tries to add more allegations into the complaint that aren't in the original pleading.

In each complaint/pleading there is a set of allegations. You can't add more allegations after you've already filed the complaint. Your objection is “Outside of Pleadings.”

This should be fairly simple. If they start trying to add more allegations, get it stopped. Object and it should be sustained.

The only thing you do is prove or disprove the essential facts which are the allegations in the pleading supposedly supporting causes of action.

It's pretty much that simple.

In court, rules apply and should not be ignored. You can only enforce the rules if you object. Setting the case up for an appeal and thinking about the appeal should help you focus on the mission at hand.

Motions and hearings before a trial go back and forth to get evidence either in or out of the case. You need to control this and you can with objections. If your objections are ignored, you renew the objections and if they are still ignored, put it in writing and make a written motion to submit on the record.

Everything has to be on the record or you can't appeal.

The other party cannot raise a new allegation in a hearing. If it's not in the original pleading it doesn't exist and therefore should be objected to and not allowed.

Once the pleadings are closed, then it's time to deal with the points one by one of the allegations. There shouldn't be anything else but this and by reading all of the back and forth in the case, you should be able to figure out exactly what the cause of action is about.

You read the original complaint, the answer(s), affirmative defenses, any counterclaims and cross-claims and/or any third-party complaints. That's how you figure out the case.

Every single issue of a material fact must be alleged in the complaint otherwise it is outside of the pleading.

At this point, both sides know exactly what they have to prove in order to win their case.

Prejudice

This is one tactic that is extremely unfair, used to tip the scales of justice in a bad direction and shock and awe the jury for no reason other than tainting the proceedings toward one specific party.

This is not allowed in court.

If what is being shown or about to be shown is shocking and can be done in a less extreme way, you have to object.

For example, there's no need to show horrific photos of an accident where children suffered extreme mutilation if there is another way to get the jury to understand the severity of the claim.

A testimony from a paramedic at the scene dealing with the bodies of the children and what he saw is a better way to make the jury understand and no photos need to be shown.

You need to object.

If the witness starts talking about something that happened to you in the past, like an arrest that isn't relevant, a news crew showing up on your property that isn't relevant, a statement about debts you owe that isn't relevant, you need to object and state the grounds as Prejudicial.

Witness Qualifications

There's a difference between lay witnesses and expert witnesses. Lay witnesses are the first-hand knowledge people who testify to something. They have no expertise, they can only state exactly what they experienced.

Expert witnesses don't have first-hand knowledge but are able to talk about the mechanics of something. Such as a plumber, talking about general plumbing issues. They may not know exactly how a pipe broke in the building, but they can testify how a pipe was supposed to function in the first place if installed correctly. An accountant can testify to the general practices of accounting and how books are supposed to be kept. A surgeon can testify to the general procedures of a surgical matter.

A lay witness testifies about facts. An expert can give opinions about hypotheticals because of their expertise in a special skill, their education or some type of advanced training.

A lay witness can't be an expert witness and an expert witness can't be a lay witness even if the lay witness is an expert in the special skill, etc. because of the conflict of interest.

Therefore, the expert witness has to be qualified by a judge and that has to have a hearing. An expert can only testify in a case if it is going to be helpful to make a determination on an important fact of the case. Other than that, they cannot give an opinion on who they think should win a case. They are there only to confirm a certain position on a material fact as far as a special skill, education or advanced training.

A judge will declare the expert as qualified or not during a hearing.

If you haven't had a chance to question the witness outside of the hearing, you need to object so you can see if the expert is really an expert in the case.

GENERAL PLEADINGS

Use Objections to Preserve Your Rights!

Starting a Court Pleading

The four types of pleadings are:

Complaint
Answer
Affirmative Defense
Reply to Affirmative Defense

A plaintiff will start the process by filing a complaint. A defendant files an Answer to a plaintiff's Complaint and tries to avoid making answers with motions if possible.

With the Answer, a defendant should also file Affirmative Defenses.

If there are any counterclaims, cross-claims, or third-party complaints, the defendant must file them as part of the Complaint. Each of these are just other forms of complaints.

These look something like this:

Counterclaim = Complaint against plaintiff
Cross-claim = Complaint against a co-defendant
Third Party Complaint = Complaint against a third party

After an answer has been filed, the plaintiff can file a reply to the defendant's Affirmative Defenses.

Then, if all motions directed to the pleadings are denied, the pleadings are said to be "closed."

Once the pleadings are closed there can be no additions to the complaints.

What Are Pleadings?

Pleadings allege facts no matter who is filing them. Complaints allege facts in support of causes of action.

Answers allege facts by admitting allegations in the Complaint, denying allegations in the Complaint, claiming defendant lacks knowledge to admit or deny plaintiff's allegations.

Affirmative Defenses similarly allege facts in support of the essential elements of the defenses.

Replies to Affirmative Defenses allege facts that claim defendant's allegations are false or cannot be proven.

There is a lot more to pleadings, but now you have a sensible framework from which you

can build a better idea about what they are. They are forms that allege facts, a set of alleged facts. They don't prove anything. The only say what both parties are going to prove later.

Pleadings are only allegations; they aren't proven yet. They're just accusations on paper.

Motions on Pleadings

When pleadings are filed, parties may attack them with motions to the pleadings.

Flurry of Motions

Both parties have an opportunity to attack his opponent's pleadings before anything actually starts happening.

This attacking phase is sometimes called "the flurry of motions", because they can fly back and forth, hot and heavy when major issues raised by the pleadings are in dispute.

Either is side can avoid the effect of his opponent's pleadings by filing one of the following:

Motion to Dismiss
Motion to Strike
Motion for More Definite Statement

Motion to Dismiss

This motion seeks to have the other parties' pleadings dismissed from the case meaning kicked out or removed.

Defendant may file if plaintiff's Complaint

- fails to allege sufficient facts to support the essential elements of a cause of action
- was filed after the statute of limitations timed out
- is not even close to saying what Complaints must say
- in any way shows obvious flaws that should not be allowed to proceed

Plaintiff may file if defendant's Affirmative Defenses

- fail to allege sufficient facts to support the essential elements of a defense
- fail to be properly worded
- simply name an Affirmative Defense without the essential facts (this may be tough in some jurisdictions, but Affirmative Defenses should be supported by facts sufficient to state the essential elements of each)

Motion to Strike

There are many grounds to "strike" part or all of a pleading. These are the most common grounds for the motion:

- Allegations are scandalous
- Allegations are redundant
- Allegations are impertinent

- Allegations are indecent
- Allegations are immaterial
- Allegations are false and known to be false when pleading was filed
-

If a party can show that his opponent knowingly made materially false statements in a pleading, the court should grant this motion. The opponent's case goes sharply downhill from these.

Motion for More Definite Statement

Opponent alleged things like this, for example:

13. Mostly pencils could update meeting partners.

14. Too many has good possibility.

15. For prevention of hurricanes.

These statements make no sense. No reasonable person could possibly know what they mean.

When this motion is granted, opponent must re-write his pleading.

Flurry of Motions Effect

When there are "legitimate grounds" for these motions they halt proceedings until the judge rules on them - granted or denied.

Nothing should be allowed to happen until every one of these motions directed to the pleadings has been heard and ruled upon.

If your judge allows your case to go forward when any motions directed to the pleadings have not been ruled upon, object and make the record clear so you can appeal if you lose because the judge refused to rule.

Hopefully, you learned some valuable and powerful information that will guide you to use pleadings tactically and strategically to win your case!

COMPLAINTS

The Complaint is the most important document in a lawsuit.

Whether you're suing someone or being sued, understanding Complaints is paramount to any case. Every civil case begins with a Complaint or a Petition.

Official rules in your jurisdiction will read something like this: *"The complaint shall contain a short and plain statement of the grounds on which the court's jurisdiction depends, a short and plain statement of the facts showing the pleader is entitled to relief, and a demand for judgment for the relief sought." (From Rule 8, Federal Rules of Civil Procedure.)*

Three essential items of any Complaint are:

- A short statement of grounds that relate to the court's jurisdiction.
- A short statement of the ultimate facts you will prove.
- What your demand for relief will be.

It's really not that complicated if you keep it at this.

Your Complaint shouldn't attempt to prove the facts it alleges. All you're doing is alleging something and this is not the time to try to prove what you're saying or get all emotional. If you get emotional, you don't stand a chance at winning.

A Complaint shouldn't be a story or attempt to become a legal argument. You're only stating one allegation at a time. Nothing more.

A Complaint is a legal doing 3 things:

A. Alleges the court's jurisdiction.

B. Allege sufficient ultimate facts to establish the essential elements of your

I. Causes of action, if you're a plaintiff.

II. Affirmative defenses, if you're a defendant.

C. Moves the Court to enter Judgment.

A Complaint can also do 2 more things:

A. Start discovery by alleging facts that might reasonably lead to discovery of admissible evidence, facts not necessary to establish a cause of action.

B. Demand a jury trial on the facts.

A Complaint shouldn't do any more than these 5 things. If you insist on doing anything else, you could be digging yourself a hole you can't get out of. Stick to the rules and you will be fine. Don't let your emotions control you. Use common sense.

Just state one alleged fact at a time, don't be redundant and then stop. Do not go beyond a few pages. More than 10-12 pages is most likely going to be a mistake.

Usually, you can make your allegations in about 5 one sentence points. Short complaints/pleadings are much more powerful than long drawn-out dissertations.

Simple and concise is what you need to do. Have someone edit it for you if you can't seem to get beyond your feelings.

The Petition

Petitions are also complaints but they are filed in certain kinds of proceedings where relief other than money is sought. Many Secured Party Creditors are interested in remedy rather than monetary relief.

For example, when one seeks an injunction this type of pleading is called a *Petition*.

The party who files a Petition is called the petitioner. The party responding to a petition is called the respondent.

On the following page is a sample petition for a temporary injunction. Jurisdictional Allegations

The court must have *"subject matter jurisdiction"* over issues alleged by the plaintiff. In addition, the plaintiff must allege jurisdiction as an essential part of his Complaint. ***(Defendant's take notice. Plaintiff's failure to allege jurisdiction is your ground for Motion to Dismiss.)***

The jurisdictional facts plaintiff must allege depend on the court and the case. Different courts have different rules, but the idea is the same regardless of the court.

Jurisdiction of a federal district court differs greatly from a county small claims court, but the allegations will be simple. Some depend on what the case is about. Some depend on where the parties live and/or do business. Some depend on the amount of money the case is about.

You have to check your local rules and then go by what is required in that particular court. You might have to file it in a different jurisdiction. The defendant doesn't decide the jurisdiction. That would be up to the plaintiff.

If plaintiff does not allege the court has jurisdiction, the defendant will prevail with a *Motion to Dismiss for Lack of Subject Matter Jurisdiction*.

Factual Allegations

In the sample document below, Plaintiff alleges sufficient ultimate facts to support all essential elements of the cause(s) of action.

It's not enough to merely list the names of elements. The plaintiff must allege sufficient ultimate facts to support each and all essential elements.

Use single sentences and each sentence is its own *paragraph number*.

Once sentence per numbered paragraph. Do not use compound sentences such as "with," "and" or "but."

Each numbered paragraph should allege one fact and one only. Factual allegations can be separated by "counts," as shown in the sample document below.

The "Wherefore" Clause

At the end of the Complaint or at the end of each Count, if there are multiple counts, the plaintiff will the Court to enter judgment in his favor. This is called the *"wherefore clause."*

It says what Plaintiff wants. It should be in the form of a *Motion for an Order*.

Some lawyers improperly make these a "prayer" or "request." You do not "pray" or "request." You will "move." You "move" the Court to enter "orders." The goal is to get Orders. To do that you Move the Court to do something.

Discovery Allegations

As mentioned above, plaintiff may allege additional facts he's certain defendant will admit or take the risk to lie about under oath. If you believe a defendant is going to lie about something, there's no point in even bringing it up. It won't do you any good unless you have proof/evidence.

If you are pretty certain the defendant will admit something, allege it in your Complaint/Petition.

When you make the allegations in your Complaint, you save yourself the trouble of having to use your Discovery Tools when they are limited by the rules. Using your allegations in the Complaint are like asking leading questions. This can be very powerful.

When your defendant/respondent answers the Complaint admitting the allegation, you don't need to use your Discovery on that point.

There is also no point alleging facts that aren't "reasonably calculated to lead to admissible evidence," since it will get you nowhere.

Only allege facts you know you can win.

Demand for Jury Trial

A demand for trial by jury, if a jury trial is desired and permitted, should be included in every "wherefore" clause.

The sample document below will show how this is done.

IN THE FOURTH JUDICIAL CIRCUIT COURT
IN AND FOR HAPPINESS COUNTY, FLORIDA

DONALD TRUMP,
Plaintiff, Case No.:_____

v.

JOE XI JING PING,

Respondent.

VERIFIED PETITION FOR TEMPORARY INJUNCTION

DONALD TRUMP petitions this Honorable Court to issue a temporary injunction and in support therefor states:

JURISDICTIONAL ALLEGATIONS

1. This is an action for a temporary injunction.
2. Petitioner resides in Happiness County, Florida.
3. The harm to be enjoined is threatened in Happiness County.
4. Respondent resides in Happiness County.
5. This Honorable Court has jurisdiction.

FACTUAL ALLEGATIONS

6. Petitioner has personal knowledge that respondent JOE XI JING PING has a well-formed plan to cause petitioner serious bodily harm.
7. JOE XI JING PING recently threatened to break petitioner's knee caps with a baseball bat.
8. The threatened harm would cause petitioner injuries for which a money judgment alone is insufficient.
9. The threat is imminent because JOE XI JING PING promised to break petitioner's knee caps as soon as possible.
10. An action for money damages alone is insufficient to restore petitioner to his status quo ante, because surgery alone cannot restore petitioner's knee caps sufficiently to allow petitioner to walk properly the rest of his life.
11. The threatened harm to petitioner outweighs any substantial harm to JOE XI JING PING who will suffer no harm whatever in being prevented from breaking petitioner's knee caps.
12. No substantial public interest will be contravened by the injunction sought.
13. A substantial likelihood exists that petitioner will prevail in this action, because facts obtained by discovery reveal that JOE XI JING PING has carried out similar threats and caused serious injuries to others.
14. JOE XI JING PING is a convicted felon.
15. A temporary injunction is necessary to protect petitioner from the threatened harm.

WHEREFORE petitioner moves this Honorable Court to enter an Order enjoining JOE XI JING PING from approaching petitioner within 50 feet, together with such other and further relief as the circumstances and demands of justice may warrant.

UNDER PENALTIES OF PERJURY, I affirm that the facts alleged in the foregoing are true and correct according to my own personal knowledge.

_____

DONALD TRUMP, Petitioner

STATE OF FLORIDA

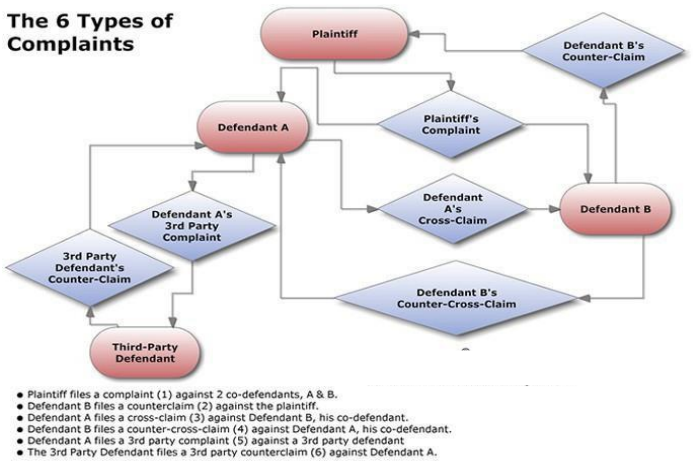
COUNTY OF HAPPINESS

BEFORE ME personally appeared DONALD TRUMP who, being by me first duly sworn, executed the foregoing in my presence and stated to me under penalties of perjury that the facts alleged therein are true and correct according to his own personal knowledge.

_____

Notary Public
My commission expires:

Types of Complaints



Study the Diagram and try to get this in your head. You'll be referring to this charge many times when you're trying to figure out the flow of a cause of action and how to respond.

Complaint Components

Every properly framed complaint contains certain components. The following list is what you'll need to make sure is in your complaint:

- Caption
- Title
- Preamble
- Jurisdictional Allegations
- General Factual Allegations
- Counts

- Wherefore Clauses
- Signature
- Verification, *this is optional but recommended*

The Caption

The caption includes:

- Name of the court
- Division of the court
- Case number
- Judge's name (optional)
- Plaintiff(s) name(s)
- Defendant(s) names(s)

The Title

The title includes:

- Complaint or
- Petition

The Preamble

The preamble says who is suing whom as well as what the person wants. For example, “Donald Trump sues Fanny Willis for money damages arising from defendant's breach of a contract and states: ...”

It's just a general summary of the entire Complaint/Petition. Read examples to see how they are written and use that for your own case.

Jurisdictional Allegations

Right after the preamble, using numbered paragraphs of one sentence each, the plaintiff will allege enough facts establishing the court has jurisdiction over the subject matter of the case and over the person of the Defendant(s). Study the provided example below.

General Factual Allegations

In this section Plaintiff alleges all facts necessary to establish the essential elements of every cause of action in pleading. You'll find this in the “Causes of Action” section of this workbook.

Counts

Each count has a title. The title of a count names the cause of action the count alleges, e.g., “Count One: Breach of Contract.”

The body of each count re-states the foregoing Jurisdictional Allegations and General Factual Allegations.

Each count goes on to allege such additional facts as may be necessary to establish all essential elements of the cause of action for that count if they were not sufficiently alleged in the General Factual Allegations sections.

Finally, each count closes with a “WHEREFORE” clause *moving* the Court for an Order granting judgment favorable to the Plaintiff, “... together with such other and further relief as the court may deem reasonable and just under the circumstances.”

It's really quite simple to see and understand, when you take it apart like this.

Signature

After the last Count, the person filing the complaint must autograph/sign their name, whether it's the Plaintiff going Pro Se or the attorney.

Below the signature the mailing address, phone number, email address, and fax number if applicable.

Verification

If the complaint is “verified,” the verification will appear below the filer's signature.

Single-Count Complaint

Here's a simple single-count Complaint for breach of contract:

IN THE THIRTIETH JUDICIAL CIRCUIT COURT IN AND FOR SUNSHINE COUNTY, FLORIDA

Case No. 2023-1776
Judge Bu**ll**ybench

DONALDTRUMP,
Plaintiff,

v.

JOEXIJINGPING,
Defendant.

_____/

COMPLAINT

DONAL TRUMP sues Defendant, JOEXIJING PING for money damages resulting from breach of contract and states:

JURISDICTIONAL ALLEGATIONS

1. This is an action for money damages in excess of $15,000. [Explained below.]

2. At all times material to this lawsuit, DONALD TRUMP was a resident of Sunshine County, Florida.

3. At all times material to this lawsuit, JOE XI JING PING was a resident of Sunshine County.

4. All acts necessary or precedent to the bringing of this lawsuit occurred or accrued in Sunshine County, Florida.

5. This Court has jurisdiction.

GENERALFACTUALALLEGATIONS

6. On17May2012Plaintiff and Defendant entered into a written agreement whereby Defendant promised to spray Plaintiff's 5- acre strawberry farm with insecticide every week for 8 weeks while Plaintiff was on vacation in Hawaii.

7. Plaintiff paid Defendant $3,000 at the time of execution of the contract in satisfaction of all the Plaintiff's obligations under the contract. [See where this is going?]

8. A copy of the written contract is attached as Exhibit1. [Many jurisdictions require written contracts to be attached to complaints.]

9. Defendant failed and refused to spray Plaintiff's strawberries at any time, breaching the contract.

10. As approximate result, strawberries valued in excess of $15,000 were destroyed by insects, causing Plaintiff to suffer money damages.

WHEREFORE DONALD TRUMP moves this Honorable Court to enter an Order for money damages against JOE XI JING PING, together with such other and further relief as the Court may deem reasonable and just under the circumstances.

_____
DONALDTRUMP, Plaintiff

Let's go over this complaint step-by-step.

First, at the very top is the caption. This tells us the name and location of the court, file number (assigned by court clerk at time of filing), name of Plaintiff(s), and name of Defendant(s).

Next is the title, telling us this is a simple “Complaint.” If it were some other forms, the title would tell us so in bold font.

Next are jurisdictional allegations. This is where Plaintiff alleges the essential facts that give this court power over the subject matter of the pleading. Right now, in Florida, a case brought in a circuit court must seek either money damages in excess of $15,000 or some equitable relief (e.g., an injunction or order determining ownership of property) or a mixture of both.

An action for breach of contract where the amount in controversy is only $14,999 cannot be brought in a circuit court in Florida. Such an action would have to be brought in a county court.

If the amount in controversy is $5,000 or less, the action would have to be brought in small claims court in Florida. Each jurisdiction has different rules for which courts have jurisdiction over each subject matter and amount in controversy. Consult local rules for details.

In this example, Donald Trump lives in the county where this court sits. So does Joe Xi Jing Ping. All acts that gave rise to the lawsuit also took place in the county where the court sits.

In Florida these are factors that may be considered in arguing that a court has jurisdiction over the subject matter of a case. If Joe Xi lived in Omaha, Donald lived in Miami, and the contract was executed in Atlanta with performance of its terms to be carried out by Joe Xi in Chicago, the Florida court would not have subject matter jurisdiction … no matter how much money was in controversy.

Allege all facts necessary to show the court you are filing in has subject matter jurisdiction, or the opposing party may move to dismiss for lack of subject matter jurisdiction.

Paragraphs 6-10 allege sufficient facts to establish the cause of action for breach of contract. It does this in “short and plain language.”

Finally, the “WHEREFORE” clause demands judgment for Donald's damages.

All three essential parts of the complaint are met:

A. short and plain statement of grounds for the court's jurisdiction

B. short and plain statement of facts on which right to relief is based

C. demand for relief

Hopefully, you are beginning to see how simple this is for you to do without an attorney.

Multi-Count Complaint

A multi-count complaint is the same as the single-count complaint we've examined, except that the general allegations include facts to establish more than one cause of action, i.e., more than one count - each with its own WHEREFORE clause.

In this complaint we'll add a second defendant just for fun so you see how easy it is to do.

A sample multi-count complaint follows:

IN THE THIRTIETH JUDICIAL DISTIRCT
IN AND OF THE COUNTY OF SUNSHINE, FLORIDA
Case No.:_____

DONALD TRUMP
Plaintiff,

Vs.

JOE XI JING PING
Defendant.

COMPLAINT

PLAINTIFF DONALD TRUMP sues JOE XI JING PING and JACK SMITH for money damages and states:

JURISDICTIONAL ALLEGATIONS

1. This is an action for money damages in excess of $15,000.

2. At all times material to this lawsuit, DONALD TRUMP was a resident of Sunshine County, Florida.

3. At all times material to this lawsuit, JOE XI JING PING and JACK SMITH were residents of Sunshine County.

4. All acts necessary or precedent to the bringing of this lawsuit occurred or accrued in Sunshine County, Florida.

5. This Court has jurisdiction.

GENERAL FACTUAL ALLEGATIONS

6. On 17 May 2012 Plaintiff and Defendants entered into a verbal agreement.

7. Terms of the verbal agreement required Defendants to deliver Plaintiff's fresh-picked grapefruit to Plaintiff's customers.

8. Defendants promised to make daily deliveries, including Saturdays and Sundays.

9. Defendants promised to continue deliveries through the end of August 2012.

10. Plaintiff paid Defendants $5,000 in advance for the contemplated delivery services.

11. Defendants performed well for the first five weeks.

12. At some time in July 2012, Defendants stopped delivering grapefruit for Plaintiff.

13. Defendants began delivering their own grapefruit to Plaintiff's customers in competition with Plaintiff prior to the end of August 2012.

14. Plaintiff lost his long-standing grapefruit customers as a proximate result.

15. Plaintiff lost the value of the remainder of the season's undelivered grapefruit crop due to spoilage.

COUNT ONE: BREACH OF CONTRACT

16. Plaintiff realleges and restates the foregoing jurisdictional allegations and general factual allegations. [This brings the foregoing allegations into this count, so each count stands by itself.]

17. The 17 May 2012 verbal agreement constitutes an enforceable contract, since the contract was for services that could be performed within the space of one year pursuant to the Statute of Frauds. [Verbal contracts for services that cannot be performed within one year are unenforceable in states that follow the common law "statute of frauds". Google "statute of frauds" to learn more.]

18. Defendants were obligated by the contract they made with Plaintiff to deliver Plaintiff's grapefruit throughout the 2012 grapefruit season.

19. Plaintiff fully performed the contract by advance payment in full.

20. Defendants' failure to deliver through the entire 2012 season breached the contract.

21. As a proximate result of Defendants' breach, Plaintiff suffered substantial money damages.

WHEREFORE DONALD TRUMP moves this Honorable Court to enter an Order for money damages against JOE XI JING PING and Larry, together with such other and further relief as the Court may deem reasonable and just under the circumstances.

COUNT TWO: TORTIOUS INTERFERENCE

22. Plaintiff realleges and restates the foregoing jurisdictional allegations and general factual allegations. [Again, bringing those allegations in so this second count stands on its own.]

23. Prior to the wrongs complained of, Plaintiff enjoyed a profitable relationship with his former grapefruit customers.

24. Defendants gained knowledge of the identity and location of Plaintiff's customers in the course of their being employed by Plaintiff.

25. Defendants gained knowledge of the number and type of grapefruit that Plaintiff's customers purchased in the course of their being employed by Plaintiff.

26. Defendants gained knowledge of the prices Plaintiff's customers paid for Plaintiff's grapefruits in the course of their being employed by Plaintiff.

27. Defendants intentionally and without legal justification interfered with Plaintiff's relationship with his former grapefruit customers by selling grapefruit to them directly and at a competitive price.

28. As a proximate result, Plaintiff suffered substantial money damages.

WHEREFORE DONALD TRUMP moves this Honorable Court to enter an Order for money damages against JOE XI JING PING and JACK SMITH, together with such other and further relief as the Court may deem reasonable and just under the circumstances.

_____

DONALD TRUMP, Plaintiff

Don't overthink and make it more difficult than it is. If you do, then you won't win. Get all the negative thoughts out of your head right now and just do one thing at a time. Only include the necessary parts without adding anything else. However, though not essential to either cause of action, it might simplify discovery to allege in the complaint that Joe Xi used one of Donald's delivery trucks.

This next section explains.

Discovery by Complaint

The plaintiff can use his complaint to begin discovering evidence. The defendant can use his affirmative defenses to discover evidence, though it's not so certain as with a complaint.

First, we'll look at using the complaint to discover evidence. The same principle applies with the affirmative defenses.

The point is to *allege facts* the other side must admit in addition to those necessary to establish the essential elements of your causes or defenses.

Once an opponent admits facts in his response, they are admitted for all purposes in the lawsuit and cannot later be denied.

Suppose it would help to prove Joe Xi sold to Donald's customers if Joe Xi admitted using Donald's truck to deliver Joe Xi's grapefruit. Use of the truck isn't an essential element for either of these two causes of action, but it may be useful if Joe Xi admits it in his answer to the complaint.

If Joe Xi denies it in his answer, Donald may be able to use his five discovery tools to prove Joe Xi is a liar!

Donald might add a paragraph like:

> *19. Defendant used Plaintiff's 1944 Ford pickup truck to deliver Defendant's grapefruit.*

But, didn't we say earlier to allege only facts essential to the causes of action?

Yes, but not if we can get discovery with the complaint.

Allege additional facts beyond what is essential to establish causes of action only for the purpose of discovery.

Defendant will be required to answer the complaint sooner or later unless he succeeds with a flurry of motions which is explained later.

If he admits using the old truck, Donald won't have to use his limited number of valuable discovery tools to get that fact into the record.

If you're certain he'll deny it and you won't be able to prove he's lying there's no point putting it in the complaint. If he denies it and we cannot prove he lied, there is nothing to gain by alleging it in the complaint.

If he admits it in his answer, however, it's admitted for all purposes throughout the remainder of the case.

He cannot later deny it once he admits it.

Add allegations of fact that if admitted, will help you get at evidence you need to prove your case.

Pleading Paragraphs

This is one of the most important topics lawyers aren't taught in law school. Few lawyers are aware of the discovery power missed by badly wording each separate numbered paragraph in their initial pleading.

Each numbered paragraph should contain only one sentence. One subject and one verb. Use as few adjectives and adverbs as possible.

Compound sentences should rarely be used. Avoid conjunctions like “and,” “but,” “or,” and “however.” Never use “and/or” if you can avoid it.

Sentences with mixed conjunctions open the door to argument about what you meant. You want each and every sentence in all your legal documents to mean one thing and one thing

only. There should be no room for misinterpretation or error in your statements. Mean what you say and say what you mean in a simple and concise manner.

Remember, the complaint is not just a paper you file to "complain." This is the first chance you get at discovery and you want to make it a strategically good one. You want each separate numbered paragraph to precisely state what it alleges, with no wiggle-room for your opponent.

Then, when the Defendant responds, he will be required to admit or deny each fact precisely. Every time they admit something, it's admitted for all purposes in the case. purposes.

A sentence like the following accomplishes nothing.

> *19. Defendant was aware Plaintiff was worried, but Plaintiff stood alone on the precipice of his financial defeat, while Defendant watched with pleasure at Plaintiff's suffering, knowing the Plaintiff would be sad.*

Who cares? What does this accomplish?

Does it provide any fact essential to a cause of action? It certainly gives no opportunity for discovery, if Defendant responds. Defendant would surely answer "Without knowledge." How could the defendant know plaintiff was worried or sad?

You gain nothing from such run-on and complex sentences. If a word does not support a cause of action or offer opportunity for discovery, leave it out.

Consider the following:

> *19. Defendant spoke by telephone with an Acme Truck Repair employee on the 12th of June 2012.*

Will he deny? Can he deny without lying? If he admits, you won't have to prove the conversation took place.

If he denies, you can subpoena the Truck Repair company's phone records or depose the employee, proving Defendant is a dishonest man and, in that light, probably responsible for the damages your complaint sets forth.

Compare the foregoing with this compound sentence.

> *22. Defendant was in Pittsburgh on 11 December 2012, and Plaintiff was unable to reach him by phone.*

How can Defendant know Plaintiff couldn't reach him by phone?

He will answer:

> *22. Denied.*

That's what his response to that sentence will be and you didn't gain anything by stating it on the complaint.

Far better to use simple sentences - one subject, one verb, like this:

> *22. Defendant was in Pittsburgh on 11 December 2012.*
>
> *23. Plaintiff was unable to reach Defendant on 11 December 2012 by telephone.*

Defendant may respond "Without knowledge" to #23, but he must admit or deny #22, and that may be a valuable point in your favor whether he lies or tells the truth.

Again, there is no need to allege any fact that won't help you win. Write, re-write, re-write, and re-write your papers until perfect.

Pleadings are the most important papers in any lawsuit. Ask someone to go over yours with you. Have someone read this section of this workbook so they can be on the same page and help you. Have someone brainstorm with you so you can ensure this part is done right.

Pleadings are high-tech smart-bombs you can program for a direct hit against the other party. Carefully-drafted pleadings will do more to help you win your lawsuit than anything else you can do.

Poorly-drafted pleadings will get you off to a slow start and give your opponent opportunities to take advantage of you.

Every lawsuit must state at least one cause of action (e.g., breach of contract, negligence, fraud, etc.) that's recognized by the jurisdiction where it's filed. Also, every cause of action has certain "elements" the plaintiff must do 2 things with:

A. Allege
B. Prove

Each distinct cause of action requires its own required items to be 1) alleged and 2) proven in order for the plaintiff to win.

- If the plaintiff does not allege all the elements of a cause of action, the defendant can successfully move the court for an order dismissing the plaintiff's complaint as to that cause of action. If that's the only cause of action alleged in his case, the plaintiff loses, and the defendant wins.

- If the plaintiff does not ultimately prove all the elements of a cause of action by the greater weight of the evidence, the plaintiff loses, and the defendant wins.

That's what lawsuits are about and for some peculiar reason this truth is rarely taught or merely glossed over by law school professors. You will soon know what many lawyers never learn quite a bit about actually doing their job.

Every lawsuit is a battle for evidence that supports what is called the "law of the case."

The plaintiff battles for evidence tending to prove the elements he alleged in support of his one or more causes of action.

The defendant battles for evidence tending to prove the plaintiff doesn't have the preponderance of evidence he needs to prove those elements.

Each cause of action, like each kind of cake, has different elements.

For example, if you sue or are sued for breach of contract, the complaint must allege at least 3 essential ingredients, the elements of a "breach of contract."

A. Existence of an enforceable contract.

B. Action by defendant or failure to act that constitutes his breach of the contract.

C. Damages to the plaintiff resulting from defendant's breach.

The plaintiff's failure to allege all 3 essential ingredients of his breach of contract case gives the defendant an opportunity to move the court for an order dismissing the case for "failure to state a cause of action."

What do we call such a motion? How about *Motion to Dismiss for Failure to State a Cause of Action?*

It's common sense. Making it very simple to make a motion and what it is supposed to be about. Simple.

Of course, simply alleging the essential elements set out in the three-point list above isn't quite enough to effectively state a cause of action for breach of contract. You must allege all "facts" of the case that explain each element. Only then have you stated a cause of action for breach of contract.

For example, in stating a cause of action for breach of contract you might state all the facts as in the following example:

COUNT ONE: BREACH OF CONTRACT

23. This is an action for breach of contract.

24. On the 1st of April 2011 defendant offered to sell his prize bull to plaintiff for $2,000.

25. Plaintiff and defendant signed a written contract agreeing to the terms of the bargain.

26. A copy of the written contract is attached as Exhibit 1.

27. Plaintiff gave defendant $2,000 in cash.

28. The next day, while visiting a local tavern where defendant goes to drink himself silly every day, plaintiff learned that defendant was bragging how the bull died the week before.

29. Plaintiff made demand for the live bull he bargained and paid for.

30. Defendant failed and refused to deliver the bull alive or return the plaintiff's money.

31. Plaintiff suffered $2,000 in money damages.

WHEREFORE plaintiff moves this Honorable Court to enter an Order of Final Judgement awarding plaintiff money damages and such other and further relief as the Court may deem reasonable and just under the circumstances.

Use common sense and this should be fairly easy for you.

All facts are alleged that need to be alleged to satisfy all essential elements of the cause of action for breach of contract. Some additional facts may be alleged to put the court on notice what the case is about and what the plaintiff intends to prove or in other words what he must prove to win.

Additionally, some further facts may be alleged simply because when the defendant files his “Answer” to the Complaint, he must admit or deny each allegation, so the Complaint is also used to begin the “Discovery Process.”

Conclusion

Complaints are the meat-and-potatoes of every lawsuit and include are:

- laws,
- facts, and
- rules

The right to bring a complaint stands on laws, facts, and rules.

There must also be

- duty
- liability
- damages

The plaintiff must allege in his complaint at least one valid cause of action the courts recognize or his case will be summarily dismissed upon the filing of his opponent's Motion to Dismiss for Failure to State a Cause of Action.

Complaints can be avoided by other valid defenses which is later in the workbook.

Whether you're a plaintiff or defendant, you need to understand complaints and defenses.

Justice is now in your hands.

ANSWERS

Response to a Complaint

When you look at the original complaint, you should see a series of numbers with one sentence allegations. You are supposed to respond to each of these allegations. It's pretty simple to do this. Answers should respond to each of the numbered sentences (or paragraphs is the attorney is stupid.) The Answers should correspond with the allegations. Read each of the allegations, one at a time and answer one at a time.

This is not the time to offer proof. It is just a response and that can be a word or two. This is just a "pleading."

The 3 responses to the allegations are:

- Admitted
- Denied
- Without knowledge

Obviously, if the answer is "admitted," you're admitting that the allegation is true. Just like "denied," means the allegation is not true. The response, "Without knowledge," means you don't have enough knowledge to know about the allegation one way or another. That's all a response should be.

You will also include Affirmative Defenses with your answer if you have any. An "affirmative defense" is *"a defense in which the defendant introduces evidence, which, if found to be credible, will negate criminal or civil liability, even if it is proven the defendant committed the alleged acts."*

For an SPC that means your affirmative defense is your status correction documentation. Even if it's ignored, you need to use this as part of your affirmative defenses. I do not believe any lawyer would tell you that. I think they are too indoctrinated to know the difference or understand the significance, but if you decided to push the issue in court, you would be able to seek remedy. That's what this is really about. Seeking remedy for wrongful accusations, things that are unconstitutional and fighting back to regain our position as the Private People being served by a Constitutional Republic of Representatives in a fair and just way.

You can also include with your Answer, one or more of the following:

- Counterclaim = Complaint against plaintiff
- Cross-claim = Complaint against a co-defendant
- Third Party Complaint = Complaint against a third party

If the Answer contains any of these, the opposite party must file an Answer just like the initial filing of an answer in response to their allegations in the Complaint/Petition.

Whether responding to the plaintiff's initial Complaint or one of these three, the procedure for answering is the same and Affirmative Defenses should be raised if there are any.

An Answer must be filed in response to every Complaint if the “flurry of motions” fails.

When there are grounds for these motions, they should be filed as soon as possible and, if necessary, another motion should be filed for an Order ruling one way or the other on each such motion before the case is allowed to move forward.

- Motion to Dismiss
- Motion to Strike
- Motion to Require a More Definite Statement

There are a lot of different motions you can file, these are just a few.

If a defendant's "flurry of motions" fails, he must file his Answer, responding to each numbered paragraph of the Complaint with one of the following:

- Admitted
- Denied
- Without Knowledge

Get it in your head that there are no other responses to this at all. Nothing. Nada. Zip.

You can make a response more detailed if you need to such as saying there is a portion of the statement that might be true but for the most part, denied. I would just stick to the three above and let it go at that. The other party will have to prove whatever they're saying.

If you fail to answer you will most likely have a default judgment against you and it will be final. Don't let that happen whether you're an SPC or not. This is not going to be good if you let that happen.

You also have to give the answer in the time allotted by law. For the State it could be different from the Federal. The Federal Rules of Civil Procedure give you 30 days to respond. Your State may be less so look it up.

If you're the plaintiff, and your defendant answers in a manner substantially different from any of these three, file a

- motion for an order striking his answer as "unresponsive"
- motion to deem your allegation admitted for all purposes

A plaintiff is entitled to a response to each allegation of his complaint. A plaintiff is entitled to know whether defendant admits, denies, or has no knowledge of the facts alleged.

Anything defendant admits is admitted for all purposes.

If defendant denies or claims no knowledge with regard to any of plaintiff's allegations, then plaintiff is “put to his proof” and must carry the burden to bring admissible evidence in support of the un-admitted allegations of his Complaint.

Pretty simple so far?

It doesn't get any more complicated that this!

Plaintiffs should demand Answers reasonable people can understand.

Plaintiffs should demand Answers that pin the defendant down to the things admitted.

Plaintiff should never allow defendant to play word games in the Answer. Never allow your defendant to squirm with weasel-word responses like, “Defendant believes plaintiff is attempting to obtain information he has no right to obtain,” or, “This paragraph of plaintiff's complaint is wholly without factual foundation of any kind.”

Those answers are considered “unresponsive.”

They don't answer the Complaint's allegations.

If you're a plaintiff, make sure all your hard work at drafting an effective initial pleading does not go to waste. Force your defendant to respond to each and every numbered paragraph of your Complaint with one of the 3 allowed answers or words that mean the same.

- Admitted
- Denied
- Without Knowledge

If you're a defendant, there's a great deal more you can do beyond "answering" the Complaint. Among these are the

- Affirmative Defenses [explained more fully in my Affirmative Defenses class].
- counter-claim (Complaint against plaintiff, if plaintiff caused you damages prior to filing his Complaint).
- cross-claim (Complaint against one or more co-defendants, if there are any co-defendants who caused you damages).
- third-party complaint (Complaint against a non-party who is the cause or partial cause of the damages plaintiff seeks against you).

Here's an example of a **Simple Answer**:

IN THE THIRTIETH JUDICIAL CIRCUIT COURT
IN AND FOR SUNSHINE COUNTY, FLORIDA

Case No. 2023-123
Judge Bullybench

DONALD TRUMP,
Plaintiff,

v.

JOE XI JING PING,
Defendant.

_____/

ANSWER

DEFENDANT JOE XI JING PING answers the complaint of DONALD TRUMP and, in response to each numbered paragraph thereof, states:

1. Denied.
2. Admitted.
3. Without knowledge.
4. Denied.
5. Denied.
6. Denied.
7. Admitted.

RESPECTFULLY SUBMITTED this 23 May 2023.

_____
JOE XI JING PING, Defendant

[Certificate of Service]

It doesn't get that much simpler.

You're literally just taking the numbered sentences/allegations and responding with one of the three acceptable answers. Sign and submit with a Certificate of Service.

Answer with a Counter-Claim

IN THE THIRTIETH JUDICIAL CIRCUIT COURT
IN AND FOR SUNSHINE COUNTY, FLORIDA

Case No. 2023-123
Judge Bullybench

DONALD TRUMP,
Plaintiff,

v.

JOE XI JING PING,
Defendant.

_____/

ANSWER AND COUNTER-CLAIM

DEFENDANT JOE XI JING PING answers the complaint of DONALD TRUMP, responding to each numbered paragraph thereof and counterclaiming as follows:

1. Denied.

2. Admitted.

3. Without knowledge.

4. Denied.

5. Denied.

6. Denied.

7. Admitted.

COUNTER-CLAIM

8. On or about 13 May 2023, Plaintiff verbally contracted to pay Defendant $3,000 as an initial deposit toward the agreed full contract price of $5,000 for grapefruit deliveries.

9. Defendant made multiple grapefruit deliveries for Plaintiff thereafter.

10. Plaintiff failed and refused to pay Defendant for any grapefruit deliveries, breaching the parties' contract.

11. Defendant suffered substantial money damages as a proximate result.

WHEREFORE JOE XI JING PING moves this Honorable Court to enter judgment against DONALD TRUMP, together with such other and further relief as the Court may deem reasonable and just under the circumstances.

RESPECTFULLY SUBMITTED this 23 May 2023.

_____
JOE XI JING PING, Defendant and Counter-Plaintiff

[Certificate of Service]

If an Answer with Counter-Claim is filed, plaintiff becomes a counter-defendant and must respond to the Counter-Claim just as defendant must respond to plaintiff's initial Complaint.

A response is required for each numbered paragraph of all complaints, no matter who files them, if the flurry of motions fails.

Answer & Cross-Claim

A Cross-Claim is like a Counter-Claim but, instead of defendant suing plaintiff, defendant sues one or more of her co-defendants.

In the following, DONALD TRUMP sued JOE XI JING PING and FANNI WILLIS.

Here's Joe Xi's answer and cross-claim against Carl.

IN THE THIRTIETH JUDICIAL CIRCUIT COURT
IN AND FOR SUNSHINE COUNTY, FLORIDA

Case No. 2023-123
Judge Bullybench

DONALD TRUMP,
Plaintiff,

v.

JOE XI JING PING and
FANNI WILLIS,
Co-Defendants.

ANSWER AND CROSS-CLAIM

DEFENDANT JOE XI JING PING answers the complaint of DONALD TRUMP responding to each numbered paragraph thereof, stating:

1. Denied.

2. Admitted.

3. Without knowledge.

4. Denied.

5. Denied.

6. Denied.

7. Admitted.

CROSS-CLAIM

DEFENDANT JOE XI JING PING sues FANNI WILLIS and states,

8. On or about 13 May 2023, Defendant and Co-Defendant agreed to work together to deliver grapefruit for Plaintiff.

9. Defendant and Co-Defendant agreed to share the labor responsibilities equally.

10. Defendant and Co-Defendant agreed to share their costs equally.

11. Defendant and Co-Defendant agreed to share Plaintiff's payments equally.

12. Plaintiff contracted to pay Defendant and Co-Defendant $3,000 as an initial deposit toward agreed full contract price of $5,000 for grapefruit delivery to be performed by both Defendant and Co-Defendant working together.

13. Plaintiff paid Co-Defendant the $3,000 initial deposit.

14. Defendant made multiple grapefruit deliveries for Plaintiff thereafter.

15. Co-Defendant, however, failed and refused to make any grapefruit deliveries, breaching the contract between Defendant and Co-Defendant.

16. Co-Defendant failed and refused to tender any part of the $3,000 initial deposit to Defendant, further breaching the contract between Defendant and Co-Defendant.

17. Defendant suffered substantial money damages as a proximate result.

WHEREFORE JOE XI JING PING moves this Honorable Court to enter judgment against FANNI WILLIS together with such other and further relief as the Court may deem reasonable and just under the circumstances.

RESPECTFULLY SUBMITTED this 23 May 2023.

_____

JOE XI JING PING, Defendant and Cross-Plaintiff

[Certificate of Service]

Answer with a Third-Party Complaint

A Third-Party Complaint is similar but requires a change in the caption to add the third-party defendant.

The initial defendant sues this new third-party, alleging he is responsible for all or some significant part of plaintiff's alleged losses.

If initial defendant loses the lawsuit brought by plaintiff, the court may find that the third-party defendant owes the initial defendant some or all of the judgment.

In the following case, Donald sued Joe Xi. When Joe Xi filed his answer, he sued Jack as a third-party, whom Joe Xi says is responsible for whatever Joe Xi may be required to pay Donald.

IN THE THIRTIETH JUDICIAL CIRCUIT COURT
IN AND FOR SUNSHINE COUNTY, FLORIDA

Case No. 2023-123
Judge Bullybench

DONALD TRUMP,
Plaintiff,

v.

JOE XI JING PING,
Defendant,

v.

THEO THIRD-PARTY,
Third-Party Defendant.

ANSWER AND THIRD-PARTY COMPLAINT

DEFENDANT JOE XI JING PING answers the complaint of DONALD TRUMP responding to each numbered paragraph thereof,

1. Denied.
2. Admitted.
3. Without knowledge.
4. Denied.
5. Denied.
6. Denied.
7. Admitted.

THIRD-PARTY COMPLAINT

DEFENDANT JOE XI JING PING sues JACK SMITH and states,

8. On or about 13 May 2023, JACK SMITH agreed to work for Defendant to deliver grapefruit for Plaintiff.

9. Defendant paid third-party defendant $1,500 to deliver grapefruit for Plaintiff.

10. Third-party defendant failed and refused to deliver any grapefruit for plaintiff, breaching his contract with defendant.

11. As a result of third-party defendant's breach, defendant has been required to defend against claims brought by plaintiff.

12. Third-party defendant is liable to defendant for all damages suffered by defendant in this lawsuit.

13. Third-party defendant is further liable to defendant for return of the $1,500 taken without consideration of any kind.

WHEREFORE JOE XI JING PING moves this Honorable Court to enter judgment against JACK SMITH together with such other and further relief as the Court may deem reasonable and just under the circumstances.

RESPECTFULLY SUBMITTED this 23 May 2023.

_____

JOE XI JING PING, Defendant and Third-Party Plaintiff

[Certificate of Service]

This is how it works. Pretty simple.

Answer & Affirmative Defenses

One or more Affirmative Defenses should always be filed with the answer if you have any.

These allege facts that support the essential elements of your *Affirmative Defenses*.

If you can prove all the facts that support the elements of at least one Affirmative Defense, you could win on that alone.

Affirmative Defenses include any defense in fact or law that could prevent plaintiff from winning any part or all of his case.

Examples include:

A. Statute of Limitations - suit brought beyond statutory limit date

B. Laches - suit brought beyond equitable time limit, prejudicing Defendant

C. Accord and Satisfaction - parties already settled the dispute
D. Assumption of Risk - Plaintiff knowingly exposed himself to danger
E. Statute of Frauds - absence of writing to enforce contract
F. Estoppel - Plaintiff's own actions prevent him from seeking a remedy in court

These are just some of the Affirmative Defenses you could have but there are many more. These are the facts you must prove so the defenses can kick in.

Every defense likely to prevent Plaintiff from winning part or all should be asserted in the Answer as affirmative defenses.

Here's an example:

IN THE THIRTIETH JUDICIAL CIRCUIT COURT

IN AND FOR SUNSHINE COUNTY, FLORIDA

Case No. 2023-123

Judge Bullybench

DONALD TRUMP,

Plaintiff,

v.

JOE XI JING PING,

Defendant.

ANSWER AND AFFIRMATIVE DEFENSES

DEFENDANT JOE XI JING PING answers the complaint of DONALD TRUMP and, in response to each numbered paragraph thereof, states:

1. Denied.
2. Admitted.
3. Without knowledge.
4. Denied.
5. Denied.
6. Denied.
7. Admitted.

AFFIRMATIVE DEFENSES

Defendant further asserts the following affirmative defenses and states:

Statute of Limitations

8. Plaintiff's action is barred by the statute of limitations.

9. The alleged breach of contract complained of took place more than 5 years prior to the filing of this action and is, pursuant to §95.11 Florida Statutes, barred.

Statute of Frauds

10. Plaintiff's action is barred by the statute of frauds (§725.01 Florida Statutes) that precludes actions to enforce a verbal contract for service to be performed within the space of

one year.

11. The alleged breach of contract complained of contemplated that defendant would work for plaintiff over a period exceeding one year.

12. The contract is not in writing.

Estoppel

13. Plaintiff's action is barred by estoppel.

14. Plaintiff's own failure to provide fresh grapefruit to defendant for delivery to plaintiff's customers is the direct and proximate cause of defendant's failure to perform her terms of the alleged contract.

RESPECTFULLY SUBMITTED this 23 May 2023.

_____

JOE XI JING PING, Defendant

[Certificate of Service]

That's all there is to the form for affirmative defenses.

Notice that Joe Xi did not merely “name” his Affirmative Defenses like lawyers who are inept. He alleged sufficient ultimate facts to support the essential elements of each, and that is what you should do if you must file an Answer.

It is strongly encouraged on the point of urgent that you include Affirmative Defenses if you have any in your answer and subsequent pleadings.

Affirmative Defenses are the ***defendant's*** arsenal.

They must be made part of the court's record at the very beginning of your case and allege facts that, if proven, give the defendant advantages including possible victory without more.

Defendant's Affirmative Defenses may require Plaintiff to file a Reply or lose his opportunity to attack them. You'll need to check your local rules to see if there is anything different than what you are learning as some places will vary in responses.

Reply to Affirmative Defenses

The Reply to defendant's Affirmative Defenses should respond to each and every allegation therein.

The Reply is filed to undermine the Affirmative Defenses and to demand “strict proof” of same. This is usually the final pleading.

Once plaintiff files his Reply, anyone who looks at the clerk's file should be able to tell what facts the parties must prove without looking outside of the pleadings.

The rest of the battle is getting admissible evidence into the record to prove your facts are more believable than those of your opponent.

If the flurry of motions fails, the pleadings are now closed.

The case is ready for trial, unless the court allows time for the parties to get evidence into the record before trial.

Here is a ***Simple Reply:***

IN THE THIRTIETH JUDICIAL CIRCUIT COURT
IN AND FOR SUNSHINE COUNTY, FLORIDA

Case No. 2023-123
Judge Bullybench

DONALD TRUMP,
Plaintiff,

v.

JOE XI JING PING,
Defendant.

_____/

REPLY TO AFFIRMATIVE DEFENSES

PLAINTIFF DONALD TRUMP replies to affirmative defenses filed by Defendant JOE XI JING PING and states with regard to each:

1. Plaintiff denies the first affirmative defense and each of its alleged facts, demanding strict proof.

2. Plaintiff denies the second affirmative defense and each of its alleged facts, demanding strict proof.

3. Plaintiff denies the third affirmative defense and each of its alleged facts, demanding strict proof.

_____
DONALD TRUMP, Plaintiff

[Certificate of Service]

Yes. It's really just this simple.

If you want to get some extra mileage out of your Reply, add to each denial some allegations of ultimate facts that, if you can back them up with admissible evidence, would tend to prove the affirmative defense has holes.

- Single sentences for each numbered paragraph.
- Single subject.
- Single verb.
- Only essential adverbs and adjectives.

Use what you've learned to construct your reply.

The Petition

Petitions are “complaints” filed in certain kinds of proceedings where relief other than money is sought. Some people who are Secured Party Creditors use this because they understand money isn't always the remedy that needs to be made to keep “in honor.”

For example, when one seeks an injunction, his pleading is called a Petition.

The party who files a Petition is called the petitioner. The party responding to a petition is called the respondent.

Here's a sample petition for a temporary injunction.

IN THE FOURTH JUDICIAL CIRCUIT COURT

IN AND FOR SUNSHINE COUNTY, FLORIDA

Case No. _____

DONALD TRUMP,

Petitioner,

v.

JOE XI JING PING,

Respondent.

_____/

VERIFIED PETITION FOR TEMPORARY INJUNCTION

DONALD TRUMP petitions this Honorable Court to issue a temporary injunction and in support therefor states:

JURISDICTIONAL ALLEGATIONS

1. This is an action for a temporary injunction.

2. Petitioner resides in SUNSHINE COUNTY, FLORIDA.

3. The harm to be enjoined is threatened in SUNSHINE COUNTY.

4. Respondent resides in SUNSHINE COUNTY.

5. This Honorable Court has jurisdiction.

FACTUAL ALLEGATIONS

6. Petitioner has personal knowledge that respondent JOE XI JING PING has a well-formed plan to cause petitioner serious bodily harm.

7. JOE XI JING PING recently threatened to break petitioner's knee caps with a baseball bat.

8. The threatened harm would cause petitioner injuries for which a money judgment alone is insufficient.

9. The threat is imminent because JOE XI JING PING promised to break petitioner's knee caps as soon as possible.

10. An action for money damages alone is insufficient to restore petitioner to his status quo ante, because surgery alone cannot restore petitioner's knee caps sufficiently to allow petitioner to walk properly the rest of his life.

11. The threatened harm to petitioner outweighs any substantial harm to JOE XI JING PING who will suffer no harm whatever in being prevented from breaking petitioner's knee caps.

12. No substantial public interest will be contravened by the injunction sought.

13. A substantial likelihood exists that petitioner will prevail in this action, because facts obtained by discovery reveal that JOE XI JING PING has carried out similar threats and caused serious injuries to others.

14. JOE XI JING PING is a convicted felon.

15. A temporary injunction is necessary to protect petitioner from the threatened harm.

WHEREFORE petitioner moves this Honorable Court to enter an Order enjoining JOE XI JING PING from approaching petitioner within 50 feet, together with such other and further relief as the circumstances and demands of justice may warrant.

UNDER PENALTIES OF PERJURY, I affirm that the facts alleged in the foregoing are true and correct according to my own personal knowledge.

_____
DONALD TRUMP, Petitioner

STATE OF FLORIDA

COUNTY OF SUNSHINE

BEFORE ME personally appeared DONALD TRUMP who, being by me first duly sworn, executed the foregoing in my presence and stated to me under penalties of perjury that the facts alleged therein are true and correct according to his own personal knowledge.

_____
Notary Public
My commission expires:

Answers are just pleadings. They allege facts the parties must prove to win.

Do a good job with them, because you cannot add things later if you don't get them in at the beginning of the case. Don't try to anything with them, because that's not what they're for.

You prove later using your 5 discovery tools if you have to go. You may win before trial.

AFFIRMATIVE DEFENSES

The Defendant's Right to Fight Back

Using Affirmative Defenses, you're going to take the bull by the horns and win this case.

Smart lawsuit defendants defend affirmatively. Whether plaintiff or defendant, you must understand defenses. Plaintiffs must overcome defendants' defenses. Defendants must allege and prove defenses. Both sides need to understand them.

In this section you're going to learn about defenses that will help you fight back and score points so you can win.

Basketball players must grab the ball from their opponents as often as possible, drive toward their own goal as powerfully as they can, and score as many points as possible for their own team if they want to win.

If a basketball team does nothing more than defend their own basket without ever getting control of the ball to score points, they have no chance whatever.

The same applies in legal battles.

Plaintiffs file complaints. Defendants may file answers to the plaintiff's complaint and think the battle is on.

This is a case losing mistake every time.

Smart defendants file answers with affirmative defenses that actively pursue points rather than merely defending against the tactics of the offense.

The plaintiff's complaint affirmatively alleges the facts plaintiff claims he can prove. His complaint is an affirmative action. His complaint has teeth

The defendant's answer, by itself without affirmative defenses, has no teeth. It's just an answer. Nothing more.

It merely answers allegations of the complaint, admitting or denying what plaintiff alleged.

By itself, a bare answer gives defendant no way to plead his defense affirmatively.

A defendant who merely answers a complaint, without filing affirmative defenses along with his answer, is like a prize-fighter entering the ring with both hands tied behind his back. He can bob and weave in defense. He can dodge the punches and dance like a butterfly but he can't hit back.

Affirmative defenses give the defendant a way to hit back, to allege his own facts that, if proven, give him victory in court.

Affirmative defenses should always be filed when defendant files an Answer to the complaint.

Affirmative defenses allow defendants to allege facts that establish the essential elements just like the elements of causes of action you learned in the preceding chapters.

The defendant can then go about affirmatively proving the facts of his defenses in order to

win, while the plaintiff goes about trying to prove the facts of his causes.

Without affirmative defenses, the defendant is always on defense never a winning position. This is how simple it is.
In the following pages we examine the most common affirmative defenses and list the essential elements of each just like you did for complaints.

The availability of any particular defenses depends on the facts of your particular case, however it's usually always possible to include one or two.

The defenses explained in this section will help you win cases in foreclosure, credit card debt, collection, family law, fraud, slander, personal injury, etc.

Every defendant must know how to use these defenses, no matter what the case is about.

If you are sued, be certain to file ALL the affirmative defenses you may have and support them with facts to establish ALL the essential elements of each.

This is how defendants win.

Pleading Affirmative Defenses

Suppose you were served with the following complaint:

IN THE THIRTEENTH JUDICIAL CIRCUIT COURT

IN AND FOR SUNSHINE COUNTY, FLORIDA

Case No. 2011-1234

DONALD TRUMP,

Plaintiff,

v.

JOE XI JING PING,

Defendant.

COMPLAINT

PLAINTIFF DONALD TRUMP sues JOE XI JING PING for money damages and states:

JURISDICTIONAL ALLEGATIONS

1. This is an action for money damages for breach of contract in excess of $15,000 exclusive of court costs and attorney's fees.

2. At all times material to this lawsuit, Plaintiff was a resident of Sunshine County, Florida.

3. At all times material to this lawsuit, JOE XI JING PING was a resident of Sunshine County.

4. All acts necessary to the bringing of this lawsuit occurred or accrued in Sunshine County.

5. This Court has jurisdiction.

GENERAL FACTUAL ALLEGATIONS

6. On 17 May 2004 Plaintiff and Defendant entered into a written contract whereby Defendant promised to spray Plaintiff's 5-acre strawberry farm with insecticide every week for 8 weeks while Plaintiff was away on vacation in Hawaii.

7. A copy of the written contract is attached as Exhibit 1.

8. Plaintiff paid Defendant $3,000 at the time of execution of the contract in settlement of all of the Plaintiff's obligations under the contract.

9. During Plaintiff's absence, Defendant failed to spray the strawberries at any time, breaching the contract.

10. As a direct result, plaintiff's strawberries valued in excess of $15,000 were destroyed by insects, and Plaintiff proximately suffered substantial money damages.

WHEREFORE DONALD TRUMP demands judgment for money damages against JOE XI JING PING, together with such other and further relief as the Court may deem reasonable and just under the circumstances, and further plaintiff demands jury trial on all issues so triable.

_____

DONALD TRUMP, Plaintiff

Your Answer to the Complaint might look like the following example.

Note: In most jurisdictions, papers filed with the court would be double-spaced with at least a 1-inch margin. Remember to check your local jurisdiction's official rules to see if they have specific requirements for spacing, text size, margin width, paper weight, paper size, paper color, etc. What's important is what goes on the paper, not how it's arranged, but judges and court clerks appreciate your following their format, because it make their life easier.

IN THE THIRTEENTH JUDICIAL CIRCUIT COURT

IN AND FOR SUNSHINE COUNTY, FLORIDA

Case No. 2011-1234

DONALD TRUMP,

Plaintiff,

v.

JOE XI JING PING,

Defendant.

ANSWER AND AFFIRMATIVE DEFENSE

DEFENDANT JOE XI JING PING answers the complaint and states:

1. Denied.

2. Without knowledge.

3. Admitted.

4. Without knowledge.

5. Admitted for jurisdictional purposes only.

6. Admitted.

7. Admitted.

8. Denied.

9. Denied.

10. Without knowledge.

WHEREFORE JOE XI JING PING demands judgment against plaintiff, together with such other and further relief as the Court may deem reasonable and just under the circumstances.

AFFIRMATIVE DEFENSES

1. Failure of Consideration: Plaintiff did not pay defendant $3000 as alleged. Defendant has not received any money whatever from Plaintiff.

2. Estoppel: Plaintiff promised and agreed to provide insecticide to spray the strawberries but failed and refused to do so in spite of repeated demands by Defendant.

3. Lack of Subject Matter Jurisdiction: Plaintiff is not entitled to recover consequential damages from breach of a contract that does not contemplate such damages but is limited to the contract amount of $3,000, which is within the exclusive jurisdiction of the Small Claims Division of this Court. This Circuit Court lacks jurisdiction to hear cases where the amount in controversy is less than $15,000.

JOE XI JING PING, Defendant

Note that the first part of this Answer before the affirmative defenses, fails to state anything that might provide an affirmative argument in defense, it has no teeth to bite back with.

The answer, by itself, denies a few of the allegations and that's all it does. Denials are not affirmative. They aren't defenses. They merely deny. There is nothing of value.

On the other hand, affirmative defenses are affirmative. That's why we call them affirmative defenses.

Affirmative defenses allege facts that, if proven by a preponderance of admissible evidence, destroys the plaintiff's case and gives defendant the victory.

Thus, both parties are put to their proofs.

The defendant is not merely stuck with proving the negative of the plaintiff's complaint. After all, proving negatives is often impossible.

Instead, defendant has affirmatively asserted defenses based on facts he hopes to prove and, thereby, puts plaintiff on the defensive.

If defendant foolishly fails to state affirmative defenses, he saddles himself with the heavy and often impossible burden of proving the negative of what plaintiff alleges in the complaint. You can't prove a negative so don't even try. If a defendant has nothing to argue beyond showing that plaintiff lied it's just not enough clout.

If this is all defendant has to work with, plaintiff has a decided advantage.

If, instead, defendant files at least one affirmative defense, he stands on far firmer ground. If he alleges more than one affirmative defense his position is that much stronger. He has the advantage of something positive to prove which is much easier than proving negatives.

If defendant then proceeds to prove one or more of his affirmative defenses by establishing the essential facts with the greater weight of admissible evidence, he wins.

It's that simple.

In the following pages we examine the most common affirmative defenses that courts recognize. Defenses set out here are commonplace. Judges deal with them on a regular basis. There is nothing bizarre or creative about them. You can use them with confidence if the facts of your case allow.

But first, some defenses to avoid like the plague.

Dangerous Defenses

Beware of the “too-good-to-be-true” defenses offered by internet amateurs and misguided anti-government movement mongers.

Today's internet, like yesterday's barbershops and beauty salons, is a place where risky rumors, tall tales, and outlandish opinions run rampant.

Search the internet for “courtroom defense,” and you'll find dozens of dumb ideas with fatal flaws and legal loopholes through which you could throw an angry cat.

They may “sound” legal, but sounding so doesn't make them so.

They may have dozens of high-sounding courtroom terms and be presented in a format that for all the world looks like it was prepared by a really smart cookie.

But, beware.

The most dangerous defenses are those that sound sure-fire.

Dangerous defenses promise to get you “off the hook” with little or no effort.

The most hare-brained slippery-slope schemes seem legitimate, offered by amateur internet lawyers and self-styled “Patriots” angry at “Big Brother” or by website charlatans out to make a fast buck selling whatever nonsense they can dress up with fancy legalese and serve with empty promises of immediate success.

I can think of a few off the top of my head and they offer no proof except for a handful of traffic tickets they've successfully done something with in their own county. That doesn't translate to serious issues.

What you need must be recognized by the courts regardless of what the gurus tell you because those same gurus keep misleading people. The courts need to be used properly and they need to be used in our Private Person and forced to go by the rules they established. You can't just write arbitrary crap on a paper and think it will fly.

The language of the “corporation” is all they know so use it to your advantage.

Here's a few of what the “Sovereign” gurus say and frankly, it doesn't really fly that far if you haven't established yourself as a Secured Party Creditor. Even with establishing yourself as such, you should be prepared to stay in jail for a minimum of 3 days if you decided to go this route. You most likely will have to pay some sort of bail until they get tired of you. The other way is to ensure your status is on the record and use this to your advantage later so you know and they know you're not going to contract with them.

Some of the ridiculous things these people say are:

- Plaintiff spelled my name in ALL CAPITAL LETTERS, so I don't have to answer the complaint, because I don't spell my name that way. (This is not what that means.)
- There's a gold fringe on the American flag in the corner of the courtroom telling me the judge is presiding over an Admiralty Court. This case is not an admiralty case, so I don't have to answer the complaint.
- I haven't given the court permission to deprive me of my rights.
- My rights as an American citizen give me sovereign power to command my government, so I can direct the government's complaint to be withdrawn. [I received email from a fellow recently who convinced a family being sued by the county to make this argument in defense. He was not their friend. They lost their home.]
- You cannot sue me, because I denounced my American citizenship. [I recommend a wonderful story for everyone who cares about justice. The Man Without a Country by Edward Everett Hale (1917.)] By making this hateful claim, people show

themselves traitors to our legal heritage, bringing the court's wrath upon them deservedly, instead of escaping the consequence of their own actions.

·I copyrighted my name. You cannot use it in pleadings against me without my permission.

These are some of the things that I have heard over the years and frankly, it is extremely annoying when you can force your rights to be preserved, use Supreme Court case law and all the little tricks they play against them IF YOU KNOW THE RULES AND HOW TO TRAP THEM IN THEIR LITTLE BOXES!

Once these go to court, they are ridiculed and cast aside by angry judges who think you're a wacko. Put the other side on the defense so you can win. Your position as a Secured Party Creditor will help you with some things and establish you do not have a contract. You have to work with the court to ensure you are winning. The more you win, the less likely they will be to mess with you further.

Those who rely on them, instead of learning how to properly defend by filing affirmative defenses and motions find out the hard way, this isn't going to work.

Honesty is still the best policy. Use affirmative defenses the courts recognize.

The following are some Affirmative Defenses the courts will not ignore.

Learn them well and use them if the facts allow.

WARNING: Affirmative defenses must be filed with your Answer, not later.

Absolute Immunity

Absolute immunity means you can't be sued, with some exceptions. There are always exceptions.

Certain officers and government employees enjoy “absolute immunity,” a rock-solid affirmative defense to lawsuits brought against them arising from actions taken *within the scope of their authority*. However, when they're acting OUTSIDE of their office and scope of their authority, then they are subject to personal lawsuit and therefore do NOT have absolute immunity. You would have to prove they are acting outside of their oath of office in order to sue them.

If the Sheriff's deputy stops you on a busy street where you were driving recklessly at high speeds and delays you from making an appointment at your hair dresser, you can sue, but you will not win.

If the same deputy yanks open the door of your car with a malicious grin, clamps an iron grip on your left ankle, drags you forcefully across a parking lot with your head banging against the pavement, clamps handcuffs on your wrists so tightly your fingers turn blue from lack of blood flow, then stomps on your stomach before shoving you angrily into the back seat of his squad car, banging your head so hard against the door frame you can no longer remember the names of your own children, you may have a lawsuit that will defeat his immunity if you can prove he acted outside the scope of his lawful authority.

Individuals seldom have absolute immunity.

Officers and government employees have it by default with exceptions. So long as an officer or government employee (e.g., judge, prosecutor, Sheriff, senator, mayor, or county commissioner) acts lawfully within the scope of his or her delegated authority, this affirmative defense protects them absolutely from lawsuits brought by disgruntled people

disappointed with the official acts of those officers or employees. The hole lies in whether and to what extent an officer or employee was just “doing his job” or whether he was acting “on his own,” perhaps out of malice or gross negligence. The hole is clouded over with a grey fog of uncertainty in most cases.

Thus, the reason you should always have a camera rolling either on your phone, your person or in your car.

The immunity only disappears when it's crystal clear that the events giving rise to the lawsuit were beyond the scope of delegated authority. The officer or government employee may then be sued as an individual, stripped of the cloak and badge of his office - just like anyone else.

If a judge, for example, enters an unpleasant order against you, there are remedies our law provides. Appeals or motions can be filed in an attempt to set aside the order. If the judge acts within the law, even if you disagree with the judge and the law, the judge is absolutely immune from a lawsuit challenging his ruling.

On the other hand, if a judge intentionally violates the law and you can prove it, the judge has stepped outside the protection of his authority. He no longer has immunity. You can sue him and win if you can prove he acted outside the scope of his authority.

This is a heavy burden. In most cases you must prove the judge acted invidiously, meaning he has acted with unlawful intent to harm you. This is akin to criminal intent, not mere negligence or stupidity. Otherwise, if judges were exposed to lawsuits every time, they made a ruling that disgruntled one of the parties, no one would agree to sit as judge and be exposed to the public's attacks.

Elements

1. Defendant is a government agent or employee.
2. Defendant is insulated from suit by a valid immunity.
3. Defendant acted within the scope of his authority relevant to all allegations of the complaint.

Accord and Satisfaction

An accord arises where two parties agree to settle some prior existing debt by the substitution of performance different from the original obligation.

A strange fellow with camera and sunglasses promises to sell his dancing bull to a circus owner for $200. The circus owner ponies up the $200, and the little guy pockets the cash.

After delivery of the bull, the circus owner discovers the big brown fellow can only juggle bowling pins and cannot really dance, other than to shuffle back and forth a bit if someone whistles a catchy tune.

If the short guy with the camera and sunglasses offers the circus owner his camera in place of the clumsy-footed bull, we say the parties reached an accord.

If the camera is delivered to the circus owner, and the circus owner accepts, we say the accord has been satisfied.

If the circus owner later wishes to sue, the strange little guy in the sunglasses has this defense.

While it's true the original agreement was a dancing bull for $200, that agreement was replaced by a new agreement sometimes called a *novation*. The definition of *“novation*” is the replacement of one of the parties in an agreement between two parties with the consent

of all three parties involved. This happens sometimes on subletting apartments and taking over other people's leases on cars, boats, motorcycles, etc.

The old agreement is as if it never existed since it was replaced by the substitute.

The accord and satisfaction erase the former obligation. It's like a compromise.

Performance of the second offer satisfies the first. This is only true, however, if there is first an accord.

If the circus owner demands the strange little man's sunglasses and camera, and the strange little man refuses to part with his shades but continues to offer the camera, there is no accord.

If there is no accord, there can be no accord and satisfaction, of course.

For an accord to take place in the first place, the parties must agree to substitution in lieu of the initial promise.

The little guy with the bull and clever sense of humor cannot unilaterally deliver his camera or his sunglasses to discharge his debt for the $200 received, unless the circus owner agrees to accept the substitute.

If a creditor accepts a debtor's substitute promise, and debtor faithfully performs the substitute, the creditor loses his right to sue. There's been an accord and satisfaction discharging the original debt.

If a debtor is sued by a creditor after reaching an accord and performing the substitute in satisfaction, he can file this affirmative defense with his answer to the complaint and, if he's able to prove the accord and satisfaction (the creditor agreed to take the substitute and the debtor delivered the substitute) then debtor is absolved of liability on the debt.

Elements

For a defendant to adequately plead the defense of accord and satisfaction, he must allege facts sufficient to establish the following essential elements:

1. Existence of a pre-existing dispute over an enforceable obligation.
2. Both parties intended to settle their dispute by entering into a substitute agreement.
3. Both parties acted in accordance with the substitute agreement, for example, the defendant tendered and plaintiff accepted the agreed upon substitute performance.

If all three factual elements of this defense are proven to exist, defendant's obligation should be discharged and plaintiff's case is defeated on defendant's motion supported by evidence of the accord and its satisfaction.

In order to comprise a complete defense, the agreed upon performance must fully discharge the pre-existing obligation. Partial satisfaction is no defense.

Act of God

This may be used if a natural disaster, such as extreme weather conditions or similar event beyond the control of defendant, makes performance impossible.

An act of God is any event beyond the reach of human control:

- Tornado

- Earthquake
- Hurricane
- Flood
- Volcano
- Avalanche
- Giant asteroid crashing into Earth

If the act of God, sometimes referred to as *force majeure,* prevents defendant from performing some obligation, this defense can affirmatively protect him from various claims.

For example, if an avalanche absolutely prevents defendant from performing some contractual obligation, the court should excuse his performance.

If a lava flow from a recently erupted volcano prevents defendant from delivering goods to a distant city on schedule, the court should excuse his performance.

On the other hand, if defendant could have gotten past the lava flow but elected to pull off the road for a few hours to watch the pyrotechnic display, his delay was not absolutely caused by an event beyond his control. The court will not excuse his tardiness.

The defense is available only when non-performance is beyond defendant's reasonable ability to cure raising the issue of “reasonableness” again.

It is not reasonable to require defendant to put on his asbestos shoes and sprint across the glowing molten rock to make his delivery on time. Reasonableness introduces the grey area of fact-finding and evidence-weighing that goes to the heart of every case in court.

This defense works only if all essential elements are present.

Elements

1. Defendant acted reasonably, and
2. Defendant was absolutely prevented from performing by an act of God.

On the other side of the proverbial coin, if defendant is accused of causing damages that were, in fact, caused by an act of God, this defense applies to insulate defendant from plaintiff's claims.

In any case where an act of God is involved in the essential facts and defendant can show by admissible evidence he acted reasonably; this defense may be available.

Alibi

Many causes on which a court can grant relief require defendant to be in the presence of plaintiff or plaintiff's property at the time of events giving rise to the cause.

For example, a complaint for assault requires plaintiff to allege and prove defendant threatened plaintiff with physical harm at a time when defendant had the present ability to do so.

And, of course, a complaint for battery requires plaintiff to allege and prove defendant actually touched plaintiff.

Finally, a claim for theft or conversion, for example, requires plaintiff to allege and prove defendant was at the place where plaintiff's property was located when the theft or conversion took place.

These claims cannot prevail if defendant can establish, he was somewhere else at the time.

Elements

1. Plaintiff's claim is based on defendant acting in the presence of plaintiff or plaintiff's property.

2. Defendant was somewhere else at the time.

Suppose plaintiff was in Cincinnati when he claims defendant battered him. If defendant can show he was 4,135 miles away in Paris at a convention of art dealers, he wins.

You can't batter someone on the other side of the planet unless you use a remote-control robot or hire a thug to do the job for you.

Arbitration and Award

If a dispute is submitted to arbitration and arbitration results in an award, this defense prevents the losing party from succeeding with a subsequent lawsuit based on the same facts and issues.

Arbitration judgments are usually final.

The loser can't force the winner into court for another bite at the apple unless the loser can prove some material fraud in the arbitration proceedings.

First, the dispute must be legally subject to arbitration. If arbitration was not, in the first place legally required, the arbitration award may be set aside by the court in a subsequent lawsuit challenging the arbitration.

Many large companies intimidate people into agreeing to arbitration after the fact. Unless there is a pre-existing legal basis for requiring arbitration, either party reserves the right to take his dispute to court.

The basis for requiring arbitration may be in a contract, it may arise as a matter of law, or it may be ordered by a court in certain circumstances.

If there is no basis for arbitration in contract or law, one is not compelled to arbitrate but may, instead, go directly to court.

Second, the dispute must, in fact, be submitted to arbitration. The arbitration must proceed in accordance with the arbitration rules. The arbitrator must be properly authorized. There must be a final decision.

A failed arbitration, obviously, does not give rise to this defense.

If a dispute is properly submitted for arbitration before an authorized arbitrator, and an arbitration award is properly reached without fraud or undue influence, the dispute is settled. Thereafter, if the disgruntled loser brings a lawsuit to re-litigate the same facts or issues, the case will be dismissed if defendant files and proves the essential elements of this defense.

Elements

1. Dispute was lawfully subject to arbitration.

2. Dispute was duly submitted for arbitration.

3. An arbitration award was made in accordance with the rules of arbitration.

4. No fraud or undue influence materially affected the decision.

If you hire a lawyer to file paperwork and appear for you in court, and the facts support this defense so the case should never have been filed against you in the first place, be certain

your lawyer moves the court for an order awarding you all your court costs and attorney's fees and sets the motion for hearing to get it ruled upon at once so you don't have to pay your lawyer.

State in your defense:

- when arbitration was held,
- where it was held,
- before whom it was held,
- that the rules were followed, and
- that an award was properly granted.

Finally, attach a certified copy of the arbitration award.

Assumption of Risk

Some activities are so inherently dangerous, our courts allow a defense against plaintiffs who voluntarily participate.

For example, if plaintiff expressly assumes the risk of sky-diving, the courts will , if the defendant pleads the affirmative defense of "assumption of risk," deem that plaintiff knew or should have known the inherent risk involved in the sport.

Plaintiff will be treated as having voluntarily waived the right to sue for damages resulting from a broken ankle or other injury resulting from this foreseeably dangerous activity.

However, if the jump school staff packs a chute negligently and injury results, this defense disappears, because it was not "reasonably foreseeable" that dirty laundry would fill the skies when plaintiff pulled the ripcord on his way down.

The defense lies only where a reasonable person should recognize the foreseeable danger.

This defense protects defendants from lawsuits resulting from losses resulting from any activity that threatens foreseeable damages, provided plaintiff's damages result from factors common to the activity.

Bungee-jumping, kick-boxing, and horseback-riding are all activities courts deem to have foreseeable adverse consequences that a reasonable person knows about or should know about - so the defense of assumption of risk will prevent judgment for resulting injuries.

Elements

1. Plaintiff elected to participate in an activity inherently dangerous.
2. Defendant did not act negligently.
3. Plaintiff's injuries were reasonably foreseeable.

The defense disappears where defendant acts negligently.

If a riding stable puts newbie riders on cantankerous stallions known to delight in throwing people off their back, or a bungee-jump operator fails to replace his worn-out rubber-bands, the defense will not apply.

Contact sports like soccer, football, karate and other martial arts disciplines, basketball, and any competition involving foreseeable risk of serious injury is included in the ambit of this defense, IF injury results and plaintiff knew or should have known the risk.

If the risk is hidden or unknown, the defense does not apply.

Plaintiff need not sign a paper acknowledging risk (though, of course, this creates a stronger defense for potential defendants.) If a court can infer from facts presented that plaintiff knew or should have known the severity of foreseeable risk and proceeded to participate without regard for the risk, the requirements for this defense are met.

Assumption of risk may not be a complete bar to plaintiff's recovery. The case may turn on whether and to what degree plaintiff assumed the entire risk and whether and to what degree the defendant is partially responsible.

Note: See also comparative negligence and contributory negligence.

Coercion

Coercion is an affirmative defense and a cause of action. Coercion exists where one person forces another to take an action that damages to himself in circumstances that allow no reasonable option.

If one is coerced into signing a contract, for example, then later sues the person coerced for breach of contract, the coerced person has this affirmative defense.

One should not be legally bound by a contract he was coerced into signing or by an act he was coerced into performing.

The fact issue before the court in such cases is whether and to what extent the coercion was irresistible. The court will decide whether the party coerced had reasonably alternative choices.

For example, if one says to another, "I won't go to the prom with you unless you sign this contract," that's not coercion. There are reasonable alternatives you can use.

If one points a loaded .38 revolver to another's head and says, "Sign zee paper, old man," coercion is an affirmative defense if the pistol-wielding plaintiff sues to enforce the contract. The coerced defendant will prevail if he can prove he had no alternative to avoid being murdered.

Elements

1. Defendant involuntarily responded to threatening demands of plaintiff.
2. The threatened harm was imminent and unavoidable.
3. Defendant had no reasonable alternative.
4. Plaintiff is suing to compel defendant to fulfill obligations obtained by plaintiff's threat.

Note the word "reasonable."

An old man coerced at gunpoint could disarm his assailant by picking up a chair and beating his tormentor senseless, but our courts refuse to require "unreasonable" alternatives.

Coercion must be real, imminent and reasonably unavoidable.

If a party claims he was coerced into signing a contract during a long-distance telephone call from someone threatening to punch him in the nose, the court will deny this defense. The threat was not imminent.

If plaintiff can show defendant acted on his own, meaning the act did not result from coercion, the defense fails.

Coercion is similar to undue influence, a cause of action arising where free will of an individual has been overcome by influence of another.

See discussion of Duress below.

Comparative Negligence

Plaintiff is often partially responsible for his own damages. Where this is true, plaintiff cannot recover that portion of damages caused by himself. He is said to be comparatively negligent.

The court uses a balancing test to determine who is most negligent and apportions damages accordingly.

If plaintiff runs a stop sign and is hit by defendant's truck traveling 120 mph, both parties are somewhat responsible for plaintiff's injuries.

Plaintiff for running the stop sign. Defendant for speeding.

Elements

1. Plaintiff was at least partially responsible for his damages.
2. But for plaintiff's own action, plaintiff would have suffered no damages.
3. Defendant should be held responsible for only that portion of plaintiff's damages for being within close proximity resulting from defendant's sole action.

Under *common law doctrine* of "contributory negligence" a plaintiff whose own wrong was the proximate cause of his injury was barred from recovering, even if defendant was partially negligent.

A fellow who injures his head when his wagon hits a log in the road might sue the person who caused the log to be in the way.

However, another doctrine of common law says each of us has a responsibility to "look where we're going."

So, if plaintiff wasn't looking where he was going and defendant can prove this, then under the common law doctrine of "contributory negligence" the negligent plaintiff could not recover, even if defendant was himself negligent.

However, under comparative negligence doctrine adopted by many states in *abrogation of common law, and/or in spite of common law*, the courts apply a "but for" analysis and apportion damages accordingly.

Note: Don't light your hair on fire, you should already know the corporation is trying to run around common law. You have to make it apply.

But for plaintiff's own negligence, the injury would never have occurred. However, but for defendant's negligence, the injury also would not have occurred.

The court decides the degree of the parties' respective negligence and applies this factor as a percentage to determine the amount of harm caused by defendant alone and, consequently, the amount of money, if any, to be awarded to plaintiff.

Consider the plaintiff who wasn't wearing a seat belt at the time of an accident. He sues for money damages resulting from his injuries. Using the *"but for"* test, the court can conclude that but for his failure to wear a seat belt, his injuries would not have been so severe as those for which he has brought his lawsuit.

Or, even, had it not been for his failure to use the seat belt he would have suffered no injuries at all. The amount of his recovery will be reduced (under the comparative negligence doctrine) by that part of the injury resulting from his own negligence.

In many jurisdictions, violation of any statutory proscription that causes or tends to contribute to a plaintiff's injury (such as failure to wear a seat belt) raises this defense and may be an absolute bar to recovery.

If defendant raises this affirmative defense, he puts the issue of the plaintiff's own negligence squarely before the court. The court must then decide how much or to what degree plaintiff's negligence caused plaintiff's injury and reduce the award - or eliminate it entirely.

If both are equally at fault, plaintiff's recovery will be reduced by one-half.

See also contributory negligence below.

Consent

This affirmative defense applies in many different types of cases. It arises where a plaintiff attempts to sue for damages resulting from an act to which he knowingly and intelligently consented.

For example, one cannot succeed with a lawsuit for conversion of a bicycle, if plaintiff gave defendant permission to use the bicycle.

The claim known as conversion requires that defendant take possession of plaintiff's property without permission.

A lawsuit founded in conversion, therefore, will not succeed if defendant pleads and proves the affirmative defense of consent. This is true even where plaintiff gave only temporary permission and defendant continued to hold the property beyond the date when it was requested to be returned. Plaintiff may have a claim for breach of contract; however, he cannot prevail with a claim for conversion if he gave his consent to defendant's taking possession.

If a patient submits to surgery, after reading and signing a consent form clearly explaining risks inherent in the operation, the patient cannot prevail with a lawsuit for damages that result from those specified risks, if the surgeon files the affirmative defense of consent, unless patient can prove he was in a drug-induced state or otherwise suffering from some debilitation that impaired his understanding at the time he read and signed the consent form.

If plaintiff's consent is not *informed consent*, the defense fails.

One cannot legally “consent” to something about which he has limited or false knowledge.

The only consent that courts recognize is when that consent is both “knowing and intelligent.”

A drunk or drugged individual lacks legal capacity to consent, as does a child or person suffering from mental defect.

Elements

- Plaintiff's consent was voluntary
- Plaintiff's consent was informed and
- Plaintiff's consent was identified to specific risk rather than general

General consent may lack sufficient specificity to create a legal defense. Simply knowing some risk may be inherent does not sufficiently identify the risks so plaintiff has actual knowledge of the risk, rather than a mere vague understanding.

If you allow someone to paint your house pink, and later decide to sue because you don't like pink, the affirmative defense of consent will lie to protect the painter. If the painter alleges all facts necessary to establish the defense and subsequently proves all those facts by the greater weight of admissible evidence, the painter will be protected from plaintiff's complaint, because plaintiff consented to having a pink house.

Consent is an absolute defense against plaintiffs who knowingly and intelligently agree to be exposed to a circumstance that later causes them injury.

Contributory Negligence

If plaintiff negligently contributes to the event giving rise to his claim, defendant may have this affirmative defense.

The defense erases defendant's liability for damages the plaintiff was partially responsible for causing.

The doctrine derives from common law, but is abrogated in many jurisdictions (replaced by statute and/or case law.) Many jurisdictions prefer comparative negligence (see above) where both parties are partially responsible for the injuries complained of, and damages are apportioned between the parties accordingly.

For example, a newspaper-reading jay-walker voluntarily exposes himself to being run over by a passing vehicle. His own action contributes to his injury. He may, in fact, be the sole cause of his injury so, under this doctrine, he will be barred from recovering in court.

The first test is whether the plaintiff's own act was the proximate cause of his injury.

The court applies a “but for” analysis.

If it is shown that but for plaintiff's own act the injury would not have occurred, then this defense results in plaintiff's getting nothing.

Consider the young fellow reading a newspaper as he steps off the curb. If he looked both ways before stepping off the curb, he'd have no injury at all. No injury to complain about.

In such cases this defense may be an absolute bar to recovering damages.

Now consider a defendant who lives in one of those states where an annual vehicle inspection is required. Suppose defendant's brakes were bad, and he failed to have his vehicle inspected when inspection was due. Suppose that, except for his bad brakes, he could have stopped in time to avoid hitting the negligent newspaper-reading jay-walker.

What then?

How does the defense apply when both parties are partially responsible?

Different jurisdictions treat this defense differently.

Historically, if “but for plaintiff's act” there would be no injury, even if defendant contributed in some way like not having his brakes inspected, the defense was an absolute bar to plaintiff's recovery.

This harsh rule has been replaced with a *“comparative negligence” doctrine* that apportions injury between the parties when actions of both contributed to the injury.

In some jurisdictions, these two defenses overlap.

The better rule is for contributory negligence to act as an absolute bar only where plaintiff was the sole cause of his own injury. When defendant's acts in no way contributed to plaintiff's injury, or plaintiff had within his power and control the ability to avoid injury through plaintiff's own reasonable exercise of due diligence and reasonable care, this defense should be an absolute bar to plaintiff's recovery.

On the other hand, if plaintiff's exercise of due diligence and reasonable care could not have prevented plaintiff's injury, this defense does not bar recovery.

Elements

1. Plaintiff was at least partially responsible for his damages.
2. But for plaintiff's own action, plaintiff would have suffered no damages.
3. Defendant should be held responsible for only that portion of plaintiff's damages proximately resulting from defendant's sole action.

Where defendant's act contributes even partially to plaintiff's injuries, courts in nearly all jurisdictions apply comparative negligence, resulting in apportionment of fault and therefore apportionment of money damages. This, of course, is measured in accordance with the degree to which plaintiff's acts directly or indirectly caused his own injury.

Discharge in Bankruptcy

If a creditor files a lawsuit to collect a debt that's been discharged in bankruptcy, the defendant need only file this affirmative defense, alleging all facts necessary to establish the essential elements and attaching a certified copy of the bankruptcy petition and the order of discharge.

Case closed.

Failure to file a certified copy of the bankruptcy petition and the bankruptcy court's discharge order falls short of the mark.

The bankruptcy petition should list the creditor from whom protection was sought.

The order of discharge will show conclusively that bankruptcy protection was granted.

only those debts listed in the petition are discharged.

Therefore, if you're sued by a creditor, but your debt has been discharged in bankruptcy, file this affirmative defense along with certified copies alleging the facts necessary to establish the essential elements of this defense.

Elements

- Debtor/defendant at one time owed the debt to creditor/plaintiff
- Creditor and debtor's debt were listed in the bankruptcy petition
- The debt to plaintiff was discharged by a bankruptcy court order.

Once discharged, the debt is forever barred.

Once discharged, all lawsuits brought to collect such a debt will fail.

Duress

Duress is like coercion. Both are defenses to a lawsuit where defendant's alleged wrongful acts resulted from threat or force.

Physical force suffices, e.g., a gun to the head. Threat of harm to one's family suffices. Threat of damage to one's business or reputation suffices.

Imagined or impossible threats will not suffice.

Some courts recognize the defense when a person is so strapped financially that his freedom of choice is unjustly limited, for example, he simply "can't say no." Such a defense, of course, is harder to establish, since a reasonable person might conclude there were reasonable alternatives. Of course, that judgment depends on one's viewpoint, for example whether one knows what it's like to be on the brink of bankruptcy.

It is not a proper way to get others to do things. Our courts frown on it.

Economic Loss Rule

The economic loss rule is an affirmative defense in many jurisdictions preventing plaintiffs from double-dipping for damages where both negligence and breach of contract are claimed.

Knowing when it applies and when it does not is key to understanding this defense.

Plaintiffs often file complaints for breach of contract and for negligence in performance of the terms of the underlying contract. If successful, on both counts, however, plaintiff might be over-compensated by double-dipping. The economic loss rule prevents plaintiffs from collecting for both types of damages in the same lawsuit in certain situations.

A Florida strawberry farmer sued a chemical company when a batch of fertilizer turned out to be herbicide. The bags were mislabeled. The herbicide killed acres of strawberry plants.

The farmer included a count for breach of contract and another for negligence.

Since the farmer contracted for fertilizer and received herbicide instead, he sued for breach of contract.

Since negligence was the only explanation how plant-killing herbicide could end up in bags marked "fertilizer," the farmer also sued for negligence.

The farmer won on both counts.

The economic loss rule did not apply.

Distinguish this first case with another.

A farmer sued a tractor manufacturer for breach of contract and negligence when a faultily designed part on the tractor caused the tractor to fail. As a result, the farmer couldn't get his crops in on time and lost money.

The court said the bargained-for consideration was a tractor, not crops safely gathered into a barn.

Only the tractor was damaged by defendant's negligence, not the farmer's crops as was the case with the poisoned strawberries.

The contract for a working tractor was breached by delivery of a faulty tractor, so the farmer won his breach of contract count. However, the negligence in the tractor did not proximately cause crop damage. The farmer was not permitted to recover for negligence, because the damages caused by negligence did not result in loss of property other than the tractor.

To allow the farmer to recover for breach of contract to deliver a functioning tractor and for negligence that damaged only the tractor would result in double-dipping.

When negligently labeled fertilizer destroyed fields of strawberries, the farmer was awarded damages for breach of contract; he paid for fertilizer and got herbicide instead, AND for negligence - the value of his lost crop.

Contract and negligence causes may be combined if something other than the bargained-for thing is damaged by defendant's negligence.

Estoppel

Estoppel arises when one party leads another to believe some fact, the second party reasonably relies on the fact, then the first party changes position and seeks to stand on a different fact.

The courts say the first party is stuck with the first fact.

He is estopped to deny the initial fact.

The second party is permitted to rely on the fact initially presented by the first party.

If plaintiff balloon operator leads defendant to believe the fee for a balloon ride will be $60, yet once the balloon sets down the balloon operator demands $75 from his passenger defendant, then if the balloon operator sues defendant for the difference of $15, the defendant has an estoppel defense.

The plaintiff is estopped, and defendant may rely on plaintiff's initial statement of fact.

A party may estop himself by words or conduct.

Having set upon some particular course of action that leads another to reasonably believe a set of facts, a party may not change his position if doing so would cause unjust damage to another.

He is estopped to do so.

Consider a grove owner who contracts with a truck driver to deliver grapefruit. Suppose the grove owner refuses to provide the truck driver with grapefruit to deliver. The grove owner cannot successfully sue the truck driver for loss of customers who didn't get grapefruit when it was the grove owner, himself, who prevented delivery.

He is estopped.

The second party must reasonably rely on the words or acts of the first party.

Further, for the estoppel doctrine to apply, the first party's change of position must threaten to cause an unjust or inequitable burden on the second party.

When these elements exist, the affirmative defense of estoppel will lie to protect the second party from the consequence of relying on acts or words of the first party who subsequently chooses to change his position by some fact contrary to what was presented at the beginning.

Estoppel is related to the defense of res judicata (the thing has been ruled upon,) wherein parties are bound by a previous court decision as to certain facts that one of the parties wishes to re-litigate.

The party wishing another bite at the apple, so to speak, is estopped.

Similarly, the defense of laches stands on estoppel principles, since plaintiff is estopped to delay bringing his case. [See defense of laches below.]

The defense of estoppel exists in equity to protect one who relies on some set of facts present or past that are communicated or demonstrated by acts or words of another.

Elements

1. Estopped party knew or ought to know the facts communicated or demonstrated were not true or were subject to be changed,

2. Estopped party intentionally or negligently caused another to reasonably rely on those facts,

3. Estopped party subsequently seeks to assert a different set of facts that would cause an unjust result.

Estoppel relates to facts present or past.

Promissory estoppel relates to future facts and applies when one person tries to withdraw or alter a promise made to another who justifiably relied on the initial promise to his detriment.

Even if there is no enforceable contract, our courts enforce such promises to protect parties who detrimentally rely on the dishonesty of crooked promisors who knew or should have known the promised facts were false or likely to be altered.

This doctrine is sometimes also called “detrimental reliance.”

Failure of Consideration

This affirmative defense is useful in breach of contract cases where plaintiff claims defendant failed to uphold his end of a bargain.

Suppose you hire a fellow to mow your lawn every Tuesday while you're away on vacation. You promise to pay $50 for each mowing it's a big lawn. You give him $200 up front - enough for 4 weeks of mowing - and leave for your long-awaited trip.

When you return three months later you discover weeds have taken over. The city has fined you $500 for not tending to your landscaping.

So, you sue the lawn guy for damages, including the $500 fine.

If defendant is on his legal toes, he'll file the defense of failure of consideration. He will allege sufficient facts to establish the essential elements of the defense, including the fact that he mowed four times on successive Tuesdays, but you were gone longer than four weeks. He was only paid for four weeks.

A contract is only enforceable by plaintiff if plaintiff performs his part of the bargain.

Failure of consideration is fatal to the contract, and to the case.

Consideration may be money, services, or goods - anything bargained-for that goes to the heart of the agreement contemplated by both parties to a contract.

If one side fails to provide the consideration he promised, he cannot successfully sue for damages on the contract if defendant raises this defense and proves the essential facts.

Failure to Demand

In some jurisdictions, failure to demand may be an affirmative defense.

For example, the elements for breach of contract are

1. existence of an enforceable contract,
2. an act by defendant in breach of the contract,
3. damages to plaintiff resulting from the breach and,
4. In some jurisdictions, a demand for performance before bringing suit.

In those jurisdictions and causes of action where demand is required, failure to demand is fatal and gives the defendant this affirmative defense.

Another example is conversion, where defendant takes possession of property of plaintiff without lawful authority. In some jurisdictions the courts require the plaintiff to make formal demand for return of the thing taken before filing a lawsuit for conversion.

In such cases, if plaintiff has not made demand, the defendant has this affirmative defense.

Plaintiff's failure to demand becomes a defense when defendant can show he lacked intent to breach the contract or to convert the property and would've promptly returned the property if plaintiff demanded its return.

The defense may also prevail if defendant can convince the court he mistakenly believed he had a lawful right to do as he did.

Very gray area. Check local statutes and appellate decisions that control your trial court before relying on this affirmative defense.

Failure to Join Indispensable Party

No lawsuit should be permitted to go forward if someone with a vested interest in the outcome is not made a party and allowed to participate.

To proceed without affording that additional interested person an equal opportunity to argue for his or her individual interests isn't fair.

If final judgment cannot be entered without affecting the interests of such an indispensable party, the outcome may be challenged as unjust.

In such cases, the indispensable party must be joined to the case.

The indispensable party may need to be added as codefendant or joined as a co-plaintiff.

Not all necessary parties are indispensable.

To proceed to judgment without requiring all indispensable parties to be joined could result in injustice to the already-joined parties as well as those excluded.

Generally, courts will not dismiss a case simply because all potential plaintiffs have not joined in the fray. Instead, they will order the indispensable parties to be joined, if possible.

Courts wish to avoid unnecessary repeat litigation. Failure to join indispensable parties will likely result in just that, repeat litigation, more costs to the court, more delay for the parties who've already tried their case.

There are times, however, when all potential plaintiffs are not available or are unascertainable, in which case it would be unjust to deny existing plaintiffs their day in court simply because others are not available to participate.

Similarly, there are times when all potential defendants are not available (including those whose interests will be affected by the outcome, even though they are not included in the

fray.) Again, it would be unjust to deny plaintiffs their day in court against the defendants they can round up, simply because some defendants cannot be found.

A case may involve title to real property. The interests of two or more owners may be affected by the outcome. Yet, perhaps only one owner has been joined to the case. Since the outcome will affect the rights of all owners not yet joined to the case, courts are unable to enter a truly final judgment without denying due process to the absent owners. In such cases, this defense will prevent the case from proceeding or, at least, delay the proceedings until all possible efforts are made to locate the missing parties.

The issue should be raised first by motion to dismiss before filing an answer and, failing that, should be filed with the answer as an affirmative defense.

In some cases, if it is discovered the absent party is, in fact, indispensable for a complete adjudication of the issues, the court may be prohibited from entering final judgment, or its orders may be subject to reversal or remand on appeal.

Failure to Post Bond

Some cases require that a bond be posted to protect some interest pending outcome of the proceedings.

Therefore, in such proceedings, failure to post the required bond forms the basis for an affirmative defense.

The requirement of a bond is typical in actions seeking an injunction, because enforcing an injunction before all the facts are in could foreseeably cause injury to an innocent party.

The bond required to protect a potentially innocent defendant is calculated by considering the value of foreseeable damages that might injure defendant, if plaintiff's case fails.

Bonds are typically tendered to and held by the clerk of court pending the outcome of such cases.

The court may require plaintiff to post a bond simply to protect defendant from foreseeable injury resulting from an unjust interruption of defendant's life.

Failure to post a bond, where justice demands, gives rise to this defense.

Failure to State Cause of Action

Every cause of action (or claim on which the court can grant relief) must be alleged by stating facts that establish all essential elements of the cause of action.

It's like listing ingredients for a recipe.

If any ingredient is missing, the recipe is not complete. The court cannot cook the dish.

Failure to state sufficient facts to establish all essential elements of a cause of action is a defense that first should be asserted by a motion to dismiss for failure to state a cause of action.

In an action for breach of contract, plaintiff must allege sufficient facts to establish at least three essential elements:

1. existence of an enforceable contract,
2. an act by defendant breaching the contract, and
3. damages to the plaintiff that proximately result from the breach.

Suppose plaintiff files a lawsuit for breach of contract but fails to allege sufficient facts to establish the third element, for example, that he suffered damages as a proximate result of the breach. Merely stating plaintiff suffered “damages” is not enough. Plaintiff must allege “ultimate facts” that establish all essential elements. For example, he might allege his strawberry fields were destroyed or that he lost business to a competitor, adding additional facts as necessary to fully explain how the loss was a proximate result of the breach.

Failure to allege all facts necessary to establish all essential elements exposes the plaintiff to a motion to dismiss for failure to state a cause of action.

Then, if the court does not dismiss plaintiff's case upon defendant's motion, then defendant should file this affirmative defense with his answer to preserve the issue in his favor.

Merely stating, “The parties entered into a contract, the defendant breached the contract, and plaintiff suffered damages,” is not enough.

Fraud

Fraud as an affirmative defense must be pled with specificity. It's not enough to merely allege the other party is guilty of fraud.

One must spell out fraudulent details with specificity so the court and all parties know what material misrepresentation was made that gives rise to the alleged fraud.

In other words, the defensive pleading must be precisely accurate and complete.

Fraud as an affirmative defense depends upon showing plaintiff intentionally misrepresented a material fact that goes to the heart of the claim on which he brings his suit.

The fact plaintiff is a fraud, or that plaintiff misrepresented facts other than those related to the lawsuit before the court, has no relation to this defense.

For fraud to support an affirmative defense, circumstances and material facts of the fraud must be pled with specificity.

In some jurisdictions, if the requisite allegations are not set out in full, the defense is treated as waived.

General allegations, vague references, or conclusions of fraud fall short.

Fraud must be pleaded with particularity.

Suppose plaintiff obtained a contract by making fraudulent claims. Suppose he was selling a house he knew was infested with termites, with a roof that leaked during even the lightest rain, and a furnace that simply didn't work at all. Further suppose he misrepresented these things to a buyer who, reasonably relying on the false statements of seller, entered the deal and used his life savings to make a down payment on that house.

Months later, buyer is late on a payment and seller sues.

Buyer has the defense of fraud.

However, again, if defendant/buyer merely lists fraud as an affirmative defense, without alleging in detail the facts necessary to establish the elements of fraud, his defense is likely to fail.

It's not enough to say, Seller made material misstatements of fact about the house. The court will require, if the defense is to stand, that defendant's allegations be specific.

Defendant must allege all facts necessary to specify fraud, e.g., quoting what seller said and how seller's representations were false and known to be false at the time.

General allegations are insufficient for two reasons.

1. The court may treat the defense as waived.
2. The plaintiff has a right to know the facts of the defense.

A defendant who fails to allege sufficient facts in defense is like a plaintiff who fails to allege sufficient facts in his complaint.

What facts are the respective parties required to prove?

Further, even if the defense is allowed, if defendant fails to allege the facts he needs to prove to win, the playing field can get very muddy very quickly as the plaintiff tries to hide the ball.

Defendants with this defense may also elect to file a counterclaim based on fraud as a cause of action , which, again, they must plead with particularity.

Futile Act

No court process can lawfully enforce the performance of a futile act.

If requiring or prohibiting an action will have no reasonably foreseeable benefit, the court is without jurisdiction to lawfully enter an order.

It's like trying to get one gear to turn another when the cogs are not meshed. No twisting on one will ever transfer power to the other.

Even if a court order compelled the turning of one gear, the order would be an absolute waste of time and, therefore, contrary to the fair administration of justice and appealable.

No court can compel a futile act.

Therefore, a defendant, sued by a plaintiff seeking to enforce a futile act, has this affirmative defense (if a motion to dismiss fails.)

Suppose a rancher sues to have his up-stream neighbor break down a dam across a creek, claiming his cattle are being deprived of needed water. If removing the dam will not divert water onto the complaining rancher's property, the court should not enter an order requiring the up-stream neighbor to break the dam. The order would compel a futile act.

A defense raising the issue of futility gives defendant an affirmative mechanism to show the court plaintiff's case is all wet.

Circumstances are rare where this defense may apply, yet the defense is tried and true for those threatened by stupid or vengeful plaintiffs having no valid basis for demanding judicial assistance in circumstances where such assistance would be to no avail.

It is a fundamental maxim of justice that the law will not enforce a futile act.

Good Samaritan

Some jurisdictions have statutory protections to limit the civil liability of persons rendering assistance in “emergency” situations.

These statutes limit liability for those who act with “reasonable care” to assist others in distress. They do not limit liability for those who act without reasonable care.

Further, the statute only limits liability for those who also do not charge money, for example, for those who offer their assistance “gratuitously.”

He who charges money or demands any value whatever for rendering assistance to another is not protected by the Good Samaritan defense. Such persons are held to the highest standard of duty.

Where such statutes exist, a person gratuitously offering assistance to another in distress is immune from lawsuits brought by persons claiming they were injured as a result of the gratuitously rendered assistance, unless the person rendering aid does so without exercising that degree of care expected from reasonable persons.

There must exist an imminent threat of bodily harm or substantial property loss for the defense to take hold.

Officious inter-meddling does not constitute a “good Samaritan” deed. If an obvious need is not present, sticking your nose where it isn't wanted will not be protected by this defense.

On the other hand, if you see someone obviously bleeding from an arterial wound pumping bright red blood in giant spurts, immediate assistance is required to save their life. In that circumstance, the Good Samaritan Act, if your state has one, will be an affirmative defense against a lawsuit for damages claimed to result from your attempt to stop the bleeding , provided you acted with reasonable care under the circumstances.

If you attempt to stop the bleeding by jumping up-and-down on the wound, you will not be protected by this defense.

If you tie a tourniquet too tightly, stopping the flow of blood and saving the person's life, but fail to loosen the tourniquet occasionally to prevent cell damage to the affected part, and the damaged person files a lawsuit for damages caused by the too tight tourniquet, you will be protected by the Good Samaritan Act - because the degree of care required is only that of a reasonable person, for example, an average person. You will not be held to the higher standard required of a medical professional or EMT.

If one has not actually begun to render assistance, regardless of preparatory actions taken to do so, the law will not hold him liable where the assumed duty has not begun.

One is only liable to act with reasonable care after he assumes a duty by beginning.

However, once one begins to render assistance, the duty to use reasonable care attaches. The one rendering care cannot abandon the injured person until professional help is on the scene without becoming liable for the consequences. Should he abandon the scene, after beginning to render assistance and before professional help arrives to take over, he may be held liable for all of the wounded person's injuries resulting from his attempts and abandoned efforts.

Assist where you are able to do so, knowing you're immune from suit brought for damages resulting from your reasonable exercise of due care. This is the right thing to do.

But. Remember that once you begin you cannot abandon the victim until professional help arrives.

Illegality

Our courts will not enforce an illegal contract. Nor will our courts entertain actions by wrongdoers wishing to obtain a benefit from their wrongdoing.

A murderer who poisons his wealthy aunt after discovering he is named as sole beneficiary in her will cannot hope to receive anything from the poor old lady's estate. It is a general rule.

Take for example a gambling agreement between two parties located in a state that does not allow gambling. If the loser welches, the winner cannot take him to court. The court isn't interested in helping him profit from his illegal activity.

More obvious, suppose Jimmy the Greek hires Three-Fingers McFee to take out the crime boss of another family. Three-Fingers does the job and returns to Jimmy with the victim's right ear as proof. Jimmy refuses to pay, (not very clever, of course,) so Three-Fingers has no remedy at law. He can put a few holes in Jimmy to get his attention, but he cannot get his money through the courts. Obvious, of course, but it makes the point clearly.

The affirmative defense of illegality provides an absolute bar to a plaintiff seeking to recover in court for loss resulting from an illegal act.

Make a deal outside the law, and you'll have no recourse in the courts.

Seek to recover a gambling debt in court, and this defense will be an absolute bar.

Pay for stolen merchandise, and you'll have no remedy in the courts if the merchandise turns out to be defective. And, if it's determined that you knew the merchandise is stolen when you received it, you will be exposed to criminal penalties. Makes no sense to go to court over it.

It is the fruit of a poisoned tree.

Impossibility

The law will not require an impossible act.

If defendant is prevented by some circumstance beyond his control to perform some obligation, and plaintiff sues for damages, this defense will succeed.

The defense arises primarily in contract cases where defendant is sued for failure to perform a promise, but it may apply in other circumstances as well, where defendant was prevented through no fault of his own.

To be impossible in the eyes of a court, the thing must be absolutely impossible.

Climbing a rock face at Yosemite may be incredibly difficult and probably impossible for most of us, but it is not absolutely impossible. Some skilled climbers have made it to the top, even grappling under the horizontal outcropping where they hang like spiders crawling on the ceiling of a room. Therefore, since some have accomplished the feat, it is not absolutely impossible.

In order for this defense to apply, the act complained of must be impossible.

In an old English case, we studied in law school, a cargo was commissioned in Singapore to bring tea to England. The ship was lost in a storm, its crew drowned, the cargo ruined. Those expecting to sell the tea and make a profit sued. The courts ruled that the shipper could not be held liable for an impossible act, since the ship was lost. This may not make much sense until we see it was not the ship with which the buyers made their deal but with the shipper. Once it was impossible to deliver the tea, the shipper was absolved of liability using this defense.

Impossibility does not provide a defense if impossibility was reasonably foreseeable by the defendant but not foreseeable by the plaintiff. In other words, if defendant knew he could not perform because of some circumstance beyond his control, yet led plaintiff to believe performance was forthcoming, plaintiff's suit will not be defeated by the impossibility defense.

If impossibility was foreseeable from plaintiff's point of view, however, and not from defendant's point of view, defendant will have the defense of estoppel. See estoppel above.

If impossibility was not foreseeable by either party, and performance was prevented or delayed by some circumstance beyond defendant's power to control, this defense may remove or at least mitigate defendant's obligation to compensate plaintiff for damages resulting from non-performance.

An ocean front land-owner contracts with a builder to erect a 25-story condominium on his beach property. The builder pulls a permit and begins construction after receiving partial payment to cover costs for the first phase. A few weeks after work begins, the state legislature passes a law stopping all construction of beach front condominiums exceeding 15 stories. Contractor stops work. Land-owner sues.

Because the law created an impossibility beyond contractor's control, this defense will protect the contractor from suit for non-performance - provided contractor did not know in advance of the impending legislation and had no duty to inquire prior to starting construction. Contractor may be entitled to the fair market value of services performed and goods delivered to the job site, but probably would be denied recovery of his anticipated profit for a completed job, since he was not allowed to complete.

The land-owner has no recourse against contractor, since the event preventing performance was beyond contractor's control.

The land-owner's only recourse is with the legislature.

Improper Venue

Venue is often confused with jurisdiction. They are two separate things. Venue is where a court sits. Jurisdiction is what the court can decide. Two very different things.

Improper venue defenses generally don't dispose of cases. They move them. Venue may be controlled by statute.

It may also be a matter of where the events giving rise to the lawsuit took place.

Or, it may be determined by where the evidence is, where essential witnesses reside, etc.

It is often a matter of convenience, determining where a case is most likely to result in a fair and just outcome.

You've no doubt heard of criminal defense lawyers trying to move a case to another town where the defendant, perhaps a scurrilous scofflaw, is not so well known and therefore, presumably, likely to have a better chance with an unbiased jury.

The purpose may be in part to conserve judicial economy by not permitting cases to be brought in courts where delays and unnecessary expenses may result because evidence, parties, or events giving rise to the claims are located elsewhere, however the legitimate basis for it is to obtain a just outcome fair to both sides.

Although all state courts have jurisdiction to hear every kind of state case throughout the state, venue rules require cases to be filed only where “venue” is proper.

Failure to file in a proper venue gives rise to a Motion for an Order Changing Venue. Such motions almost always succeed.

For example, a Miami plaintiff will not succeed with a lawsuit filed in Dade County against a Fort Lauderdale resident (Broward County) if the Miamian's damages occurred in

Broward County - even though the two cities are less than 30 miles apart and virtually one metropolis - because Dade County is not a proper venue for such cases.

To require the Fort Lauderdale resident to come to Miami to defend would unduly prejudice him, delay proceedings, and increase the cost to taxpayers.

Improper venue frustrates the efficient administration of justice.

It also creates a prejudicial burden on the defendant.

In general, venue is proper in the county where defendant resides (or, if a corporation, where it has an office for customary business,) where events giving rise to the claim (cause of action) accrued, or where property involved in the litigation is located.

A defendant sued in an improper venue should first move to have the case dismissed or transferred and, failing that, should preserve this issue by filing this affirmative defense with his answer.

Injury by Fellow Servant

When one employee is injured by another employee of the same employer, this defense protects the employer from liability if employer did not contribute in any way to the injury.

Where employer puts employees in places where work exposes employees to hazards, they cannot avoid by using reasonable care, the employer has a duty to warn his employees and provide sufficient safety measures to protect them from harm.

If one employee injures another in such a hazardous working environment, and the injury results from the hazard as opposed to a fellow servant's separate negligence or intentional disregard, then this defense will not protect the employer.

On the other hand, if one employee's negligence or intentional disregard is the proximate cause of another employee's injury, this defense may be available to protect the employer, since the employer literally “had nothing to do with it.”

Often, when an employee is injured on the job, the first person to be sued is the employer, because it's presumed the employer has deep pockets.

If employer fails to require employees to wear goggles, for instance, where eye injury from flying objects is reasonably foreseeable, then if one employee's negligence causes eye injury to another employee resulting from flying objects, employer is not protected by this defense.

The measure is always to what extent employer had a duty to prevent his employee's injury.

If employer has a duty, employer remains liable.

If employer had nothing to do with it, for example, had no knowledge of a foreseeable injury and in all other respects provided well for his employees' safety, then if one employee injures another employee this defense will protect the employer from liability.

Insufficiency of Process

The defense of insufficiency of process arises when the clerk's summons attached to the copy of the complaint is defective.

The summons and complaint are called the court's process.

If the process is insufficient in some regard, the court never has jurisdiction over the person served - even if they do receive the summons and copy of the complaint.

If the summons has not been signed by a court officer, for example, or if a copy of the complaint was not attached to the summons when served, the process is insufficient to confer jurisdictional power on the court.

Insufficiency of process is a weak link in the chain that ties defendant to court power. If the process is insufficient, the court has not yet acquired jurisdiction over the defendant, and any orders entered in the case against the defendant are void *ab initio ,* for example, from the outset.

This defense does not arise when a party has not yet been served with a summons and copy of the complaint. That defense is called insufficiency of service of process. *See below*.

When one is served with improper process, he has a duty to assert his defense. He cannot choose to believe he is free to ignore the service. Many people make this mistake, and lose. The technicality they rely upon is ignored by the courts. One cannot wait until the court enters judgment, by default or otherwise, and then make the argument that proper service was never affected.

Once defendant knows a lawsuit has been filed against him, he must take affirmative action to participate or he will be deemed to have waived his defenses.

Ignoring service brings certain disaster.

The defense will be waived if the court determines the process served

1. substantially complies with the rule and
2. defendant is not prejudiced by the alleged defect

Insufficiency of Service of Process

This defense arises when service of process (not the process itself) fails.

The purpose of process is to put the defendant on notice that

1. defendant has been sued,
2. what the suit is about, and
3. failure to respond before the deadline stated in the summons will result in the court entering default judgment against defendant and, in some cases, issuance of a warrant for defendant's arrest.

Suppose plaintiff uses mail to deliver the summons and copy of complaint, and the rules in effect require service by other means (e.g., service by a Sheriff's deputy or process server specially authorized by the court to serve process on defendants.)

The process itself may be good, but service may be insufficient to give defendant actual notice that he's been served.

In such cases, the court never acquires jurisdiction over the defendant.

Suppose a process server delivers service to the wrong person at the wrong address. Process is fine. All the papers are in proper order, duly signed, etc. If the defendant has been served, he would be on notice that a lawsuit was filed against him and that failure to respond would result in default.

But the defendant was not served. The service of process was insufficient.

Or, if process is served by someone who's not duly authorized to serve process, service of process is insufficient.

It is an error to learn of attempted service and attempt to evade service. Hiding from service has serious pitfalls. Most jurisdictions hold that once a defendant has actual knowledge that a lawsuit has been filed against him, he must appear to defend or be found in default, even when service was insufficient. See the discussion above under insufficiency of process.

The first response of defendant who learns a lawsuit has been filed but that service was not properly affected should be to file a motion for an order quashing the insufficiently served process or a motion to dismiss for insufficiency of process.

Failing that, he should file this affirmative defense with his answer to preserve the issue.

Of course, once defendant makes an appearance this defect will soon be cured.

Irreparable Harm

If plaintiff sues for an injunction when the wrong, he seeks to prevent by an injunction could be fully compensated by an award of money damages, the court should dismiss the action.

Injunctions are only proper where money damages cannot cure the threatened harm. An essential element for an injunction to issue is allegation and proof that money damages alone cannot compensate plaintiff for the threatened harm.

This argument should be raised by a motion to dismiss before filing an answer.

Then, if the motion is denied, the defense should be filed with defendant's answer.

If plaintiff has been beaten within an inch of his life, an injunction cannot restore him to the condition he enjoyed before the beating. The best the court can do is award plaintiff money damages to be paid by the defendant.

When an award of money would justly compensate plaintiff for his injuries, the court should not enter an injunction, because there has been no irreparable harm. If the harm can be cured by money, an injunction is improper.

The decision whether money alone is sufficient to protect plaintiff is not based on whether defendant has sufficient means to satisfy a money judgment. The decision rests squarely on whether money alone would (if money were available) prevent or cure the threatened injury.

If a money amount cannot be calculated that would protect plaintiff from a threatened injury (as would be the case, for example, if an upstream dam was planned to divert water to a valley different from where plaintiff has his ranch and thirsty cattle) entry of an injunction is proper.

Otherwise, no.

Laches

The affirmative defense of laches *(The Law of Laches)* rests on the idea that one who unreasonably delays pursuing his remedy in court (while witnesses die, evidence dries up, and memories fade) should not be permitted to sue, even if the statute of limitations has not yet expired.

This defense lies where the plaintiff's intentional delay prejudices the defendant.

Elements

1. A genuine basis for plaintiff's lawsuit, for example, defendant's acts gave rise to the complaint (otherwise the defense is not necessary)
2. For an unreasonable time before filing suit, plaintiff knew the facts giving rise to his claim,
3. Plaintiff had a reasonable opportunity to file sooner,
4. Plaintiff unreasonably delayed,
5. Defendant did not know plaintiff would file suit sooner or later,
6. Defendant would be prejudiced if plaintiff is allowed to proceed.

The question for the court is whether and to what extent plaintiff's delay has weakened defendant's ability to defend.

If a key defense witness is extremely ill at the time of events giving rise to plaintiff's claim, plaintiff may think to himself, Old Mrs. Peters may kick off any day now. Why not wait till she's safely out of the way before I sue Jones? With Mrs. Peters safely out of the way, defendant may have a much harder time defending himself. Therefore, if defendant can show the elements listed above, he may avoid the plaintiff's late-filed lawsuit altogether by asserting this defense.

Delay may actually preclude the court from arriving at a just result because the span of time makes it too difficult to find the truth of matters asserted by the respective parties.

In some states a defense of laches will not be heard until the statute of limitations has run. In other states this is not true.

Problems arise when the statute is tolled for one reason or another, for example, when the clock is stopped. Consult local statutes and case law.

Laches - Excuse

Once defendant shows the elements of this defense exist, the burden shifts to plaintiff to show his delay in filing suit was reasonable. Perhaps he could not sooner obtain the evidence he needed. Perhaps he knew of the wrong but didn't know the wrongdoer's identity. Under such circumstances, plaintiff may be excused from filing sooner.

Laches - Infants

An infant (which term in law generally means anyone younger than the statutory minimum age required to bring suit) is excused from filing suit during the period of his incapacity. However, as soon as he is of age the law imputes to him a duty to timely file an action against those, he claims caused him injury during his minority.

If laches is not affirmatively pled at the start of a case, it may be deemed waived.

The burden of proving each element of the defense is, of course, on the defendant. In some jurisdictions it must be proved by clear and convincing evidence (a higher evidentiary standard than a mere greater weight or predominance of the evidence.)

Unlike statutes of limitations that apply to actions in law, laches is a defense in equity that looks behind the scenes, so-to-speak. Laches examines the prejudicial effect of intended delay. Statutes of limitations simply tick off time and mechanically bar suits thereafter. Laches only bars suits when not to do so would threaten an avoidable injustice.

The mere passage of time does not give rise to this defense. Each of the elements must be alleged and proven.

Lack of Jurisdiction over Person

Courts obtain jurisdiction over persons by the service of process. See insufficiency of process and insufficiency of service of process above.

Without jurisdiction over the person, no order of the court can be effective to command such person to do anything whatever. This is sometimes called in persona jurisdiction (for example, jurisdiction over the person.)

Service of process alone, however, is not enough.

Suppose an Alabama resident decides to visit the new aquarium in Atlanta. As soon as he enters the Peach State, he's hit by a Georgia driver soaked to the gills in moonshine. Our Alabama fellow suffers substantial damage to his vehicle, and weeks later his throat makes frog-like sounds when he tries to sing Irish folk tunes. He clearly has damages and a right to sue.

But, suppose the injured Alabamian returns home, recovers from his injuries, and decides to sue the Georgia driver in an Alabama court.

Too bad. So sad. Won't work.

Georgia residents cannot be sued in Alabama's state courts for events occurring entirely within Georgia's borders.

Alabama's state courts have no jurisdiction over the person of Georgia residents, unless they cause harm within Alabama.

A motion to dismiss for lack of jurisdiction over the person should be filed and, if that motion fails, this affirmative defense should be filed with the answer to preserve the issue.

If a Georgia resident causes injury in Florida before returning to his home state, courts in the Sunshine State can exercise long-arm jurisdiction. Most states have long-arm jurisdiction. A Floridian injured by a Georgian vacationing in Florida can file suit in a Florida court and have the Georgia resident served in Georgia using Florida's long-arm statute. (Every state has one. Consult the official rules in your state to learn how.)

If everything is done as the long-arm statute requires, Florida obtains personal jurisdiction over the Georgia resident, just as if the Georgia resident resided in Florida and was served with process in Florida.

It takes a bit of extra time, but it works.

Causing or contributing to damages in a foreign state subjects' defendants to jurisdiction in the state where they cause their damage.

Lack of Jurisdiction over Subject Matter

This defense may be raised at any time.

It should be raised as soon as possible.

1. With a motion to dismiss before the answer is filed
2. If the motion to dismiss fails then by affirmative defense with answer

If plaintiff sues defendant in state court to preclude patent infringement, defendant would prevail, because federal courts have exclusive jurisdiction to hear patent cases. State courts do not.

On the other hand, if plaintiff sues in state court for loss of earnings due to some matter remotely related to patent infringement, but not the infringement itself, the federal courts do not have exclusive jurisdiction, and this defense would fail.

Subject matter jurisdiction is sometimes limited by the amount of money plaintiff puts into controversy.

County court may not have subject matter jurisdiction over a case claiming millions after a nearsighted surgeon removed plaintiff/pianist's left thumb instead of a wart on the poor fellow's nose. The amount in controversy may exceed what the county court can award.

To bring an action in federal court based on diversity of citizenship (where plaintiff and defendant reside in separate states) requires plaintiff to claim at least $75,000 in damages (as of this writing.) Failure to allege the minimum amount is fatal. Even if the plaintiff alleges the minimum of $75,000, this defense will operate if defendant can prove damages plaintiff alleges do not comport with plaintiff's actual losses.

I won a case several years ago when plaintiff residing in Illinois brought a case in federal court against my client, a Florida-based moving van company. Plaintiff presented a laundry list of damages, all of which amounted to things like a scratched refrigerator door, broken picture frame, and other incidentals that could not have cost more than $5,000 to fix or replace. The federal court was only too glad to grant my motion to dismiss.

A common situation arises when plaintiff sues in the wrong court. Inexperienced lawyers and pro se non-lawyers sometimes bring suit in the highest trial court level when their case should have been brought in small claims. In such cases this defense should be raised by motion to dismiss for lack of subject matter jurisdiction and, if the motion fails, should be preserved by affirmative defense when the answer is filed.

I once succeeded in having a very complicated case against my client dismissed for lack of subject matter jurisdiction when the other side sued under a particular statute that required five factual elements. Only four were present. Since the court's jurisdiction to hear the matter in the first place stood solely on the wording of that statute, the court lacked jurisdiction to decide the case with only four of the five fact elements present. The judge had no choice but to dismiss the case against my client.

If the court lacks subject matter jurisdiction, and defendant raises and proves the elements of this defense, the judge's hands are tied.

License

This defense arises when plaintiff sues for trespass or conversion or similar cause of action alleging defendant unlawfully and without authority or permission entered upon or took possession of plaintiff's property.

The property could be farm land and the offense nothing more than walking on the land to hunt pheasant.

The property could be a bicycle taken by defendant for a brief ride around the block.

The property could be intellectual, such as a copyright to plaintiff's book, painting, or other protected creation.

However, if plaintiff grants defendant license to use, possess, or enter on plaintiff's property (either formally or implied at law,) defendant has an affirmative defense that is absolute.

Plaintiff's permission or consent destroys plaintiff's case.

License may be granted by someone who only appears to be plaintiff, e.g., a person holding out as an officer of plaintiff's corporation but lacking, in fact, authority to license use of plaintiff's property. Plaintiff's license may be granted by plaintiff or an agent of plaintiff having actual authority or only apparent agency to grant license on plaintiff's behalf.

Proving license may be no more difficult than presenting a ticket stub or written agreement reciting sufficient detail to advise the court that permission was granted.

It could be in the form of a hand-written letter or a formal contract.

If the license is in writing, properly authenticated, signed, and dated, defendant has an absolute defense to any action brought by plaintiff claiming damages resulting from defendant's use of plaintiff's property.

If permission was merely verbal, however, and no corroborating witnesses were present to support defendant's assertion that he had a legal right by way of plaintiff's license to use plaintiff's property, the court may inquire into the circumstances to determine if defendant is telling the truth and plaintiff did, indeed, give permission , actual or implied.

What constitutes license may be little more than a nod of the head.

However, nodding heads are extremely difficult to get into evidence.

No Prior Course of Dealing

This defense defeats complaints for account stated.

(Please see explanation of account stated in the class on Causes of Action.)

In order for plaintiff to prevail on claim for account stated, he must allege and prove there was a history of prior dealings between the parties, for example, a reasonably long history of periodic billing the defendant timely and routinely paid over an extended course of time prior to the lawsuit.

Since this prior course of dealing is an essential element of plaintiff's case, this affirmative defense asserts there was no prior course of dealing which, if proved, ends the case.

One way to defeat a complaint for account stated is to show the debt claimed is new, for example, there was no prior course of dealing between the parties or, at best, a very short period with few transactions.

Sending an invoice or other demand for payment of a debt that includes language such as, Failure to dispute the amount of this debt will result in the legal conclusion that the debt is owed, may intimidate unwary people into paying the claimed debt, however such a demand is without legal effect and does not give rise to account stated.

Failure to respond to a demand letter, without more, is insufficient to give rise to this cause of action.

Suing for account stated when essential elements are clearly absent, may expose the party bringing the action to a counterclaim for abuse of process if it can be shown plaintiff intended to intimidate debtor and there was no prior course of dealing.

Payment

Payment of a debt is an absolute defense.

To prevail, defendant need only tender admissible evidence to show all amounts payable, including interest (if applicable,) are fully paid.

Payment in full satisfies every debt.

Suppose bank lends $10,000 to borrower who signs and delivers a promissory note the bank holds. Suppose the lender decides to use the borrower's house in the islands for a three-week vacation, and the parties agree the value of the vacation will cancel the obligation of the note. The obligation to pay has been satisfied, even though the borrower paid no cash to the lender. There is more than one way to settle a debt.

The affirmative defense of payment applies either way.

The problem many people run into is failure to insist on a receipt or other written evidence of payment - identifying the debt, signed and dated, with amount of payment clearly indicated.

This occurs a great deal in child support cases, where non-custodial parents provide cash to former spouses without getting receipts identifying the funds as child support. Things go well for a while. Then a disagreement erupts. Suddenly, the parent who's been faithfully paying his or her obligation is served with a motion to compel payment, alleging no payment has been made. Of course, it's a lie. Of course, it's not fair. But it happens all the time when non-custodial parents fail to obtain proof of payment.

The best way to satisfy money obligations is with a check designating on the line provided to say what the check is for that the amount is Satisfaction of child support for the month of March 2006 or similar words that estop [See the affirmative defense of estoppel above.] the recipient from claiming the check was for anything else. Once endorsed and negotiated, the cancelled check is prima facie evidence that the debt has been extinguished.

In lieu of using a check, if cash (or other value, e.g., property) is tendered to pay a debt, then a signed and dated receipt should be obtained from the recipient, identifying the amount of value given and received and clearly specifying the debt toward which the payment is made. The original of such a receipt is prima facie evidence the obligation was satisfied by the amount tendered.

Absence of proof of payment destroys this defense.

Release

If plaintiff sues for breach of some obligation, and plaintiff (by word or deed) released defendant from that obligation, defendant should file this affirmative defense (after moving the court to dismiss before filing an answer.)

Once a party is released from obligation, plaintiff cannot succeed suing that party for breach of the obligation - if defendant files this affirmative defense and proves the essential elements of the defense by a preponderance of admissible evidence.

Release may operate in several ways.

The happy soldier with his discharge papers cannot be prosecuted for dereliction of duty. He has been released, discharged, no longer under his former obligations.

On the other hand, for his defense to stand, the release must be clear and unambiguous.

To be effective, a release cannot be vague, or ambiguous. If it is susceptible of multiple interpretations, then any reasonable interpretation may be attached to it - including those having nothing to do with release.

If in writing, a release should specify obligations being released including, if necessary, the scope of release in time and geographical area. Some releases written by persnickety

lawyers may include terms like from the beginning of time and in all places whatsoever and without restriction.

When a client fires an incompetent lawyer and dares to hire another to take his place, the replacement lawyer may file a paper with the court that in some jurisdictions requires the client's signature as well. The paper is called a notice of appearance. It clearly states the second lawyer is replacing his predecessor and that all future filings are to be served on the replacement lawyer. Once this paper is filed, the initial lawyer is released from the responsibility to continue representing his former client.

The replaced lawyer will remain responsible to deliver papers from his file to the replacement lawyer (if his bill was paid,) and he will be responsible for his prior incompetence, yet he will thereafter have no duty to represent his client, because the notice of appearance releases him.

If verbal, of course, statements constituting release must meet the requirements of a writing and be witnessed by credible persons who can attest to the terms of the release if called upon to do so in case of a lawsuit.

If a release is communicated by actions (as opposed to written or spoken words) the actions evidencing release must be similarly clear and unequivocal, capable of only one interpretation, for example, a clear and unconditional release of defendant's obligations.

For example, suppose a creditor accepts partial payment as complete satisfaction of a prior debt. The debtor may make a notation on his check that the amount is payment in full. If the creditor negotiates the check, his accepting and negotiating the check with the notation printed clearly and conspicuously may constitute a legal release of the debtor's obligation to pay the balance. If the creditor brings a lawsuit seeking to recover the alleged unpaid balance of the debt, the defendant can file this affirmative defense and his cancelled check as conspicuous evidence in support of the defense.

Whatever the form of release, if defendant can present clear and convincing evidence the former obligation has, in fact, been canceled by some act of the person to whom the obligation is allegedly owed, this defense is absolute.

Res Judicata

The meaning of this Latin phrase is simply the thing has been already adjudged. The decision is already in the court's file. *It will not be tried again*.

If plaintiff sues to rehash issues already resolved by a court, defendant should file a motion for an order dismissing the complaint, raising res judicata as his defense, attaching a certified copy of the final order from the previous case.

If this motion fails, defendant should preserve the issue by filing this affirmative defense with his answer.

Suppose a court ruled last year a particular parcel of real property belongs to Mr. White and not to Mr. Green. If Green sues over the issue of title to that same parcel, this defense applies as a complete bar.

If defendant properly raises the defense and subsequently proves the essential elements of fact, plaintiff's attempt to get another bite at the apple is doomed.

No court should alter any material decision of an earlier court, unless the second court is an appellate division having control over the initial court.

The United States Supreme Court, for example, can change the decision of any state court or inferior federal court.

One trial level court, however, cannot overrule or otherwise alter the material parts of the previous decision of another trial court. The courts are on an equal footing. Neither has power over the other. A circuit court sitting in the civil division should not be permitted to overrule or materially alter the decision of another circuit court sitting in the probate division.

Defendant faced with such a situation should file this affirmative defense (if his motion to dismiss fails) and proceed with discovery to obtain admissible evidence to show a prior court decision has already decided the matter by a final judgment.

Self-Defense

Self-defense is not defense against self. Self-defense is action to prevent injury to oneself.

Self-defense can also apply loosely to action to protect one's property or a separate person in peril and their property.

Self-defense can even apply to words or other communications offered to prevent injury.

Suppose you threaten to hit me with a beer bottle. I wave an umbrella over my head shouting, *"Hit me with that bottle, and I'll break your arm with this umbrella."*

If you sue me for assault, I have self-defense in my favor.

Suppose you actually start beating me with that beer bottle. I haul off with my umbrella and break your arm.

If you sue me for battery, I have this defense to defeat you.

Any communication or act done in defense of personal safety or private property is a lawful defense.

If you are in the act of stealing potatoes from my garden, and I run toward you waving a shovel over my head, shouting, "Get out of my garden or I'll pound you with this spade," I have an affirmative defense to your cause of action against me for assault.

If you continue stealing my potatoes and I break your arm with my shovel, your lawsuit against me will result in my filing this affirmative defense to protect my property.

I have a right to protect my property, provided I act reasonably.

If you threaten to hit me over the head with a pillow, and I break your leg using a steel crow-bar, however, I cannot claim self-defense, because my response was not reasonable under the circumstances.

You may plead self-defense if you are threatened with imminent harm to personal safety or private property, and your defensive action is reasonable under the circumstances.

You will not be excused for killing or severely maiming potato thieves. The law forgives only reasonable force suitable to repel the immediate threat.

You can, however, chase thieves out of your garden with a shovel and even smack them on the backside as they run. However, once the threat disappears, you must stop acting in self-defense, for it is no longer self-defense.

If you are threatened with imminent death or serious bodily harm, many jurisdictions honor your right to use deadly force in response.

If it's possible to withdraw from a threatening situation, however, the law favors your doing so. But, in many jurisdictions you are not required to retreat. You may stand your ground and defend yourself with force appropriate to the immediate threat.

Use of defensive force greater than reasonably necessary, is not an affirmative defense to a lawsuit for damages.

Use only such force as is reasonably necessary under the circumstances.

Sham

If plaintiff files a lawsuit alleging material facts plaintiff knew were false at the time he filed, his complaint may be stricken as sham.

If only ancillary facts are false and known to be false at the time of filing, those allegations may be stricken as sham.

What applies in pleadings also applies to motions and all other papers filed with the court.

A motion for an order striking sham is an excellent (but seldom used) tactic to force the issue of your opponent's outright dishonesty and disregard for the honor of the court. By filing the motion, you put the other side's veracity into question and, if you've done your discovery well (explained fully in another class in this course) you'll be able to prove the other side knew what he said in his papers was false and tried to get away with it.

This is always good for your side.

As a defense, like others, this should be asserted by motion to strike sham prior to filing an answer. If that fails, be certain to include it as an affirmative defense when you file your answer to preserve the issue.

A motion to strike sham must assert

1. a material allegation of the paper submitted is false and
2. party submitting the paper knew the allegation was false at the time of filing.

A false allegation must be material for this defense to stand. The false allegation must go to the heart of at least one cause of action.

Sham pleadings are taken seriously by good judges.

Proving an allegation false is not easy. It is extremely difficult at the beginning of a case, when there has not yet been sufficient opportunity to get much discovery, to prove that the other fellow knew the material allegations made were false at the time they were made.

Therefore, if a motion for an order to strike sham fails, defendant should file this affirmative defense to preserve the point and give him a clear target for further action that may give him the victory after he has an opportunity to get discovery and put admissible evidence into the court file.

Statute of Frauds

The statute of frauds was inherited from English jurisprudence and remains as a vital part of our common law, amended in part by statute.

If a lawsuit is brought over a verbal agreement for the sale of goods (for example, tangible personal property,) nearly all states will refuse to hear the case if the value of the goods exceeds a certain minimum amount, unless there is a written contract spelling out the terms. Typically, disputes of sale of goods for lesser amounts is handled in small claims court, and no written contract is required.

Suppose, for example, the jacket on the mannequin sells for $499.99, and the salesperson allows the customer to wear the jacket home upon his promise to pay for the jacket the next day. In Florida (and other states) where the limit for sale of goods without a written contract is $500 (as of this writing,) that verbal contract can be enforced in court (provided the salesman can get the proof he needs to win.)

If the same jacket in another store sells for $501, and the salesperson allows the customer to wear the jacket home upon his word of honor he will pay for it the next day, we say the sale is outside the statute of frauds, and the salesman is without a remedy for breach of contract. He may bring a complaint for unjust enrichment (see in the class on Causes of Action,) but he cannot sue for an amount in excess of the maximum unless he has a contract in writing.

If parties reach an agreement for services capable of being performed within the space of one year (as the law reads in Florida and other states at the time of this writing) the courts will hear a breach of contract suit and enforce a verbal agreement. If the agreement is for services that cannot be performed within the space of one year, the agreement will not be enforced unless in writing signed by the party against whom the action is brought.

As with many other defenses, this should be first raised with a motion to dismiss. Then, if the motion to dismiss fails, the issue should be preserved by filing this affirmative defense with the answer and proceeding with discovery to prove the elements with admissible evidence.

Though statutes of fraud differ somewhat between jurisdictions, commonalities do exist. The purpose is everywhere the same: to minimize fraud.

Statute of Limitations

Courts will not wait forever to hear a complaint. Though cases like murder remain viable forever, nearly every civil case must be brought before a deadline tolls. This deadline is set out by statute in most states. You guessed.

It's called the statute of limitations, and it sets different deadlines for different types of cases.

One must consult the local statutes to determine what limitations apply, because they can change unexpectedly. As some wise man once said long ago, No one is safe when the legislature is in session.

Wise litigants mark their calendars and start counting time from the moment a possible cause of action arises, because once the deadline passes the cause is dead. That's why it's called a deadline.

This defense should be asserted by motion to dismiss before filing an answer. If the court does not dismiss, defendant should file as an affirmative defense with his answer.

Keep in mind what you learned about the defense of lack of jurisdiction. It can be argued that a court lacks jurisdiction to hear a case after the statute of limitations has run, so it is vital to preserve this defensive issue by filing it as an affirmative defense, because later when you've had the advantage of gathering evidence through discovery you may be able to show the date on which the clock started ticking.

If the time from that date until the time the plaintiff filed his suit exceeds the limitation, the court has lost jurisdiction, and the case must be dismissed or else any judgment resulting will be overturned on appeal as void ab initio.

Not all causes of action have the same time limitations.

For example, a case brought to enforce a negotiable instrument generally may be brought much later than a case of medical malpractice or breach of contract.

The only way to be certain of the deadlines is by going to the statutes itself and by reading the applicable appellate decisions that control your trial court judge.

For example, in many states the clock starts ticking to limit the time for bringing a case for medical malpractice as soon as plaintiff knows or should have known a negligent medical act caused plaintiff's injury. Plaintiff cannot wait for a convenient time to bring his suit. He has only a statutorily-specified period from the date on which he knew or should have known of the negligent act and its damage-causing consequence.

The statute of limitations is usually an absolute bar.

It must, however, be properly asserted in the record.

Truth

If an alleged slander is true, there can be no action. If an alleged fraud is not false, this defense will win the day.

Plaintiff has the burden of proving falseness. Defendant does not have a burden to prove truth.

If plaintiff alleges in his complaint, Defendant robbed me, yet plaintiff cannot prove defendant stole anything, this defense will close the issue in defendant's favor. Defendant will use what's taught in this course to force plaintiff to prove his allegations of theft.

If plaintiff alleges defendant committed fraud when he advertised a used car as having been only driven by a little old lady once each week to go to church, but plaintiff cannot prove that the car was driven by anyone else for any other purpose, defendant will stand on this defense and win. Defendant will use what's taught in this course to force plaintiff to prove his allegations of fraud.

If plaintiff alleges defendant defamed him by publishing on the internet that plaintiff did time in Folsom Prison, and plaintiff did spend time in Folsom Prison, defendant will use what's taught in this course to prove plaintiff is an ex-con.

It's putting the ball in the other guy's court.

If you tell your neighbor, *"Our mailman is a communist,"* and it gets back to the Post Office, and your mailman loses his job, prepare for battle.

But, if you prove your mailman is a communist, this defense will protect you.

Unclean Hands

He who comes to equity must come with clean hands.

This ancient maxim is as binding today as it was many centuries ago.

Those who seek the benefits of equity must not have contributed to the problems for which they need a remedy. Such persons are said to have unclean hands.

Every injunction is a remedy in equity. Therefore, one who's acted with bad faith in some way to contribute to his own problems should be denied the remedy. He has unclean hands.

If a plaintiff wrongfully defrauded defendant yet seeks an injunction, the defendant should file unclean hands as an affirmative defense with his answer, explaining how the plaintiff is not without fault in the very thing for which he seeks the court's equitable remedy.

The court should look beyond the bare allegations of pleadings when asked to deny an injunction for unclean hands. Factors to be considered include:

- Necessity of interest sought to be preserved or protected.
- Unreasonable delay of plaintiff to timely seek the remedy.
- Misconduct of plaintiff in regard to the interest.

The wrongs of plaintiff that constitute unclean hands must relate to the subject matter of the equitable remedy sought. The fact plaintiff brutally murdered his mother-in-law with a chain saw three years ago is not the kind of unclean hands this defense contemplates.

Unclean hands are rather like estoppel in that it looks into how a party has contributed to his own problems.

Suppose a property owner deceitfully prepares a deed purposely misdescribing property boundaries. He takes the buyer's money and tenders the deed. The buyer, relying on the deed and its boundary description, builds a house that encroaches on seller's own property.

Buyer based his actions on the seller's property description, so buyer has clean hands. He in no way has done wrong.

Seller, however, has very unclean hands.

So, if plaintiff sues for an injunction requiring his new neighbor to move the house, this defense will defeat the dishonest plaintiff's efforts - because the wrong of plaintiff relates directly to the subject matter of the remedy sought.

When a party seeks equitable relief for damages caused even partially by his own acts, the defendant should file this affirmative defense to preserve the issue and use discovery to find admissible evidence to prove plaintiff has unclean hands.

Unconscionability

If a party becomes the unwitting victim of a contract, deed, mortgage, promissory note, or other agreement procured by fraud, overreaching, or other unjust means, this affirmative defense should be pleaded with defendant's answer.

Courts should not enforce an unconscionable agreement.

This is true even when injury results from victim's own foolishness, lack of caution, and failure to act reasonably.

If the injury results from the wrongful act of another, the courts should cure the injury.

This affirmative defense is a first step toward obtaining that relief from the court, because it puts the court on notice of the issues to be tried.

Elements

1. The agreement was outrageously unfair.
2. Preceding events luring the victim were outrageously unfair.

This first element is called substantive unconscionability, for example, the terms of agreement itself are unreasonably favorable to plaintiff bringing suit to enforce.

The second element is called procedural unconscionability, for example, there was an absence of any meaningful choice on the part of defendant. Perhaps he was too feeble. Perhaps he lacked all understanding of technical aspects of promises made to him. Either way, there was no meeting of the minds essential to formation of an enforceable agreement, and therein lies the gist of this defense.

It has been said at common law an unconscionable contract is one that no man in his right mind not under delusion would make on the one hand, and no fair and honest man would attempt to enforce on the other.

Some authorities examine the respective bargaining powers of the parties, for example, the ability of one to understand the terms and conditions communicated by the other.

Synonyms for unconscionable include shocking the conscience, monstrously harsh, grossly unfair, etc.

Unconscionability as an affirmative defense must be pled, or it may be waived.

Waiver

Waiver arises when plaintiff waived the right or privilege on which he sues. The right or privilege waived must, of course, first exist, or there is nothing to be waived.

The waiver must be knowing, for example, plaintiff cannot be said to have waived a right or privilege without knowing (or having constructive knowledge) of the fact.

Finally, plaintiff must have waived with actual intention to relinquish the right or privilege.

Elements

1. Plaintiff possessed a right or privilege upon which he's brought a complaint.
2. Plaintiff waived the right or privilege.
3. Plaintiff knew or should have known he waived the right or privilege.
4. Plaintiff intended by his waiver to relinquish the right or privilege.

For the court to imply waiver from plaintiff's conduct, facts relied on to demonstrate the waiver occurred must be clear and convincing. Mere inferences are not enough, however probable they may seem. In the absence of direct facts demonstrating waiver, defendant must meet a heavy burden for the court to imply a waiver.

In some jurisdictions, waivers cannot be established unless evidenced by some express writing demonstrating plaintiff had knowledge of the waiver and its consequence.

THE BOTTOM LINE!

The best defense is a good offense.

This fat fish swimming peacefully among sharks has the right idea. Swim softly and carry a big club with sharp spikes on the end.

No need to attack others, unless they attack you - but when they do attack one is wise to have an affirmative defense, a strike-back response with teeth.

If you read the typical affirmative defense pleadings filed by typical lawyers, you'll find they often list only the name of each affirmative defense without alleging any of the facts necessary to establish the defendant's right to rely on the defenses.

This is a big mistake.

But that's what law schools are turning out these days for the $200,000 it costs to attend 3 years of law school with tuition, books, and living expenses. (They could do better by signing their students up with a subscription to my course.)

YOU are not going to make this stupid mistake nearly every lawyer makes.

You won't merely list the names of your defenses (e.g., laches, license, or payment.)

You will allege with each the facts that show you are entitled to the protection of each defense, and then you will prove each of those facts to win your case as a defendant.

This is smart.

Just as you've learned about drafting a complaint, case-winning litigants allege each and every ultimate fact necessary to establish each and every essential element of their case - whether they're the plaintiff or defendant - every fact you need to prove to prevail.

To merely list the names of your affirmative defenses weakens your case. You and the court end up confused as to which facts you need to prove to win.

Remember: Affirmative defenses are affirmative, not defensive.

Defendants never should let themselves be put on the defense.

Use affirmative defenses to take the ball from the plaintiff and drive for the goal on our end of the court. Then pound away at the plaintiff discovery and motions until the weight of admissible evidence in favor of your defenses is greater than weight of admissible evidence in favor of his complaint.

That's why I'm urging defendant to use affirmative defenses. Nothing less is good enough.

Winning defendants turn the tables on plaintiffs by affirmatively alleging facts in defense that (if proven by admissible evidence) defeat plaintiffs' claims.

Once affirmative defenses are properly pleaded, all that remains is to prove the alleged facts by the greater weight of admissible evidence.

The contest becomes one of who can pile up the most evidence.

That's how wise defendant’s win.

This also has the advantage of eliminating water-muddying arguments over relevance down the line when plaintiff refuses to respond to discovery requests. By alleging what you need to prove to win, you've clearly established what facts are relevant. If sufficient facts are not alleged, it's anyone's guess what is and what is not discoverable.

Stop worrying how other people do things.

Stop worrying how big shot lawyers do things.

Do things right.

Begin your defense on a solid footing.

Put plaintiff on the defense.

Then use your discovery tools (covered in a later class) to keep him on the defense.

This is how defendants win.

Defend affirmatively.

DISCOVERY

Fact Finding for Admissible Evidence

This is the Magic Bean.)

Without discovery, there's no hope of winning. Discovery is how you find facts that lead to the admissible evidence you need to prove the facts you alleged in your pleadings.

That's how you win: Discover more admissible evidence than your opponent, and put your "preponderance of admissible evidence" in the record. Discovery is called discovery because you use it to discover facts.

Use it to fill blanks in the court record.

You can actually win your case during the discovery phase of litigation.)

Yes. You can win before trial, if you use discovery wisely.

Use it to find facts leading to admissible evidence that tends to prove the essential elements in your pleadings and facts leading to admissible evidence that tends to disprove the essential elements of your opponent's pleadings.

That's how you win.)

Discovery is usually a bitter battle where liars are unmasked, those who try to "hide the ball" are foiled, and the groundwork of proof is laid to win your case before trial (as you should be able to do, if you do what this course teaches.)

Know your options.

Discovery can be used to:

- Find what your opponent has in the way of evidence.
- Force your opponent to admit facts and law helpful to your cause.
- Require your opponent to produce all sorts of documents and things.
- Obtain testimony, documents, and tangible evidence from non-parties.

Discovery may be obtained in civil cases using these five tools:

1. Requests for Admissions
2. Requests for Production
3. Interrogatories
4. Depositions
5. Subpoenas and other Court Orders

How to use each of these tactically and strategically is explained below.

By clever use of your five discovery tools, you can find any fact reasonably calculated to lead to admissible evidence that tends to:

- Prove the facts alleged in your pleadings.
- Dis-prove the facts alleged in your opponent's pleadings.

Winning requires nothing more than this:

- Pleadings that allege all essential facts.
- Discovery that finds facts leading to admissible evidence.
- Motions that force the court to enter orders favoring your case.

WHAT CAN YOU DISCOVER?

The most important thing you must learn from this book is this:

The rules allow you to discover any fact "reasonably calculated to lead to the discovery of admissible evidence".

Information you seek need NOT be admissible in court.)

Do NOT let anyone abuse you about this.

Your opponents and their lawyers will try to escape discovery of facts they want to hide by complaining to the court, "Objection. Information sought is not admissible.)"

Doesn't have to be.)

Expect your opponents and their lawyers to play dirty tricks like this and be prepared to resist by citing the rule and controlling appellate cases that explain what is "reasonably calculated to lead to the discovery of admissible evidence".

During discovery, facts you seek do NOT have to be "admissible" in court, so long as they are "reasonably calculated to lead to the discovery of admissible evidence".

Quoting directly from Rule 26 of the Federal Rules of Civil Procedure (controlling in all federal courts and generally followed by all state courts) "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence."

Due process includes your right to discovery, and your right to discovery is NOT limited to "admissible evidence".

Planning

This is where you absolutely must do your homework.

There's no point spending time and money to find evidence that won't:

- Tend to prove the facts alleged in your pleadings OR
- Tend to dis-prove the facts alleged in your opponent's pleadings.

Nothing else matters.)

Planning for discovery begins with listing those facts - the ones you alleged in your pleadings and the ones your opponent alleged in his pleadings.

Make this list.)

This will be your map for discovery success.)

Your list will keep you from chasing proverbial rabbits that waste time and energy better spent winning your case.

Evidence

Any evidence that doesn't tend to prove or disprove a material fact is, well, it really isn't evidence at all.

Evidence, by definition, is anything that tends to prove or disprove a material fact.

If it doesn't tend to prove or disprove a material fact, it isn't evidence, because it is inadmissible.

Fact information about a person, place, or thing cannot be evidence unless it has some bearing on a disputed issue, like something that needs proof.

It may clearly be information," but it isn't "evidence" unless it tends to prove or disprove a fact that's in controversy, i.e., a "material fact".

The best you can say about information unrelated to a dispute is that the information is only "evidence of itself," i.e., evidence that the information exists.)

If information proves nothing but itself, what good is it?

None whatever.)

Others haphazardly use the term "evidence".

You and I won't.)

We will use the term carefully, precisely, effectively - so we can defeat those who use words like "evidence" carelessly.

"Evidence is information that tends to prove or disprove a material fact."

Everything else is a waste of time, serving only to take you off the right path, confusing genuine issues, muddying the evidential waters, and dragging the court's attention away from the only thing that can resolve your word war: EVIDENCE.

So, make that list.)

List the essential facts alleged by the pleadings, those facts alleged in the pleadings that tend to establish the essential elements of both parties' respective positions.

You will then "prove" your own and "disprove" your opponent's essential facts.

Nothing else matters.

Written v. Spoken

Discovery comes in two flavors: written and spoken. Take note of the differences as you will most likely want as much written as possible. Written discovery can be used in an appeal. Spoken discovery can be re-iterated in writing but it's a tossup whether the appellate court would listen to an audio when reviewing a case. The likelihood is they will stick to the written documents which means you'll be submitting a transcript of the audio if necessary for your appeal.

Written discovery includes:

- Pleadings
- Requests for Admissions

- Requests for Production
- Interrogatories
- Subpoenas for Documents and Tangible Evidence

Spoken discovery includes:

- Depositions
- Live Testimony at Hearings
- Live Testimony at Trial

Right off we see critical differences between the two:

- Written requests can be carefully planned and incisively worded to get just what you want.
- Spoken requests can be planned somewhat but, in the heat of questioning a party or witness, with opposing counsel making objections and citing case law, with the judge, at hearings and trial, interrupting for one reason or another, and with the party or witness throwing curve-balls back at you instead of giving you straight answers, results are rarely as precise and useful as those you get with written discovery requests.

Written discovery requests can be served on the other party at any time and require the opposing party to answer in writing under oath, typically within a set number of days.

The beautiful part of written discovery requests is that they can get at precisely the information you need.

At depositions rabbit trails are many, while truly useful questions and answers are few.

By asking carefully-worded questions in writing, demanding admissions, and requesting that the other side produce documents and tangible things in support of your case, you put your opponent in a position from which the rules require him to respond faithfully, honestly, and completely.

Once your opponent answers in writing he cannot retract. He might complain he didn't understand a spoken question asked at a deposition, but that complaint won't get him far if the question was carefully written and he had a week or more to answer faithfully.

Many lawsuits are won through clever use of written discovery requests alone.

The best time to take depositions is after you know what your case is all about and what your opponent's position is on the issues by first using written discovery. Once you find out what your opponent is up to, by clever use of written discovery tools, you can ask the right questions and get valuable information at a deposition.

Otherwise, you are wasting time and energy on a fishing expedition.

In most jurisdictions, you are permitted to depose people once only, so it only makes sense to know as much as you can about your opponent's position before you schedule depositions.

Knowing how to use discovery wisely is the key to winning every kind of case: foreclosure, credit card debt, collection, family law, fraud, slander, etc.

In every case, the key to winning is using discovery wisely.

Request for Admissions

This is your most powerful written discovery tool. Use it to embarrass your opponents.

Make them admit things that will help your case. Make them admit anything "reasonably calculated to lead to the discovery of admissible evidence."

Force the other side to tell the truth so you can win. Force your opponent to admit each element of your case, facts and law.

Get tough. Dig deep. Make him show what he's got.

If he does not respond in good faith, you can move the court for an order finding facts admitted for all purposes against his will. If he will not respond as the rules require, move the court to deem your requests admitted by default. In some cases, you may even succeed in having his pleadings stricken and his case dismissed.

This is part of your due process right.

Review what was section about the Complaint and getting a responsive Answer as your first discovery tool.

Then, using requests for admissions force the other side to poke holes in their own case.

Attach copies of documents to your requests, and force your opponent to admit they are true and correct copies or that a signature thereon is his.

Force him to admit details. Force admission of the facts and law you must prove to win.

If you're the good guy who's supposed to win according to principles of justice and fair play, there's nothing the bad guy can do but comply with the rules and help you win.

Each item for which an admission is requested should appear in separately numbered paragraphs as you learned before in drafting pleadings.

Each numbered paragraph should be written as a single sentence, the same way you learned to draft pleadings in an earlier class:

- SINGLE SUBJECT
- SINGLE VERB
- MINIMUM ADVERBS AND ADJECTIVES

Each numbered paragraph is a separate statement, *not a question or request*.

A request for admissions begins with the preamble saying, "Admit or deny each of the following numbered statements of fact and law:"

A good preamble will include direct quotes from the rule itself, so the other side is on notice what the law requires and what will happen if he does not respond to each numbered paragraph in accordance with the rules.

In some jurisdictions, failure to admit or deny within the time allowed is deemed an admission. For example, if the time allowed to answer a request for admissions is 30 days in your jurisdiction, but the other side fails to respond within the time allowed by the rule, the court may rule upon your motion, of course that all items are admitted.

If any items are objected to without explanation and the court finds the objections objectionable, the court may deem those items admitted.

The responding party is required to either admit, deny, or give a good faith explanation why he can neither admit or deny.

There are no excuses. The rule applies to both sides in every case.

If you write your admission items carefully, it will be impossible for the other party to object in good faith.

All that's needed are simple statements of the facts and law you need to prove so you can win.

Put each statement you wish admitted as a single sentence in a separate numbered paragraph.

- SINGLE SUBJECT
- SINGLE VERB
- MINIMUM ADVERBS AND ADJECTIVES

If the other side refuses to admit all your numbered items, they will surely admit some of them, and you have that much less to prove later.

If you know a denial is fraudulently given, get mileage out of the other side's law-breaking practice by using other discovery tools to prove your opponent lied in his response to your requests for admissions. Then you are well on your way to a quick and favorable judgment.

Denials must be specific; they must speak straight to the matter and not beat around the bush.

Objections must be explained in detail.

If you don't get the response, you believe good faith requires, move the court for an order to compel good faith responses or to deem the items admitted. Set your motion for hearing and go to court to tell the judge what's going on and why the court should force the other side to tell the truth. This is very effective.

For example, suppose you're the defendant. The other side has sued a half-dozen other people recently with the same claims for damages. You aren't liable, of course. You're one of the good guys. The opponent is looking for some easy money by pulling wool over the judge's eyes. His complaint is a collection of fabrications and exaggerations designed to ruin your reputation and extract from you an unfair sum of money. By examining the court file, you find the same plaintiff harassed others in the recent past, making similar claims. Get the clerk to give you certified copies from other cases that this out-of-control, unlawfully litigious plaintiff has filed in the past. Certified copies from the clerk are admissible over all objections.

Get the plaintiff to admit he is plaintiff in other cases and that the damages he seeks in those cases is similar to the damages he claims in your case. You thereby eliminate the necessity of being required to prove he has filed the same complaints against others.

One paragraph in a request for admissions.

The other side can be required to admit facts and law for you.

The other side's admissions become a permanent part of the court file and can be relied on at trial without further proof or testimony whatsoever. Use this tool.

In a real case in Florida the plaintiff claimed she suffered physical injuries when she was touched on the shoulder by a workman installing carpet in her home. The complaint demanded compensation for medical expenses, costs of hospitalization, lost wages, rehabilitation expenses, and similar outrageous damages, for being touched on the shoulder.

The complaint even sought money for her husband's loss of his wife's consortium. That word means, physical intimacy. Well, as it turned out, this same lady and her husband made an almost identical claim two years earlier when they were in a traffic accident, alleging “loss of consortium.”

By using requests for admissions, the attorney was able to require the plaintiff to admit she did not, in fact, suffer any physical injuries at all. There was never any hospital visit. She lost no wages whatever. As for the “consortium,” nothing ever came of that claim. The case never went to trial.

Admissions and other discovery techniques explained in this course ended the lawsuit long before my client was required to foot the horrible expense and risk the dreadful uncertainty of trial by jury. The case was bogus from the get-go.

By using discovery, the plaintiff was forced to admit that facts alleged in her complaint simply were not true. The complaint was false and known to be false when it was filed.

Requests for admissions can put the other side's case in the light it deserves.

Use them to drag truth out into the sunshine where your opponents' dark secrets can be discovered.

A request for admissions is very simple to write.

It's similar to a complaint. It alleges facts the responding party must admit or deny.

Used carefully, a request for admissions can prove your case without more.

Any fact a party admits in response is deemed admitted for all purposes. Here's an example:

IN THE THIRTIETH JUDICIAL CIRCUIT COURT
IN AND FOR SUNSHINE COUNTY, FLORIDA

Case No. 2012-123
Judge Bullybench

DONALD TRUMP,
Plaintiff,

v.

JOE XI JING PING,
Defendant.

REQUEST FOR ADMISSIONS

PLAINTIFF DONALD TRUMP requests Defendant JOE XI JING PING to admit the truth of the following statements of fact:

1. You were employed by Plaintiff to deliver grapefruit.

2. You were allowed to use Plaintiff's grapefruit delivery truck.

3. On 17 May 2012 you signed a document in the presence of Plaintiff who also signed the document in your presence.

4. You received $3,000 from Plaintiff on 17 May 2012.

RESPECTFULLY SUBMITTED this ____day of _____2012.

_____
DONALD TRUMP, Plaintiff

[Certificate of Service]

When you want to force your opponent to admit some certain law or rule of court or the authenticity of documents (e.g., contracts, phone bills, canceled checks, etc.) and other things (e.g., photographs, recordings, video footage, X-rays, etc.) or even the nature or condition of things (e.g., blown-out tire that caused an accident, digital watch that stopped at a particular moment in time, a broken tail light, etc.) you can use a request for admissions to do this also, if the law or facts you are trying to discover in this way is "reasonably calculated to lead to the discovery of evidence that will be admissible in your case." Here's another example:

IN THE THIRTIETH JUDICIAL CIRCUIT COURT
IN AND FOR SUNSHINE COUNTY, FLORIDA

Case No. 2012-123
Judge Bullybench

DONALD TRUMP,
Plaintiff,

v.

JOE XI JING PING,
Defendant.

REQUEST FOR ADMISSIONS

PLAINTIFF DONALD TRUMP requests Defendant JOE XI JING PING to admit the truth of the following statements of fact:

1. The document attached as Exhibit A accurately states Rule 1.370 of the Florida Rules of Civil Procedure.

2. The document attached as Exhibit B accurately states the entire contents of a written contract dated 17 May 2012 and signed by you.

RESPECTFULLY SUBMITTED this ___day of _____2016.

_____
DONALD TRUMP, Plaintiff

[Certificate of Service]

Request for Production

This discovery tool allows you to require the other side to produce documents and things for inspection. It could be a notebook, a canceled check, an automobile, anything relevant to the outcome of your case. They must produce.

If they don't produce, you can move the court to strike their pleadings, dismiss their case, or have them held in contempt of court if you follow the precise step-by-step procedures set out elsewhere in this workbook.

Every civil jurisdiction in the United States gives litigants the right to obtain production of documents and other tangible things by serving the other side with a written request for production.

Like other discovery tools, a request for production can seek things that might not be admissible at trial, so long as their discovery before trial is "reasonably calculated to lead to the discovery of admissible evidence," which is evidence that could be used at trial.

Even though a document or thing may not be admissible later on, you nonetheless have the right to demand its production if it will help you discover things that will be admissible.

This is a very powerful tool for getting at the truth. Use it.

For example, rather than use one of your limited interrogatories to discover a party's date of birth by asking a direct question in an interrogatory, request production of their birth certificate, driver's license, or some other document that will provide the necessary information.

Rather than using a valuable interrogatory to ask what were the terms of a certain written contract, request production of the contract itself.

In jurisdictions where interrogatories are limited in number, this is an essential tactic.

If you are involved in a lawsuit arising from an automobile accident, for example, and the other side is claiming physical injuries, hospitalization expenses, lost wages, and such like damages, request production of their medical records, invoices of health care providers, canceled checks paid to health care providers, payroll records, and any other document or thing that might reasonably lead to discovery of evidence of actual losses.

If they cannot produce canceled checks, invoices, or other records of their alleged physical injuries, you win. Yes. It is that simple.

Requests for production may be served more than once in many jurisdictions. You're not limited to just one bite at the apple.

Often production of one thing leads to the need to require production of other things you may learn about only after the first production.

Most civil jurisdictions permit multiple requests for production so that litigants have a fair and open opportunity to build their case for trial long before the trial date comes around.

Indeed, part of the purpose for pre-trial discovery stated in the official rules is to narrow issues and promote settlement.

By getting the “goods” on the other side, you usually can encourage a reasonable settlement so both sides are spared the expense and possible surprise that too often results from full-blown trials.

Those who refuse to obtain production of all documents and things needed to prove their case are only contributing to their potential for loss at trial.

You have the right to obtain discovery of documents and things through requests for production. Use that right to build your case on a solid foundation before you go to trial.

When a requested production is not produced, the proper procedure is to file a motion to compel production. Set your motion for hearing. Explain to the court how the document or thing requested is either admissible as evidence at trial or will assist you to discover evidence that will be admissible at trial.

Unless a document or thing requested is totally unrelated to your case, the court should grant your motion and give the other side a limited amount of additional time to comply with your request.

See the material on compelling discovery for further details on how to get your way when the other side refuses to comply with rules of discovery.

Requests for production may seek any documents or things admissible or likely to lead to discovery of admissible evidence:

- contracts,
- agreements,
- death certificates,
- court papers from another case,
- receipts,

- canceled checks
- any document at all.

As for things, there is no limit other than the necessity that the thing requested is either admissible evidence as it stands or will assist you to discover admissible evidence.

Anything within the rule is fair game. The other side must produce according to the rules.

Just remember when you're writing your requests to be specific.

Be as precise as possible in your description of the documents and things you wish to be produced.

If possible, describe the document or thing in terms of the issues of the lawsuit, i.e., making it clear in your request not only what the document or thing is but also how it relates to the case.

Be exact. Pin the other side down. Don't leave any squirming room.

Bracket dates, places, people involved, and so forth so as to prevent the all-too frequent objection, “Over-broad, vague, etc.” Don't be over-broad or vague.

Pin precisely what you want. Then make certain you get it.

Use requests for production to build the facts of your case and make your winning record in the court file before trial. It makes no sense to wait until trial to obtain documents and things you can obtain before trial.

Use requests for production to get all the documents and things you need to win your case, before trial.

A request for production is similar in form to a request for admissions but, rather than asking the responding party to admit, it asks the responding party to produce documents and things.

A typical request for production follows:

IN THE THIRTIETH JUDICIAL CIRCUIT COURT
IN AND FOR SUNSHINE COUNTY, FLORIDA

Case No. 2012-123
Judge Bullybench

DONALD TRUMP,
Plaintiff,

v.

JOE XI JING PING,
Defendant.

REQUEST FOR PRODUCTION

PLAINTIFF DONALD TRUMP requests Defendant JOE XI JING PING to produce for inspection and copying the originals of the following documents and things at the offices of Plaintiff or such other place as the parties may hereafter agree.

1. All corporate records of Grapefruit Delivery Corporation.

2. All records of money or other consideration received by you for sale or delivery of grapefruit from 17 May 2012 to the present, including but not limited to invoices and bank statements.

RESPECTFULLY SUBMITTED this ___day of _____2012.

_____
DONALD TRUMP, Plaintiff

[Certificate of Service]

Interrogatories

A very powerful and economical way to get at the truth is written questions called interrogatories. Don't let the long word mislead you.

Interrogatories are nothing more than direct questions written out and served on the other side, questions that must be answered under oath, usually within a set time period.

To gain the court's approval, questions must be reasonably written to get at facts relevant to the case at hand.

You cannot ask in a breach of contract case, for example, “When did you stop beating your wife?” Such questions are outside the scope of lawful discovery.

Interrogatories should be designed to get facts relevant to the case.

Interrogatories can be in the form of direct questions, e.g., “How long have you lived at your present residence address?” or they may be in the form of commands, e.g., “Identify all persons having any knowledge whatsoever of the facts alleged in your complaint.”

In some jurisdictions there's a limit to the number of interrogatories you can use. Check your local rules. If that's the case in your jurisdiction, it may be a good idea to discover all you can about the other side's case by requests for admissions and requests for production before using your valuable, limited number of interrogatories.

Since you may be allowed to depose witnesses once only, it's good practice to learn all you can before taking depositions by first using written discovery requests so you'll know what questions to ask when you finally depose the other side. Use requests for admissions and

requests for production to discover all the facts you can, then use a few interrogatories to fill in the blanks, before taking depositions.

If your jurisdiction limits use of interrogatories, save a few questions for after depositions so you can use your remaining interrogatories to get last-minute information from the other side before going to trial.

Make interrogatories meaningful.

Get to the point. Be direct. Use simple language. Ask questions that will help you win your case. Don't waste your interrogatories.

Many young lawyers use interrogatories to get information they could better obtain by requests for admissions or requests for production of documents and things. If you wish to identify your opponent, for example, you could use an interrogatory to ask his name, or you could request production of that person's birth certificate, driver's license, or similar documents that will give you the information you need.

If you wish to establish that the other party was at a particular place at a particular time, you could request him to admit he was there or request copies of hotel or restaurant receipts for that time period, instead of using a valuable interrogatory to ask him where he was.

Pin the other side down. Be exact. Make your winning record before trial.

Many inexperienced lawyers use interrogatories to discover information meaningless to the case at hand. For example, an interrogatory commonly-used by beginning lawyers commands the other side to "Identify all persons assisting you to answer these interrogatories."

In most lawsuits it doesn't matter who assisted with the answers, since the party himself must sign and swear to his responses. It makes no sense to waste valuable interrogatories to discover useless information.

Give the other side no weasel room. Pin him down.

Write your interrogatories carefully and use them sparingly if your jurisdiction limits interrogatories to a maximum number.

Save a few until just before trial to close any remaining gaps in your discovery and perfect your winning record.

If requests for admissions and requests for production are not limited in your jurisdiction, use admissions and production to get all the facts you can before using interrogatories.

Don't dissipate your discovery powers.

If you use discovery wisely and have a winnable case you should be able to win before trial through settlement or summary judgment.

Interrogatories are simply written questions that must be answered under oath in writing.

Interrogatories can narrow issues of fact before taking depositions. This gives you an advantage over those who take depositions before they know what a case is about or what valuable testimony a witness may be able to offer.

When drafting interrogatories, ask your questions in such a way that only one answer (i.e., the answer you want) is possible.

The following is an example.

IN THE THIRTIETH JUDICIAL CIRCUIT COURT
IN AND FOR SUNSHINE COUNTY, FLORIDA

Case No. 2012-123
Judge Bullybench

DONALD TRUMP,
Plaintiff,

v.

JOE XI JING PING,
Defendant.

_____/

INTERROGATORIES

PLAINTIFF DONALD TRUMP propounds the following interrogatories to Defendant JOE XI JING PING.

1. List the names, addresses, and telephone numbers (if known) of all customers to whom you sold or delivered grapefruit from 17 May 2012 until the present, listing also the gross revenues received from each such customer.

2. List the names, addresses, and telephone numbers (if known) of all persons having any knowledge of your sales of grapefruit from 17 May 2012 through the present.

3. List the names, addresses, and telephone numbers (if known) of all persons you intend to call as witnesses at trial in your defense.

4. List the names, addresses, and telephone numbers (if known) of all persons holding shares in Grapefruit Delivery Corporation at any time from 17 May 2012 to present.

RESPECTFULLY SUBMITTED this ___day of _____2012.

_____

DONALD TRUMP, Plaintiff

[Certificate of Service]

Note the use of specific dates to pin down answers, instead of giving wiggle-room to object.)

Depositions

Depositions are proceedings where parties examine and cross-examine each other and witnesses under oath in the presence of a Notary or stenographer.

Every word spoken at the deposition can be printed as a deposition transcript (if needed.)

The deposition transcript can then be filed with the court clerk before trial to prevent parties and witnesses from later changing their stories.

It's always good to know what the other side and each of the witnesses is going to say before going to trial and putting them on the stand.

If they tell a different tale in court, you have a deposition transcript of them prior sworn statement to wave in their face. “Were you lying then, or are you lying now?”

The most important point to note about depositions is that they are best used after you've learned enough about the case to ask the best questions.

Don't take your depositions until you know enough about the case to do a thorough job of questioning the deponent. In most jurisdictions you only get one bite at the deposition apple. You cannot depose someone again and again. You may only get one chance.

So, if you don't yet know what your opponent's case is all about, how will you know what questions to ask at a deposition?

Lazy lawyers or lawyers whose clients cannot afford to pay them to do the job right hurry to take depositions because, frankly, it's easier to sit at a deposition and fire questions at someone than it is to sit alone in your office writing well-crafted requests for admissions, requests for production, and interrogatories.

Effective lawyers do not rush to deposition.

Effective lawyers get all the data they can using written discovery. Then, and only after studying all they can learn by interviewing witnesses informally and going over responses to written discovery requests, they may if needed schedule depositions so they can ask questions and get answers that will be admissible at trial – statements made under oath in the presence of a court reporter.

Do your written discovery before taking depositions.

Gather all the information you can by first using written discovery tools like requests for admissions, written interrogatories, and requests for production. Know in advance what a deponent is going to say before you begin asking him questions at a deposition.

Some lazy lawyers use depositions as a "fishing expedition," searching for facts they could have discovered before deposition. They ramble and waste precious time, time for which the attorneys and court stenographer must be paid. The more they ramble, the longer the transcript becomes. More transcript pages mean more money out of the clients' pockets. They have little or no idea what the deponents know. They try to use premature depositions to find out, when they could use depositions only to pin a party or witness to what they want for testimony at trial.

Remember: Discovery is aimed at getting facts on the record.

The more facts you get on the record the better your chances of winning.

If you learn what a deponent knows before you depose him, you can ask the right questions and pin him down.

Once he testifies at deposition, he'll have a hard time changing his story at trial.

If you do discovery well, your case may not go to trial. You may be able to settle or get summary judgment on the basis that there are no disputed issues of fact relevant to the outcome.

Discovery alone can settle cases.

Please take note that there is nothing you can ask a witness at trial that you cannot ask the same witness before trial.

Depositions and written discovery tools give you an opportunity to pre-try your case, to know what will come out at trial (if the case doesn't sooner settle.)

There is no testimony you can get out at trial that you cannot get on the record before trial.

Pin your witnesses down.

Depose them.

But, do not depose them until you know what questions to ask and have all the documents and things you need to show them while you do the asking.

Be prepared.

Good lawyers know what they're going to ask a deponent before they arrive for a deposition. Some write out their questions. Others make an outline of points to be touched upon.

Only the most inexperienced or careless lawyers show up for deposition unprepared.

If you have no idea what to ask a deponent, you aren't ready to depose.

It may not be necessary to write out in advance every single question you intend to ask, however it is downright foolish not to have at least an outline of points you want to get to and the documents and things about which you intend to ask questions.

Don't be pushed around by the other side during depositions. There are only a few things that are “out of bounds” at depositions. Don't be bamboozled by intimidating lawyers. In most jurisdictions, protocols for examining and cross-examining deponents at depositions are looser than at trial where rules of evidence are strictly enforced.

If the other side begins to object to every question you ask, request a conference with the other side outside the room, away from the deponent's hearing. Ask what the point of the objections is.

Know the official rules by heart and have a copy of the rules with you.

If the other side abuses the rules by interrupting with objections you believe are improper under the rules, terminate the deposition and immediately file a motion with the court for a ruling before resuming the deposition.

If you continue a deposition deprived of your right to get what you want because of the other side's unruly and unlawful objections, you may not get another chance.

Know the rules.

If you are represented by a lawyer, make certain your lawyer does not allow the other side to interrupt without good cause.

Depositions are powerful tools, rightly used.

They can also be horrible wastes of time and money.

Preparation and determination to get what you have a right to put on the record are essential to success. Be very precise in your questions. Use simple sentences. Keep your questions simple and to the point.

Allow no weasel room for a deponent to give half-answers or evasive responses. If a deponent begins to weasel, pin him down. If you can catch him in a lie, you may gain valuable ground in your lawsuit that otherwise would be missed.

Be as polite as you can without being pushed around or otherwise abused.

You have a right to ask questions aimed at getting to relevant facts in your case. The deponent has a duty to answer truthfully, candidly, and in good faith.

Do your best to be nice, but don't lose your case because you were afraid to insist on valid answers.

Whatever a witness says at deposition can be used against that witness if he changes his story at trial. This is called impeaching a witness, i.e., demonstrating to the court that a witness has no sense of honesty, that his testimony is not reliable. If a witness is asked a question at trial and gives an answer different from the answer he gave at deposition, you can wave the deposition transcript in his face on the witness stand and ask, "Were you lying at the deposition, or are you lying now?"

This has a decided effect on judge and jury.

The right to depose witnesses under oath before trial is very powerful.

Use it wisely. Be prepared. Get to the point.

Don't let the other side evade your questions or push you around with unfounded objections or questions beyond the scope of discovery.

IN THE THIRTIETH JUDICIAL CIRCUIT COURT
IN AND FOR SUNSHINE COUNTY, FLORIDA

Case No. 2012-123
Judge Bullybench

DONALD TRUMP,
Plaintiff,

v.

JOE XI JING PING,
Defendant.

NOTICE OF TAKING DEPOSITION

YOU ARE HEREBY NOTIFIED that the undersigned will take the deposition of DONALD TRUMP at the offices of Esquire Deposition Services, 515 North Flagler Drive, West Palm Beach, Florida 33401 (800-330-6952) at 9:30 a.m. on 12 June 2012.

This deposition is for discovery and for use at hearings and at trial.

TIME RESERVED is six (6) hours.

GOVERN YOURSELVES ACCORDINGLY.

_____
JOE XI JING PING, Defendant

[Certificate of Service]

Subpoenas and Court Orders

Here's power you didn't know you had. The power of court orders.

Subpoenas are just a fancy name for a special court order commanding a non-party to appear for trial, hearing, or deposition, or to turn over papers and things listed in the subpoena.

Other court orders are as widely varied as your imagination.

For example, an attorney once persuaded a judge to order the Sheriff to send one of his deputies with me to remove customers and employees from a pharmacy then put padlocks on the doors. By this tactic he was able to secure the pharmacy's customer prescription lists

and show the court how the employees were violating terms of my client's contract with them. According to the attorney, the deputy was a big, burly fellow armed with pistol, handcuffs, and one of those giant 5-cell flashlights.

There was no guff from the employees. Everyone left, and the place was locked up tight.

Discovery power? You bet.

When you're the good guy in court, you have more power than you might ever imagine.

That's what's so great about our legal system. It may have a few flaws here and there, but it works beautifully most of the time, and it's your power to win.

With subpoenas and other miscellaneous court orders you can actually have people picked up in handcuffs and locked behind bars if they refuse to obey. I've done it with deposition witnesses who refused to answer my questions after being ordered by the court to do so.

Judges are 800-pound gorillas in a black robe. You may be a Secured Party Creditor but only foolish people willingly disobey court orders without going through the process of appeals. Unless you've got a really good reason and are willing to go to jail for your beliefs, don't do it.

Once a court acquires jurisdiction over a person because he elected to become a plaintiff by filing a lawsuit or was unlucky enough to have a lawsuit filed against him, that person has rights and powers he didn't have before, rights and powers called due process and The Rule of Law.

You lose a bit of freedom by coming under the court's jurisdiction in a lawsuit, but at the same time you acquire amazing rights you did not have before. Many of the SPC gurus are only talking about parking tickets and traffic “violations.” We're not dealing with petty stuff. Some people are dealing with life changing and devastating issues.

Evaluate your situation and remember, there are always consequences for what you do whether you're and SPC or not.

Among these is the right to exercise your subpoena power or to obtain court orders directing others to assist you to put truth on the public record, bringing evidence favorable to your cause so good guys win, as they always should.

Subpoena power is a formidable weapon truth has against liars.

With subpoena power and other court orders you can obtain bank records, require the President of the United States to appear for questioning, or command the local school board to explain its curriculum policies.

Subpoenas are orders by which you command the world to help you win.

Subpoenas can command anyone at all to do pretty much anything you wish them to do, so long as legitimate discovery is your goal, i.e., so long as it's reasonably likely you can thereby obtain knowledge that may lead to evidence that will be admissible at trial.

Court orders are issued by a judge, of course, either upon the motion of a party or upon the court's own instigation.

Court orders can command anyone to do anything.

So long as getting truth on public record is the goal, a court can command anyone to do anything necessary to see that the record is complete before trial.

Otherwise, how would any of us ever find justice?

For example, suppose you wish to examine your neighbor's barn to discover evidence you need to prevail at trial. If your neighbor is an adverse party in the lawsuit, you can bet he's not going to let you go snooping around his barn.

Even if your neighbor is not a party to the lawsuit, it isn't likely he will permit you to climb around his expensive equipment or put yourself in danger for which he may be uninsured. You'll need a court order.

Fortunately, if you can show the court, you genuinely need to look around the neighbor's barn for evidence relevant to your case or facts that are "reasonably calculated to lead to admissible evidence," you'll get the order.

You may have to carry out your inspection under the supervision of an officer of the court (e.g., a sheriff's deputy) however the court will issue an order permitting you to do the inspection, if you satisfy the judge that the facts you seek are "reasonably calculated to lead to the discovery of admissible evidence."

Necessity and reasonableness are the factors considered by the court when called upon to issue such discovery orders.

So long as your goal is to discover facts "reasonably calculated to lead to admissible evidence," the court should issue any orders reasonably necessary for you to discover those facts.

Other court orders enforcing your discovery rights include orders directing medical examinations, psychological evaluation, or virtually anything reasonably calculated to lead to discovery of admissible evidence.

Subject to local rules, subpoenas can be issued by attorneys of record or by the clerk of court upon application of any party to the suit.

The force of every subpoena is found in its opening words: "YOU ARE COMMANDED."

We're talking about real power here.

Subpoena power.

Power rightfully yours to use. Use it.

Subpoenas can command persons to appear for questioning, either at depositions or at hearings or trial before the court.

Subpoenas can also command persons to produce documents and other things specified in the subpoena.

In most cases subpoenas should be formally served on the person they command, i.e., they should be personally delivered into that person's possession by an authorized process server who can provide the court with a disinterested affidavit attesting that delivery was made on such-and-such a date.

Effective service triggers the power. Don't let adversaries stonewall you. Use all your discovery tools.

Get truth on the public record.

1. Use admissions to pry into statements of fact, opinions of fact, and the application of law to fact.

2. Use production to require your adversaries to bring in documents and other tangible evidence favorable to your cause.

3. Use interrogatories to demand answers to critical questions that must be answered under oath under penalties of perjury.

4. Use depositions to mop-up in your information warfare, digging for those special points you may have missed with your initial written search for discovery of evidence, impeaching your adversary if possible.

5. Use the court's power and your own subpoena power to close every loophole and get ready for trial.

Consult your local rules for how to issue and serve subpoenas in your jurisdiction. In some jurisdictions, attorneys as officers of the court, may issue subpoenas, however it's usually not possible for non-lawyers to issue subpoenas. The clerk of court, however, can issue subpoenas in most jurisdictions if you present the proper paperwork. Again, consult the local rules for more details.

Once a judge orders a thing to be done, failure to comply comprises contempt of court and may be punished by severe fines and jail terms.

Filing Your Evidence

After getting all the facts you need to win your case and working through all those facts to sift out the admissible evidence, you must be CERTAIN all your evidence is IN THE COURT FILE so it will be there for an appellate court to review if you lose at the trial level and must appeal.

For example, you may have forced your opponent to admit some powerful stuff at a deposition, but if the official transcript of that deposition stating in writing what your opponent said does not end up in the court file, it won't be seen by an appellate court if you must appeal.

If your opponent produces some documents that are evidence in support of your case, those documents in your file will never be seen by an appellate court.

All is well if you don't lose at the trial level.

But if you do lose at the trial level and must appeal your case, it is imperative that everything you need the appellate court to see is IN THE RECORD.

One way to do this is with a Notice of Filing form.

The following is an example. You should always consult the local rules in your jurisdiction before filing anything, because some courts have different ways of doing things, but the principle demonstrated here will put you on the right path.

Here's an example:

IN THE THIRTIETH JUDICIAL CIRCUIT COURT
IN AND FOR SUNSHINE COUNTY, FLORIDA

Case No. 2012-123
Judge Bullybench

DONALD TRUMP,
Plaintiff,

v.

JOE XI JING PING,
Defendant.

NOTICE OF FILING

PLAINTIFF, DONALD TRUMP hereby gives notice of filing the following documents attached as exhibits numbered as follows:

1. Copy of transcript of 12 February 2020 deposition of JOE XI JING PING.

2. Copy of documents provided to plaintiff in defendant's response to plaintiff's First Request for Production.

3. Copy of defendant's sworn written response to plaintiff's First Set of Interrogatories.

_____
DONALD TRUMP, Plaintiff

Notice that copies of the originals are filed. If there is any question as to the authenticity of those copies, that can be sorted out at a later time.

Never send valuable originals by postal mail. In most modern jurisdictions, filing can be done by email or via an "e-portal" provided by the court.

Discovery is how you win lawsuits.

First of all, your pleadings must be solid. If you already studied the class on pleadings, you know some discovery can be done at the outset using pleadings alone.

Next you use your three written discovery tools.

Then, if needed, you use depositions, subpoenas, and court orders to get the rest of what you need to win.

Discovery proves the facts alleged in your pleadings and disproves the facts alleged in your opponent's pleadings.

Your own pleadings are a waste of ink if you cannot prove the facts you allege.

On the other hand, if you effectively plead all facts needed to establish all essential elements of your cause(s) of action as plaintiff or your affirmative defense(s) as defendant, then if you use your discovery tools effectively to put into the court record the greater weight of admissible evidence in support of your alleged facts (i.e., more than your opponent has offered in support of his alleged facts) you win. You're learning the easiest way to do this.

MOTIONS AND HEARING

Fact Finding for Admissible Evidence

This is the Magic Bean.

Motion sickness happens in court, too!

It happens to people who don't know how to use motions, people who move the court for the wrong reasons.

There's only one reason to move the court.

This class will show you how to **move** the court correctly to get the job done!

It's easy to do ... once you learn the basics set out in this class.

In this class you'll learn how to move your case forward in a way that's ridiculously easy to understand. We'll give examples and practical tips to help you win your lawsuit ... with or without a lawyer.

Whether you're a defendant or plaintiff, you protect yourself from loss by moving your case along, keeping your position alive and kicking so it doesn't fall through the cracks or get lost in the storm of arguments and evidence presented by your opponent.

Here's how you get the case moving along at the pace you want it to be going.

You want to win your case, but you also want to get it over with usually as quickly as possible. You and your family need to resume a normal lifestyle after the lawsuit is over, without the emotional stress, prolonged delay, and crushing expenses required to keep on fighting.

Try to win quickly.

Few things in life are more satisfying than winning a lawsuit. It is also true that few things are more financially draining or emotionally debilitating than a lawsuit that drags on for years. Move your case forward and get it over with if at all possible.

In fact, keeping your case moving forward is what it takes to win. Parties who fall prey to the other side controlling by failing to move their own case forward with enthusiasm usually end up the losing party.

If you can stay out of court in the first place, of course, you should do so. Nobody in his right mind wants to be burdened by the costs and disruptions common to every kind of lawsuit. The best course of action when a lawsuit threatens is to attempt settlement.

Do everything reasonable to avoid litigation.

But, if you're stuck in a legal battle and can't avoid conflict some other way, such as when you're the injured party and the other side refuses to pay, you'll be way out in front once you learn how to deal with your cases and learn about motions and hearings.

You'll know how to move your case forward, avoid unnecessary delays, and push dispositive issues through the court to a successful and profitable conclusion. Dispositive

issues are those that tend to dispose of a case, issues that are relevant to the outcome, issues that tend to influence the outcome.

Courts don't usually move until one party or the other files a motion. Judges do nothing unless one side or the other takes the initiative to move the court by filing a motion.

Motions by themselves, however, are empty gestures until the court rules on them. You can file dozens of motions in your case, but until the court enters orders on your motions, either granting or denying them, you've accomplished nothing of any lasting value.

You must not only move the court with motions, but must also make persuasive legal arguments and in some circumstances, present evidence that encourages the court to grant your motions while the other side busies itself with arguments and evidence it hopes will convince the court to deny your motions.

That's how lawsuits go forward, by "moving" the court to do something.

This chapter covers motions and hearings in both state and federal courts in this class.

- In State Court: Motions are usually argued at hearings.
- In Federal Court: Motions are usually argued on paper.

There are exceptions to the foregoing general rule. Some state court motions may be ruled on without a hearing. Some federal court motions require a hearing.

However, in general, the rule applies. In the following pages you'll learn what you must do to get a favorable judgment in both state and federal courts.

In state court, for the most part, if you want a judge to rule on a motion, you'll probably have to set the motion for hearing. You can set your own motions or the other side's motions for hearing but with few exceptions, if you don't set state court motions for hearing they may never be ruled on. How to set hearings will be explained later.

Failure to follow the simple rules for motions and hearings is the reason many people with winnable cases end up losing.

In federal court, with a few exceptions, if you're the moving party called the *"movant,"* instead of arguing your motion at a hearing, you argue by filing a *memorandum in support of your motion*. This motion tells the court what order you want the judge to enter on the books.

The memorandum tells the court why the judge should enter the order, explaining the legal and factual basis for your motion and the order you seek. Then the non-moving party files a "*response memorandum* in opposition to your motion, arguing the legal and factual reasons why your motion should be denied.

That's how easy it actually is and you don't need to pay some lawyer $3500 or more for that.

Making motions by themselves is not enough whether you're in state or federal court.

Until a judge rules on your motion by entering an order, your motion doesn't do anything except get filed in the court records for no reason other than taking up space.

It's up to you to get your motion ruled on.

This is usually at a hearing in state court where both sides have an equal opportunity to argue for and against or in federal court after the judge has time to read and consider your

motion, your *memorandum in support*, and the opposing party's *response memorandum in opposition*.

You can effectively use these things to win your case, totally on paper for the most part.

You also have to familiarize yourself with your local rules so you can win your case.

The Right to be Heard

An ancient maxim of law states simply, *"A judge who rules without first hearing both sides, though his judgment may be just, is not himself just."*

Justice implies this essential right to be heard.

One might rather say, true justice requires *the right to be heard*. The court should give both parties an equal opportunity to present the facts and law on which the court is required to rule with regard to those facts. Each side has a different point of view, but both are given an equal chance to argue their case free from the court's prejudice or penalty.

Anything less is un-American. However, simply arguing to a judge that your "constitutional rights have been violated," and expecting such a simplified argument to cause the court to do anything at all in your favor is a total, complete, absolute waste of time no matter what anyone tells you to the contrary.

Courts don't operate that way whether you like it or not.

Courts act on pleadings and on motions that *move the court* to enter orders usually after a hearing where both sides argue their motions *in person* or after the court has read and considered written motions supported by *memoranda* and *responses in opposition* which will be explained more fully later.

The average courtroom is witness to dozens of complex and sometimes heated legal arguments in the space of an average day. The typical judge reads hundreds of pages of pleadings, motions, notices and memoranda as well as official documents and court records, between the time he arrives at the courthouse in the morning and the hour when he finally heads home.

Multiply this judicial workload by the number of judges in a typical courthouse, then multiply by the number of days in a year, and you quickly realize why there must be *order in the court*.

Courts have strict rules that govern everyone equally giving each person the right to put forth his arguments succinctly and, as the litigant hopes, convincingly, while the court tries to pay attention to both sides and render fair judgments in accordance with the court's own rules and established protocols.

Your *"right to be heard"* doesn't mean the right to yell back-and-forth like feuding hillbillies. I can say that because I live in the Ozarks.

Arguments outside the courthouse are not controlled by rules of procedure or rules of evidence. Inside the courtroom everyone is expected to act with dignity and decorum. One hopes people would be civil to each other at home or on the golf course or baseball field, but in the courtroom, civility is imposed by law. Violators can suffer serious adverse consequences.

Arguments in court are presented with pleadings and motions, sometimes amplified by memoranda or persuasively polite presentations at hearings or at trial, never by raising one's voice or making offensive comments about the opposing party or attorney. There's

absolutely no tolerance for rudeness. Bad behavior always works against you so don't do it.

There's no reason to start trying to force your will and make statements that would be considered outbursts.

Pleadings state what a case is about. Complaints state what plaintiffs want. Answers state why defendants should not be required to pay. Counterclaims, cross-claims, third-party complaints, affirmative defenses, and replies are pleading variations of the basic complaint and answer. Pleadings tell what parties are fighting about.

Motions, on the other hand, state what orders a party wants the court to enter.

Some examples are:

- Motion to strike
- Motion to dismiss
- Motion for more definite statement
- Motion for continuance (or enlargement of time)
- Motion for default
- Motion to amend
- Motion to compel discovery
- Motion for protective order
- Motion (in Lamine) to exclude evidence
- Motion (in Lamine) to include evidence
- Motion for summary judgment
- Motion for rehearing (in state court) or reconsideration (in federal court)
- Motion for in camera inspection of documents

These, of course, are just a few of the more commonly encountered motions. There is no limit to what a motion can move a court to do. Just because there are 15 motions you could make at one time; doesn't mean you should do it. When you do that, you're just going to sink your own ship. Choose the most reasonable and go from there.

If a disabled person needs special assistance because of a physical handicap, she can move the court to allow her seeing eye dog into the courtroom. Or, if one is hypersensitive to heat or cold, he might move the court to adjust the courtroom thermostat. This doesn't mean the court will necessarily grant such motions. Motions are as often denied as granted. The point is that one may move the court to do nearly anything that is reasonable and within the rules of procedure and evidence.

Getting judges to grant our motions or deny those filed by our opponent of course, is another matter covered more completely in the pages that follow.

In the typical lawyer's library or average law library at your local courthouse, law school, or university are *"form books"* with page after page of standardized forms for various types of motions, pleadings, and other papers.

Though these books may be useful for novices, they don't include all possible motions one might make in the course of a single lawsuit. They're only a guide to get you started. They are examples of how you should be writing your motions or other court papers which in law is called a *form*.

Any motion, regardless if there is a “form” for it, as long as it adheres to the rules and standards of the court, is viable regardless if an attorney tries to smack it down because he's never heard of it. That doesn't matter whether he's heard of it. It matters if the motion is following the rules of the court.

The court may deny your unusual motion, of course, but you can move the court to do almost anything within reason, so long as your motion is intended to move the case forward and not going to cause confusion, delay, or prejudice to the other side.

If you have access to form books for the jurisdiction where your case is pending you should use them. There are plenty of examples online in your area and you can also use the format of the case you're involved in if it came from another attorney. Be careful to understand that the examples are merely offered as a guide.

No two cases are the same. Facts are never identical. Laws apply differently to different facts. Form books are intended only to help you understand essentials that need to be included in your motions. The rest is up to you. Understanding the goal which is the purpose of obtaining a particular order for a motion, is far more important than knowing its technical form.

While on this subject, never use fill-in-the-blanks forms. They're usually wrong. I only use Rocket Lawyer if I need some particular wording but I'll reformat and reword what is being said because it's not exactly what I need regardless of the state it is supposed to represent.

You are responsible for knowing what your legal papers must contain, why such specific content is required, and how the content of your paperwork will affect the court. To imagine you can win a contentious lawsuit merely by filling-in-the-blanks on pre-printed forms is nothing short of foolish.

The examples here are just examples and meant to make sure you have a place to start. People who think they can win by filling in blanks on a pre-printed form or its electronic counterpart are in for a rude awakening. Stop trying to efile and all that crap.

You need PAPER TRAILS you can use in court if you need an appeal and doing all this electronic crap is what lawyers do in an emergency but not as a rule and then they follow it up with a paper copy either hand delivered or in the mail. They don't use snail mail for nothing.

Lawsuits are typically knock-down, drag-out battles in which every party suffers some degree of damage. Lawsuits are a form of verbal warfare. The party who knows best how to move the court wins!

So, learn what motions do and how they do it.

Motions in General

Every well-stated motion seeks one thing and one thing only: a court order.

The singular purpose of every motion is to get the judge to enter an order. If a motion doesn't move the court to enter an order, it is improperly stated.

Many experienced lawyers write motions that begin like this:

> *COMES NOW the plaintiff, by and through her undersigned attorney, and prays this Honorable Court will compel the defendant to produce the records plaintiff previously requested, stating in support: yada, yada, yada...*

This is a *"prayer,"* not a motion. It doesn't *"move"* the court at all.

The example merely *prays* the court will do something. Though frequently seen in papers filed by experienced lawyers, it is completely improper and inappropriate.

We don't "pray" to judges, we "move" them. We "move" judges to enter "orders."

Only ambitious lawyers pray to judges. They're usually political climbers who'd rather sell their clients down the river than stand up to a judge who disobeys the rules.

Even though a prayer is not a motion, most judges treat them as motions. Nonetheless, this is not good practice. Do NOT imitate the habits of bad lawyers who seek to ingratiate themselves with judges for political reasons, afraid to talk back, afraid to speak up, afraid to advocate their clients' causes zealously when the judge is clearly in the wrong lest it adversely affect their standing in the community or their ability to own a nicer car or buy a larger yacht.

Anything other than moving the court to enter orders through motions isn't good enough.

When we want a judge to order someone to do something, we don't ask the court to "compel" them, we don't pray the court will compel them, and we certainly don't beg the court to do anything whatsoever.

We move the court to enter orders that command people to do what we want for the very good reason explained below.

When a court enters an order commanding someone to do something, that person is suddenly subject to the potential penalty of being held in contempt if he disobeys. If one is found in contempt of court he may be fined, could lose by default, or could be hand-cuffed and taken to the jail where he will remain behind bars until he decides to obey the court's order.

That's why we move courts for orders commanding people to do what we want.

It is the court's contempt power that gets things done.

Courts have power to require a sheriff (county/state) or federal marshal (federal court) to put people in jail behind iron bars or take their property away and sell it if they don't obey court orders unless you're a Secured Party Creditor. If that happens to you as an SPC, you have remedy against the court and the judge as well as the officers who refuse to protect your rights. You are the first lien holder and should be paid first if something happens to your property. Just remember, if you decide to go after these guys, it will be a long hard road but you can do it. Other people have done it and won.

It is ultimately this power we seek when we file lawsuits as a plaintiff.

And, if we're sued as a defendant, this is the power we use to avoid a judgment against us.

Orders issued by a court that lacks the power to put people in jail or take possession of their property are worthless pieces of paper and such a court (if one existed) could be ignored without fear of penalty.

In this nation, however, both state and federal courts use their power to command both imprisonment and sequestration of private property if orders are disobeyed which is unconstitutional and the reason you would have to be a Secured Party Creditor if you're wanting to make sure when they steal your property, you have remedy against them.

What we want from the court when we file motions, therefore, are orders.

We move courts to enter orders. The reason is enforcement.

This is why many people who are Secured Party Creditor mess up with their arguments. They don't know how to enforce their positions and even with a “Grand Jury” they convene with Private People, they fail to have enforcement. You have nothing if you don't have enforcement.

My law professor once took a deposition of a guy after he'd lost a case to his client. He wanted to know what he owned so he could direct the sheriff to put a levy on his property. In the deposition he asked him to describe his gun collection - an asset he always asks about in post-judgment proceedings, as it's often a major asset retained by judgment debtors who are down on their luck.

This guy refused to answer when asked about his firearms. The deposition was terminated at that point and he filed a motion for an order commanding him to appear for deposition at a later date and to give him the information about his gun collection.

He had the sheriff serve him with a certified copy of the order. On the date he was to re-appear for his deposition, he failed to show. An affidavit from the court reporter was taken stating he did not appear and moved the court for an order finding him in contempt.

The order gave him an option to appear once more for deposition to answer the questions and avoid contempt charges. Again, he didn't show. This time when he took the court reporter's affidavit to the judge, the judge issued a warrant for the man's immediate arrest.

The sheriff picked him up, handcuffed him, carried him to the jail, and locked him in a cell. There he sat until he decided to tell the professor about that gun collection.

This is power everyone has. You have this power. Your next-door neighbor has this power. The opposing party in your lawsuit has this power.

This is your right and how to use the current legal system to win your cases and get remedy. This is the legal power most people never think about when they're involved in a lawsuit, yet it is the very power that makes lawsuits effective in controlling people who injure us.

It isn't paperwork that makes the system function. It isn't the judge banging his gavel on the bench. It isn't the flag in the front of the room or the high ceilings or the black robe. *It's the inherent contempt power of courts to enforce their orders by force of arms which the Private Grand Juries don't have and makes them ineffective.*

Without handcuffs, firearms, and jail cells, courts are worthless exercises in futility.

Use the court's contempt power in your case by moving for and obtaining orders that command others to do what the law requires. Put heat on the other side if they play games with you or the judge. Don't put up with high-jinks or evasive tactics.

Move for entry of orders that carry the penalty of contempt if disobeyed.

Bring the full force of this power against anyone who disobeys a court order in your lawsuit and press for full enforcement.

Every motion should move the court to enter an order.

Motions move the court to enter orders that command people and carry with them the penalties of contempt for those who refuse to obey.

If someone in your lawsuit disobeys a court order, move the court for an order to show cause why they should not be held in contempt and, if they fail to show cause, move the court to issue an arrest warrant.

An arrest warrant is an order commanding the sheriff or Marshall to carry out the court's order by force.

This is how you exercise your rights in this country and take charge especially with the current corruption of the judicial system and law enforcement.

Spoken Motions

If your motion is spoken at a hearing or trial the court may rule on it instantly.

These spoken motions are called *via voce* motions from the Latin *"by the living voice."*

Via voce motions are made on-the-spot and are usually ruled on quickly.

One example is a motion to strike damaging testimony that should be excluded for hearsay reasons. You've seen many such via voce motions on TV.

A cross-examining lawyer demands, "What did your neighbor tell you?"

The witness quickly answers, "She said she saw the defendant enter our backyard and carry away our chickens!"

Counsel for the other side, waking from a day-dream, jumps to his feet, "Motion to strike! Hearsay!"

The court calmly rules, "Sustained."

Motion granted!

But the toothpaste is out of the tube, and you can't put it back.

The jury heard the testimony.

The judge may direct the jury to disregard the witness' statement, but you can't un-ring the bell.

A jury will not disregard what they've already heard, no matter how many times the judge tells them they must.

Under most circumstances a witness should not be permitted to testify what someone else said. If a witness offers to say what someone else said, and the other person's statement is offered to prove the truth of an alleged fact relevant to the outcome of the case regarding a material fact, the testimony is inadmissible hearsay.

However, if a *via voce* motion to strike is not made promptly, the damage may be too awful to repair, and the party who objects too late has no one to blame but himself.

He cannot complain on appeal that the hearsay testimony caused him to lose. Every party is responsible for paying attention and objecting promptly.

How often have you watched TV as an objection is made after a witness testifies? The court sustains the objection, but the damage is done. This happens in real life also.

The key to making effective *via voce* motions, therefore, is to make them promptly and be prepared to back up your motion with the legal basis for your motion, such as a rule of evidence the court is obligated to enforce.

Via voce motions, unlike written motions, must be made quickly. You don't have the luxury of sitting at your word-processor weeks in advance, researching the law to draft a multi-page treatment of facts and supporting cases and statutes like you do with written motions.

A spoken motion, like its near cousin the written motion, must have a sound legal foundation. But that sound legal foundation must be on the tip of your tongue.

You must be prepared on-the-spot to argue the legal foundation for all your spoken motions and objections while your opponent tries to interrupt to throw you off your game and persuade the judge against you.

Failure to promptly offer solid legal foundations in such circumstances leads to losing lawsuits.

The foundation of a motion, written or spoken, is the legal basis on which the motion is predicated, it is the law that controls the court.

You must be prepared to argue the law that forms the foundation for spoken motions, often in the space of only a few brief seconds.

When you make a spoken motion, the judge will frequently ask, “On what grounds?”

If you stand there stammering, beads of sweat breaking out on your nervous brow as you thumb frantically through the rule book for answers, the court will deny your motion. Your motion may be proper. You may make it in a timely fashion.

But, if you cannot give the court a quick response when asked why your motion should be granted, most judges will deny the motion and permit proceedings to continue as if no motion had been made.

The court rules then-and-there. No hearing or carefully written memorandum is permitted.

Written motions, on the other hand, are not created for the first time in court.

They are typed on paper in your office days ahead of time and filed with the clerk, long before a judge gets around to ruling on them. In fact, it's possible to withdraw a written motion, if you do so before the court rules on it.

If you get to court and you believe the motion you entered would be better scrubbed, just say, “I withdraw the motion.”

You have to remember your strategy and sometimes it might be better to withdraw the motion before it is ruled on. The other side might get mad because they're prepared to argue the motion, but that's not your problem. Your task at hand is to win your case and/or set it up for an appeal. Making friends isn't your goal but try not to be a jerk about what you're doing or what you're arguing.

As soon as a motion is withdrawn, it's as if it never was made in the first place.

Remember that point.

If a motion is withdrawn before the court rules on it, the court must treat the motion as if it never existed. The judge cannot make motions for parties, and the other side cannot re-instate what you've already withdrawn.

They can file their own motion, but they cannot make you pursue your motion once you withdraw it.

This is as true of the spoken motion as it is of a written motion. If a motion is made and withdrawn before the court rules, it is a nullity. It is null, void, it has no effect.

Not all motions can be made by speaking them. Some must be written and filed with the court in advance.

The following, however, are a few examples of *via voce* motions you can make by speaking them during trial or at a hearing:

- Motion to disqualify a witness

- Motion to sequester the *venire* which means to have the jury removed from the courtroom
- Motion to have a witness declared hostile
- Motion for recess
- Motion to have the thermostat set lower (or higher – yes for real)

Motions made *via voce* during trial or hearings are usually ruled upon before further business is taken up by the court, meaning before further evidence or argument is presented. Once made, a *via voce* motion becomes a pending motion that calls on the court to rule and, in all but a few instances, the court should rule before other business is taken up.

Whenever a judge fails or refuses to do what you believe the judge should do, make your objection immediately on the record to preserve the issue for appeal. If you don't object the issue is not preserved. If you don't object, the issue cannot be raised for the first time on appeal. Even if you know an objection will be overruled, object anyway.

Object often. Object clearly. Give the legal grounds for your objections.

And, of course, make certain the court reporter is taking it all down so you have your record for appeal, if appeal becomes necessary.

Be prepared to make your argument at the time of your spoken motions. Speak clearly.

Make your motions in a timely manner.

And ask the court in a polite way to instruct the opposing party not to interrupt you while you are speaking.

Written Motions

Written motions are potentially more powerful because they can be carefully planned days or weeks in advance.

Planning is power.

A savvy litigant might spend days writing a motion, researching law that supports the motion, reviewing the motion with colleagues to get second opinions before filing it, and only then sending the motion to the court clerk with a copy to the other side as the rules require in every jurisdiction.

In state court written motions may include extensive legal arguments supported by citations to statutes, court rules, constitutional provisions, and case law such as decisions of appellate courts that should control or influence the trial judge.

If the motion involves complex issues, it may be filed by itself and supported by a separate memorandum that contains the legal arguments and citations. The non-moving party is not required to file a response but is permitted to do so, telling the court why the motion should not be granted, giving legal argument and citations in opposition along with, where appropriate, explanations why the statutes, rules, constitutional provisions, and cases cited by the movant do not apply to the facts in controversy and therefore should be ignored.

Federal court motions, on the other hand, are usually accompanied by a supporting memorandum explaining why the motion should be granted, and the non-moving party always files a response memorandum in opposition.

Motions in federal court state only what the moving party is *moving* the court to order, while the memorandum in support tells the court *why* the motion should be granted and the order entered.

The non-moving party's response memorandum argues why the motion should not be granted, giving argument and citations in opposition along with, where appropriate, explanations why statutes, rules, constitutional provisions, and cases cited by the moving party do not apply and therefore should be ignored.

THIS IS REALLY IMPORTANT BECAUSE LAWYERS DO THIS ALL THE TIME:

If a non-moving party's response memorandum misleads the court with citations that don't stand for what's claimed or if the non-moving party's response is otherwise flawed or dishonest in some material regard the movant may file a reply memorandum setting out the errors of his opponent's response memorandum.

- Movant files motion and memorandum in support
- Non-movant files response memorandum in opposition
- Movant (at his option) files reply to non-movant's response

No other papers are permitted.

State courts allow memoranda in support of motions which is optional for the moving party, while federal courts insist on them.

In state court a response memorandum is optional. In federal court it's mandatory and may be the only opportunity a non-moving party has to argue against the movant's motion, since most federal court motions are ruled on without hearings.

In state court, most motions require hearings before the court will rule. In federal court, the judge usually rules on the papers filed.

For now, we'll concentrate on what makes a successful written motion and what a non-moving party can write in response before hearing to oppose a written motion.

Content of Written Motions – State Court

The first thing to remember is that you are moving the court to enter an order. It is an order you seek. Nothing less. Move the court to enter an order.

The next thing to make clear in the first few sentences is the legal basis for the order you seek. If it's a *statute*, cite the statute and quote directly from it to show the court what it says about the court's legal duty to enter the order based on the facts.

If the legal basis for an order you seek is *case law*, cite the case(s) and quote from the opinion(s) directly so the court can see how appellate courts have required trial courts in the past to enter the order you seek based on facts. In many cases, there will be case law, statutes, court rules, administrative codes, and constitutional references that support entry of the order you seek.

Cite only those authorities most compelling to your motion's argument. You don't need to have every case ever known to man. Three is enough. Some people go overboard. Save your ammo for later if you need it. No need to expend more energy than is needed and really make the judge mad.

After stating the legal basis for the order, you seek, lay out all facts necessary to trigger the command of the statute(s) and/or case(s) cited as legal basis for the order.

Do not discuss facts that have no direct application. They'll only get in the way. Make it easy for the judge.

Too many words tend to diminish rather than enhance the effectiveness of motions.

Judges are busy people. Come to the point. Say no more than necessary.

Tell the court in simple terms why the order you seek should be entered.

Content of Written Motions – Federal Court

Since you'll support your motion with a memorandum in federal court, it isn't necessary to lay out in the motion itself all the facts relevant to your motion nor all the statute(s) and case(s) that support your motion. That's what the memorandum is for.

What you do want to make clear in your motion is the order you seek with a simple statement of the legal basis and factual background, giving reference to the memorandum in support that you are filing contemporaneously.

Your motion tells the court the order you want it to enter. Your memorandum will tell the court why it should enter the order.

More is not required.

Content of the Memorandum in Support – State or Federal

The memorandum in support should, of course, clearly reference the motion it is offered to support. This is done not merely by name (e.g., Plaintiff's Second Motion to Compel Better Answers to Interrogatories) but also by the service date of the motion as filed (e.g., "… bearing service date of 17 October 2005") so there is no possible mistake about what motion you are arguing for.

The memorandum should re-state your motion concisely and support the motion with citations of case law, statutes, court rules, administrative code, and/or constitutional references. Did you get that? CONSTITUTIONAL REFERENCES that should be from a Supreme Court ruling which is case law. For all of those Secured Party Creditors out there, this is where you'll be dealing with a lot of the Constitutional Case Law if the lower court is so ridiculous, they couldn't get this from the very beginning. If you do this correctly, you probably won't need to go this high in the court system.

Everything in the memorandum should support entry of the order you seek. Where language in the supporting citations applies directly to the facts, quote directly from the references.

If a controlling case reads, *"Upon motion of a party, the court must examine the document in camera, …"* (i.e., in the court's private chambers) and you do wish the court to examine some document in camera, then quote from the statute directly so the court has no wiggle room to deny your motion.

Better still, *cite the statute and controlling case law in your jurisdiction, so the judge knows that failure to grant your motion will result in his being reversed on appeal.*

Judges must obey the law like everyone else.

It's your job to make the record clear as to judges' duty.

Many courts limit the number of pages you may use for a memorandum. There are also paper-size, type-size, and margin-size limits that must be obeyed, or your motion may be denied on technical grounds – an avoidable catastrophe that is easily prevented by nothing more than you consulting and complying with the local rules for your court.

Provided you follow the rules, the more you make your memorandum readable and concise, the better your chance for success. Dry, overly-verbose papers that try to sound "high-brow" and "scholarly" are far less likely to obtain the desired goal than those that speak plainly.

In some cases, it's appropriate to introduce a bit of humor. Most judges are bored by the unimaginative paperwork they must go through on a daily basis. If your papers take some of the hum-drum out of the judge's job, they will be more favorably received. *Highly-technical writing should be avoided.*

And, please don't use words you don't know nor fail to use your spelling checker. You'll get yourself in big trouble if the judge asks you what they mean. One woman who was trying to go Pro Se in court was asked directly if she knew the definitions of the words in her motions. She said she didn't and that was the end of that. Because she was so inept in court, she finally just hired an attorney who made a deal with the prosecutor. This is not where you want to be. You want to learn what you need to do and then be able to articulate concisely and very clearly.

If your memorandum is difficult to read, your argument will be difficult to follow.

If your memorandum makes the judge smile a little it definitely can't hurt.

Content of the Response (Memorandum in Opposition) – State or Federal

The response memorandum should do two (2) things.

First, it should tell the court why the motion should not be entered by citing controlling authorities ignored by the movant, arguing how those authorities that were omitted by the movant are, in fact, the law that controls the outcome.

Second, it should show the court how the movant's arguments are off-point. *If the movant cites as legal basis for his motion references that do not apply to the facts of the case, make that clear in your response.* Quote from the references cited by your opponent to show where the authority is misplaced.

It is not uncommon for young lawyers to rely on nothing but headnotes of cases and therefore miss what the body of the case is saying, thereby giving you an open door to correct him in your response.

Headnotes are not legal authority. They appear before written opinions in many reporters but are not part of the judicial opinion. They are tools prepared by salaried editors working for companies publishing official opinions, e.g., West or Lexis.

In most cases they accurately describe what a case is about, but sometimes they are wrong. If your opponent hasn't bothered to read the official court opinion in its entirety but took the lazy lawyer's way of relying on headnotes instead, you may have the excitingly satisfying opportunity of correcting him formally in your response memorandum to the court.

You must, of course, read all the cases, statutes, and other authorities your opponent cites in his memorandum. Read beyond the headnotes, carefully analyzing every word of the official writings to determine whether or not they are controlling law.

Finally, cite your own authorities, explaining why they apply, instead of those cited by your opponent, and finalize a strong argument why your authorities require the court to deny the motion.

It's no more difficult than that.

Content of the Reply – State or Federal

Though the movant may not be obligated to file a reply memorandum, there may be times when *the non-movant's response memorandum misquotes the law or misapplies the law,* in which case the movant is permitted to file a reply which is to the response memorandum what the response is to the initial motion and memorandum in support.

The movant's reply opposes the non-movant's response which, you'll remember, opposes the movant's initial motion.

The reply is not for re-arguing what's already argued in the movant's initial motion and memorandum. The reply should not go over old ground. The proper use of the reply is to oppose error or new argument raised for the first time in the non-movant's response. The reply cites and quotes controlling authority, persuading the court that the argument and authorities set forth by non-movant in his response memorandum are misleading or utterly false.

This is where you can add additional case law, additional statutes, as long as you're not being redundant in your writing.

Motions in State Court

In federal court, the motion is filed by itself, simply stating what the party wishes the court to rule, while the argument and citations to case law and statutes are filed separately in a memorandum in support of the motion

In state court, the same two-step process may be used, but generally state court motions contain both a statement of what the movant wants and also the movant's legal and factual argument (supported by citations to controlling authorities) that tell the court why it should grant the motion. In other words, with most state court motions, the memorandum and motion are combined in one paper.

If argument in favor of a state court motion is unusually complex, however, the movant may (at his option) file a memorandum in support (as in federal court) going into greater detail with arguments of law and statements of fact supporting his motion.

As a general rule, if a motion with argument requires more than four pages, make the motion simpler and amplify with a separate memorandum in support.

Consult local rules and the judge's particular rules to see what state court motions do and do not require hearings in your court's jurisdiction.

Most motions in state court are presented at hearings prior to the court's ruling. If you don't set a state court motion for hearing (brilliantly reasoned and skillfully written though it may be) the paperwork could lie dormant in the court's files for years before finally being stashed away on microfilm in some storage warehouse at the edge of town. Ultimately, it might be scanned as a digital image in some giant computer database in a faraway city never to be seen again.

“But doesn't the court have to rule on every motion?”

The answer is categorically, no.

Some written motions (e.g., motion to reconsider or motion for rehearing) may be ruled on by the court without further action on your part. This may be true in both state and federal courts, but you must check your local rules.

Notice the word “may,” however.

Most written motions in state court require a hearing which is an opportunity for both sides to prepare and present legal and factual arguments in hopes of persuading the judge to rule one way or the other.

Without a hearing, most state court motions will never be ruled upon whether yours or the other guys. It isn't fair to allow the court to rule without giving both sides an equal chance to prepare and present arguments and, in certain cases, to call witnesses and offer evidence.

This is where “due process” really kicks in. In fact, the very meaning of due process is nowhere clearer than when we're talking about notices and hearings.

Every person has an equal right to be heard.

Being heard, however, includes the right to receive reasonable notice in advance of the hearing, meaning to know where and when the hearing will be held, to know the nature of the matter being reviewed, and to have time to prepare, including time to call witnesses, discover evidence, and research law - cases, statutes, rules, or constitutions - that could persuade the judge and control the outcome.

Anything less is not due process. Without “due process,” anything done would be unconstitutional.

To get due process in your case and protect yourself from crooked lawyers, you must demand it and make a record for appeal if you don't get it.

Filing motions in state court without setting them for hearing is not making your record for appeal.

It's up to you to move your case.

Strangely, however, many pro se people, and even a few experienced lawyers, fail to see the necessity of setting motions for hearing. It's as if they think the judge reads all the papers that get filed with the clerk. Nothing could be farther from the truth.

To get a state court to rule on your motions or the other guy's motions, you must set the motions for hearing, prepare for hearing, attend the hearing, and argue your cause effectively while giving the other side an equal opportunity to argue against you.

If you don't set state court motions for hearing, they may never be ruled upon.

In some state court jurisdictions, judges do occasionally read and rule on a few types of motions, however these motions are those that require no evidence or argument that is not contained within the motion itself. If more is required (e.g., case law, statutes, or other legal authority, testimony, or evidence in support) the court is not required to look beyond the motion itself and will not rule until the non-moving party has a chance to argue against the motion (providing his own case law, statutes, or other legal authority, testimony, or evidence in opposition to the motion.)

A judge may deny a motion for summary judgment (for example) without a hearing, if he reviews the file and sees, without argument of the parties, there are issues of untried material fact in the record that preclude entry of summary judgment. If the record shows issues of material fact remain, no amount of argument by parties at a hearing can make those issues go away. So, the judge may deny a motion for summary judgment without a hearing, but is not likely to grant summary judgment without one.

Judges are busy people dealing with hundreds of anxious litigants demanding their respective rights, arguing over every kind of diverse legal and factual issues, requiring

valuable judicial time to decide dozens of disputes on a daily basis. If it's clear from the record that a motion for summary judgment (for example) is doomed to failure, because the judge can see from examining the record there were issues of material fact when the motion was filed, the court may deny the motion without giving the movant (the person making the motion) a chance to argue his motion at hearing.

If, after reviewing such a motion and studying the court file it's uncertain whether a triable issue exists, the judge should insist on a hearing to give both sides an opportunity to argue. Indeed, it would be unlikely for any court to grant summary judgment without allowing the non-moving party a chance to argue why the motion should not be granted. A wise and honest judge will refuse to rule until there's a hearing where both sides have an opportunity to present their side of the story.

Some hearings are "evidentiary hearings," i.e., hearings at which parties are allowed to offer evidence, e.g., live witness testimony, self-authenticating documents, or tangible evidence like bloodstains or fingerprints.

Other hearings are "non-evidentiary hearings." In fact, the majority of hearings in civil lawsuits (non-criminal) are non-evidentiary at which lawyers argue motions to dismiss, motions to strike, motions for a more definite statement, Motions in Lamine, and such like motions that do not require and do not allow presentation of witness testimony or other evidence.

At a hearing on a motion to dismiss for failure to state a cause of action on which judicial relief can be granted (for example) the judge is required to stay within the "four corners" of the complaint and assume (for the limited purpose of the motion) everything the plaintiff says is true.

Then, if any essential elements of the complaint's cause(s) of action are missing, the judge may dismiss part or all of the complaint (usually giving the plaintiff a reasonable time to amend the complaint to cure its deficiency.)

The judge will not allow the plaintiff to bring in witnesses, present documents, or otherwise add anything to what his complaint states on its face. Such hearings are non-evidentiary.

Two kinds of hearings: Evidentiary and Non-Evidentiary.

Evidentiary hearings are those, not surprisingly, that require evidence to be presented and/or refuted. Examples are a motion for in camera inspection of questioned documents or a motion to admit photographs. The court needs the documents or photographs before it in order to rule.

To get a state court to rule on your motion (if it isn't one of the rare motions courts rule on without a hearing), you must first schedule hearing time and give proper notice to the other side as explained in a later chapter in this class.

Motions in Federal Court

In federal court, as we said before, your motion does little more than tell the court what order you want the court to enter. You follow this with a memorandum in support of your motion. Your opponent then files a memorandum in opposition. You may then (at your option) file a reply memorandum rebutting the response memorandum that opposes your motion.

In due course (when the federal judge or magistrate) gets around to it, your motion and the parties' respective memoranda will be read and ruled upon, without a hearing.

There are exceptions, of course. There are always exceptions. Check the local federal court rules to see what motions require a hearing and what motions permit a hearing upon petition by one or both of the parties.

Typically, federal court motions are not unlike state court motions.

They seek orders.

The orders sought either command someone to do something, make findings of fact as legal conclusions from evidence presented, or adjudge one party indebted or otherwise obligated to the other.

The memorandum in support contains the legal basis that justifies entry of the order sought together with a discussion of relevant facts and citations to legal authorities that should persuade the court to grant the motion.

The non-moving party's response memorandum, sets out a different view of the law and facts, making opposing arguments designed to persuade the court to deny the motion.

The movant may file a reply to the response (but is not obligated to do so.)

This is called "motion practice."

Because of the formality, delays, and precision involved in federal motion practice, we recommend that pro se litigants avoid federal court whenever possible and take their cases to the local state court. Federal court is a labyrinth of legal posturing and protocol that can confuse even veteran lawyers familiar with its procedural niceties.

If you can keep your case in state court, where judges are elected (instead of being appointed for life), are answerable to members of the local community, and tend to be less formal and more willing to listen to inartful legal arguments of inexperienced litigants, don't go to federal court.

Nearly all issues that can be argued in federal court can be argued in state court. *[Exceptions include patent and trademark matters, certain limited cases in admiralty, claims arising under the Public Utility Regulatory Policies Act of 1978 (PURPA), cases involving regulation of railroads, and such like matters where federal statute stipulates exclusive federal jurisdiction.]*

This is "concurrent state court jurisdiction." Indeed, there's a presumption state courts have concurrent jurisdiction over federal issues unless a particular issue is statutorily designated as "exclusive federal jurisdiction," which is limited to a comparatively few categories of cases.

This presumption *"can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by clear incompatibility between state court jurisdiction and federal interests."* Gulf Offshore Co. v. Mobil Oil Corp., *453 U.S. 473, 478; 101 S.Ct. 2870, 2875; 69 L.Ed.2d 784 (1981.)*

Federal courts are, for the most part, far more unfriendly to the uninitiated. There are traps where pro se litigants can fall prey to the gamesmanship of smoke & mirrors lawyers. These traps are far more numerous in federal court than in state court (where the playing field is somewhat more level between members of the bar and non-lawyers fighting on their own.)

If you find yourself in federal court, move to have the case removed to state court with a Motion to Remove. *For a discussion on this subject by the United States Supreme Court see:* University v. Cohill, *484 U.S. 343; 108 S.Ct. 614; 98 L.Ed.2d 720 (1988.)*

Frequently Used Motions

Here are a few of the more frequently used motions you will encounter in both state and federal courts.

Motion for Extension of Time

This motion seeks an order giving movant a later deadline, e.g., extending the time to file a response to some discovery request, to obtain additional discovery, or to take some other action that is constrained by time limitations. The motion needs to show a good faith effort was made to comply within the deadline, that the extension will not unduly burden or prejudice the other side's case, and that the interests of justice will be served by the extension. This motion should be filed as soon as the necessity for more time is known.

Motion to Exceed Page Limit

Many courts put a limit on the number of pages one can use with various documents (motions, memoranda, briefs, etc.) In unusually complex cases, this limit on pages may prevent a party from fully explaining a matter. In most cases the motion will be granted, unless the movant has previously abused an extended court privilege or otherwise acted beyond the scope of proper protocol and procedure.

Motion for Continuance

Judges don't like continuances and generally oppose them. Continuances juggle the court's calendar and delay efficient conclusion of cases. Good cause must be shown. The fact you wanted to take a family vacation during the week scheduled for a hearing or trial will probably be insufficient. A death in the family or some other genuine emergency that prevents you from attending will almost always be honored.

Motion to Seal

Sensitive papers must sometimes be filed with the court. The judge and the opposing party must see these papers to ensure due process, however in some cases the party filing the papers has valid reasons for not wanting anyone else to see the papers. The motion to seal seeks an order directing the clerk to put such papers in a sealed file and deny access to anyone who doesn't have a court order authorizing inspection.

Motion for Leave to Amend

A motion for leave (permission) to amend may be filed anytime a party wishes to alter what's been said in a document already filed. It might be a discovery response, a motion, or a memorandum. In most cases it is a pleading. Pleadings include complaints, answers, counterclaims, cross-claims, third-party complaints, affirmative defenses, and replies. See our other tutorials for more information on pleadings, how to draft them, and what they are designed to accomplish.

In the case of the initial pleading (the complaint) one may amend without leave of court (i.e., without a motion) so long as the other side has not yet filed an answer. In all other cases, if what's been said needs to be changed, one must file a motion to amend and obtain an order authorizing the amendment. A sample copy of a motion for leave to amend is shown.

FIFTEENTH JUDICIAL CIRCUIT COURT

PALM BEACH COUNTY, FLORIDA

CIVIL DIVISION

Case No. 12345

DONALD TRUMP,

Plaintiff,

v.

JOE XI JING PING,

Defendant.

MOTION TO FOR LEAVE TO AMEND

PLAINTIFF DONALD TRUMP moves this Honorable Court to enter an Order allowing him to amend his complaint to add HUNTER BIDEN as defendant and to allege counts against her individually, stating in support:

1. As a result of discovery and the ongoing proceedings in this matter plaintiff has acquired knowledge of torts committed against it by BIDEN who should be added as a defendant in this action.
2. The torts committed by BIDEN arise out of fact circumstances common to this action.
3. A copy of the proposed amendment is attached.

WHEREFORE the plaintiff moves the Court to enter an Order allowing him to amend his complaint by appending the pleading attached hereto.

I CERTIFY that a copy of the foregoing was provided to Dewey Cheatham, Esq., 38 Liar Lane, Happiness, Florida 33333 this 19 April 2005.

DONALD TRUMP, Plaintiff

Motion for Default

If the defendant fails to file a responsive pleading (or delaying motion) within the time permitted for such filings, the plaintiff may move for entry of the clerk's default. Defaults are usually set aside by a showing the failure or delay was a result of excusable neglect and there is a reasonable likelihood that the defaulted party can prevail in the case. The defaulted party cannot proceed until he files a motion and obtains an order setting aside the default.

Motion for Default Judgment

If the clerk enters a default against the defendant, or if any party violates the rules so abusively that default is warranted as a sanction to punish the offending party, one may move the court for entry of an order of default judgment and the case is over.

Motion to Dismiss

Motions to dismiss may be filed for various reasons. The order sought is one that dismisses part or all of the other side's case. The general rule is for dismissals to be set aside, upon motion by the dismissed party, if the error is cured within a reasonable time. The most common motion to dismiss is filed when the plaintiff fails to state a cause of action or claim

upon which the court can grant relief, however courts generally give plaintiffs additional time to amend complaints to cure this common defect.

If one party has not taken affirmative action to move his case along and nothing is done within a certain period of time (varies by jurisdiction) one may move the court to dismiss for lack of prosecution.

Motion for Judicial Notice

A motion for judicial notice can be used in many ways, however it is important to know there are some things a judge must take notice of and some things it is discretionary whether the judge will grant the motion.

If the matter for which one seeks an order taking judicial notice is a law, treaty, official document (e.g., deed, previous court order, etc.) then the judge must enter an order granting the motion and stating that the matter may be relied upon as true for all purposes during the proceeding.

If the matter for which one seeks an order taking judicial notice is one of opinion or something about which reasonable persons may disagree, then the court will usually deny the motion.

If the matter for which one seeks an order taking judicial notice is a fact well known in the community or firmly established in the literature (e.g., that cyanide is poison, that Shakespeare wrote plays, etc.) the judge will almost always grant the motion and state that the matter may be relied upon as true for all purposes during the proceeding.

The principal thing is to consult local rules, because local rules sometimes require advance notice to your opposing counsel before filing a motion for judicial notice, and failure to follow the local rules may be fatal to your effort.

Motion to Intervene

A motion to intervene may be filed by an individual or other legal entity whose substantial rights, powers, privileges, and/or immunities will be affected by the outcome of the case.

The intervenor must have an actual, present, adverse, and antagonistic interest in the subject matter in both fact and law.

Motion to Strike

A motion to strike seeks an order deleting parts or all of an opponent's paper on the grounds it is scandalous, impertinent, inflammatory, or absolutely false and known to be false at the time of filing.

An example is the motion to strike sham, filed when a movant's opponent files a paper containing false statements known to be false at the time of filing. If a plaintiff files a complaint, for example, containing false statements known to be false at the time of filing, the defendant may by this motion obtain an order dismissing the case in its entirety and with prejudice so it cannot be amended and filed again. Movant must, however, prove the falsehood and his opponent's knowledge of the falsehood.

Motion for Summary Judgment

If a case presents no issue of material fact (i.e., not one single issue that could affect the outcome) so there remains nothing further to be decided by the court, you can move the court to enter an order of summary judgment. To obtain such an order, however, you must show there is absolutely nothing about the facts that can be seen in any way other than

favorable to you. If there are any issues of material (relevant) fact remaining in the record of the case, summary judgment motions should be denied.

If summary judgment is granted while there are remaining issues of material fact, appeal is necessary. Appeal is not permitted if summary judgment is denied.

Motion for Reconsideration / Re-hearing

This is an often-misunderstood motion. Although it is recommended when one loses a motion (because it gives the losing party another opportunity to make his record in a cogent writing filed with the clerk) it is seldom granted.

Moreover, it does not toll the deadline for appeal. Don't make the common mistake of failing to file notice of appeal while waiting for the court to rule on your motion for reconsideration. The clock keeps ticking. *Failure to file notice of appeal in the time allowed makes appeal impossible.*

Motion to Compel Discovery

It's amazing how many pro se litigants fail to move the court to compel discovery after receiving from a hired-gun lawyer for the other side bogus responses to reasonable interrogatories, requests for production, or requests for admissions. Most lawyers refuse to file good faith discovery responses.

Instead, you'll get, “Objection! Vague, ambiguous, seeks to inquire into the attorney-client privilege, outside the scope of discovery, and not reasonably calculated to lead to discovery of admissible evidence,” or something similar intended to throw you off.

Don't put up with it. File a motion to compel, citing rules that grant your right to discovery. Explain why things you sought to discover are “reasonably calculated to lead to admissible evidence.”

If what you seek is reasonable, the court will command the other side to respond accordingly. If you don't file a motion, you won't get your evidence, and you'll likely lose your case for lack of proof.

Motion for Protective Order

If discovery (including depositions) is likely to unduly burden or prejudice a party, that party may move for a protective order to either prevent the discovery altogether or require that discovery take place under controlled conditions.

If controlled conditions will afford sufficient protection, the movant should state the conditions requested, instead of seeking to avoid the discovery altogether, since judges are disinclined to deny discovery completely except under the most egregious circumstances.

Motion to Determine Sufficiency

This motion is used to challenge an opponent's response to a request for admissions. The rules require no more than simple “Admitted” or “Denied” responses. But the rules are intolerant of objections or outright refusals to respond.

The penalty for trying to avoid either admitting or denying a fact set forth in the request is to have that fact deemed admitted by court order using a “Motion to Determine Sufficiency” of the responses.

The penalty for lying in a response may be judgment for the requesting party, if the lie was intentional and can be proven.

If a party objects, he must give detailed reasons for his objection. An objection by itself does not suffice. Objections must be explained in detail.

If a party fails to either admit or deny or otherwise fails to respond appropriately to a request for admissions, the requesting party may file a *Motion to Determine Sufficiency*.

If the motion is granted, the court's order will deem the improper responses as admissions, in which case everything the other side refused to admit in a straightforward manner as required by the rules will be treated as true for all purposes in the case.

A good thing for you.

Here's a sample motion:

FIFTEENTH JUDICIAL CIRCUIT COURT

PALM BEACH COUNTY, FLORIDA

CIVIL DIVISION

Case No. 12345

DONALD TRUMP,

Plaintiff,

v.

JOE XI JING PING and

HUNTER BIDEN,

Defendants.

MOTION TO DEEM REQUEST ADMITTED FOR DEVIOUS RESPONSES

PLAINTIFF DONALD TRUMP, pursuant to Rule 1.370 Florida Rules of Civil Procedure, moves this Honorable Court to enter an Order determining insufficient a response of defendant HUNTER BIDEN (hereinafter BIDEN) to plaintiff's request for admissions and deeming same admitted for all purposes, stating in support:

1. This court is not a forum for cute tricks nor a stage for clever use of smoke and mirrors word magic to evade responding to lawful discovery requests pursuant to the rules that control this court.

2. BIDEN's response to plaintiff's request for admissions is nothing short of a word game.

3. Paragraph 1 of plaintiff's request for admissions sought to establish that a contract forming the basis for this lawsuit "contemplated" there would be a limit on BIDEN's ability to trade her stock.

4. BIDEN evaded answering by claiming contracts cannot "contemplate" because (as BIDEN asserts with the transparent guile of a preschooler) contracts are "inanimate objects."

5. Use of the verb "contemplates" in reference to contracts is well known and widely recognized.

6. The Florida Supreme Court and Fourth District Court of Appeals use this term routinely in written opinions describing what contracts "contemplate." Pandya v. Israel, 761 So.2d 454 (Fla. 4th DCA 2000); Petracca v. Petracca, 706 So.2d 904 (Fla. 4th DCA 1998); Baker v. Baker, 394 So.2d 465 (Fla. 4th DCA 1981); Potter v. Collin, 321 So.2d 128 (Fla. 4th DCA 1975); Belcher v. Belcher, 271 So.2d 7 (Fla. 1972); Bergman v. Bergman, 199 So. 920 (Fla. 1940); Bowers v. Dr. Phillips, 129 So. 850 (Fla. 1930.)

7. BIDEN's resort to word games is in contempt of this Court's lawful authority and should be sanctioned by entry of an Order deeming the requested admission admitted for all purposes.

WHEREFORE plaintiff DONALD TRUMP moves this Honorable Court to enter an Order deeming the request referenced herein admitted for all purposes during the pendency of these proceedings.

I CERTIFY that a copy of the foregoing was provided by regular U.S. Mail to the law offices of Dewey, Cheatham & Howe at 38 Liar Lane, Hogwash, Florida 33333 this 19 April 2005.

_____

DONALD TRUMP, Plaintiff

Motion to Show Cause

If a party disobeys a court order or commits perjury (a materially false statement that was known to be false when made) the proper procedure is a motion to show cause why that person should not be held in contempt.

The motion will generally be heard, so the offending party has an opportunity to show either he didn't do or fail to do what the movant alleges or that he had good cause to do what he did or didn't do. If he cannot show good cause, an order may be entered requiring further performance.

Motion for Contempt

If a party fails to obey a show cause order, a motion for contempt should be made, seeking an order finding the offending party in contempt. In general, contempt orders give the offending party one further opportunity to cure. Failure to cure can result in a warrant being issued for the offending party's arrest.

Motion in Lamine

Motions in Lamine are filed before trial to either limit the introduction of evidence or to ensure that certain evidence will be allowed. These are a good idea whenever there's a chance the other side may pull a fast one and bring in something at the last moment that the jury shouldn't see, or if you're pretty sure the other side will try to prevent you from presenting critical evidence you need to get in.

Here's a sample:

FIFTEENTH JUDICIAL CIRCUIT COURT
PALM BEACH COUNTY, FLORIDA
CIVIL DIVISION

Case No. 12345

DONALD TRUMP,

Plaintiff,

v.

JOE XI JING PING and

HUNTER BIDEN,

Defendants.

MOTION IN LIMINE

PLAINTIFF DONALD TRUMP moves this Honorable Court to enter an Order preventing the defendants from presenting at trial argument or evidence in support of the "clean hands" defense and states:

1. The clean hands defense cannot be used as a defense to intentional torts.
2. All allegations of plaintiff's complaint are based on defendants' intentional torts.
3. The clean hands defense is appropriate only in cases where plaintiff seeks equitable relief.
4. The ancient maxim is, "He who comes to equity must come with clean hands."
5. Plaintiff seeks only money damages caused by defendants' intentional torts.
6. Plaintiff does not seek equitable relief of any kind.
7. Therefore, the clean hands doctrine is inapplicable as a defense, and no evidence or argument should be permitted in support of same at trial.

WHEREFORE plaintiff moves the Court to enter an Order preventing defendants from presenting at trial evidence or argument in support of their alleged "clean hands" defense.

I CERTIFY that a copy of the foregoing was provided to Dewey Cheatham, Esq., 38 Liar Lane, Happiness, Florida 33333 this 19th day of April 2005.

_____

DONALD TRUMP, Plaintiff

Motion to Invoke the Rule

During trials, hearings, and depositions it is generally improper for witnesses to be present if their testimony is not being taken. *"The Rule"* sequesters witnesses who are not being questioned at the time, so their independent testimony can be obtained when their turn comes. If the court does not invoke the rule on its own, you can move the court to enter an order invoking it.

Motion to Set Aside / Vacate

If an order was granted under circumstances contrary to the fair administration of justice (fraud, false statement, mistake, lack of proper notice, etc.) you can file a motion to have that order set aside or vacated. To prevail, of course, you must prove the fraud, false statement, mistake, etc.

Motion for In Camera Inspection

On occasion you may run into an obstreperous opponent who refuses to produce some document upon the specious claim that the document contains some "trade secret" or even that the document contains some sensitive information related to "national security." To get past such nonsense, you may file the following motion and set it for hearing.

FIFTEENTH JUDICIAL CIRCUIT COURT
PALM BEACH COUNTY, FLORIDA
CIVIL DIVISION

Case No. 12345

DONALD TRUMP,

Plaintiff,

v.

JOE XI JING PING and

HUNTER BIDEN,

Defendants.

_____/

MOTION FOR IN CAMERA INSPECTION

PLAINTIFF DONALD TRUMP moves this Honorable Court to enter an Order compelling defendants to produce for in camera inspection the written agreement between them dated 27 November 2013 and states:

1. On 23 October 2013, Plaintiff served defendants with a request to produce the agreement.
2. Defendants have steadfastly refused to produce the agreement.
3. Defendants claim the agreement contains "trade secrets" and should not be subject to plaintiff's request to produce.
4. Upon information and belief, plaintiff asserts the agreement contains terms of an unlawful conspiracy between the defendants that threatens immediate harm to plaintiff if not made a part of the record in this case.
5. Plaintiff further asserts the agreement contains no "trade secrets" as defined by law in this state.
6. The agreement should be produced.

WHEREFORE plaintiff moves this Honorable Court to enter an Order compelling defendants to produce the said agreement for in camera inspection by the Court and, if the Court determines that same does not contain "trade secrets" as defined by law in this state, that said document be produced to plaintiff without further unnecessary delay.

I CERTIFY that a copy of the foregoing was provided to Dewey Cheatham, Esq., 38 Liar Lane, Happiness, Florida 33333 this 19th day of April 2005.

_____
DONALD TRUMP, Plaintiff

- - - - - - -

These are just a few of the commonly encountered motions you will run into as you fight your battles in court.

There are as many different potential motions as your imagination can create, but these are a few that courts are used to seeing on a daily basis – motions you can file without raising judicial eyebrows.

Certificate of Good Faith

In both state and federal courts, it's a good idea to attach a certificate of good faith to all your motions.

In many courts it is required.

The certificate of good faith shows the court that the movant made an effort to communicate with the opposing party and tried to resolve the matter without requiring the court's valuable hearing time. (Non-lawyers must do this by notarized oath.)

All parties affected by a motion should be contacted, and a good faith effort should be made to reach agreement that might eliminate the need for a motion.

It's not enough to phone the other side's office after business hours on Friday to leave a message requesting someone to call you back and then to certify they didn't call.

That's not a “good faith” effort.

At a bare minimum (best practice) you should speak with the other party (or their lawyer) in person. Tell them the gist of the motion you're about to file and ask them for ideas how you might resolve your differences without filing the motion.

Take notes.

Write down the time you called, who you spoke to, what you told them, and what they said to you.

Save your notes.

If they agree to cooperate, so your motion isn't needed, you've gained ground.

If they refuse to cooperate, make absolutely certain you have your notes in case the court wants you to confirm that you made a “good faith” effort to resolve the matter before filing your motion. Be prepared to tell the court what you said to the other side, who you spoke to, when, and what they said to you in response.

If possible, write down their exact words. Before you record conversations, either in person or over the phone, know the laws in your State. Some states force you to first tell the other party on the tape so you have a record that you are recording the communication. Violation is a felony in some jurisdictions, punishable by fine and/or imprisonment.

If it takes place during a lawsuit and the court finds out about it, you could be sanctioned (i.e., suffer heavy fines or have your pleadings struck so you cannot win the case.)

Whether they agree or refuse to agree, follow-up with a letter (faxed and mailed) that provides an outline of what was said, requesting the other side to respond to your letter in writing if you have misconstrued the position they stated on the phone. In this way, if they do not write back with a different view, they will have a difficult time convincing the court otherwise when you present a copy of your CMA letter. CMA is shorthand for “cover my a**.”

Once you've done all these things, go ahead and file your motion. At the bottom of the motion (below the certificate of service but above your signature) ***add a certificate of good faith*** something like this (or worded as local rules in your jurisdiction require):

I CERTIFY that a good faith effort was made to communicate with opposing counsel with a view toward resolving the issues raised by the foregoing motion, however the parties are at an impasse.

Just be sure to keep your notes with details of that effort to communicate. Don't be caught before the judge while the other side complains, “But, Judge! Nobody contacted us about this motion. The first we knew of it was the day we received it in the mail!”

Lawyers sometimes lie. Don't be victimized by corruption. Expect dishonesty. Fore-warned is fore-armed.

Protect yourself with copious notes of all your communications with lawyers.

If you fail to make a good faith effort to resolve matters before filing motions, some judges will order sanctions against you. In some cases, the sanctions can be severe indeed.

Scheduling Hearings

Before you can send out a notice of hearing you must schedule time with the court.

You have to make a date with the judge.

In federal court this may depend on local rules you should consult before attempting to schedule a hearing.

In state court the process is not much easier.

However, if you follow the procedures recommended here, you'll fare much better than if you go at it “hammer-and-tong” with no thought for common practice, procedural rules, or proper protocol.

You need a time, date, and place where the court will give you and your opponent time to appear and make your arguments. You also need to reserve a particular length of time, e.g., 30 minutes or 4 hours, or whatever time you anticipate needing so you and your opponent are not rushed.

Judges (most of them) are very busy people. Imagine it's you sitting on the judge's bench day-after-day listening to complaints and arguments, moaning and groaning over all kinds of personal problems and it's your job to sort out the “good guys” from the liars and thieves. It takes a special kind of person to be a “good judge,” and the good ones stay pretty busy.

Many judges are out of bed before the sun's up, reading the memoranda and motions scheduled to be heard that day. They can't just drop everything, put everybody else on hold, and hear what you have to say when you're ready to say it. You must get your hearing time scheduled on the judge's calendar in advance.

In many busy courts, you must reserve hearing months ahead of time.

If your motion (or the other side's motion) can be heard in 5 or 10 minutes, the court may provide what's called Uniform Motion Calendar, sometimes abbreviated UMC. This is hearing time specifically set aside, usually early in the morning (before the court's regular business begins) to hear simple motions that don't require presentation of evidence or prolonged legal arguments.

UMC hearing time is reserved for motions that shouldn't take more than a few minutes to argue.

Dozens of lawyers and pro se litigants may show up for UMC hearings, signing in on a roster sheet posted outside the courtroom door, hoping their case will be called before UMC time is up.

If you intend to argue at a UMC hearing, show up before everyone else and put your name at the top of the list so your case gets called first.

UMC hearings, like all other hearings, require an original *Notice of Hearing* to be filed with the clerk and copies sent to all parties involved.

Scheduling Hearing Time

Motions that can't be argued in a few short minutes must be specially scheduled with the assigned judge.

Scheduling hearing time (or any business with a judge) requires tact and diplomacy.

Judges have secretaries who like to be called *judicial assistants*. You'll be tempted to refer to them by the initials JAs (as arrogant lawyers do) however it's a mistake to let them hear you use those initials, and never let them hear you refer to them as the judge's secretary, even though that's what they are.

A JA is to a litigant what the school janitor or lunch room lady is to a new school teacher. Make friends or your life may become a living hell. The degree of tact and diplomacy required to pull this off varies with the JA.

Many are pleasant people anxious to help. Others are horribly insecure wretches who, because their job puts them in a judge's office, believe they are entitled to the highest degree of obeisance. Fail to give these types the respect they think they deserve, and you may find yourself waiting for hearing time far longer than everyone else.

Rude litigants may have their hearings set for the twelfth of never!

If you're courteous and professional and lucky enough to avoid the Nurse Ratchet type, it's a relatively simple process to get hearing time for a motion.

1. Call the JA.

2. Explain what the motion is and how much time you believe you'll need, allowing time for the other guy also.

3. Ask the JA for three (3) dates/times on the judge's calendar when the motion can be heard.

4. Carefully write down these three (3) dates/times.

5. Tell the JA you'll call back promptly to pick one of the three (3) available times.

6. Immediately call all opposing parties and (again being courteous) see if any of the three (3) possible times will work for the other side. If they cannot (or will not) agree to any of the three times, call the JA again to get another three, then repeat with a call to the other side, etc.

7. Once the other side agrees to a date/time, call the JA back acknowledging the date/time you and the other side agreed upon and promising to send a *Notice of Hearing* to all parties, to the Clerk, and to the JA.

That's the process.

If, after making several reasonable attempts, the other side will not agree to hearing date/time, go ahead and set the hearing and send out your Notice of Hearing. If you've kept

accurate notes (i.e., how many times you had to call the JA for different dates, who you spoke with at the office for the other side, when you spoke with them, what they said, reasons and excuses they gave) then when the time comes for hearing, if they don't show, you'll have a record you can show the judge explaining why you went ahead and set the hearing without their agreeing to the date.

It is very effective (and extremely wise) to get a disagreeable opponent pinned down by using letters and faxes to make a written record that shows they were unreasonable in refusing to pick a mutually agreeable time.

When I run into a recalcitrant opponent who won't cooperate, I mail and fax a letter confirming what they told me. The letter might read something like this:

> *Dear Counselor,*
>
> *This will confirm my communication this morning with your secretary Sue who told me you could not attend a hearing before Judge Grumpy on my motion for more definite statement on any of the following dates:*
>
> *13 September at 3:30*
>
> *14 September at 11:00*
>
> *15 September at 9:15*
>
> *17 September at 2:30*
>
> *21 September at 10:45*
>
> *24 September at 2:45*
>
> *Nor would she provide me any dates when you will be available for hearing at any time during the next three months.*
>
> *If I have not heard from you in writing within 5 days of this letter, I will assume your secretary correctly conveyed your wishes.*
>
> *Respectfully yours,*

If you fax the letter, keep a record of the fax log and the correspondence, staple together and put that in your evidence file.

This letter is mailed and faxed (if the other side has a fax number), and copies are kept so I can show the judge later, if the other side doesn't come around to my way of thinking. Of course, if my opponent is foolish enough to write back trying to explain why we can't have a hearing at any time in the next three months, then I have real ammunition to shoot him down and I will set the hearing at a time convenient to my own schedule and send out my Notice of Hearing without cooperation from the other side, confident the judge will take a dim view of my opponent's refusing to adjust the calendar so my motion can be timely heard.

Remember: You may set a hearing for your own motions or the other side's motions. If the other side files a motion you don't want to be ruled upon, of course, leave it to the opposition to set their own motion for hearing. Maybe they'll forget.

If the other side files a motion, you're ready to argue, but they won't set the motion for hearing, don't wait for them. Go ahead and set their motion for hearing as soon as you wish, and be prepared to argue when the hearing date arrives.

It is up to you to move your case along. If that means getting your motions heard and ruled upon, then you set the hearings. If it means getting the other side's motions heard and ruled upon, then if the other side won't set their motions for hearing you set them.

If the other side won't cooperate by agreeing to a mutually convenient date/time for hearings, follow the procedure outlined above and set the hearing anyway.

Noticing Hearings

Just as everyone is entitled to an opportunity to be heard, so too are they entitled to receive reasonable advance notice of when and where a hearing is to take place.

This is given by a paper we call, not surprisingly, the Notice of Hearing.

A proper Notice of Hearing must accomplish eight things:

1. Identify the court.
2. Identify the case.
3. Identify the parties.
4. Identify the motion to be heard.
5. Identify the time and place where the motion will be heard.
6. Identify the judge who will hear the motion.
7. Identify the length of time set aside for the hearing.
8. Provide reasonable advance notice to all parties, the Clerk, and the judge.

You'll recall in the previous chapter that after we pinned down a date and time, we immediately called the JA so that slot would be reserved for our hearing on the judge's calendar. We also let the JA know the other dates/times provided would not be used, making those times available for other parties to bring their motions before the judge.

In most courts (check your local rules) the original of your Notice of Hearing is sent to the Clerk with a copy of the motion (or other pending matter to be heard) and a cover letter requesting the Clerk to file the notice and forward the entire file to the assigned judge for the court's consideration.

If the motion is your motion, you should file the original of your motion with the Clerk along with your Notice of Hearing. [Original documents are those that bear the actual signatures, not copies. There should never be more than one (1) original of any paper filed in a lawsuit. One paper gets signed in ink and copies are made so everyone concerned has knowledge of what the original says. In most cases (but not all) originals are filed with the clerk and copies provided to opposing parties and the judge.]

Unless local rules differ from common practice, a copy of the Notice of Hearing and a copy of the motion should be mailed (or hand-delivered) to the JA, just in case you have one of the "good" judges who actually read motions before hearings.

Good judges want to do their job well, adjudging the parties' motions with fairness and knowledge of the underlying legal and factual arguments. Occasionally, you run into a lazy judge who's just earning his salary and isn't about to spend any more time attending to his duty than is absolutely necessary.

When you run into such judges as these, you should begin the hearing with a question to the bench, "Good afternoon, your honor. Have you read my motion?"

If the judge says, "Yes," we're off on the right foot.

If the judge impatiently glowers down from his high perch with a black-robed frown, his gavel ready to strike, demanding in a gruff stentorian tone, "Get on with it," at least you know where you stand and if you've hired a court reporter, which I would recommend you

do, you can make certain all essential points of your written motion get spoken into the record just in case the judge rules against you so an appeal is needed.

Good judges work hard. The very best take-home motions and matters scheduled to be heard the following day, reading them before breakfast. Thank the Lord if you are blessed to have such a judge.

The following is a typical Notice of Hearing that should work in most jurisdictions.

As always, consult local court rules for specifics on practice requirements, forms, fonts, paper size, margins, etc.

Here's an example:

IN THE THIRTIETH JUDICIAL CIRCUIT COURT
IN AND FOR SUNSHINE COUNTY, FLORIDA

Case No. 2012-123
Judge Benchpounder

DONALD TRUMP,
Plaintiff,

v.

JOE XI JING PING,
Defendant.

NOTICE OF HEARING

PLAINTIFF DONALD TRUMP hereby gives notice he will call up to be heard before the Hon. Barry Benchpounder in Courtroom 5 at the Sunshine County Courthouse, 10 Justice Avenue, Small Town, Florida at 10:00 a.m. on 31 February 2012 his Motion for a More Definite Statement.

TIME RESERVED is 15 minutes.

GOVERN YOURSELVES ACCORDINGLY.

_____
DONALD TRUMP, Plaintiff

[Certificate of Service]

STATE OF FLORIDA
COUNTY OF SUNSHINE

BEFORE ME personally appeared DONALD TRUMP who, being by me first duly sworn and identified in accordance with Florida law executed the foregoing in my presence.

Notary Public

NOTE: The foregoing is offered merely to show the essential parts of a notice of hearing. Check local rules to ensure this form complies with requirements of your jurisdiction.

Arguing Motions at Hearings

So, you've drafted your motion, filed it with the clerk, sent a copy to the judge, and served the other side. Some judges do not want to receive courtesy copies. Others insist on them. If your court allows copies of motions to be sent to the judge before hearings, do so. If the judge reads your motion, the chance of winning at the hearing is much improved.

You've supported your motion with a carefully-researched and well-written memorandum, setting out relevant facts and legal arguments why the court should grant your motion. [If you're the defendant, of course, you've filed a response memorandum in opposition to the motion.]

You've scheduled hearing time with the judge's Judicial Assistant agreeable to the other side. You've filed your Notice of Hearing with the clerk and sent a copy to the other side (by fax and mail.)

Now the day is here.

You've taken your seat. The courtroom doors have closed behind you. The bailiff announces, “All rise!”

Enter the judge. Everyone stands. The judge looks around the room before saying, “Please be seated.”

Don't sit down!

The judge will announce the hearing, telling everyone including the court reporter you brought to write things down if you brought a court reporter, “We're here on case number 05-123, DONALD TRUMP versus JOE XI JING PING. This is the plaintiff's motion for summary judgment. Mr. Graves, please proceed.”

The movant goes first.

Don't let the other side interrupt. This is one of the most egregious things crooked lawyers do. They will jump to their feet and interrupt as often as the judge lets them get away with it. After the second or third interruption, stop your presentation long enough to request of the court, “Your honor, I have only a limited time to present my argument. May I proceed without interruption?”

Even if the court allows your opponent to continue interrupting, at least there will be less tendency for the judge to overlook obvious rudeness designed to disrupt your concentration. If the other side doesn't have a valid objection, you should insist on being able to speak without interruption.

Often a good thing to say is, “Your honor, I need to make my record here, and counsel is interrupting with no legitimate purpose other than to prevent me from speaking.”

You have a right to be heard. It's been bought for you by the blood of men and women who died for your right to be heard. Remember this, and demand to be heard.

Getting Started

The first question to ask the judge at hearings on the motion is, *“Have you read my motion, your honor?”*

If the judge says he's already read the motion, then you can refer to it in general as an outline while making your argument, taking care to touch all points so my court reporter writes down every word.

If the judge says he's not read the motion, ask, *“Would the court care to take a moment now to review the written motion?”*

If the court agrees, I wait silently while the court reads my motion, keeping on guard for my opponent's attempts to interrupt the judge's train of thought which can happen when you're dealing with crooked lawyers.

If the court gruffly commands, *"Get on with it. Present your argument,"* then make certain to touch every point of your written motion completely and in every pertinent regard, with the court reporter writing down every word you say.

After all, the written motion was prepared at your office, where you weren't being interrupted, where you had hours instead of only a few minutes, to set out your arguments.

While writing the motion you have the advantage of doing legal research, reading cases, statutes, rules, and occasionally constitutional provisions in support of your motion whereas standing in a courtroom, being stared at by a gun-toting bailiff, being listened to by an impatient judge who'd rather be playing golf, and being interrupted by your opponent at every opportunity imaginable, it is far less likely you can keep your concentration on all those points by simply working from memory.

Use your motion as an outline and cover every point in detail before sitting down.

Controlling the Opposing Party

At some point you will finish arguing your motion and sit down. It's now the other side's chance to shoot holes in everything you just said.

Some unscrupulous bums in the profession will take personal shots at you, insinuate you're trying to deceive the court, even suggesting you're a dishonest person who should never be believed no matter what you may say.

Don't put up with it. Object and make your record, on the record.

Do whatever is necessary to be certain the record being taken down verbatim by the court reporter reflects everything pertinent that takes place at the hearing, including the things that are done without words.

For example, if the other side makes inappropriately threatening or insulting side-glances in your direction during his argument, speak up.

"Your honor, may the record reflect opposing counsel is making childish faces at me when you aren't looking."

That will put a stop to it.

This is also effective at depositions or any place where the record is preserved only by what a court reporter writes down. If opposing counsel drums fingers on the table or glowers or rolls his or her eyes in an effort to disarm or discredit the witness, speak up. "Let the record reflect opposing counsel is making threatening gestures at the witness with his fountain pen." If you're up against a crooked lawyer, hang him out to dry.

Avoid helping your opponent, unless you can help him shoot holes in his own case.

If the opposing party cites cases or statutes that don't apply to facts before the court, let the argument continue but make notes. As moving party, you should be allowed an opportunity for rebuttal.

That's when you explain to the court how the other side misrepresented what those statutes and cases truly stand for. Don't interrupt if the other side is going down the wrong path.

You might unwittingly give him an opportunity to correct his errors. It's far better to wait till he sits down before showing the court, in calm, measured tones, that he's misrepresented the law and the facts and is "attempting to mislead this Honorable Court, your Honor."

An exception to not interrupting the other party is when a lawyer for the other side begins telling the court what the evidence is, rather than referring to evidence that's already been admitted. Lawyers are not supposed to testify.

They weren't present at the time of the matter being testified to, so they don't have first-hand knowledge. If you've studied the *Evidence* chapter you know that testimony by persons lacking first-hand knowledge is not competent testimony and is, therefore, inadmissible.

If a lawyer begins telling the court what the facts are instead of referring to facts already made a part of the record by admissible testimony and other evidence, jump to your feet.

“Objection, your honor. Counsel is testifying. Counsel is incompetent to testify as to matters about which he has no first-hand knowledge. I move the court to strike his attempt to testify as to facts beyond his personal knowledge.”

In most courts the judge will sustain your motion and instruct the lawyer to stick to legal argument.

Rebuttal Argument

After the other side concludes his argument against your motion, the court may give you a chance to rebut what's been said. This is especially true if the other side raised new points of fact or law that weren't discussed in your own argument.

This is the purpose for rebuttal. It's normally not a chance to re-state what you said during your initial argument, but many judges will give you this second bite at the apple whether or not the other side raised new issues that open the door for rebuttal.

If permitted to do so, make a final summation argument why your motion should be granted and sit down.

Above all, don't be afraid. Whether you're arguing in favor of your own motion or arguing against your opponent's motion, if you've done your homework, you already know what needs to be said to make your record and convince the judge.

You've already spent hours studying the law and drafting your motion and memorandum or response in opposition, and if you stick to your paperwork you'll not wander or be drawn off-course by an unscrupulous adversary's intentional interruptions.

Follow the arguments you've already written and stick to them.

Don't let the other side throw you off course. Keep it simple.

Judges are just humans. They are not the rocket scientists most people tend to believe they are. Many judges sit on the bench because they can't make it in private practice as a working lawyer. Don't be afraid of the judge.

Don't be intimidated by the black robe or imposing high bench he sits on.

Above all, don't think the way to win is by making complex arguments, as if the judge will respect you more and give greater weight to your cause because you couch it in complicated verbiage.

Don't do it.

Talk to the judge, not to the opposing party and talk directly to the judge and only to the judge.

At trial before a jury, talk to the jury when presenting evidence and to the judge when

arguing law. Speak as if you were talking to a small child. Use measured tones, one short sentence at-a- time. Don't imagine for a moment that the judge is smarter than you are. He may know more about the law, but in the facts, you're trying to present he may be as empty-headed as a box of rocks.

Explain your argument the way you would if you were speaking to an acquaintance of only average intelligence. Be understood.

Maintain eye contact with the judge. Don't look about. Pay no attention to anyone else. Look the judge straight in the eye and, if the judge looks away, pause and wait silently until the judge looks back at you.

Scientific studies have proven that people who look away from a speaker are less likely to absorb and retain what's being said to them. Those who maintain eye contact fare much better, as if one mind speaks directly to the other.

Don't look down except to find papers on the table or lectern. Look alert.

Speak loudly enough to be heard clearly and no louder. Do not emphasize what you're saying by raising your voice or wildly inflecting your pitch. Measure your words, and use vocabulary, not physical emotion, to emphasize strong points. Lawsuits are won with words, not gymnastics or histrionics no matter what you see on Law & Order or other TV court shows.

Don't allow yourself to be rushed. You're here for a purpose. This is your time to be heard. Valuable time. Make the most of it.

Whether you win your motion or not, you're there to make a record of the argument in support of your motion and of all the judge and opposing party say and do.

Take your time.

If the judge says, “Hurry it along,” simply thank the court and proceed as before. Determine to cover all the necessary points in your argument. Use all the time you are allotted for the hearing. Each side should be given equal time. Use all of yours.

If you win, so much the better.

If you lose, at least you'll have made an effective record on which to predicate a successful appeal.

The trick about making your record for appeal is that the better you make your record at the trial level, the less likely the judge will be to rule against you.

Judges hate to be appealed.

Have your prepared order ready for the judge to grant your motion then-and-there.

What's next...

The next step is getting experience on your feet in a courtroom under the demanding gaze of a grumpy judge with a rude attorney on the other side doing his best to make your life miserable. I'm confident the information provided will steer you clear of the more common pitfalls and increase your overall confidence so you can win more often, but the only way you'll know for sure is to jump in the game with both feet kicking.

After you've written and argued a few motions at hearings in front of a live judge with an obstreperous lawyer on the other side doing all he can to distract you from making the important points you need to make, it will come much easier and what you've been taught will gradually become second-nature, guiding you to successfully getting all the orders you seek with your motions.

Move the court for orders that accomplish what you want and deserve as a matter of law, and don't settle for anything less.

Make cogent arguments that go no farther than necessary to close the noose on your opponent's neck. Be as brief as possible while taking care to say everything that needs to be said.

Then, when you've said enough: STOP.

Too many words get in the way of what's really important.

Having a brilliant argument on the ready isn't necessary and it could happen that the judge just stops you in your tracks and says, “you win.”

Don't argue because you've got this great long-winded elegant speech prepared. Take the win.

Once you win, shut up and sit down.

CAUSES FOR ACTION
The Plaintiff's Right to Sue

Think of a lawsuit like a recipe for baking a pineapple upside-down cake. There are certain ingredients you must put in. One is pineapple.

If you don't include any pineapple in your recipe, you're not going to get a pineapple upside-down cake, whether you turn it right-side-up or upside-down.

You might get something else, and it might taste yummy, but it won't be a pineapple upside-down cake unless you add the essential ingredient, pineapple.

Lawsuits are a bit like pineapple upside-down cake.

Lawsuits also have essential ingredients.

The essential ingredients of a lawsuit are called “elements.”

Every lawsuit stands or falls by its elements.

If it's a breach of contract case, it has certain essential elements.

If it's a negligence case, it has other essential elements.

If it's a slander or libel case, it has still other essential elements.

Each different kind of case has different essential elements.

The essential elements combine to create a “cause of action.”

Every lawsuit must state at least one cause of action e.g., breach of contract, negligence, fraud, etc. that's recognized by the jurisdiction where it's filed, and every cause of action has certain elements the plaintiff the party bringing the lawsuit must do two things with:

1. Allege
2. Prove

If there are more than one cause of action, each must contain certain essential facts that must be alleged and proven for the plaintiff to win.

- If the plaintiff does not allege all the elements of a cause of action, the defendant can successfully move the court for an order dismissing the plaintiff's complaint as to that cause of action. If that's the only cause of action alleged in his case, the plaintiff loses, and the defendant wins.

- If the plaintiff does not ultimately prove all the elements of at least one cause of action by presenting the greater weight of the admissible evidence, the plaintiff loses and defendant wins.

That's what lawsuits are all about, and yet, for some peculiar reason, this truth is rarely taught or is merely glossed over by law school professors many of whom never went to

court as practicing lawyers where they might have learned this truth and stressed the importance of it to their students.

Many lawyers never learn this truth.

Every lawsuit is a battle for evidence to support or refute the elements, depending on which side you're on.

The plaintiff battles for evidence tending to prove the elements he alleged in support of his one or more causes of action. The defendant battles for evidence tending to prove the plaintiff doesn't have the evidence he needs to prove those elements.

The side with the most evidence wins.

It's all about the elements.

Each cause of action, like each kind of cake, has different elements.

For example, if you sue or are sued for breach of contract, the complaint must allege at least three essential ingredients, the elements of breach of contract.

1. Existence of an enforceable contract agreement by the parties.

2. Action by defendant or failure to act that constitutes his breach of the contract.

3. Damages to the plaintiff directly resulting from defendant's breach, i.e., the breach was the cause of plaintiff's damages, and in some jurisdictions that the breach goes to the heart of the contract, i.e., that the breach was material.

The plaintiff's failure to allege all 3 essential ingredients of his breach of contract case gives the defendant an opportunity to move the court for an order dismissing the case for failure to state a cause of action.

What do we call such a motion? How about *Motion to Dismiss for Failure to State a Cause of Action?*

See? Like I told you earlier, this isn't rocket science or differential calculus. You can learn this stuff and win in court without a lawyer.

Of course, simply alleging the essential elements set out in the three-point list above isn't quite enough to effectively state a cause of action for breach of contract. You must allege all facts of the case that explain each element. Only then have you stated a cause of action for breach of contract.

For example, in stating a cause of action for breach of contract you might state all the facts as in the following example:

COUNT ONE: BREACH OF CONTRACT

23. This is an action for breach of contract.

24. On the 1st of April 2011 defendant offered to sell his prize bull to plaintiff for $2,000.

25. Plaintiff and defendant signed a written contract agreeing to the terms of the bargain.

26. A copy of the written contract is attached as Exhibit 1.

27. Plaintiff gave defendant $2,000 in cash.

28. The next day, while visiting a local tavern where defendant goes to drink himself silly every day, plaintiff learned that defendant was bragging how the bull died the week before.

29. Plaintiff made demand for the live bull he bargained and paid for.

30. Defendant failed and refused to deliver the bull alive or return the plaintiff's money.

31. Plaintiff suffered $2,000 in money damages as a direct result of defendant's breach, and the breach was material in that it went to the heart of the bargain in that Plaintiff did not get the bull he paid for.

WHEREFORE plaintiff moves this Honorable Court to enter an Order of Final Judgment awarding plaintiff money damages and such other and further relief as the Court may deem reasonable and just under the circumstances.

That's how it's done.

See? It's truly easy, once you see the common-sense of it.

All facts are alleged that need to be alleged to satisfy all essential elements of the cause of action for breach of contract. Some additional facts may be alleged to put the court on notice what the case is about and what the plaintiff intends to prove, i.e., what he must prove to win.

Additionally, some further facts may be alleged simply because when the defendant files his Answer to the Complaint, he must admit or deny each allegation, so the Complaint is also used to begin the Discovery Process.

Note: There is more to winning lawsuits than knowing the elements of causes of action, however this is perhaps the most important thing to know, whether you are being sued or suing someone else.

The following pages list many of the most common causes of action you will encounter.

The list is in alphabetical order.

Note: Some causes of action not listed here arise from state or federal statutory law. The essential elements for such statutory causes of action will be stated in the statutes and explained by controlling appellate court opinions i.e., case law that interprets the statutes. Your interpretation of what a statute says or what the elements are may not count for much in the heat of battle. It's always best, when tracking essential elements of statutory causes of action, to find appellate court opinions that interpret those statutes and how they control the courts.

ALSO NOTE: The elements of some Causes of Action may differ between jurisdictions. Check local rules and case law for specific details before proceeding. The causes of action listed here are for your general information to get you started.

Abuse of Process

A cause of action for the intentional tort abuse of process arises when one intentionally uses the legal system to attain a wrongful, unjustified result, thus causing another injury. A tort is an act that causes injury to another, whether intentional or negligent.

The term process applies to a summons that attaches to a complaint served to initiate a lawsuit. The term may also apply to witness subpoenas or other special orders or writs issued by the court that command persons to do certain things.

The abuse of the court's process and injury caused by that abuse gives rise to this cause of action.

The person injured by such abuse has this cause of action i.e., a right to sue.

As stated above, however, the injured person must properly state his cause of action and support it with all facts necessary to establish the elements listed below.

Suppose Smith sues Jones for fraud just to keep Jones from closing a deal with Miller. Smith believes when Miller sees Jones has been sued, Miller will doubt Jones' honesty and refuse to go forward with the deal. Smith wants to stop the deal, so he abuses legal process to attain a wrongful result.

In order for Jones to sue Smith for abuse of process, however, Jones must show that

1. Smith intentionally used the legal system to attain a wrongful result,
2. That Jones was not guilty of fraud, and
3. Smith knew i.e., Smith acted intentionally that Jones was not guilty of fraud.

If Jones was, in fact, guilty of fraud that caused Smith money damages, then Jones cannot sue Smith for suing Jones, because Smith had a legitimate right to sue Jones in the first place.

The underlying wrong that gives rise to the cause of action is perversion of our legal system. The act of using the courts for an improper purpose i.e., a purpose the law never intended is a wrong for which injured persons need an opportunity to seek redress of their grievance in the courts.

If Smith had a legitimate purpose for suing Jones for fraud, there's no perversion, and Jones has no cause of action for abuse of process.

If Smith did not have a legitimate purpose for suing Jones for fraud, then Jones has a cause of action i.e., right to sue for abuse of process against Smith.

Abuse of process may arise where a person either sues another in civil court or applies to the criminal system to achieve an improper purpose the law does not intend.

It may not be necessary for Jones to win the underlying lawsuit brought by Smith, provided he can show in his action against Smith for abuse of process that Smith intentionally proceeded against him and did so for an improper purpose.

Maliciousness is irrelevant. It is the improper purpose that gives rise to the cause of action, purpose not intended by law, an ulterior purpose for which our laws were not designed, a purpose that abuses the system itself.

Elements

For a plaintiff to adequately plead a cause of action for abuse of process, he must allege facts sufficient to establish the following essential elements:

1. Defendant illegally or improperly perverted the legal system against plaintiff.
2. Defendant had ulterior motive or purpose exercising such perverted use of the system.

3. Plaintiff suffered damages as a proximate result.

Each of these three elements must be expanded with the facts to fully explain how each element exists in the situation. To win the case plaintiff must prove each and every essential fact alleged.

Defenses

Absolute Immunity

So long as the acts of the court or a judge have some relation to the proceeding, the court system and the judge are protected by absolute immunity from suit for abuse of process. Statements amounting to perjury, libel, slander, and defamation do not give rise to an action for abuse of process.

Act After Process Issues

Before the cause of action of abuse of process can arise, the court must issue some form of process usually the summons that commands a civil defendant to appear in court and answer the complaint. Process must be used for an improper purpose. No act occurring prior to issuance of the court's process can give rise to this cause of action.

Intended Purpose

There is no cause of action for abuse of process unless the process was used for a purpose other than that which the law intended. If process is used to accomplish a proper result e.g., bringing a civil defendant before the court to answer a complaint that's predicated on a legitimate cause of action there is no abuse of process, even if the process furthers another purpose separate from its legitimate purpose.

If a person sued for abuse of process had a legitimate purpose for the process that caused damage to the other unrelated to the legitimate purpose, the cause of action does not arise. There is no abuse of process if process is used to accomplish a legitimate result, even if there is a separate, wrongful motive behind it.

Frequently, abuse of process arises from a form of extortion, i.e., used to compel another to do something he would not otherwise be lawfully compelled to do. If the one using process has a legitimate reason to do so, however, there is no abuse, and the cause of action must be dismissed.

Counterclaim

In jurisdictions where the complaining party need not prevail in the underlying action as a pre-requisite to bringing this cause of action, one may file a counterclaim seeking damages for abuse of process.

Unless the counterclaim itself stands on a solid footing, however i.e., unless the counterclaim is justified by the facts, rather than being a mere retaliatory tactic without merit in its own right, the party filing the counterclaim may be sued for abusing process.

Check local rules and case law to determine if abuse of process requires as one of its essential elements a termination of the action in favor of the person against which the allegedly abusive process was issued in the first place.

Accounting

A cause of action for an accounting arises where there is a fiduciary relationship, a relationship based on trust that the law recognizes, such as where one party has a dispute

with a guardian, trustee, receiver, or other fiduciary who has control over assets of the complaining party.

An accounting may also be ordered where issues in a contract case, for example, are so complicated it's not clear if the facts can be ascertained any other way and where terms of the underlying contract provide for an accounting to be ordered in the event of a dispute.

When the complaining party has no separate access to the records, such as where a fiduciary e.g., a trustee or guardian has control of the books, an accounting will almost never be denied, since the complaining party has no other way to know if the fiduciary has performed his duties faithfully and not squandered or otherwise used assets wrongfully.

Elements

To successfully plead for an accounting, one should allege sufficient facts to establish the following essential elements of the cause of action:

1. Existence of a fiduciary relationship or contract terms so extensive or complicated it is not clear that money damages alone are adequate.

2. Circumstances indicate necessity for an accounting to be made and reported to the court.

The remedy sought is one in equity, therefore the court has broad discretion in whether or not it will grant the relief sought.

It is important, therefore, to allege sufficient facts to make clear that justice and fairness demand that an accounting be ordered.

Defenses

If the matter for which the other party seeks an accounting is simple on its face, e.g., an oral agreement for performance of a clear-cut duty that involves no fiduciary entrustment of assets, this defense should be raised with a motion to strike or motion to dismiss.

Comments

The remedy of an accounting is almost always granted by a judge or by a special master appointed by a judge. *Accountings* are never submitted to a jury, unless the court deems that justice demands that a jury try the facts and reach a determination on the facts. The application of law is the judge's province.

Winding up of partnerships, for example, frequently requires an accounting to determine the respective parties' interests in the assets of the terminated partnership.

An accounting may also be necessitated when a closely held corporation's business comes to a standstill because of decision deadlock between directors.

Account Stated

This cause of action arises where parties engaged in a prior extended course of dealing i.e., long-standing history of commercial transactions and debtor refuses to deny the amount that is claimed by the creditor's demands failure to deny coupled with long-standing course of dealing.

If creditor makes demands e.g., periodic invoices and debtor does nothing to acknowledge amount demanded and refuses to pay, creditor can bring this cause of action to collect the debt based on the defendant's prior dealings with plaintiff.

The longer the course of prior dealing, the easier it is for the plaintiff to win.

This cause of action is often abused by people unfamiliar with its elements. Many mistakenly believe they can invoice someone for a debt, stating in the invoice, "*If we do not hear from you within 10 days,"* or words to that effect, we will assume you acknowledge the debt. This may work against naïve or poorly-represented defendants; however, ***it will not work where the essential elements of the cause of action do not exist.***

Elements

To successfully plead a case for account stated, one should allege sufficient facts to establish the following essential elements:

1. The parties engaged in prior dealings out of which the account arose. Mere statement of a liquidated amount due on a contract for fixed price alone that defendant is clearly obligated to pay does not give rise to an action for account stated.

2. When account was presented, debtor had a prior liability to pay. There can be no action for account stated if, when the account was presented, the debtor had no liability to pay.

3. The defendant either expressly or implicitly promised to pay the balance of the account stated. An express promise is easy to prove. An implied promise, however, cannot be established by the defendant's mere failure to dispute the debt. There must be more, such as a well-established practice of periodic billing in the regular course of dealing to which no objection is made within a reasonable time. The term reasonable is a concept essential to our American system of justice.

4. Plaintiff suffered damages as a proximate result.

Defenses

The most common way to defeat an action for account stated is to show the debt claimed is new, i.e., there was no prior course of dealing between the parties.

If there was a prior course of dealing and a long history of periodic billing defendant timely and routinely paid over an extended course of time before receiving the invoices in question, defendant is put to the difficult task of proving he did not assent to the amount of debt stated in the invoice or demand, he had no obligation to do so, he never received the goods or services for which the invoice applies, or he paid the debt.

Comments

Sending an invoice or other demand for payment of a debt that includes language such as, Failure to dispute the amount of this debt will result in the creditor's assumption that the debt is owed, may intimidate some people into paying.

A lawsuit on this cause of action may actually result in a judgment if the defendant is unfamiliar with the law. A savvy litigator will not be taken in, however.

Failure to respond to a demand letter, without more, is insufficient to give rise to this cause of action.

Suing for account stated when essential elements are clearly absent, may expose the party bringing the action to a counterclaim for abuse of process.

Assault

Assault is merely a threat to do physical harm coupled with the present ability to cause the threatened harm.

Contrary to popular belief assault has nothing to do with slapping, striking, biting, kicking, scratching, or any other physical touching.

The cause of action arises when the plaintiff is placed in well-founded fear of imminent injury by the intentional threat or offer of another to cause him bodily injury by force. The cause of action arising from the resultant actual injury is called battery.

If I phone you from Wisconsin, while you're comfortably seated pool side at your cozy home in South Florida and say, *"I will now bash in your nose,"* you have no action for assault. You've not been placed in well-founded fear of imminent injury. I cannot bash you in your nose from icy Wisconsin if you're lounging by your pool in sunny Florida.

On the other hand, if I walk up to you in a tavern, beer bottle clenched in my uplifted fist, and shout angrily just inches from your face, *"I will now bash in your nose,"* you have a cause of action for assault. If you have witnesses to testify on your behalf, you'll probably win.

The measure of damages you can recover, i.e., how much money the lawsuit may be worth, depends on severity of the threat and degree of fear the court believes it would cause a reasonable person in the same or similar circumstances typically a jury decision.

Elements

To successfully plead a count for assault, one should allege sufficient facts to establish the following essential elements:

1. An intentional threat or offer to cause bodily injury by force, or force directed toward another, regardless of whether any injury is caused.

2. The threat was not lawful nor authorized by the plaintiff.

3. Circumstances surrounding the threat created a well-founded i.e., reasonable fear of imminent peril of bodily injury.

4. Defendant had apparent present ability to cause the threatened injury if not prevented.

5. Plaintiff suffered damages as a proximate result.

As you now see, my threatening you over the phone cannot give rise to this cause of action.

However, if I threaten to club you on the nose with a beer bottle while we're standing face-to-face in a tavern or to throw a beer bottle at you from across the bar, I've committed the civil tort of assault, and all elements exist to support the essential elements of this cause of action.

It is up to the plaintiff to allege all facts particular to the circumstances that are necessary to establish each element in his complaint. If he omits any ultimate fact necessary to establish any one of the elements, the defendant can move the court for an order dismissing the plaintiff's complaint for failure to state this cause of action.

Comments

Keep in mind this cause of action arises not from actual physical violence but from defendant's threat to do violence. And, moreover, there must be a reasonable fear of imminent i.e., immediate bodily injury.

A threat to do injury to property is not assault.

Defenses

Any communication or act done in pure self-defense is a defense. If you threaten me first with a beer bottle, and I wave an umbrella over my head shouting, *"Do it, and I'll crush your head with this umbrella,"* you have no cause of action against me. You started it.

Any communication or act done in defense of property is a defense. Thus, if you're in the act of stealing potatoes from my garden, and I run toward you waving a shovel over my head, shouting, *"Get out of my garden or I'll pound you with this spade,"* I have a defense to your cause of action against me for assault.

Spoken words alone do not constitute sufficient justification for assault. The old adage, *"Sticks and stones may break my bones, but words will never hurt me,"* applies in cases where one person tells another, *"You are by far the ugliest mortal I have ever witnessed."*

To respond to such a statement with, *"Hold still, you little varmint, while I pound your head with this beer bottle,"* will subject you to civil liability for the tort of assault.

Caveat

Threats to cause severe bodily injury may be justified only if made in response to a well-founded fear of imminent bodily injury.

Threats to cause mortal injury by lethal force, however, are only justified in response to threats that cause a well-founded fear of imminent death or severe physical injury. Whether the severity of a threat is sufficient to justify the responsive threat is typically a question of fact for a jury.

One cannot be excused for threatening to kill potato thieves.

If it's possible to withdraw from a threatening situation, wisdom counsels you to do so, rather than cause physical harm to others for which you may become an unwilling defendant in a financially-destructive, character-assassinating lawsuit.

Respond with force or threats of force only when absolutely necessary and only in degree as the threat demands.

Use of force or threat of force greater than what is privileged, even when acting in self-defense, may subject you to civil liability and possible severe criminal charges.

Assumption of Duty

An action taken for the benefit of another, whether for payment or not, imposes a duty and imputes knowledge of that duty on the person taking action to do so with reasonable care.

Failure to exercise reasonable care when assuming a duty to assist another gives rise to a cause of action for assumption of duty.

In law school they told us of a young man enjoying sunshine on a crowded beach when a frightened cry for help is heard beyond the breakers. Dashing to the water's edge the

would-be hero plunges into the surf ahead of several other strong swimmers who might otherwise have attempted the rescue but, upon seeing this hero already several yards ahead of them powerfully pulling toward the thrashing victim they refrain.

Just a few short yards short of reaching the frantic, grasping victim our would-be-man-of-the-hour suddenly realizes the mortal danger into which he is putting himself and turns back, leaving the hapless victim to fend for herself without his aid.

Seeing the young man shirk his assumed duty, the strong swimmers strike out valiantly on their own in hopes of reaching the drowning victim in time.

A moment later, however, the struggling soul disappears beneath the waves, forever lost.

Some say the first fellow who started to the rescue had no duty to complete the task. They say he should not be held liable for the drowning since, after all, he had no duty to begin the attempt.

Our courts uniformly hold otherwise.

One who undertakes to act for the benefit of another is deemed by our system of justice to have assumed a duty to do so with reasonable care.

If our swimmer had not begun his rescue attempt in the first place, he'd not be deemed to have assumed a duty. The bereaved family of the drowning victim would have no cause of action against him. However, since his aborted attempt dissuaded others from making the attempt, he is responsible.

He assumed a duty. He breached the duty. Damages resulted. A cause of action for assumption of duty arises accordingly.

Elements

It's important to note that the elements constrain this cause of action to certain fact situations so as not to create a chilling effect on those who might otherwise attempt to render assistance to someone in distress or difficulty. Read carefully:

> 1. Defendant undertook, gratuitously or for consideration, to render services to another in circumstances a reasonable man would recognize as necessary for protection of the other person or the other person's property.
>
> 2. Plaintiff suffered physical harm resulting from defendant's failure to exercise reasonable care to perform the services he undertook to perform.
>
> 3. Defendant's failure to exercise reasonable care foreseeably increased plaintiff's risk of harm.
>
> 4. Plaintiff's harm proximately resulted from reasonable and justifiable reliance on defendant's undertaking to render services.

Our courts have settled this issue.

If you undertake to act for another's benefit in a manner reasonable persons would agree as necessary for the safety of the other person or his property, you will be deemed by our courts to have assumed a duty to do so with reasonable care, and you can be held liable for injury to that person resulting from your failure to act with reasonable care.

Defenses

Good Samaritan Act

Some jurisdictions have enacted statutory clarifications that limit liability of persons who gratuitously i.e., without charge or anticipation of financial gain, render assistance, medical

or otherwise, in emergency situations. These statutes do not remove liability for those who act without reasonable care but clarify the standard of care that must be observed.

Be aware of these statutory clarifications in your jurisdiction and controlling case law that further refines those clarifications with regard to specific fact circumstances.

Performance Not Begun

If the defendant has not actually undertaken to begin rendering service, regardless of preparatory actions taken by him, our law will not hold him liable where the assumed duty has not begun. He is only liable to act with reasonable care after he assumes that duty by beginning.

Battery

Battery is a cause of action that arises when plaintiff suffers harm or humiliation as a proximate result of being touched, whether violently or gently, without an invitation or legal justification.

It's not necessary for the touch to cause physical injury. Herein be warned.

Some years ago, a carpet-layer was complaining he'd been sued for battery as a result of merely touching one of his customers on the shoulder while telling her, *"We don't have to finish this job, you know."* He had no intent to cause physical harm.

All he did was touch her with his index finger to punctuate what he was saying. She'd demanded he use left-over remnants from the living room to carpet her hallway a demand outside their written contract. She raised her voice demanding compliance when he refused. He merely touched her on the shoulder. That was the excuse she needed. She sued him for battery.

He did intend to touch her. She did not invite him to touch her. She deemed the touch offensive, mild though it was. His lawyer was able to prevent her from getting a judgment, however the damage to his business and consequent emotional strain on his family resulted in great suffering.

All because he touched someone with the tip of his index finger without being invited to do so. That's battery.

Beware.

Elements

To successfully state a cause of action for battery, one must allege sufficient facts to establish the following essential elements:

1. Plaintiff suffered a harmful or offensive uninvited contact by defendant.
2. Defendant intended the contact and resulting harm or offense or acted with reckless disregard for whether or not his acts would result in the harm or offense.
3. Defendant acted unlawfully or without authority or consent.
4. Plaintiff suffered damages as a proximate result.

The degree of force is immaterial, except as it may be considered in determining the amount of money damages to be awarded to the plaintiff.

It is not the degree of force or even the degree of hostile intent that gives rise to this cause of action.

The cause of action arises where the touching is offensive and unauthorized.

Summary

Negligently touching another i.e., without intent does not give rise to a cause of action for battery, however if the person touched is unusually sensitive the person negligently touching him may still be liable for damages resulting from negligence, but not from battery.

Battery is an intentional tort, i.e., a cause of action that requires defendant's intent as a necessary element that must be alleged as part of the pleadings and proven before the plaintiff can win.

Defenses

Insanity

Since intent is a requisite element for the tort of battery, insanity or extreme intoxication may be a defense. The question is one of degree, i.e., whether defendant possessed the requisite mental capacity to intend his act. A merely intoxicated person may in some cases avoid liability for battery yet remain liable for negligence, if it is determined his intoxication was, itself, intentional.

Self Defense

One is authorized to use reasonable force against another to protect oneself from physical harm. Thus, it is a defense to battery if one resisted physical force with physical force that was reasonable under the circumstances.

Words Alone

As explained under the heading for assault, spoken words alone do not constitute sufficient justification for battery. The adage, *"Sticks and stones may break my bones, but words will never hurt me,"* applies.

Caveat

As stated under the heading for assault, bodily injury may be justified only if in response to a well-founded fear of imminent bodily injury to yourself. Whether severity of a threat is sufficient to justify a physical response is typically a jury question.

If possible, to withdraw from threatening situations, wisdom counsels you to do so, rather than cause physical harm to others for which you may become the unwilling defendant in a financially destructive, character assassinating lawsuit.

Respond with force or threats of force only when absolutely necessary.

Use of force or threat of force greater than what is privileged, even when acting in self-defense, may subject you to civil liability and possibly severe criminal charges.

Sexual battery arises from any non-consensual sexual contact. If Sue consents to sexual contact with Sam, and Sam knows Sue is ignorant of the fact that he carries a sexually transmitted disease, Sue has a cause of action against Sam for sexual battery, even though their contact was consensual.

Breach of Contract

Essentially, breach of contract arises where the defendant acts as if no contract ever existed.

Here are the essential elements:

1. Existence of an enforceable contract,
2. An act or failure to act that breaches the duty imposed by the contract.
3. Damages to the plaintiff proximately resulting from the breach.

What could be simpler?

Actually, there are pitfalls for the unwary in breach of contract cases.

Enforceability

First, a contract must be enforceable to provide the basis for a suit. Many contracts aren't enforceable.

For example, a contract in contemplation of marriage e.g., Harriet tells Harry she will give him title to her farm if he will marry her is not enforceable in most jurisdictions today.

Contracts for sale of goods valued at more than $500 cannot be enforced in most jurisdictions unless committed to a writing signed by the defendant.

Contracts for the performance of services that cannot be performed in the space of one year are only enforceable if committed to a writing signed by the defendant.

So, the first pre-requisite is that the contract be enforceable at law.

Justification

Second, the breach must be committed without justification.

For example, Tom promises to deliver 75 bushels of apples to Bill on Tuesday for $25. Tom shows up a day late with the apples. Bill has no obligation to pay. Tom has no cause of action for breach of contract. Tom breached first.

Nexus

Finally, there must be a direct nexus i.e., connection between the damages suffered and the breach. In other words, the damages must be a proximate result of the breach.

Consequential or incidental damages are ordinarily not recoverable in a breach of contract action.

The most famous example is the case of *Hadley v. Baxendale*, an English case in the Court of Exchequer 1854, brought by a mill owner against a mill wheel crankshaft repairman.

The learned appellate judges wrote in their opinion, we think there ought to be a new trial in this case; but, in so doing, we deem it to be expedient and necessary to state explicitly the rule which the Judge, at the next trial, ought, in our opinion, to direct the jury to be governed by when they estimate the damages. It is, indeed, of the last importance that we should do this; for, if the jury are left without any definite rule to guide them, it will, in such cases as these, manifestly lead to the greatest injustice.

The court's instruction in law to the jury follows and should be noted carefully by all students of law and, particularly, those seeking damages for breach of contract.

Now we think the proper rule in such a case as the present is this: Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated.

But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them.

In other words, damages resulting from breach of contract cannot arise from more than the obligation agreed to by the breaching party. Baxendale didn't agree or consider that he'd be liable to Hadley for lost profits while the mill wheel shaft was being repaired.

He only undertook to repair it as quickly as was reasonably within his power to do, so the court decided in an opinion that continues to be honored by courts today that damages for breach of contract should only be those contemplated by the parties, i.e., damages for which they agreed in their contract to be liable one to the other, not consequential or incidental damages, damages that proximately result from breach of the duties promised by the contract itself and nothing more.

So, that being said, the essential elements in their barest form follow.

As stated at the beginning, merely listing the elements as opposed to all of the facts necessary to establish the elements exposes the complaint to the defendant's successful motion to dismiss.

Sufficient facts must be alleged to establish each essential element as a matter of law.

Comments

When does a contract arise? What constitutes a contract? These questions should be understood by all parties involved in a breach of contract case.

A contract arises when two parties exchange promises. A contract is nothing more than a promise for a promise.

There must, however, be a meeting of the minds in order for a contract to arise. For example, in the hypothetical case about the sale of a prize bull discussed earlier, there was no meeting of the minds about the bull being dead or alive.

The buyer reasonably believed the bull was living. The seller knew the bull was dead. There was, therefore, no meeting of their minds. No enforceable contract can arise where there is no meeting of the minds.

If the seller delivered a dead bull and demanded his $2,000, the buyer could refuse to pay without being liable for breach of contract.

There can be no enforceable contract without an exchange of promises and a meeting of the minds.

If Jones makes an offer, and Smith accepts the offer before Jones withdraws the offer, a contract is formed between them. If their contract is enforceable, either can sue the other for breach and recover damages within the contemplation of the parties.

At the moment the offer is accepted, a contract is formed. Both are bound by their mutual promises.

If Jones withdraws his offer before Smith accepts, no contract is formed.

The law of offer and acceptance, when an offer is accepted, when an offer by mail can be accepted by telephone, and such like issues that are beyond the scope of this workbook.

All foreclosure cases are contract cases. What you learn in this workbook will help you with foreclosure cases as well as all other contract cases. The promissory note is a contract, and the mortgage securing payment of the note is a contract. Apply the same principles to foreclosure cases that you would apply to any other case arising from breach of contract.

Defenses

Abandonment

If the plaintiff abandons his contract through some overt act e.g., pursuing performance through a separate contract with another the defendant may have an affirmative defense to breach of contract. As with all affirmative defenses, he should plead abandonment with the filing of his answer or by motion to dismiss.

Act of God

If hurricane, lightning, flood, or other unforeseeable and unpreventable natural circumstance makes performance of a contract impossible, there arises a defense to breach, as defendant is unable to perform due to causes beyond his control.

Breach by Other Party

If plaintiff breaches first e.g., refusal to pay sums when due there arises a defense to his complaint that should result in dismissal. Where there is only a partial breach, however, defendant may be held liable for portions of the contract and damages to the plaintiff resulting therefrom.

Duress

One compelled by force or threat of force to enter a contract is relieved of liability to perform its obligations. Such a contract is voidable if the defendant can prove he entered it under duress.

Failure of Consideration

A plaintiff who does not pay the purchase price, for example, is not entitled to sue for delivery unless the contract contemplated delivery would be tendered before full payment. Moreover, if a contract is a unilateral promise without a countervailing promise in return, it is unenforceable ab initio. For example, the promise of a purely gratuitous gift cannot be enforced, since there is no consideration flowing from the other side.

Fraud in the Inducement

Like contracts obtained by duress, contracts obtained by fraud cannot be enforced. Like causes of action, such defenses have essential elements that must be alleged and proven to prevail.

Hindrance of Performance

This defense is predicated on the common-sense doctrine that one who hinders or prevents another from performing his contract should not be heard to complain about the breach. It's that simple.

Illegality

No contract that's illegal or contemplates an illegal result can be enforced at law. This defense is an absolute bar to enforcement.

Impossibility

A contract that cannot possibly be performed, like delivery of a particular living prize bull that has died, is not enforceable at law. However, any consideration given for performance must be repaid, i.e., the parties must be put in the same position they enjoyed before entering their agreement, to the extent it is possible to do so.

Mistake

A party may avoid the consequence of a contract if, after exercising due care, he can prove he was excusably mistaken in his understanding of its terms and obligations. The mistake must go to a material element of the contract and comprise a substantial part of the value bargained for.

Therefore, if one promises to pay $6 million for the building on the corner of Maple and Elm only to later discover the property being sold is at Main and Chestnut, the court may excuse performance if the mistake is not the result of an inexcusable lack of due care or the other party has so detrimentally relied on the contract that it would be inequitable to deny enforcement.

Breach of Implied Covenant of Good Faith

Many jurisdictions tighten the obligations of contract by adding what they call an Implied Covenant of Good Faith and Fair Dealing.

In those jurisdictions a court may award money damages to plaintiff if defendant takes any action to interfere with plaintiff's ability to enjoy plaintiff's reasonable expectations in the bargain, even when that interference does not expressly breach the contract.

This cause of action often arises when there is some ambiguity as to the terms of a contract, and the defendant takes advantage of the ambiguity causing plaintiff loss, benefiting defendant unfairly.

If plaintiff can prove defendant acted unfairly, the court may award plaintiff money damages.

Suppose for example plaintiff, while visiting defendant's farm, saw a handsome strong-backed work horse grazing in a field. Plaintiff, being in need of a work horse offers defendant $450 dollars for the horse, defendant accepts, plaintiff tenders the cash to

defendant, and defendant grabs a halter from a nearby fence post and enters the field whistling for the horse to approach.

The horse does not move, so defendant walks up to the horse, applies the halter, leads the horse through the gate, and hands the halter to the plaintiff saying, *"Congratulations. She's all yours."*

As it turns out the handsome horse is blind and deaf.

Now the contract per se had no conditions other than payment of $450 and delivery of that particular horse, so defendant has not truly breached the contract.

However, plaintiff in some jurisdictions has this cause of action for breach of the implied covenant of good faith and fair dealing.

Here are the essential elements:

1. The parties enter into an otherwise enforceable contract.

2. Plaintiff performed his part of the bargain.

3. Defendant's conduct was not consistent with plaintiff's reasonable expectations under the specific terms of the contract.

4. Plaintiff suffered money damages as a proximate result.

Breach of Fiduciary Duty

No person should gain advantage by abusing another's trust.

When one person entrusts another with assets or even his well-being, as in the case of a guardian, then by accepting that trust the second person is deemed to have a duty to carry out that trust in good faith.

Good faith does not admit of self-dealing.

Thus, if defendant acquires and then abuses his influence of trust over plaintiff or plaintiff's property, then if plaintiff suffers damages as a proximate result, the plaintiff has a cause of action for breach of fiduciary duty.

The term fiduciary comes from the Latin for faith. *Semper Fidelis*, the motto of the United States Marine Corp, comes from the same root. A fiduciary can be a trustee, a guardian, or simply someone who is put in charge of something or someone with an obligation to carry out his charge faithfully.

A fiduciary is one in whom others entrust their faith.

If that faith is abused to the plaintiff's injury, this cause of action arises.

Elements

1. Existence of trust relationship or influence based on plaintiff's faith. The plaintiff's faith in defendant must be reasonable, i.e., it must arise from circumstances that would cause a reasonable person to believe the defendant owed plaintiff the duty of acting in good faith obligation and meeting obligations of the plaintiff's trust.

2. Breach of the duty or abuse of the trust.

3. Damages to the plaintiff proximately caused by the breach of fiduciary duty i.e., abuse of trust.

Summary

There is no fiduciary duty or trust arising from an arm's length agreement. The fact that two persons exchange promises and enter into a contract does not impute to them any obligation to act for the benefit or protection of the other. Nor does it require either to disclose facts the other could have discovered by reasonable diligence.

A fiduciary duty arises only where one-party places trust in another, and the second person, explicitly or implicitly, assumes the obligation of trust.

For example, suppose I say to you, *"Would you hold my bicycle while I go in this shoe store for a few minutes?"*

Suppose you say, *"Sure,"* and agree to hold the bicycle during my absence.

If you get tired of waiting for me and decide to go home, leaving my bicycle to fend for itself in front of the shoe store, then if someone steals my bicycle as a proximate result of your breaching the fiduciary duty you agreed to, then I will have a cause of action for breach of fiduciary duty.

The measure of damages will be the fair market value of my bicycle as of the moment you assumed the fiduciary duty to hold it during my temporary absence.

To establish that a fiduciary duty existed, plaintiff must allege he placed trust in the defendant and defendant accepted that trust.

Breach of fiduciary duty may be intentional or negligent. The difference is in the dollar amount of damages. One who intentionally breaches a fiduciary duty may be held responsible for all of plaintiff's damages and possibly punitive damages as well.

One who negligently i.e., not intentionally abuses the duty may be liable only for such damages as are consistent with the degree of his negligence.

Conspiracy

To prevail in an action for civil conspiracy, one must allege and prove two or more persons acted in concert to cause a wrong for their own advantage.

- two or more conspirators
- acting in concert
- to cause a wrong
- for their own advantage

They don't even have to communicate with each other.

At least one of them must commit at least one wrongful overt act with a shared goal to disadvantage the plaintiff.

Each must seek advantage for himself to be liable for plaintiff's damages.

The overt acts must be unlawful, willful, or malicious a broad range of behavior.

When pleading conspiracy, one must also plead at least one additional count seeking damages for the wrongful acts. That is to say there must be some underlying wrongful act,

such as tortious interference with an advantageous business relationship. An action for conspiracy alone is without basis and will be dismissed.

Plaintiff may sue for one or more other causes of action, adding a final count for conspiracy in which he alleges the wrongs were committed in concert by multiple defendants seeking their own advantage.

Elements

1. Intentional commission of an unlawful act or a lawful act by unlawful means by the combined effort of more than one actor. The acts need not be criminal, so long as they are forbidden by civil or criminal law. An intentional tort like fraud, for example, is sufficiently unlawful.

2. The acts complained of must be in furtherance of the conspiracy. Any act that does not advance the goal of the conspiracy is not conspiratorial.

3. Overt acts by each conspirator. Mere agreement or consent to the act of another isn't enough.

4. Damage to plaintiff resulting proximately from the conspiratorial acts.

The gist of conspiracy is not the conspiracy itself, for the conspiracy alone causes no damage. It is the damage, accomplished by the conspired acts of multiple persons acting in concert to further the conspiracy, that gives rise to this cause of action.

One person cannot conspire.

Comments

Civil conspiracy arises from an agreement, confederation, or other combination of two or more persons. Each must intend some benefit to himself resulting from the intended wrongful act.

The meeting of two or more independent minds must be intent on one purpose, and those two or more must perform overt acts in furtherance of the conspiracy.

The benefit need not be money or property. The benefit could be advantage over or destruction of a circumstance previously enjoyed by the plaintiff, such as a business advantage or opportunity.

The benefit proves intent, an essential element of this cause of action.

If Harry and Bob conspire to destroy Sam's business, and Bob does the dirty work while Harry sits back in his office participating by nothing more than letting Bob use his car, Harry is responsible for every act Bob commits just as if he were there in person.

By Harry's agreement and the overt act of supplying Bob with a car, the law will hold both Bob and Harry liable for Sam's damages. It is as if Bob and Harry each acted alone. The law deems that each conspirator is jointly and severally liable for all damages caused by acts of the coconspirators.

The act of one is the act of all.

A mafia boss who orders a hit commits murder, though he is nowhere near when the killing occurs. If he furthers the act of the hit man by promising to pay for the kill by money, property, or any advantage the law treats him as if he pulled the trigger in person.

The same applies in a civil conspiracy.

A businessman who promises to pay officers of a competitor firm to walk out and take the competitor's business records, thereby destroying the competitor's business, is liable for civil conspiracy. His overt act is the promise to pay for wrongful acts of co-conspirators. The damaged plaintiff would sue for the damages he suffered by the underlying act of the walkout and theft of his records and would add a count for civil conspiracy that could result in punitive damages in addition to his actual money damages.

Constructive Fraud

If a person of weakened mental ability signs a deed transferring his or her home to another for no money or substantially less than the home is worth, a presumption of constructive fraud arises, and this cause of action lies for suit to be brought in court.

This cause of action arises where the defendant enjoys a position of trust with the plaintiff e.g., a lawyer or guardian or the plaintiff suffers mental weakness or similar infirmity that prevents her from understanding the nature of what she's doing.

This action arises in equity seeking an injunction to prevent plaintiff from suffering damages or, if the damage is already done, seeking an order for money damages or otherwise restoring the plaintiff to the condition enjoyed before the act complained of.

Constructive fraud may lie even when the defendant had no intent to defraud.

The gist of the cause arises from the duty of each of us to do justice to others.

The old adage of caveat emptor let the buyer beware is displaced in modern times by society's need to protect innocent people from suffering loss as a result of unjustly enriching others. The weakness of the person needing protection may be ignorance, inability to understand, or misplaced trust, whether or not the one benefitting is aware of the wrong.

This duty each of us owes to all others arises from moral, social, domestic, and personal obligations imposed by equity in our courts. It is from this common law duty of fairness and the need to protect innocent people from the consequence of their own weakness that the cause of action for constructive fraud was created by our courts.

Some courts refer to this cause of action as unjust enrichment covered later in more detail.

Elements

1. Plaintiff, through no fault of her own, reposed trust in the defendant.
2. Defendant abused the trust, obtaining unjust enrichment from plaintiff's loss.
3. Plaintiff suffered damages as a proximate result.

It's not necessary for defendant to occupy a relationship of trust with plaintiff, however such a relationship does strengthen plaintiff's case, for the cause of action arises from defendant's abuse of plaintiff's trust, imputed, implied, or actual.

This cause of action may arise from misrepresentation or concealment, however such is not necessary, so long as defendant gains an improper advantage that equity abhors as wrong.

Facts that can give rise to an action for constructive fraud are widely varied, but in every case, defendant must be proven to have taken unjust advantage of plaintiff.

Conversion

Conversion arises when defendant, without permission or lawful authority, takes possession of tangible personal property rightfully belonging to plaintiff.

Conversion takes place at the moment of unlawful possession.

It doesn't matter whether defendant retains possession of the property or promptly or belatedly returns it. It matters not if possession is temporary. If defendant takes possession of any tangible personal property of plaintiff, even for only a few seconds without permission or lawful authority, the thing possessed has been converted.

Once conversion is made, this cause of action will lie. Defendant cannot un-ring the bell by returning the property.

Tangible personal property includes but is not limited to such things as a bicycle, boat, airplane, and or prize bull, dead or alive.

Money is personal property but is not tangible personal property.

A dollar bill is a negotiable instrument, not unlike any other dollar bill. It is not normally considered to be unique. And, like other instruments e.g., deeds, mortgages, and such like documents that merely represent assets but in and of themselves have no intrinsic value money is considered intangible property.

The wrongful taking of money, therefore, does not give rise to an action for conversion, because money is not tangible personal property.

An exception is a collection of rare coins or some other identifiable currency having value inherent in the particular tangible thing that it is. A dollar bill might be useful to play a game of fool's poker with, or it could be used to stuff into crack in the wall to keep out drafts, but it is not unlike any other dollar bill and has no inherent value other than some strange use to which any other dollar bill could be put.

The wrongful taking of ordinary money, therefore, may give rise to an action for civil theft, but an action for conversion will not lie unless the money is rare coins or such like having a uniquely inherent value so it can be treated as tangible personal property, like a bicycle, boat, airplane, or prize bull.

The gist of conversion is the exercise of dominion or control over the tangible personal property of another that is inconsistent with the owner's right of possession, i.e., depriving the rightful owner of possession without the owner's consent or other lawful authority.

The wrong is not in the taking but in the depriving.

Houses, barns, buildings, things attached to them and the land they sit on are real property, not personal property, and therefore cannot be converted.

Elements

1. Deprivation of plaintiff's right to enjoy possession of tangible personal property, either temporarily or permanently.

2. Plaintiff's demand for return and defendant's refusal to return. Not necessary where plaintiff can show demand would be futile, i.e., without effect.

3. Proximate damages to plaintiff.

Demand and refusal are an essential element in some, but not all, jurisdictions. To overcome the necessity of this element in jurisdictions that permit plaintiff must show evidence that demonstrates the futility or impossibility of demand. Mere alleging the effort is not enough. Facts must be alleged and proved.

The element of intent may not be necessary in some jurisdictions.

The measure of damages for conversion is the fair market value of the thing converted at the time of the conversion plus legal interest to the time of the verdict.

Defenses

Consent

There is no conversion where plaintiff gave defendant permission to possess plaintiff's tangible personal property. This is true even where plaintiff gave only temporary permission and defendant continued to hold the property past the date when it was to be returned.

Failure to Demand

Plaintiff's failure to demand may be a defense in some jurisdictions if defendant can show he lacked intent to convert and would have returned the property promptly if plaintiff had demanded its return. The defense may lie where defendant mistakenly believed he had a right to possess. Check local case law to see if this defense applies in your jurisdiction.

Money

Money being a fungible item like grains of wheat in a Kansas silo conversion will not lie unless the particular instruments of money can be uniquely identified. A coin collection, for example, can be converted, even though it is technically money. In most cases a cause of action for conversion of money will not stand against this defense.

Ownership

If defendant can show that plaintiff had no ownership interest in the property at time of conversion, this defense arises. Only plaintiffs with ownership interests in the tangible personal property can prevail with this cause of action.

Arguably, one who purchases property from another who converted it from its rightful owner does not have this cause, because the one from whom he purchased the property had no lawful ownership interest to sell.

Declaratory Judgment

A cause of action for declaratory judgment does not seek money damages. Instead, it seeks to have the court declare something.

Not too complicated so far?

You might file an action for declaratory judgment to settle a dispute over what is or what is not covered by an insurance policy.

Suppose Jones is sued by Smith for tortious interference with an advantageous business relationship cause of action explained later. Jones is covered by a business liability policy he believes should pay for his defense in the lawsuit. Jones believes the insurance company should be liable to pay Smith, if Jones loses the case.

The insurance company, on the other hand as insurance companies do, wishes to avoid payment by finding every possible loophole to evade that responsibility.

The insurance company may believe Smith's lawsuit involves an intentional tort tortious interference is an intentional tort, not one arising from mere negligence and that its policy does not protect policy-holders from damages resulting from intentional acts.

In such cases it is common for insurance companies to file an action seeking a declaration that its policy does not cover the losses Smith claims.

The action is to determine rights of parties in dispute, not to award money damages.

Declaratory actions can only be brought in narrow circumstances.

For example, one cannot seek the court's declaration that a particular tax is unconstitutional, unless the party seeking declaration can show a special injury to himself that is different from that allegedly suffered by other taxpayers.

The purpose of the cause of action is to provide parties with relief from insecurity and uncertainty with respect to rights, status, or other legal or equitable relationships.

In many jurisdictions the cause of action is created by statute so, before filing an action for declaratory judgment, consult your state or federal statutes depending on the court you'll be filing in along with local rules and applicable case law.

Elements

A party seeking declaratory relief must allege and ultimately prove that:

1. There is a bona fide, actual, present, practical need for the declaration sought.

2. The declaration deals with present, ascertainable facts or a present controversy as to such facts. Anticipated future controversies will not support the action.

3. Some right, power, privilege, or immunity of the complaining party is dependent on the facts or law applicable to the facts.

4. Some person has or may have an actual, present, adverse, and antagonistic interest in the subject matter in fact or law.

5. The adverse and antagonistic interest is before the court by proper process or class representation.

6. The relief sought is not merely legal advice from the court or an answer to questions founded merely in curiosity.

The first issue to be decided by the court and first issue defendant should raise in his allegations to avoid immediate dismissal of the action is whether plaintiff is entitled to a declaration.

Each of the foregoing elements must be alleged, or defendant will succeed with a motion to strike or dismiss the complaint. The fact that the court may refuse to declare what the plaintiff seeks, or to declare otherwise than what the plaintiff wishes, does not divest the plaintiff of his day in court if each of the elements is alleged and reasonably provable.

Unless plaintiff shows he has a bona fide need for the declaration, based on present, ascertainable facts, the court not only lacks jurisdiction to render relief but also lacks jurisdiction to entertain the action. In such cases the court may dismiss the action sua sponte i.e., on the court's own initiative.

Defenses

If what plaintiff seeks amounts to an advisory opinion based on hypothetical facts which have not arisen and are only contingent, uncertain, and rest entirely in the future, the court lacks jurisdiction to entertain the complaint.

Defamation

A cause of action for defamation arises when plaintiff is damaged by shame, contempt, hatred, or loss of reputation as a result of defendant's false, unprivileged communication.

Plaintiff's money damages are computed from injury in his occupation, business, or employment. If there are no calculable money damages, the action may still lie for nominal damages when plaintiff believes it is worthwhile to pursue the action for nothing more than to clear his name. More on this below.

Merely bringing shame to an individual by publishing facts that are true does not give rise to this cause of action.

Defamation only arises where defendant publishes false information about plaintiff.

If the proximate consequence of the published falsehood causes injury to the plaintiff in his personal, social, official, or business relationships, wrong and injury are presumed or implied. Such publication is said to be actionable per se i.e., in itself, taken alone, without more.

If publication is in print, as in a letter or newspaper article, the defamation constitutes libel see below for more.

If communicated verbally, as by a TV newscaster or politician making a speech or even one gossip on the phone with her gossipy friend, the defamation constitutes slander see below for more.

Both libel and slander constitute defamation.

Elements

1. Publication by speech or print of a false and defamatory statement regarding a private person as contrasted with public figures, see below.

2. Unprivileged communication of the publication to at least one other person.

3. Fault amounting to at least negligence on the part of the publisher i.e., at least a lack of reasonable care as to the truth or falsity of the communication.

4. Publication is actionable per se or publication proximately caused plaintiff provable or presumable damages.

The most important thing to consider before filing suit on this cause of action is determining the amount of money damages. The fact someone calls you a thief may be defamation, however unless the defamation causes you actual, measurable damages, a lawsuit for defamation is worthless except to prove the defamatory statement was false for whatever value that may have by itself.

Plaintiffs suing for defamation frequently spend thousands on costs and legal fees only to recover a nominal amount, because they cannot prove actual damages e.g., loss of a job or business opportunity.

For example, if you're a bank president and lost your job because the head teller told the board of directors, you're a thief, your damages are provable or presumable.

If you are a newspaper boy embarrassed by one of your delivery customer's shouting, Thief, as you ride away on your bicycle after delivering his paper, it's not likely this cause of action will win you enough money to make it worth your while.

Courts sometimes award one-dollar $1 as nominal damages in defamation cases to establish on the public record that a defamatory publication was, in fact, false. But such a judgment will not likely provide anything in the way of financial compensation for the trouble and embarrassment one must go to bringing one's dirty laundry into the public arena.

If in doubt about the ability to prove the amount of money damages proximately resulting from a false publication, unless it's extremely important to prove the falsity in a court of law, let it go.

Not all wrongs can be righted in court, and nowhere is this truer than in defamation cases.

Caveat

If you are a public figure e.g., politician or professional athlete you may be unable to sue for defamation unless you can show the publisher intended his statement to injure you. Unless you can prove the false statement was communicated with actual malice, you are unlikely to prevail.

This is why we so often hear comedians making fun of public figures, saying things certainly unlikely to be true, yet doing so in jest, knowing they cannot be sued.

Unless actual malice intent to cause injury can be proven, a public figure cannot bring an action for defamation. I personally disagree with this legal doctrine; however, it's been the law of the land since the U.S. Supreme Court decision, *New York Times v. Sullivan, 376 U.S. 254 1964.*

Defenses

Truth

If the allegedly defamatory statement is true, there can be no action. Plaintiff has the burden of proving falsity. Defendant does not have the burden to prove truth. This raises an important fact about arguments in general. It is far harder to prove a falsehood than to prove a truth.

This is yet another reason why one should consider carefully before bringing an action for defamation except in the most extreme cases where it is absolutely necessary to do so.

Absolute Privilege

Allegedly defamatory statements made in judicial proceedings are privileged. If this were not so, every party prevailing in a lawsuit could sue the other party for making false statements during the case.

Statements made out in the hall, however, are not privileged.

First Amendment

Courts may refuse to hear cases brought against representatives of religious orders or denominations because of First Amendment proscription against government being entangled with religion.

If an allegedly defamatory statement is so entangled with religion that the court would be unable to sort out the truth without crossing the line, the case may be dismissed ab initio i.e., from the beginning.

Class of Persons

If the allegedly defamatory statement is made about a collective, race, religion, or other large group, the courts may refuse to hear the case.

Of course, if the statement is Bob and Harry are thieves, that's not a large group, and the injured person has a cause of action.

On the other hand, if the statement is, All Nazis are murderers, no court will hear such an action if brought by a single member of the Nazi party claiming he is not a murderer.

Public Official

If the would-be plaintiff is a public official, he must prove defendant acted with actual malice, i.e., intent to injure by making false statements. Actual malice is proven by showing the false statements were known to be false or were made with a reckless disregard for whether they were true or false.

The reason more public officials don't file suit against comedians and media pundits is that doing so exposes them to discovery of their closeted skeletons. As stated above, wisdom counsels against suing except where absolutely necessary.

Pure Opinion

Everyone is entitled to an opinion, and opinions are not actionable if expressed as opinion and not fact.

If you say to a neighbor, I think our mailman is a Communist, the mailman cannot sue, because you're entitled to an opinion, right or wrong.

If you say, *"Our mailman **is** a Communist, and it gets back to the Post Office and your mailman loses his job, prepare for battle."*

Only pure opinion is protected.

Duress

Duress is both a cause of action and a defense. Duress arises where defendant forces plaintiff to take some action damaging to the plaintiff under circumstances that allow no other reasonable course. This cause of action is also sometimes called coercion.

Duress coercion, threat, etc. is not a proper way to get people to do things.

If defendant uses duress to compel plaintiff to do something in such a way that plaintiff has no reasonable alternative or opportunity to refuse, then plaintiff has this cause of action to recover his damages.

For example, suppose Jones held a loaded shotgun to Smith's head, forcing Smith to sign a deed conveying Smith's home to Jones. Smith has this cause of action to not only get a court order setting aside the deed but also for any money damages Smith suffered as a consequence.

The issue of fact before the court in such cases is always whether and to what extent the power of duress was in fact irresistible. This is another way of asking if the party claiming

coercion had alternative choices by which he might have avoided the consequence. If there were reasonable alternatives to submitting to duress, the cause of action will not lie.

For example, if Jones says to Smith, I won't go to the prom with you unless you sign this contract, that's not sufficient grounds for coercion. Attendance at the prom is not an unavoidable imperative.

On the other hand, if Jones says to Smith, while pointing a loaded .38 revolver to the Smith's head, shouting insanely, Sign zee paper, old man. a cause of action for duress will lie. The coerced party will prevail if and only if he can prove he had no reasonable alternative by which he could avoid being shot.

The dividing line between these extremes is somewhere in the middle.

What must the court decide?

Too far toward the threat of missing the prom, and plaintiff's case will fall apart from the start.

Too far toward the threat of having a pistol bullet smash through the skull, and the plaintiff will most surely win if and only if he can prove the threat was real and no reasonable alternative was available.

Elements

The elements are simple to explain but difficult of proof.

1. One side involuntarily accepted the demands of another.
2. Circumstances permitted no reasonable alternative.
3. Plaintiff suffered damages as a proximate result.

Note how the word reasonable is used.

The old man coerced at gunpoint could disarm the threat by unscrewing a table leg and beating the crazed madman senseless, however the courts will not require such an unreasonable alternative.

Coercion must be real, material go to the heart of the issue, and reasonably unavoidable.

Defenses

Legal Right

It is not coercion to threaten to do what one has a legal right to do.

For example, if one of two neighboring farmers engaged in a feud threatens to raise pigs if the other does not stop planting tomatoes, the tomato farmer might complain to the court that pigs are a very smelly and noisy animal, that he's being forced to raise tomatoes under duress.

If the pig farmer has a legal right to raise pigs, however, the tomato farmer has no cause of action whatever.

Reasonable Alternative

If a plaintiff claims he was coerced into signing a contract by defendant's threat to punch plaintiff in the nose during a long-distance phone call from another city 500 miles away, the court will conclude the threatened party had reasonable alternatives. The cause of action will fail.

Free Choice

If a defendant allegedly threatening the plaintiff can show the plaintiff acted out of his own will, i.e., that the act did not result from any threat, then the plaintiff alleging to have acted under duress loses.

Comments

Duress is similar to undue influence, another cause of action arising where free will of an individual is overcome by the influence of another. See Undue Influence below for details on this related cause of action.

Fraud

In order for fraud to give rise to the right to sue i.e., a cause of action plaintiff must do more than merely state a falsehood.

It's true that making a false statement is fraud, however it is not actionable fraud without more than mere falsehood.

Merely lying doesn't by itself give rise to this right to sue.

In order for a plaintiff to have a live cause of action for fraud, it is necessary the lie be coupled with other elements. Only then can a court award plaintiff money damages proximately resulting from the fraud.

Moreover, the underlying facts pled in a complaint for fraud must be very specific. Failure to set out the facts of the fraud with specificity will result in losing the case. General allegations of fraud routinely result in the court's granting the defendant's motion to dismiss for failure to state the cause of action.

Plaintiff must precisely specify the facts that establish each of the essential elements of this cause of action.

Elements

1. Defendant made a false statement verbal or in writing.

2. The false statement concerns a material fact i.e., a fact that goes to the heart of the plaintiff's damages.

3. Defendant knew the statement was false at the time he made the statement.

4. Defendant intended plaintiff to act in reliance on the false statement or showed a reckless disregard for the consequences to plaintiff.

5. Plaintiff reasonably relied on the statement in acting upon it. Some authorities say the plaintiff's reliance on the false statement must be justified. Reasonable or justified, it is the same. Plaintiff must act reasonably in relying on the false statement.

6. Plaintiff suffered damages as a proximate result.

If an inebriated patron in a local tavern suddenly exclaims, Oh, my God. There's a giant elephant sitting on your car and Phil jumps up to go look, stumbling over the legs of his own bar stool in the process and falling flat on his face, Phil has no cause of action against the other fellow, because it wasn't reasonable to rely on the statement.

On the other hand, if a travel agent promises Phil a trip around the world in a luxury liner for $7,000 when, in fact, the agent knows the luxury liner is a rusty island freighter carrying lumber from Miami to Jamaica and returning a week later with a hold full of prickly pineapples and buggy bananas then, if Phil pays his money before discovering the false promise, he has a cause of action for fraud. All essential elements are met. He also has an action for breach of contract, and should plead both in separate counts, as explained elsewhere in the course.

This cause is sometimes called misrepresentation.

See also fraud in the inducement below.

Defenses

The following may be defenses to a cause of action for fraud.

Bad Faith

In some jurisdictions, the courts require a showing that the false statement was made in bad faith or with reckless disregard for the reasonably foreseeable consequence of relying on the statement.

This is not necessary in all courts. Check controlling case law in your jurisdiction.

Class Actions

In some jurisdictions, courts will not allow fraud as a cause of action brought by a class. The theory behind this is that fraud is directed at individuals, not groups.

In Pari Delicto

If the would-be plaintiff in a fraud case is, himself, guilty of participating in the fraud, courts may refuse to award damages. The theory is that plaintiff should never receive a benefit from his own wrongs.

Promise

A promise to do something in the future normally does not give rise to a cause of action for fraud.

It may give rise to breach of contract. However, unless the false statement concerns a material matter in the past or present, a cause of action for fraud normally does not arise.

If the promise was made with intent never to perform the promise, then a cause of action for fraud may arise. However, proving someone intended never to perform is a steep hill to climb. See fraud in the inducement below.

Puffing

When a salesperson claims the used car, you're about to drive is a sweet-running automobile with a suspension system that's like riding on clouds, though these statements are not technically true, they are treated as statements, they are considered statements of the salesman's opinion. This is called puffing.

Such statements of opinion do not give rise to an action for fraud.

A buyer is obligated to test the product and form his or her own opinion.

If one buys a car, vacuum cleaner, or miracle toothbrush solely on representations of a salesman's opinion, the buyer has no cause of action for fraud if in the buyer's own opinion these things are not true.

If a car salesman, on the other hand, claims actual mileage is only 9,827 miles when he knew the mileage is actually 109,827, a cause of action certainly does arise. If buyer can prove the fraud, he may win a judgment for punitive damages over and above what he paid for the car.

In some states statutes provide criminal penalties for such motor vehicle odometer fraud.

Generally, for a false statement to give rise to a cause of action for fraud, the statement must be one of fact past or present and not opinion.

Comments

Omitting a material fact may also give rise to fraud.

If it can be shown the omission of a material fact was intentional and for the purpose of misleading another, the cause will lie.

For example, if the seller of a home omits to advise buyer that the roof leaks profusely when it rains, that omission will be considered material to the value of the house and give rise to a cause of action for fraud.

The question for the court is whether and to what extent the omission was material and, of course, known and intentional.

If seller doesn't know his roof leaks, there's no cause of action for fraud.

If seller knew or, in some courts, if he should have known the materiality of the reduction in value of the house by a leaking roof is such the court will impose a duty on seller to report the hidden defect or be liable to the buyer for fraud.

The degree of knowledge on the part of the person making a false statement or omitting a material fact may be measured in one of three ways, each requiring a different degree of proof.

1. Defendant actually knew the statement was false. To prove this, of course, plaintiff must show defendant had actual knowledge the statement was false, i.e., that defendant knew at the time that the statements were not true.

2. Defendant had no knowledge the statement was false. To prevail in this circumstance, plaintiff must show the representation was made in such absolute, unqualified, positive terms that a reasonable person would infer the maker had knowledge of its truth. For example, fraud arises if an office supply salesman claims*, "This printer holds 250 sheets of blank paper and prints in 256 colors, and it is later discovered the printer holds only 50 sheets and only prints black-and- white."* Such specificity overrides opinion. The salesman and the company he works for will be held liable for such specific false statements.

3. Defendant should have known the statement was false. To prevail here, plaintiff must show defendant possessed special knowledge about the subject matter or occupied a special position that imputes to him the knowledge of such fact, whether he knew or not. Fraud arises, for example, if a bank president claims his bank holds $892 million in deposited assets when, in fact, the bank has only $12 million. The special knowledge or position of the bank president imputes to him the duty to know what he says about such particulars material to the bank's assets and operations.

Fraud in the Inducement

Fraud in the inducement is a sub-category of fraud that includes all the elements of common fraud but applies where plaintiff suffers damages from entering into a contract e.g., contract to rent, purchase, or perform services after being persuaded to do so by the lies of another.

As in common fraud or misrepresentation, the plaintiff's reliance on false statements must be reasonable and justifiable.

Therefore, if one justifiably and reasonably relies on false statements of another to enter a contract that causes injury money damages or other loss, he has a cause for fraud in the inducement.

Goods Sold

A cause of action for goods sold arises when plaintiff has sold and delivered goods to defendant, and defendant refuses to pay for the goods.

In certain jurisdictions plaintiff may be entitled to interest on the unpaid price from date when payment was due.

Elements

1. Plaintiff sold and defendant agreed to pay for described goods.
2. Plaintiff delivered and defendant accepted delivery of described goods.
3. Defendant refused to pay.
4. Plaintiff suffered damages as a proximate result.

That's all there is to it.

If the goods are not as described, defendant may have a defense, however the goods cannot be retained unless paid for at the stated price or negotiated price.

If defendant can show the goods were never delivered, defendant has a defense. For this reason, it is always a good idea to get a receipt for delivery of goods yet to be paid for.

Infliction of Emotional Distress

The gist of this cause of action is to compensate victims of conduct that inflames the sense of human decency.

This cause of action may lie to award money damages to plaintiff, whether defendant actually intended the injury or simply acted with a reckless disregard for the consequence to others. So, although the cause includes the word intentional, keep in mind the intention is imputed to the wrongdoer when it was reasonably foreseeable that the acts of the wrongdoer would cause the injury.

Elements

1. Defendant acted intentionally or with reckless disregard.

2. Defendant knew or should have known it was reasonably foreseeable that the acts would cause severe emotional distress.

3. Defendant's conduct was outrageous, indecent, atrocious, odious, uncivilized, or intolerable.

4. Plaintiff suffered severe emotional distress as a proximate result.

Defenses

Legal Rights

The thin line in these cases is whether defendant was within his legal rights to act in the manner that caused injury. This is always a judgment call for the court.

Clearly, if a funeral home incinerates Aunt Betsy's mortal remains, and Sister Sue is outraged that such a procedure was used instead of cemetery interment as Sister Sue requested, the funeral home may have a defense claiming it acted within the legal limits of the law. Note use of the word may in that sentence.

On the other hand, if the funeral home dumps Aunt Betsy along some lonely country road in southern Alabama, the act is one our courts will deem outrageous, indecent, atrocious, odious, uncivilized, and intolerable, so family members and loved ones will likely prevail in court with this cause of action and receive a sizable judgment.

Between these limits is a broad, uncertain factual gray area.

Defamation

If the only cause of injury is defamation, and the defamation falls within one of the privileges See Defamation. plaintiff cannot prevail.

For example, if a prominent politician is accused of being a slithering skunk with ties to the underworld, even though the scurrilous attack offends or even causes emotional distress, the politician cannot prevail, because of the privilege unless he can prove actual malice.

Injunction, Preliminary

Injunctions are classified as both temporary and permanent.

They are most often obtained to stop someone from doing something but may also be brought to compel someone to do something or continue doing something.

Temporary injunctions often called preliminary injunctions are fairly easy to obtain upon a proper showing of the immediate necessity based on alleged facts sufficient to establish the essential elements. Such injunctions are self-terminating, i.e., they expire after a set time determined by the court according to the apparent necessity. Actions for temporary injunctions are typically heard at the start of a lawsuit in which the plaintiff seeks some immediate remedy for threatened damages he has yet to prove.

Suppose a contractor begins excavating in the lot next to your home, using a giant, noisy earth-moving machine to scrape out a deep pit right up next to your property line. It's obvious the first heavy rain will cause a substantial part of your yard to wash into that pit. The court would issue a temporary injunction to stop further excavation empowering law enforcement to use handcuffs and steel bars to stop it, if necessary until you have time to prove the threat of damages is real.

Permanent injunctions are much harder to obtain. Permanent injunctions are issued to continue the initial orders of preliminary injunctions beyond their expiration. There must, of course, be sufficient evidence to show a permanent injunction is necessary to ensure justice and protect the good guy going forward.

All injunctions derive from the inherent equitable power of our courts to issue writs and warrants to empower and command sheriffs or other law enforcement to use force, if necessary, to carry out the court's orders.

Injunctions can stop action or compel action.

Injunctions are issued to protect petitioners who are threatened with harm at the hands of the respondents.

Injunctions may also be used to carry out a court's prior judgments or orders.

Anywhere that a respondent needs to be compelled to do something he or she does not wish to do or restrained from doing what he or she wishes or threatens to do, an injunction is the correct remedy.

A count for injunction can be combined with other counts alleging any other causes of action that may arise from related fact circumstances.

Elements for Temporary Injunction

1. Existence of an imminent likelihood of irreparable harm if the injunction is not issued,

2. Unavailability of an adequate remedy at law i.e., an award of money damages after the threatened harm cannot restore petitioner to his status quo ante i.e., the condition he enjoyed before,

3. The threatened harm to petitioner outweighs any reasonably possible harm to respondent,

4. Granting an injunction will not contravene any substantial public interest i.e., will not adversely affect the legitimate interests of disinterested persons, and

5. Petitioner has a substantial likelihood of success based on the underlying allegations i.e., the facts alleged are not merely speculative on their face.

The granting of a preliminary injunction is an extraordinary remedy that should be granted only sparingly upon presentation of adequate proof of the essential elements.

Elements for Permanent Injunction

1. Existence of an imminent likelihood of irreparable harm if the injunction is not made permanent or extended for a longer term,

2. Unavailability of an adequate remedy at law i.e., an award of money damages after the threatened harm cannot restore petitioners to his status quo ante i.e., the condition he enjoyed before,

3. The threatened harm to petitioner outweighs any reasonably possible harm to respondent,

4. Granting an injunction will not contravene any substantial public interest i.e., will not adversely affect the legitimate interests of disinterested persons, and

5. Petitioner has demonstrated the facts alleged in his petition by a preponderance of the admissible evidence and is entitled to the order sought as a matter of law.

Since injunctions invoke the court's equitable powers, petitioners seeking an injunction must come to court with clean hands. To obtain the relief sought they cannot be found to have in any material way contributed to the condition that threatens them with harm.

One does not attempt to prove the grounds for his petition in the petition. This is the worst mistake you can make, and yet experienced lawyers who should know better do it all the time. Do not think you must tell the whole story in the petition. You must not. The petition is not a story, nor is it an argument. It is a petition that must accomplish three 3 things:

1. Allege all facts necessary to trigger the court's jurisdiction power to issue the injunction,

2. Allege all facts necessary to satisfy the five 5 elements listed above, and

3. Demand judgment.

Wise petitioners will also use the petition to do the following fourth 4th important thing in moderation, as explained here:

Allege such additional facts as petitioner is certain the respondent must admit facts that will tend to prove the essential elements without becoming unnecessarily burdensome. This 4th set of allegations is solely for the purpose of getting early discovery of facts the respondent cannot deny.

It is not essential and should not be abused. Allege only those facts the respondent cannot deny. Then the admitted facts become part of the record, requiring no further effort on your part to prove them.

The most common flaw in pro se pleadings and those of inexperienced lawyers is the overbearing tendency to demonstrate one's brilliant mastery of the English language, to impress the world with one's vast legal knowledge, or to beat a dead horse with superfluous allegations that go beyond what is essential, thus weakening the case by alleging non-essentials.

The purpose for the petition is to allege what must be alleged to get one's foot in the courthouse door, not to prove the case in a single document. Alleging more than absolutely necessary serves only to give the other side an advantage in that judges don't want to read it and the opponent has more facts to try to disprove.

#1 – Jurisdiction – Allege only those facts necessary to obtain the court's jurisdiction.

#2 – Essential Elements – Allege only those facts necessary to establish the five elements.

#3 – Demand Judgment – Using the polite terminology given in the included example.

#4 – Discovery – Allege only those facts the respondent must admit or lie about and keep these to only those that will help you prove the essential facts. Anything else will only serve to weaken the effectiveness of your petition and make it harder to win in the long run.

Filing pleadings more than 10-12 pages in any kind of case is usually a mistake. In most cases where there is only one claim one cause of action pleadings of 4-5 pages should suffice. Short pleadings are powerful.

The purpose of pleadings is not to prove the case. That's what discovery is for.

Keep it simple. Short and concise.

Jurisdiction

The court you apply to must have jurisdiction power to enter orders to grant the relief sought. In the case of injunctions, pretty much any federal district court and any trial level court in the state court system of your State has that power.

One may merely need to allege facts that establish that the petitioner resides in the court's jurisdiction, the respondent resides in the court's jurisdiction or is otherwise give specifics subject to the court's jurisdiction, the petition seeks the equitable remedy of a temporary injunction.

The first step is always at temporary injunction. Once the initial temporary injunction is obtained, one can further petition the court to make the injunction permanent.

Temporary first. Easier to obtain and the court has jurisdiction. Those facts meet the first of the three requirements of a petition: to allege jurisdiction.

The Facts Elements of the Cause of Action

There should be a brief section where the petitioner alleges sufficient facts to establish each of the five elements required for the court to have jurisdiction to issue the order sought. It is not enough to merely recite the elements one-by-one.

You must allege the ultimate facts and only so many of those facts as are absolutely essential to establish all five elements for an injunction to issue. That is all.

Add nothing more, except those facts alleged for the sole purpose of discovery, as already discussed, where it is certain the respondent must admit the facts or lie to the court. And, the facts alleged for discovery should be only those facts that will help you prove the essential facts.

Use single sentences. Let each sentence have its own paragraph number. Do not put more than one sentence in any single numbered paragraph. Do not use compound sentences i.e., with and, but, etc. ***Each numbered paragraph should make one statement of fact and one only.***

Demand for Judgment

Demand issuance of the injunction. This is often done in the form of a prayer, but the language should not be precatory. ***Do not wish. Do not pray. Do not hope. Do not beg.*** Move the court to enter an Order enjoining the respondent or granting such other relief as the petitioner may seek. The example below demonstrates sample language for this.

Discovery Allegations

One may optionally allege such additional facts as one is absolutely certain the respondent must admit or lie about by denying. This is solely for the purpose of getting the obvious facts into the record without wasting valuable discovery.

Many discovery tools are limited. One should, therefore, use them sparingly and only as necessary. Since the initial petition is an opportunity to allege facts that the respondent

must either admit or deny, this is an excellent chance to allege such facts as one is certain the respondent must admit, if truthful. All facts that are thus admitted are admitted for all purposes.

There is no point whatever in alleging additional facts you anticipate the respondent will deny. Allege only those additional helpful facts you are certain the respondent will admit.

This must not be over-used or abused. There is no need to force the respondent to admit that Tuesdays follow Mondays or that such-and-such a law is in existence. One can get those facts into the record later using motions for judicial notice. Allege only those facts that will help win the action and keep the number of such allegations to no more than the total of all the other allegations.

Powerful pleadings are short and plain statements. ***They are not a letter to the judge nor a story that must persuade someone to believe.***

Do not fall into the amateur lawyer's trap of stating more than is necessary.

Let the pleading do what it is intended to do, and no more.

There'll be time enough for proving when the pleading is done.

IN THE FOURTH JUDICIAL CIRCUIT COURT

IN AND FOR SUNSHINE COUNTY, FLORIDA

Case No _____

DONALD TRUMP,

Petitioner,

v.

JOE XI JING PING,

Respondent.

VERIFIED PETITION FOR TEMPORARY INJUNCTION

DONALD TRUMP petitions this Honorable Court to issue a temporary injunction and in support therefor states:

JURISDICTIONAL ALLEGATIONS

1. This is an action for the equitable remedy of a temporary injunction.

2. Petitioner resides in SUNSHINE County, Florida.

3. The threatened harm to be enjoined is threatened to be imposed in SUNSHINE County.

4. Respondent resides in SUNSHINE County or has some other legal nexus to SUNSHINE County that invokes the jurisdiction of this Honorable Court

5. This Honorable Court has jurisdiction.

FACTUAL ALLEGATIONS

6. Petitioner has personal knowledge that respondent Boris Badguy has a well-formed plan to act in a manner that will surely cause petitioner serious bodily harm.

7. The threatened act complained of is

8. The threatened bodily harm is

9. The threat is imminent because

10. An action for money damages alone is insufficient to restore petitioner to his status quo ante after the threatened harm because

11. The threatened harm to petition outweighs any substantial harm to the respondent, because

12. There is no substantial public interest that will be contravened by this Honorable Court's issuing an injunction favoring this particular petitioner.

13. There is a substantial likelihood that petitioner will prevail in this action, because the facts obtained on the record by discovery will reveal that

14. Boris Badguy is a registered pharmacist.

15. A temporary injunction is necessary to protect petitioner from the threatened harm.

WHEREFORE petitioner Peter Piper moves this Honorable Court to enter an Order enjoining respondent Boris Badguy from [*briefly describe the threatened harm once again*] and granting such other and further relief as the circumstances and demands of justice may warrant.

UNDER PENALTIES OF PERJURY, I affirm that the facts alleged in the foregoing are true and correct according to my own personal knowledge.

_____

DONALD TRUMP, Petitioner

STATE OF FLORIDA

COUNTY OF SUNSHINE

BEFORE ME personally appeared DONALD TRUMP who, being by me first duly sworn, executed the foregoing in my presence and stated to me that the facts alleged therein are true and correct according to his own personal knowledge.

_____

Notary Public
My commission expires:

Footnotes to the foregoing pleading to include:

1. The title of the court, of course. Local research is required to know how to state the title of the court.

2. Leave this blank. The clerk will assign a case number when the case is filed.

3. Verify the petition by swearing to it under penalties of perjury. This gives it more force. Judges consider sworn facts more favorably, since petitioner risks a jail term by stating them under oath.

4. For example, Coca Cola can be sued anywhere in the world. My next-door neighbor, on the other hand, can only be sued in the Florida county where we live, unless he runs over someone's dog in South Dakota.

5. Describe in reasonable detail the planned act, not the effect it will have. That comes next. Be brief without omitting any essential fact. If known, state the time and place where the act will happen. If known, state the manner in which it will happen. If known, state the persons who will carry out the act.

6. When detailing the harm, state only the essential facts necessary to prove the harm and that the harm is such that it will impact the petitioner in a substantial and serious manner.

7. See preceding footnote.

8. See preceding footnote.

9. Remember that here we are talking about outweighing, not that there will be no harm to respondent. In nearly every action for an injunction, the respondent will be adversely affected. What must be alleged here in brief are the facts that demonstrate that petitioner's harm outweighs that of respondent.

10. As before, you will explain in brief some provable facts to sustain this allegation. You will not try to prove those facts in this pleading. You will simply allege sufficient facts and only such as are sufficient to establish that if proven the petitioner's injury is all that has already been said and that an injunction is necessary to carry out the essential requirements of justice.

11. Example of a fact being alleged for discovery purposes only, i.e., a fact we are certain must be admitted, one that will be helpful to have admitted up front, so we don't have to use valuable discovery tools later on to prove. Use these with discretion. If such facts will not serve to assist in proving the essential element facts alleged to establish your right to the injunction, don't try to prove them. You'll be busy enough proving those things that are necessary to win. No need to build a straw house here.

Defenses

Unclean Hands

An injunction, being an equitable remedy, should not be granted when the party seeking it has not acted in good faith. The maxim in equity is, He who comes to equity must come with clean hands. Thus, if a plaintiff petitioner has wrongfully defrauded the defendant respondent when he seeks an injunction, the court should deny him, if the respondent pleads unclean hands as an affirmative defense and explains in his pleading why the plaintiff petitioner has unclean hands.

Totality of the Circumstances

The court should not merely consider the allegations of the pleadings when asked to grant an injunction. Other factors should be considered:

- Nature of the interest to be protected.
- Relative adequacy of other available, less-restrictive remedies.
- Unreasonable delay of plaintiff petitioner to seek the remedy.
- Relative hardship likely to be caused to defendant respondent.
- Possible prejudice to defendant respondent of defending in underlying lawsuit.
- Related misconduct of plaintiff petitioner.
- Interests of third persons and of the public.
- Practicality of framing and enforcing the injunction.

Comments

Bond

Some jurisdictions require the posting of a bond to protect the foreseeable injury to defendant respondent. The amount of bond is calculated in relation to the amount of money damages a wrongfully-issued injunction might cause the defendant respondent. In

some jurisdictions, if the court requires a bond and no bond is posted, the injunction cannot be lawfully enforced. Check local statutes and case law.

Breach of Contract

Injunctions typically do not issue to enforce contracts. The proper action is for specific performance, covered elsewhere, in which case if sufficient proof is shown the court may issue an injunction to require the defendant respondent to perform provisions of a legally-binding contract.

Covenant Not-to-Compete

Non-compete provisions in written agreements e.g., contracts for employment are typically enforced by injunctions if sufficient proof is shown. Restrictions apply if services of the party to be enjoined are of particular value to the community e.g., doctor or another medical services provider.

Further, if the conditions of the covenant e.g., length of time or size of geographic area are unreasonable, courts will not enforce the covenant. Injunctions to prevent unauthorized use of trade secrets, or solicitation from proprietary customer lists are typically granted.

Domestic Violence

These are generally related to statutory enactments that define the procedures and pre-conditions necessary to obtain an injunction to prevent violence. See local statutes and case law.

Evidence

The mere argument of counsel does not constitute evidence and is insufficient grounds for issuance of an injunction, temporary or otherwise.

Futile Act

No court process can lawfully enforce the performance of a futile act, i.e., an act that can have no possible consequence. If requiring or prohibiting an action will have no reasonably foreseeable benefit, the court is without jurisdiction to lawfully enter an order compelling such an act.

Irreparable Harm

If the wrong sought to be prevented by an injunction could be compensated by an order awarding money damage to the injured person, an injunction should not issue. The decision is not based on whether the defendant respondent possesses sufficient means to satisfy a money judgment but whether money alone would if available restore plaintiff petitioner to his original status. If a money amount cannot be calculated to restore the injured party, an injunction is proper.

Injunction, Permanent

To obtain a permanent injunction, one is generally required to offer a much higher degree of proof and clearly demonstrate necessity. Further, where a temporary injunction may issue without notice or hearing, a permanent injunction can only issue after notice and pleadings have been served on the defendant respondent who must then be given a reasonable opportunity to respond and present evidence in defense.

The elements are the same but for one additional essential: success on the merits of the underlying case see previous section.

Elements

1. Imminent likelihood of continuing irreparable harm if permanent injunction not issued.

2. Unavailability of adequate remedy at law, i.e., an award of money damages alone will not restore the plaintiff's threatened loss.

3. Threatened harm to plaintiff petitioner outweighs any possible harm to defendant respondent.

4. Granting of injunction will not contravene the public interest.

5. Plaintiff petitioner has prevailed in the underlying case, i.e., plaintiff has proven the facts on which he seeks the permanent injunction.

The granting of a permanent injunction is an extraordinary remedy that should be granted only sparingly upon presentation of adequate proof of all essential elements.

Defenses

The defenses for a permanent injunction are the same as those for a preliminary or temporary injunction.

Invasion of Privacy

Like defamation, this cause of action can bring more problems to plaintiff than merely letting the matter go by.

Litigation for invasion of privacy tends to re-publicize facts that might be better left alone.

Still, the cause of action exists, and essential elements follow.

Elements

To win a cause for invasion of privacy, plaintiff must allege and prove:

1. Defendant publicized a matter concerning the private life of plaintiff.

2. The matter would be highly offensive to reasonable persons.

3. The matter is not one of legitimate concern to the public.

4. Plaintiff suffered damages as a direct result.

Everyone has a right to enjoy his or her privacy.

This right of privacy has been interpreted from the U.S. Constitution by the Supreme Court and is specifically protected by the state constitutions of many of the 50 states.

Where a person's private life begins and his public life leaves off, of course, are decisions for the court in each individual case.

When the unwarranted publication of private affairs, with which the public has no legitimate concern, causes mental suffering, shame, or humiliation to a person of average sensibilities, the cause of action arises, and the plaintiff is entitled to recover money damages.

Some jurisdictions have carved out four situations that give rise to this cause:

- ➔ Intrusion, like photographing plaintiff sun-bathing in her own backyard behind a privacy fence.
- ➔ Public disclosure of private facts, e.g., publishing the existence of great wealth that exposes plaintiff to foreseeable injury at the hands of thieves and con-men.
- ➔ False light in the public eye, e.g., publishing false facts about plaintiff, a variant form of defamation.
- ➔ Commercial exploitation of the property value of plaintiff's name.

Defenses

Public Right to Know

If the public has a right to know some matter that would otherwise be protected by plaintiff's claimed privacy right, the cause of action does not arise.

If, for example, a local physician suffers from severe cocaine addiction, the public has a right to know, and the physician would have no right to sue those who publish such a private fact.

Hypersensitivity

The measure of sensitivity that gives rise to the cause of action is that of a man of reasonable sensitivity.

A person of unusual sensitivity is not protected.

Malicious Prosecution

Malicious prosecution is available to award damages to those who are sued or criminally prosecuted without legal grounds.

If the underlying action was brought without sufficient legal justification AND the injured party prevails in the underlying action, this cause of action may lie.

It does not arise, however, until the successful conclusion of the underlying case.

Additionally, the injured party must show the person who brought the underlying action had NO probable cause and knew he had no cause or should have known he had no cause through the exercise of reasonable diligence. If he knew or should have known the case was merely malicious without any genuine legal basis in fact, this cause favors the plaintiff.

Elements

The essential elements are:

1. A prior legal action against the present plaintiff was commenced criminal or civil.

2. Defendant in present case was the direct cause of prior proceeding. Defendant in present case need not have been plaintiff or prosecuting party in prior case, if he was person substantially responsible for commencement or continuation of the prior case ultimately found to be without meritorious foundation.

3. Prior proceeding terminated favorably to defendant there plaintiff here.

4. There was no bona fide probable cause or legal justification for the prior case.

5. Defendant in present case caused prior case with actual or legal malice.

6. Plaintiff in malicious prosecution case suffered damages proximately resulting from the underlying case.

Defenses

Absolute Immunity

Government prosecutors are entitled to absolute immunity from prosecution for malicious prosecution unless the prosecutor can be shown to have acted with personal motive or outside the scope of his or her authority.

Individual private actors are not immune.

Dismissal on Technical Grounds

If prior case terminated for any reason other than innocence or lack of legal liability of defendant therein plaintiff in malicious prosecution case the cause of action will not lie, because the result does not constitute termination favorable to defendant in the prior case, i.e., it was not determined that defendant was without guilt, culpability, or civil liability.

In order for defendant in prior case to have a cause of action for malicious prosecution, the prior case must have adjudicated him without fault.

Dismissal or other termination on technical grounds or even a stipulated settlement, unless the stipulation states defendant was without fault does not give rise to this cause of action.

Bona Fide Termination

Another point to hold in mind when considering this cause of action is whether in the prior case the plaintiff there defendant here was afforded a reasonable opportunity to prosecute his claim. If prior plaintiff was unable to complete discovery, for example, it may be found that his failure to prove the plaintiff here defendant there at fault was not the result of justice but circumstances beyond his control.

As stated above, in order for this cause of action to lie, the prior case must be terminated in favor of defendant there, and termination must be bona fide, i.e., in good faith, with the plaintiff there defendant here having been allowed his day in court.

Counterclaim

Malicious prosecution may not be pled as part of a counterclaim, since it must first be proven that defendant in prior case was without fault. That requires complete bona fide termination of the prior case.

Malice

Malice may be either actual, i.e., state of mind of prior plaintiff to harm prior defendant or legal, i.e., inferred from circumstances, such as absolute lack of probable cause that a reasonable person would recognize.

Nolle Prosequi

If the government prosecutor in good faith enters a nolle prosequi or declination to prosecute in the prior proceedings, the essential element of a bona fide termination in the prior defendant's favor is satisfied.

Negligence

Negligence is simply failure to exercise reasonable care under the circumstances, like driving a car with one's eyes closed.

When my law professor was still in law school, a classmate of his suffered a debilitating disease making it extremely difficult for him to maintain his balance when walking. On his first day of classes, not knowing his handicap, he caught up with him at the elevator after their first contracts class to congratulate him for the masterful way he responded to their crotchety old professor.

Good naturedly, with only friendly intent, he said, “Good going in class,” and slapped he him on the shoulder. He was horrified as he crumpled helplessly to the floor.

He asked for him to help him to the wall where he managed to work himself into an erect stance once more, waving off the professor's anxious apologies.

They became good friends and remained so for years afterward, however he never forgot that negligence lesson. He had no idea his good-natured congratulatory slap would have no effect on healthy persons would cause his friend to collapse. Nonetheless, he was negligent and legally responsible for the consequence of his action.

It doesn't matter if a defendant intends to harm the plaintiff. If his act causes harm, the defendant is liable for injury that proximately results from his act.

The common law adage, *“A defendant takes his plaintiff as he finds him,”* applies. We all have a common law duty to exercise reasonable caution to protect others from the consequence of our acts, intentional and otherwise.

You are responsible for damages caused by what you do, even when the person damaged is unusually susceptible to injury. This is known as the eggshell skull doctrine in law. The doctrine developed from an old case where a fellow with an unusually thin skull was seriously injured by an accidental blow to the head so slight it could not have caused a healthy man so much as a headache.

Nonetheless, the act resulted in substantial harm to the thin-skulled plaintiff, and the courts found the defendant was liable.

Failure to exercise reasonable care gives rise to a cause of action for negligence.

Elements

In order to effectively plead a cause of action in negligence, the plaintiff must allege sufficient facts to show each of the following essential elements exist:

1. Defendant owed plaintiff a legal duty to exercise at least reasonable care or, in some cases, to conform to a higher standard of care.

2. Defendant breached his duty of care.

3. Plaintiff was damaged as a proximate result of the defendant's breach of that duty of care.

It's no more complicated than that.

Defenses

Comparative Negligence

In many cases, plaintiff is at least partially responsible for his own damages.

Where this is true, plaintiff cannot recover that portion of damages caused by himself. He is said to be comparatively negligent.

If plaintiff runs a stop sign and is hit by defendant's car going 120 mph, both parties are somewhat responsible. Plaintiff for running the stop sign. Defendant for speeding. The jury will determine the degree of their comparative negligence and apportion money damages accordingly.

Economic Loss Rule

The economic loss rule is a doctrine developed to prevent plaintiffs from double-dipping.

Plaintiffs may file an action for breach of contract and also for negligence in performance of a contract. The economic loss rule prevents plaintiffs from collecting for both.

For example, a case involving a contract between a strawberry farmer and a chemical company was filed in Florida when a batch of fertilizer the farmer ordered turned out instead to contain herbicide that killed his strawberry plants.

The farmer's case included a count for breach of contract and another for negligence. Since the farmer contracted for fertilizer and received herbicide instead, he sued for breach of contract. Since the packaging of herbicide in fertilizer bags could only result from bone-headed negligence, the farmer also sued for negligence. The farmer won, and the economic loss rule did not apply.

In another case, however, a farmer sued a tractor manufacturer for breach of contract and negligence when an improperly designed part on the tractor caused the tractor to fail. As a result, the farmer claimed he was unable to get his crops in on time. The faulty tractor resulted from negligence, no doubt of that.

The court said, however, the bargained-for consideration was a tractor, not crops safely gathered into the barn. When the tractor failed it was only the tractor that was damaged by defendant's negligence. The farmer's contract for a working tractor was breached by delivery of a faulty tractor, and the farmer won on his breach of contract count. But the tractor did not directly damage the farmer's crops, so the farmer was not permitted to recover for negligence and the value of his lost crops.

In the first case, a negligently delivered chemical damaged other property, and the economic loss rule did not prevent recovery for both breach of contract and negligence.

In the second case a negligently manufactured tractor damaged itself, and the court applied the economic loss rule to bar the farmer from recovery on his negligence count for crops left to rot in the field.

The gist of this rule is that when one is prevented from enjoying the benefit of his contract by negligence that only affects the thing bargained for, recovery must be by a breach of contract action alone. A negligence count will not be heard unless the defective thing bargained for also damaged other property.

You cannot double-dip.

Since the negligently manufactured tractor damaged only itself and not the farmer's crops, the farmer was required to seek recovery in court solely on his breach of contract count.

When the negligently packaged herbicide destroyed fields of strawberries, however, the farmer was permitted to recover damages both for breach of contract he paid for fertilizer and for negligently labeled herbicide that destroyed his crop.

Assumption of Risk

Some activities e.g., karate and sky-diving are so inherently dangerous that courts allow a defense against plaintiffs who voluntarily engage in such activities.

If plaintiff expressly assumes the risk of a bodily contact sport, like soccer or football, the courts treat him as waiving his right to recover damages for reasonably foreseeable injuries.

Plaintiff need not sign a paper acknowledging the risk though, of course, this would create a stronger position for defendant if the court can infer from facts presented that plaintiff understood or should have understood the severity of reasonably foreseeable injuries and that he voluntarily proceeded to participate without regard for the risk.

This defense does not exist where defendant is wantonly or recklessly negligent. If defendant exposes plaintiff to risk that was not foreseeable e.g., owner of parachute club that packs old rags and dirty laundry in a parachute bag by mistake there is no defense.

Quantum Meruit

A cause of action for quantum meruit arises when one person confers a benefit on another under circumstances that would cause a reasonable person to believe he would be compensated reasonably by the other for doing so.

The Latin phrase means literally, for so much as the thing is worth.

Suppose a fence painter came to your house while you were on vacation and painted your scratched and faded fence a lovely blue color.

You arrive home to find your fence looking much better, but not the color you'd choose.

The fence painter asks for $7,000 for less than a day's work. You refuse, of course.

There is no contract, and you'd not have asked for blue if there were a contract.

If the sign painter sues for breach of contract, he loses, because there is no contract.

If he sues for quantum meruit, however, he may win ... but not for $7,000.

If he can convince the court, it was reasonable for him to expect payment a slippery slope indeed under the facts of our little hypothetical, he might recover what the job was worth.

The court would award him no more than fair market value for the job, and only then if he can convince the court by a preponderance of the admissible evidence it was reasonable under the circumstances for him to expect payment.

Now, suppose you were not on vacation when the fence painter began painting. You sat at the front window of your home enjoying a cup of coffee and reading your morning paper as the man labored in plain view. You watched him paint the gate, the posts, each panel. You watched him carefully lay a drop cloth below his work so the paint wouldn't kill your grass. Occasionally, he looked up to see you sitting in your window, smiled, and waved in a friendly manner as if he'd known you all your life. It was all very amusing. You thought to yourself*, "How kind of that nice young man to paint my fence."* Meanwhile you did nothing to interrupt his work, hoping he'd paint it all before realizing he was at the wrong house.

The fence painter comes for payment, and you refuse, thinking you got a windfall bargain.

So, the fence painter sues for quantum meruit and breach of contract, seeking his $7,000.

Again, he loses on breach of contract, because there's been no meeting of the minds, no promise for a promise.

However. He wins easily on quantum meruit, because you knew he was conferring a benefit to you while you sat by and accepted that benefit without opposing in any way. If he can convince the court, you watched him paint all morning and half the afternoon, he will surely win something.

And, under these conditions the judge will exercise human nature and lean toward the high end of fair market value for the sign painter's work, because you were so obviously willing to take advantage of the young man.

That's what lawsuit for quantum meruit can do.

This only works when there's no underlying contract to give rise to a cause of action for breach of contract. A separate count for quantum meruit should always be made part of the pleadings when there's any likelihood a contract action might fail upon the court's finding there was no contract or that an alleged contract was unenforceable at law thus removing contract from the equation and opening the door for fair market value recovery for *quantum meruit*.

Under the *quantum meruit* doctrine plaintiff is entitled to nothing more than reasonable fair market value of the benefit conferred on defendant, a benefit defendant knowingly accepted in the absence of any contract, written or verbal.

See Unjust Enrichment

Promissory Note

This is probably the easiest of all causes of action to win.

Plaintiff's possession of a signed but unsatisfied promissory note raises presumption of non-payment and shifts the burden of proof to the defendant to show he paid the note in full, on time, with interest.

This can only be shown by receipts, cancelled checks, or other evidence of actual payment.

If the defendant cannot prove he paid and satisfied the note, the court will grant judgment for that portion of the note that remains unpaid, together with accrued interest.

If the note also provides that the holder is entitled to recover reasonable attorney fees and costs as most do plaintiff recovers judgment for the full amount he is owed plus the cost of bringing suit.

Elements

The essential elements are simple common-sense.

1. Defendant executed and delivered a promissory note on a certain date.

2. Plaintiff owns and holds the note. A copy of the original note is usually required to be filed with the complaint. If not, the original note will be required at trial unless the court allows plaintiff to establish its existence another way.

3. Defendant failed to pay some part or all of the obligation when payment was due.

4. Plaintiff suffered damages as a proximate result.

Where many plaintiffs get into trouble is with acceleration of the note. They may attempt to bring suit when only one payment is late. In such cases, they can only recover judgment for the amount that is then due.

If a note itself does not contain a provision that the full amount will become due at once and payable upon the event of any default i.e., an acceleration clause, the full amount of the note will not be due nor will plaintiff have a cause of action to collect the full amount until the complete term of the note has run.

Always be sure you put an acceleration clause and clause for attorney fees and costs in any promissory note you accept from others in lieu of cash.

Defenses

Payment of a promissory note is, of course, an absolute defense.

To prevail, defendant need only produce admissible evidence to demonstrate all funds payable under the terms of the note, including interest, have been fully paid.

Another absolute defense arises where holder of the note negotiated some consideration for the note other than payment, in which case the obligation created by the note disappears and, along with it, the cause of action.

Finally, failure of the plaintiff to produce the original note is an absolute defense in all but a few jurisdictions.

Quiet Title

An action to quiet title arises when an individual holding legal title is threatened by a genuine or perceived outside interest in the title.

Such threats may include:

- meritless mortgage
- easement
- lis pendens (a pending legal action)
- mechanic's lien
- occupation by force
- or any other claim of right to possession, occupation, or other use

Legal title is typically limited to evidence by duly executed deed or other absolute instrument of ownership, whether or not such evidence is encumbered by a mortgage or other security interest.

One who does not hold such a deed or instrument has no standing to bring an action to quiet title, for he has no title to quiet.

On the other hand, one who holds legal title to property must bring this action to obtain an Order from the Court declaring what interests are held to the property and who holds those interests.

The action is, of course, most frequently brought to remove what we lawyers call a cloud on the title, some issue that either challenges ownership outright or imposes an issue that would tend to diminish the property's sale value wise buyers do not pay top-dollar for properties in which ownership or right of use is unclear or challenged.

Elements

The essential elements are:

1. Party bringing the action holds legal title according to local law.
2. The cloud is real, presently in place, and not speculative or imagined.
3. The cloud can be proven to exist.
4. The cloud threatens a genuine valuable interest in the property.

A common example is an action to quiet title where an alleged mortgage holder or other party claiming a security interest in the property asserts rights that are illegal or otherwise barred by equitable principles. Where a mortgage has been obtained by fraud, for example, the title owner may be able to prove the fraud and cancel the mortgage holder's claim.

Another common example arises where a contractor made improper repairs to a roof resulting in substantial water damages. If the property owner refuses to pay for the faulty work, the contractor may file a lien against the property. Obviously, if the owner can prove the faulty repair work was not worth the contractor's demands, the owner would include an action to quiet title along with an action for negligence and, possibly, breach of contract to recover the cost of his damages and lift the lien.

Defenses

Valid defenses to this action include:

1. The mortgage, lien*, lis pendens*, or other cloud is legally valid.
2. The alleged cloud is imaginary or speculative.
3. The alleged cloud does not affect the value of the property or its use.
4. There is no cloud as alleged by the owner.

Replevin

A cause of action for *replevin* seeks a court order directing the defendant to return possession of specific goods, furniture, equipment, or other such personal property.

For example, if the angry woman agreed to pay for the pie but later refused, the young fellow pictured here has a right to get his pie back, un-eaten.

In practice, replevin is carried out by the sheriff or other authorized law enforcement officer empowered by a writ called, not surprisingly, a writ of replevin.

The court will issue the writ, the plaintiff or the clerk will serve the sheriff with the writ, the sheriff may require the plaintiff to post a bond, and then the sheriff will direct one or more of his deputies to visit the place where the subject property is located and there to take it by force, if necessary, and return it to the plaintiff.

Elements

The complaint must allege sufficient facts to establish the following:

1. Description of claimed property sufficient to identify it and its location if known.

2. Property's value supported by bills of sale or similar evidence, if available.

3. That plaintiff lawfully owns subject property and is entitled to immediate possession.

4. That defendant is wrongfully in possession of the property, how defendant came into possession if known, and why defendant is wrongfully detaining the property if known.

5. That property has not been taken for a tax, assessment, or fine pursuant to law.

6. Damages suffered by plaintiff as a proximate result of defendant's wrongful retention of plaintiff's property.

Money cannot be replevied, unless it is specific money, e.g., a coin collection, particular locked bag of cash, some specifically identifiable negotiable instruments, or otherwise, identifiable money.

Real property i.e., land, buildings, and fixtures affixed to the land or buildings also cannot be replevied.

Rescission

While normally a disgruntled party cannot get out of a contract or other legal commitment simply by tearing up a piece of paper, like this angry fellow here, it is possible to obtain an order of rescission from the court declaring the obligation null and void.

Rescission is an equitable remedy whereby a party obligated by some legal commitment resulting from fraud, false representation, mutual mistake, impossibility of performance, or similar cause resulting from other than his own wrongdoing may obtain an order relieving him of that commitment.

Rescission is a purely equitable remedy, and for relief to be granted the plaintiff must show the court he is clearly entitled to the court's assistance and that he comes to equity with clean hands.

Elements

A complaint for rescission must set out the following essential elements.

1. The making of a contract or other legal commitment with evidence attached, if available.

2. Existence of fraud, mutual mistake, false representation, impossibility of performance, or other ground for rescission or cancellation.

3. Plaintiff rescinded and notified the other party that he rescinded.

4. If plaintiff received any benefit, he must offer to restore defendant to the extent of the benefits, if restoration is possible.

5. Plaintiff has no adequate remedy at law i.e., an award of money damages alone is not sufficient to restore plaintiff to his status quo ante i.e., status before the fact.

If rescission is granted, the court will attempt to restore both parties, as nearly as possible.

This is always the goal of rescission.

A common cause for rescission results when, for example, an elderly person of limited mental ability unwittingly executes a deed conveying his home to a person who knew or should have known that the incapacity of the seller prevented seller from appreciating the consequence of his acts. In such cases, the deed will be rescinded. If defendant paid anything for the conveyance, he will be given back what he has paid. Both parties will be restored as nearly as possible.

If buyer in such a case was aware of the sharp deal he was making at the other's expense, the court may not go to the trouble of restoring the purchase price.

Equity may punish as well as protect.

Rescission is sometimes a harsh remedy and, therefore, is not favored by our courts.

Defenses

Adequate Remedy at Law

If plaintiff's damages can be corrected by a money judgment alone, rescission is not the proper remedy. The count for rescission should be dismissed.

Modification of Contract

If a contract has been modified after fraud or mistake was discovered, the court will not rescind, unless the modification is also the result of fraud or mistake.

Specific Performance

Specific performance is, in a way, the opposite of rescission.

Where rescission is an action to avoid a legal obligation, specific performance is an action to force an unwilling party to perform his obligations.

Specific performance cases seek an order compelling someone to satisfy some legal obligation they refuse to act upon.

Cases arise frequently in land deals, where a seller enters contract to sell, buyer performs all conditions precedent, and seller refuses to close and deliver a deed.

The elements are quite simple.

Elements

1. Existence of a contract or other legal obligation.
2. Plaintiff performed all conditions precedent to defendant's obligation to perform.
3. Defendant refused to perform.
4. Plaintiff has no adequate alternative remedy at law i.e., money damages alone are insufficient to restore him to his status quo ante, i.e., prior condition.
5. Plaintiff suffered damages as a proximate result.

Specific performance sounds in equity, so the party bringing the action must not have contributed to the problem. The adage is, He who comes to equity must come with clean hands.

Spoliation of Evidence

Until recently, this cause of action was not available.

A party was entitled to argue prejudice in prosecuting other claims against parties who destroyed evidence, negligently or with invidious intent, but there was no separate cause of action against defendant who destroyed the evidence plaintiff needed to prevail.

Now, in many jurisdictions, there is.

A plaintiff who lacks sufficient evidence to bring a case for negligence or breach of contract, for example, because the defendant destroyed evidence has a separate cause of action for spoliation.

After all, what's the point of bringing a lawsuit for negligence or breach of contract if you know from the outset that evidence you need to prevail has been destroyed?

Where this cause of action is available, you sue for the damages you might have recovered by stating a cause of action for the spoliation of the evidence that no longer exists.

Elements

The essential elements are:

1. Existence of a potential lawsuit.
2. Defendant's legal or contractual duty to preserve evidence material to plaintiff's case.
3. Defendant's intentional or negligent destruction of the material evidence.
4. Significant impairment of the plaintiff's case as a direct result.
5. Plaintiff's damages.

In a recent Florida case, a truck rental company employee suffered injuries when a ladder belonging to the company collapsed. Before the case could be filed against the ladder manufacturer, the truck rental company sent the broken ladder out with the trash, effectively destroying the injured employee's case. So, the employee sued the truck rental company for spoliation and won the full value of his injury, medical bills, loss of future earnings, loss of enjoyment of life, etc. It didn't matter that the truck rental company was in no way responsible for the ladder failure.

The court found it liable to the employee on the theory that it knew or should have known that ladder was critical evidence, and its act of tossing the ladder in the trash was a breach of duty, giving rise to a cause of action.

Statutory Causes of Action

These are the most commonly encountered common law causes of action and some of the defenses that may be raised against them.

Many other causes of action are created by statute, i.e., laws created by state and federal legislative bodies and subsidiary agencies.

Statutes, codes, ordinances, and such like codified laws often provide civil remedies for those injured by violations.

An example is a cause of action available against insurance companies in some states to compensate insured parties for damages resulting from an insurance company's refusal to pay a claim when the insurance company knows or ought to know it is liable for the claim.

In some jurisdictions this cause of action gives the insured party the right to recover treble damages in addition to the amount he would otherwise be entitled to under the terms of his policy. This is not a common law cause of action but one that arises out of statutory law.

Another is the lemon law statute that exists in many states. The requirements to prevail with a lemon law cause of action vary from state-to-state, but it is not a common law cause of action. The elements will be found by examining the statute that creates the cause.

Statutory laws of this kind are constantly being created and changing, so it is beyond the scope of this course to set out all the causes of action that arise from statute.

It is up to you to carefully study the statutes that may provide remedies and identify the elements set forth in those statutes to determine what must be alleged by the plaintiff and what the plaintiff must prove by the greater weight of admissible evidence to prevail.

The list is too long to include here, but the cause of action principles are the same as those set out under other headings in this chapter.

If you are dealing with causes of action that arise from statutory law, don't stop at studying the statutes. Study the case law that interprets those statutes also, so you are absolutely certain what the elements are and how to plead and prove or disprove them.

Your private interpretation of statutory language and the elements of a statutory cause of action may not agree with controlling appellate courts. Always study the case law along with the black-letter law i.e., the law created by legislatures and other law-making bodies.

Tortious Interference

When a defendant interferes with an advantage of some sort enjoyed by plaintiff, the plaintiff has this cause of action to recover his damages.

Tortious interference takes two forms. They differ only in the elements necessary to plead and prevail.

Tortious interference with an advantageous business relationship does not require the existence of a contractual relationship. Mere expectancy that an advantageous relationship would have continued but for the interference is sufficient.

Indeed, the cause of action will lie even when the business relationship is based on a contract that is void or unenforceable

Tortious interference with a contractual relationship, like the name implies, results where the plaintiff is injured as a result of the defendant's interference that results in breach of plaintiff's contract with another and proximate damages to plaintiff.

The elements are similar for both.

Elements

For tortious interference with an advantageous business relationship:

1. Existence of a business relationship favorable to plaintiff, not necessarily evidenced by a binding contract.

2. Defendant's knowledge of the relationship.
3. Defendant's intentional and unjustified interference with the relationship.
4. Damage to plaintiff as a proximate result.

For tortious interference with a contractual relationship:

1. Existence of a binding contract favorable to plaintiff.
2. Defendant's knowledge of the contract.
3. Defendant's intentional and unjustified procurement of the contract's breach.
4. Damage to plaintiff as a proximate result.

Discussion

In order for either cause based on interference to lie, the interference must be intentional.

Negligent interference does not give rise to a cause of action.

Where interference with a business relationship is lawful competition, the cause of action will fail.

Where interference involves theft of trade secrets or misappropriation and use of proprietary confidential customer lists and critical information, the plaintiff is entitled to a money judgment to recover the value of the relationship prior to defendant's interference. A temporary injunction may also be obtained to prevent interference from continuing.

Interference with a contractual relationship is more severe. If plaintiff's contract is binding i.e., it is enforceable and defendant's intentional acts interfere with that contract so that a breach or other diminution of the value of the contract results, plaintiff's damages are more easily determined and defendant's wrong more clearly identified.

It is not lawful competition to encourage one person to breach his contract with another, and those that do so are liable to plaintiff for damages sounding in tortious interference with a contractual relationship.

Undue Influence

Undue influence is a cause of action brought to avoid the legal effect of a document e.g., a will, deed, trust, or similar conveyance of rights or property procured from a person of weakened mental ability by a person who occupied a position of trust with the person of diminished ability.

The court's favorable judgment prevents the latter from gaining unjust advantage from his unduly influencing the former.

The most common cases, of course, involve a greedy sibling who importunes an elder family member to change the will, cutting his brothers and sisters out of their rightful inheritance.

Other cases involve lawyers, care-givers, and even next-door neighbors who prey upon the weakened mental capacity of others to wrongfully obtain gain for themselves.

Elements

1. Existence of a confidential relationship between beneficiary and grantor.
2. Beneficiary actively procured the instrument will, trust, deed, etc.
3. Grantor suffered some condition lessening her ability to resist the influence.

4. Grantor or grantor's estate suffered damages as a proximate result.

Element #3 may not be required by all courts, however it is an essential element in some jurisdictions, since it should not be argued that a grantor in perfect physical and mental health could be unduly influenced to dispose of property in a manner contrary to his free will.

Of course, if an otherwise capable individual suffers this injury as a result of coercion or duress which see above, then this action could be joined.

In a case in Miami, an extremely elderly gentleman having unknown distant relatives and an avaricious stockbroker died leaving $12 million to his stockbroker and nothing to his blood relatives.

The old gentleman enjoyed a long-term confidential relationship with the stockbroker. The stockbroker was also the old man's attorney and drafted the will by which the old gentleman signed away his millions.

Finally, evidence was adduced to show the stockbroker used a girlfriend to visit the elderly gentleman at his home to obtain the needed signature.

These facts gave rise to a cause of action for undue influence and, as soon as the judge saw what was presented, the lawyer was turned out of his inheritance and true relatives rewarded.

In another case, a disgruntled sibling complained his sister received the bulk of their father's estate. He brought an action for undue influence. The sister, however, had nothing to do with procuring the will, nor did the sister live in the same state with the decedent or have any confidential relationship with the decedent greater than the relation her brother also enjoyed. The cause of action failed because the requisite elements were not present.

Comments

If a beneficiary enjoyed the requisite confidential relationship and also procured the will or other beneficial instrument e.g., taking the elderly person to the beneficiary's lawyer to have the will drafted a presumption of undue influence arises in most jurisdictions. Once this legal presumption arises, the burden of proof shifts to the procuring beneficiary to prove absence of some or all elements of undue influence.

A judgment favorable to this cause of action nullifies provisions of the document procured by undue influence and restores the situation to what it was before the document was executed.

Unjust Enrichment

The gist of unjust enrichment is similar to the cause of action for quantum meruit explained above.

Unjust enrichment arises whenever plaintiff confers a benefit on defendant under circumstances that would cause a reasonable person to believe plaintiff would be compensated for the fair market value of the benefit.

Our courts reason that one person should not be unjustly enriched at the expense of another. Even when there's no contract to detail the parties' expectations, this cause of action prevents the defendant from being unjustly enriched at the expense of the plaintiff.

Elements

The essential elements are:

1. Plaintiff conferred a benefit on defendant.
2. Defendant either requested the benefit or knowingly and voluntarily accepted it.
3. It would be unjust for defendant to retain the benefit without compensating plaintiff reasonably.
4. Plaintiff suffered damages as a proximate result.

For example, an itinerant house-painter asks a homeowner if he can paint the homeowner's house. The homeowner answers, of course., thinking he will get a free coat of paint. After all, he hasn't agreed on a price, so he figures he's not bound to pay.

In fact, our course will imply a contract in such circumstances. The house painter who brings this cause of action under this set of facts will be awarded the fair market value of his services and the cost of his paint.

It would be unjust to do otherwise.

Such cases are said to arise out of quasi contract, i.e., a contract not created by the parties but by the court enforcing principles of equity to prevent a wrong.

Defenses

Express Contract

This cause of action fails if defendant can show an express contract exists, verbal or in writing. The terms of an express contract confirm the mutual understanding of the parties. In such cases, the parties will be held to the terms of their express contract.

Burden

The plaintiff seeking to enforce an implied contract must meet a greater burden than one who uses better business sense and requires an express contract before undertaking to render services or deliver goods to another. This is especially true when it comes time to prove the value of the services and goods rendered where there is no express prior agreement.

Payment Accepted

Once plaintiff accepts payment, he cannot sue for unjust enrichment. A motion to dismiss will prevail upon evidence that payment was tendered and accepted.

Conclusion

So, we come to the end of this section on complaints.

The meat-and-potatoes of every lawsuit are:

- laws,
- facts, and
- rules.

The right to bring a complaint stands on laws, facts, and rules.

There must also be

- duty
- liability
- damages

Plaintiff must allege in his complaint at least one valid cause of action the courts recognize or his case will be summarily dismissed upon the filing of his opponent's *Motion to Dismiss for Failure to State a Cause of Action*.

Although there may be a few rare common laws causes of action not listed in this workbook and many statutory causes of action too numerous to list we've covered the causes you'll most often encounter.

To find the essential fact elements of any cause of action not included in this workbook, try using a search engine using a phrase like cause of action elements for trespass, for example. This should give you all you need, now that you understand what causes of action and essential fact elements are.

Complaints can be avoided by valid defenses. Common defenses to the most frequently encountered complaints are listed above.

Whether you're a plaintiff or defendant, you need to know and understand the essential elements of both complaints and defenses.

Knowing the elements of complaints and defenses is half the battle of winning.

There may be a few rare common laws causes of action not listed in this workbook and many statutory causes of action too numerous to list however those presented here are the causes you'll most often encounter.

The rest of the battle is simply a matter of learning the rest of what's explained in my course.

Justice is in your hands.

COMPELLING HIDDEN EVIDENCE
Making Them Go by The Rules

If you can't get evidence from others, you can't win.

If your opponent hides evidence and he will hide it, this shows you how to get him out from behind that tree, no matter how he drags his feet, screams, and complains.

You have your God-given right to get evidence in support of your case.

If your opponent insists on hiding, you need to force the court to strike his pleadings, dismiss his case, or even throw him in jail until he comes out in the open, obeys the rules, and turns over the evidence he doesn't want you to see.

However. There are certain steps you must follow to effectively compel evidence from your opponent or anyone else who has evidence you need to win your case. You must follow those steps before being able to force the court to take action.

Most lawyers will try every trick in the book to hide evidence or hope you don't find out their “evidence” isn't admissible. You have to know what you're seeing and be able to find hidden evidence if they refuse to hand it over. It will happen in your case.

It's remarkably easy to get the evidence you need, but you need the knowledge and the powerful forms to get the job done.

The first step depends on what kind of discovery process you are using:

1. Request for Admissions - Motion to Deem Requests Admitted
2. Request for Production - Motion to Compel Production
3. Interrogatories - Motion for Better Answers to Interrogatories
4. Deposition - Motion to Show Cause
5. Subpoena Violations - Motion to Show Cause

Whichever you choose, you'll see there is a document for each one of these.

Please anticipate your opponent's efforts to hide the evidence you need to win. It will happen. It always happens.

You may think you already have all the evidence you need to win, however if you come to court with *your own evidence* instead of using discovery to make certain your evidence will be admitted to the court record as authenticated, your opponent will object, the court will sustain the objections, and you'll be left holding an empty bag.

If you cannot get your evidence admitted in the court record as admissible, you don't really have any evidence you can use to win your case.

Learn how to compel your opponent to produce what you need to win.

Request for Admissions

If you studied the Discovery chapter before this one, then you know your written *Request*

for Admissions is your most powerful evidence discovery tool. You can use it to force your opponent to admit law relevant to your case or facts that can lead you to discover admissible evidence.

Here's the problem. Your opponent will try to avoid admitting anything.

The good news is the rules for this discovery tool are on your side.

What you do depends on what your opponent does after you serve him with your *Request for Admissions*.

If you are clever, most if not all of the items in your *Request for Admissions* will be or lead to discovery of genuine issues for trial.

That's why your opponent will try to hide by:

1. Failing to Respond,
2. Failing to Admit, or
3. Objecting

Each of these is covered in the following sections.

Failure to Respond

In nearly all jurisdictions, once your request for admissions has been served on the other side, a deadline clock starts ticking. Your opponent has only a certain number of days to respond. In many jurisdictions this is only 30 days, but you need to check your local jurisdiction's rules to make certain how many days are allowed for the response. In Missouri it's even shorter – 21 days.

If your opponent fails to respond within the number of days allowed by your local jurisdiction's rules, you will file a *Motion to Deem Requests Admitted* and set your motion for hearing. Here's an example:

IN THE THIRTIETH JUDICIAL CIRCUIT COURT
IN AND FOR SUNSHINE COUNTY, FLORIDA

Case No. 2012-123
Judge Benchwarmer

DONALD TRUMP,
Plaintiff,

v.

JOE XI JING PING,
Defendant.

MOTION TO DEEM REQUESTS ADMITTED FOR FAILURE TO RESPOND

PLAINTIFF Donald Trump moves this Honorable Court to enter an order deeming all items of his Request for Admissions to be admitted for all purposes during the pendency of these proceedings and states in support.

1. Plaintiff served defendant with his First Request for Admissions on 3 January 2016.

2. As of 8 February 2016, defendant has failed and refused to file or serve on defendant any response to plaintiff's First Request for Admissions.

3. The time allowed for responding to Requests for Admissions in this jurisdiction has expired.

4. Justice and the Rules of Civil Procedure controlling this Honorable Court require that the facts requested in plaintiff's First Requests for Admissions be deemed admitted for all purposes during the pendency of these proceedings.

WHEREFORE plaintiff moves this Honorable Court to enter an order deeming the facts stated in plaintiff's First Requests for Admissions to be deemed admitted for all purposes during the pendency of these proceedings.

RESPECTFULLY SUBMITTED this ____day of _____2016.

_____
Donald Trump, Plaintiff

[Certificate of Service]

Cite the controlling rule in your jurisdiction and include any controlling published appellate court decisions that support your position that everything you requested your opponent to admit should be deemed admitted for all purposes.

For example, suppose one of your requests for admissions was, *"Admit that the document attached as Exhibit A is an accurate copy of a contract signed by you on 23 May 2016."* If your opponent doesn't respond within the time allowed, the court may deem consider, find, adjudge that the exhibit is an accurate copy of the contract and that your opponent signed it on 23 May 2016, and your opponent will be stuck with that fact throughout the proceedings.

Failure to Admit

If your opponent responds by filing some paper with the court and sending you a copy, but the response does not admit or deny the items in your request, you have the rules on your side once again. The response must specifically deny each item in your request or state in detail why the responding party cannot truthfully admit or deny it.

If your opponent denies an item in your request, that denial must fairly respond to the

substance of the matter, and when good faith requires the responding party to qualify a response or deny only part of an item, the response must specify the part admitted and qualify or deny the rest.

The responding party may assert lack of knowledge or information as a reason for failing to admit or deny only if he states he has made reasonable inquiry and the information he knows or can readily obtain is insufficient to enable him to admit or deny.

If you receive anything less than this, you file a *Motion to Deem Requests Admitted* and set your motion for hearing.

IN THE THIRTIETH JUDICIAL CIRCUIT COURT
IN AND FOR SUNSHINE COUNTY, FLORIDA

Case No. 2012-123
Judge Benchwarmer

DONALD TRUMP,
Plaintiff,

v.

JOE XI JING PING,
Defendant.

MOTION TO DEEM REQUESTS ADMITTED OVER OBJECTIONS

PLAINTIFF Donald Trump moves this Honorable Court to enter an order deeming certain items of his Request for Admissions to be admitted for all purposes during the pendency of these proceedings and states in support.

1. Plaintiff served defendant with his First Request for Admissions on 3 January 2016.

2. Paragraph 2 of plaintiff's request stated, "You were allowed to use Plaintiff's grapefruit delivery truck."

3. Paragraph 4 of plaintiff's request stated, "You received $3,000 from plaintiff on 17 May 2012."

4. Defendant objected to both these requests stating, "Objection. Plaintiff's request seeks to discover a fact that presents a genuine issue for trial."

5. Defendant's responses are contrary to the rule that forbids such objections.

6. Justice and the Rules of Civil Procedure controlling this Honorable Court require that the facts requested in plaintiff's paragraphs 2 and 4 be deemed admitted.

WHEREFORE plaintiff moves this Honorable Court to enter an order deeming the facts stated in paragraphs 2 and 4 to be deemed admitted for all purposes during the pendency of these proceedings.

RESPECTFULLY SUBMITTED this ___day of _____

2016._____
Donald Trump, Plaintiff

[Certificate of Service]

Responding with Objections

In most jurisdictions objecting to a requested admission by itself isn't good enough.

The responding party must state his grounds for objecting to a request. He cannot object on the ground that the request presents a genuine issue for trial.

In any case, you file your *Motion to Deem Requests Admitted*, set it for hearing, and insist on your right to either get proper responses pursuant to the rule or to have the judge enter an order deeming your items admitted as true for all purposes in the rest of the proceedings.

Once an item is admitted or deemed admitted by the court that item be it an issue of law or a fact related to your case is thereafter established and cannot later be withdrawn or amended.

IN THE THIRTIETH JUDICIAL CIRCUIT COURT
IN AND FOR SUNSHINE COUNTY, FLORIDA

Case No. 2012-123
Judge Benchwarmer

DONALD TRUMP,
Plaintiff,

v.

JOE XI JING PING,
Defendant.

MOTION TO DEEM REQUESTS ADMITTED OVER OBJECTIONS

PLAINTIFF Donald Trump moves this Honorable Court to enter an order deeming certain items of his Request for Admissions to be admitted for all purposes during the pendency of these proceedings and states in support.

1. Plaintiff served defendant with his First Request for Admissions on 3 January 2016.

2. Paragraph 2 of plaintiff's request stated, "You were allowed to use Plaintiff's grapefruit delivery truck."

3. Paragraph 4 of plaintiff's request stated, "You received $3,000 from plaintiff on 17 May 2012."

4. Defendant objected to both these requests stating, "Objection. Plaintiff's request seeks to discover a fact that presents a genuine issue for trial."

5. Defendant's responses are contrary to the rule that forbids such objections.

6. Justice and the Rules of Civil Procedure controlling this Honorable Court require that the facts requested in plaintiff's paragraphs 2 and 4 be deemed admitted.

WHEREFORE plaintiff moves this Honorable Court to enter an order deeming the facts stated in paragraphs 2 and 4 to be deemed admitted for all purposes during the pendency of these proceedings.

RESPECTFULLY SUBMITTED this ___day of _____2016.

_____
Donald Trump, Plaintiff

[Certificate of Service]

Then, if your opponent gets particularly out of control, you might find yourself filing a motion something like the following that was involved in a real case where several millions of dollars was at stake.

FIFTEENTH JUDICIAL CIRCUIT COURT
SUNSHINE COUNTY, FLORIDA
CIVIL DIVISION

Case No. 12345

DONALD TRUMP,

Plaintiff,

v.

JOE XI JING PING and

DOROTHY DIRTBAG,

Defendants.

MOTION TO DEEM REQUEST ADMITTED FOR DEVIOUS RESPONSES

PLAINTIFF Donald Trump ,pursuant to Rule1.370 Florida Rules of Civil Procedure, moves this Honorable Court to enter an Order determining insufficient a response of defendant Dorothy Dirtbag herein after Dirtbag to plaintiff's request for admissions and deeming same admitted for all purposes, stating in support:

1. This court is not a forum for cute tricks nor a stage for clever use of smoke and mirrors word magic to evade responding to lawful discovery requests pursuant to the rules that control this court.

2. Dirtbag's response to plaintiff's request for admissions is nothing short of a word game.

3. Paragraph1of plaintiff's request for admissions sought to establish that a contract forming the basis for this lawsuit "contemplated" there would be a limit on Dirtbag's ability to trade her stock.

4. Dirtbag evaded answering by claiming contracts cannot "contemplate" because as Dirtbag asserts with the transparent guile of a preschooler contracts are "inanimate objects."

5. Use of the verb "contemplates" in reference to contracts is well known and widely recognized.

6. The Florida Supreme Court and Fourth District Court of Appeals uses this term routinely in written opinions describing what contracts "contemplate." Pandya v. Israel,761 So. 2d 454 Fla. 4th DCA2000; Petracca v. Petracca, 706 So. 2d 904 Fla.4th DCA 1998; Baker v. Baker, 394 So. 2d 465 Fla. 4th DCA 1981; Potter v. Collin, 321 So. 2d 128 Fla. 4th DCA 1975; Belcher v. Belcher, 271 So. 2d 7 Fla. 1972; Bergman v. Bergman, 199 So. 920 Fla. 1940; Bowers v. Dr. Philips, 129 So. 850 Fla. 1930.

7. Dirtbag's resort to word games is in contempt of this Court's lawful authority and should be sanctioned by entry of an Order deeming the requested admission admitted for all purposes.

WHEREFORE plaintiff Donald Trump moves this Honorable Court to enter an Order deeming the request referenced here in admitted for all purposes during the pendency of these proceedings.

I CERTIFY that a copy of the foregoing was provided by regular U.S. Mail to the law offices of Dewey, Cheatham& Howe at 38 Liar Lane, Hogwash, Florida 33333 this 19 April 2005.

_____

Donald Trump, Plaintiff

Yes, it is permissible to use italics as in the foregoing and sometimes even bold type to emphasize points of your arguments in motions as well as in pleadings and other papers, so long as you don't over-use them and that their use is done with respect to the court.

Remember: You are writing to the court record to be read by the trial judge and, possibly, appellate court justices in the event you must appeal. You are not writing to impress or ridicule your opponent. Use restraint, but make your points clear.

Request for Production

Compelling production is a bit different. It requires a few more steps. Each step should be taken in sequence.

The process may require considerable time, however when the dust settles you will get to see the documents and/or things you sought with your Request for Production if they are "reasonably calculated to lead to the discovery of admissible evidence" pursuant to the general rule controlling discovery.

Anticipate this response: "Objection, vague, ambiguous, seeks to inquire into the attorney-client privilege, work product, and overly burdensome."

Yep.

When you request documents or things that will help you win, do not expect your opponent to turn them over with a smile. He will drag his feet, obfuscate, make up stuff, and do whatever he can to prevent you from getting your hands on anything that will cause him to lose.

We have a fix for that.

There are three 3 steps.

1. Motion to Compel Production
2. Motion to Show Cause
3. Motion for Contempt Order

You may not need to use every step, but each is explained below along with suggested forms you can use.

Motion to Compel Production

Remember this and never, ever forget it.

You are entitled to obtain discovery of anything and I do mean "anything" that is "reasonably calculated to lead to the discovery of admissible evidence. What you seek with your discovery efforts need not be admissible at trial ... so long as it is "reasonably calculated to lead to the discovery of admissible evidence.

Your opponents do not want you to see the documents and things they have in their possession or those that are obtainable by them through the exercise of reasonable diligence if those documents and things will help you win.

So, file a Motion to Compel Production, set it for hearing, and make it crystal clear to the judge with a court reporter writing everything down so a record is made in case you have to appeal the judge's denial of your motion why the documents and things you request are either already admissible evidence or "reasonably calculated to lead to the discovery of admissible evidence.

If all goes well, the judge will order your opponent to produce the documents and things you request, and then your opponent is not only subject to your request but under a court order to do what you requested.

IN THE THIRTIETH JUDICIAL CIRCUIT COURT
IN AND FOR SUNSHINE COUNTY, FLORIDA

Case No. 2012-123
Judge Benchwarmer

DONALD TRUMP,
Plaintiff,

v.

JOE XI JING PING,
Defendant.

MOTION TO COMPEL PRODUCTION

PLAINTIFF Donald Trump moves this Honorable Court for an Order compelling Defendant Danny Defendant to produce for inspection and copying the originals of the following documents and things at the offices of Plaintiff or such other place as the parties may hereafter agree, stating in support:

1. On or about 13 December 2012 plaintiff served defendant with a Request for Production.

2. In paragraph 1, plaintiff requested "All corporate records of Grapefruit Delivery Corporation.

3. In paragraph 2, plaintiff requested "All records of money or other consideration received by you for sale or delivery of grapefruit from 17 May 2012 to the present, including but not limited to invoices and bank statements."

4. Defendant failed and refused to respond with any of the requested production within the time limit set by the Rules of Civil Procedure that control this Honorable Court.

5. Each of the items requested are reasonably calculated to lead to the discovery of admissible evidence in accordance with the general rule governing discovery in this court.

6. Justice and the rules controlling this Honorable Court require that the requested items be produced forthwith.

WHEREFORE plaintiff moves this Honorable Court to enter an ORDER compelling defendant to produce in accordance with the rules.

RESPECTFULLY SUBMITTED this ___day of _____2016.

_____
Donald Trump, Plaintiff

[Certificate of Service]

Now, suppose your opponent fails and refuses to respond as ordered.

What then?

Motion to Show Cause

The next step and you really shouldn't skip this step unless there is some bona fide reason, such as the likelihood evidence will disappear or be destroyed is a *Motion to Show Cause*.

Of course, you try to work things out ahead of time by phoning your opponent or his attorney so you can include a certificate of good faith. But, if your opponent fails and refuses to produce as now ordered by the judge, you go ahead and file your motion and set it for hearing.

For this motion and its notice of hearing, you do something a bit different, however. You have the motion and notice of hearing served on your opponent by a *U.S. Marshal if federal court or the Sheriff or other authorized process server if state court.*

When the time comes for your hearing, you go to court prepared to demand the production you requested and that the court has ordered.

If your opponent shows up, the judge will usually give your opponent more time to produce, but now the extra time may be as short as a few hours and seldom more than a few days.

If your opponent does not show up, call the court's attention to the *Return of Service* the affidavit filed by the Marshal, Sheriff, or process server showing that your opponent was served with the motion and notice of hearing. The judge may issue a *Bench Warrant* directing a law enforcement officer to take your opponent into custody until such time as he can be forced to appear and respond to your motion.

IN THE IN THE THIRTIETH JUDICIAL CIRCUIT COURT
IN AND FOR SUNSHINE COUNTY, FLORIDA

Case No. 2012-123
Judge Benchwarmer

DONALD TRUMP,
Plaintiff

JOE XI JING PING,
Defendant.

MOTION TO SHOW CAUSE WHY DEFENDANT SHOULD NOT BE HELD IN CONTEMPT FOR FAILURE TO PRODUCE

PLAINTIFF Donald Trump moves this Honorable Court for an Order requiring Defendant Danny Defendant to show cause why he should not be held in contempt for failing and refusing to abide by this Court's order to produce, stating in support:

1. On or about 13 December 2012 plaintiff served defendant with a Request for Production.

2. Defendant failed and refused to comply with plaintiff's request.

3. Plaintiff subsequently file a Motion to Compel Production that was heard on 19 January 2013.

4. At the 19 January 2013 hearing this Court entered an Order compelling defendant to produce the requested documents within 10 days of entry of that Order.

5. As of the date of this motion, defendant has failed and refused to comply with this Court's Order.

6. Justice and the rules controlling this Honorable Court require that the requested items be produced forthwith.

WHEREFORE plaintiff moves this Honorable Court to enter an ORDER requiring defendant to show cause why he should not be held in contempt for failure to produce as ordered.

RESPECTFULLY SUBMITTED this ___day of _____2014.

_____
Donald Trump, Plaintiff

[Certificate of Service]

In unusual cases after being twice ordered to produce what you originally requested, your opponent may stupidly fail and refuse to obey the court's order.

Here's what you do next...

Motion for Contempt

File the following motion, set it for hearing, and again have your opponent personally served with both documents.

IN THE THIRTIETH JUDICIAL CIRCUIT COURT
IN AND FOR SUNSHINE COUNTY, FLORIDA

Case No. 2012-123
Judge Benchwarmer

DONALD TRUMP,
Plaintiff,

v.

JOE XI JING PING,
Defendant.

MOTION TO FIND DEFENDANT IN CONTEMPT
FOR FAILURE TO PRODUCE

PLAINTIFF Donald Trump moves this Honorable Court for an Order finding Defendant Danny Defendant in contempt of this Court for failing and refusing to abide by two 2 of this Court's orders to produce, stating in support:

1. On or about 13 December 2012 plaintiff served defendant with a Request for Production.

2. Defendant failed and refused to comply with plaintiff's request.

3. Plaintiff subsequently file a Motion to Compel Production that was heard on 19 January 2013.

4. At the 19 January 2013 hearing this Court entered an Order compelling defendant to produce the requested documents within 10 days of entry of that Order.

5. Defendant failed and refused to obey this Court's 19 January 2013 Order.

6. On 31 January 2013 plaintiff filed his Motion to Show Cause and had defendant personally served with same and a Notice of Hearing set for 15 February 2013.

7. At the 15 February hearing defendant failed and refused to appear.

8. Defendant is now in violation of two 2 of this Court's orders to produce.

9. Justice and the rules controlling this Honorable Court require that the defendant be found in contempt of this Honorable Court and incarcerated until such time as he complies with this Court's lawful orders.

WHEREFORE plaintiff moves this Honorable Court to enter an Order finding defendant in contempt of this Court and directing a law enforcement officer to take him into custody until such time as he complies with the prior two 2 orders of the Court.

RESPECTFULLY SUBMITTED this ___day of _____2014.

_____
Donald Trump, Plaintiff

[Certificate of Service]

If your opponent is stupid enough to fail to show up for this hearing, the Court will not hesitate to enter an Order directing a law enforcement officer to take him into custody and hold him until he is prepared to obey the Court's orders.

If he shows up, the judge may give him a few hours to bring the requested document directly to the judge or, in some cases, order him to bring the requested documents to you but allowing you to file an affidavit of non-compliance that will immediately result in issuance of a *Bench Warrant* directing law enforcement to take your opponent into custody until he decides to obey the Court's orders, or take other actions such as striking your opponent's pleadings or dismissing your opponent's case.

This is your power. Use it vigorously when your opponent tries to hide from your requests to produce.

Interrogatories

The solution here is a *Motion for Better Answers* to *Interrogatories*.

Suppose you serve your opponent with a set of interrogatories that includes a paragraph, *"How much money did you report as earned income to the IRS in 2015?"*

Now, further suppose the response to that paragraph was, *"Objection, vague, ambiguous, seeks to inquire into the attorney-client privilege, violates the work product rule, overly broad, and unduly burdensome."*

Obviously, your opponent doesn't want to answer. However, if you follow these steps, you will get the answers justice and the rules demand:

1. Motion to Compel Better Answers
2. Motion to Show Cause
3. Motion for Contempt

If how much money your opponent reported to the IRS as earned income in 2015 is either admissible evidence in your case because relevant to some material issue or is reasonably calculated to lead to the discovery of admissible evidence, then you are entitled to an answer.

"Objection, vague, ambiguous, seeks to inquire into the attorney-client privilege, violates the work product rule, overly broad, and unduly burdensome," is not the answer to which you are entitled pursuant to the rules. It is an all-too frequent bogus, foot-dragging, ball-hiding response to discovery requests, so you need to know how to deal with it when it comes as it will.

The following motion shows you how to start the process. Set it for hearing. Serve your opponent with a copy of the motion and the notice of hearing. Attend the hearing prepared to argue that the information sought is either admissible at trial or "reasonably calculated to lead to the discovery of admissible evidence."

FIFTEENTH JUDICIAL CIRCUIT COURT
SUNSHINE COUNTY, FLORIDA
CIVIL DIVISION

Case No. 12345

DONALD TRUMP,

Plaintiff,

v.

JOE XI JING PING and

DOROTHY DIRTBAG,

Defendants.

MOTION FOR BETTER ANSWERS TO INTERROGATORIES

PLAINTIFF Donald Trump moves this Honorable Court to Order defendant Danny Defendant to file a better answer to plaintiff's interrogatories, stating in support:

1. On 12 January 2015, plaintiff served defendant with his First Set of Interrogatories including in paragraph 7 the following: "How much money did you report as earned income to the IRS in 2015?"

2. Also served with plaintiff's First Set of Interrogatories was paragraph 9, "Identify all persons having any knowledge of your using insecticide to spray plaintiff's strawberry plants."

2. Both interrogatories are reasonably calculated to lead to discovery of admissible evidence, since a material issue in this case is how much money defendant was paid by plaintiff to spray plaintiff's strawberry plants with insecticide and whether defendant did in fact spray any of plaintiff's strawberries.

3. Defendant's contumelious responses to both interrogatories were, "Objection, vague, ambiguous, seeks to inquire into the attorney-client privilege, violates the work product rule, overly broad, and unduly burdensome."

4. Defendant's responses are not in good faith, are in violation of the general rules governing discovery by interrogatories that control this Honorable Court, and defendant should be ordered to provide better answers to the said interrogatories forthwith.

WHEREFORE plaintiff Donald Trump moves this Honorable Court to enter an Order directing defendant to respond with a better answer to paragraphs 7 and 9 of plaintiff's First Set of Interrogatories.

I CERTIFY that a copy of the foregoing was provided by regular U.S. Mail to the law offices of Dewey, Cheatham & Howe at 38 Liar Lane, Hogwash, Florida 33333 this 19 February 2015.

_____

Donald Trump, Plaintiff

If all goes well, the judge will order a better answer. But, suppose your opponent fails and refuses to file a better answer as ordered. What then?

Motion to Show Cause

The next step as when your opponent fails to produce, you should not skip this step is a *Motion to Show Cause*.

Try to work things out ahead of time by phoning your opponent or his attorney so you can include a certificate of good faith. But, if your opponent fails and refuses to provide a better answer to your interrogatory as now ordered by the judge, you go ahead and file your motion and set it for hearing.

For this motion and its notice of hearing, you do as you should always do with a *Motion to Show Cause*. You have the motion and notice of hearing served on your opponent by a *U.S. Marshal if federal court or the Sheriff or other authorized process server if state court*.

When the time comes for your hearing, you go to court prepared to demand the better answer to your interrogatory that the court already ordered.

If your opponent shows up, the judge will usually give your opponent more time to file his better answer, but as with production the extra time may be as short as a few hours and seldom more than a few days.

If your opponent does not show up, call the court's attention to the Return of Service the affidavit filed by the Marshal, Sheriff, or process server showing your opponent was served with the motion and notice of hearing, in which case the judge may issue a *Bench Warrant* directing a law enforcement officer to take your opponent into custody until such time as he can be forced to appear and provide the better answer he has been ordered to provide.

IN THE THIRTIETH JUDICIAL CIRCUIT COURT
IN AND FOR SUNSHINE COUNTY, FLORIDA

Case No. 2012-123
Judge Benchwarmer

DONALD TRUMP,
Plaintiff,

v.

JOE XI JING PING,
Defendant.

MOTION TO SHOW CAUSE
WHY DEFENDANT SHOULD NOT BE HELD IN CONTEMPT
FOR FAILURE TO GIVE BETTER ANSWER TO INTERROGATORY

PLAINTIFF Donald Trump moves this Honorable Court for an Order requiring Defendant Danny Defendant to show cause why he should not be held in contempt for failing and refusing to abide by this Court's order to give a better answer to one of plaintiff's interrogatories, stating in support:

1. On or about 13 December 2012 plaintiff served defendant with his First Set of Interrogatories.

2. Defendant failed and refused to answer paragraph 7 of plaintiff's interrogatories.

3. Plaintiff subsequently file a Motion to Compel Better Answers that was heard on 19 January 2013.

4. At the 19 January 2013 hearing this Court entered an Order compelling defendant to provide a better answer to paragraph 7 of plaintiff's interrogatories within 10 days of entry of that Order.

5. As of the date of this motion, defendant has failed and refused to comply with this Court's Order.

6. Justice and the rules controlling this Honorable Court require that the better answer be produced forthwith.

WHEREFORE plaintiff moves this Honorable Court to enter an Order requiring defendant to show cause why he should not be held in contempt for failure to provide a better answer as

ordered.

RESPECTFULLY SUBMITTED this ___day of _____2013.

_____
Donald Trump, Plaintiff

[Certificate of Service]

In unusual cases after being twice ordered to produce what you originally requested, your opponent may stupidly fail and refuse to obey the court's order. So, here's what you do.

Motion for Contempt

File the following motion, set it for hearing, and again have your opponent personally served with copies of the motion and notice of hearing.

IN THE THIRTIETH JUDICIAL CIRCUIT COURT
IN AND FOR SUNSHINE COUNTY, FLORIDA

Case No. 2012-123
Judge Benchwarmer

DONALD TRUMP,
Plaintiff,

v.

JOE XI JING PING,
Defendant.

MOTION TO FIND DEFENDANT IN CONTEMPT
FOR FAILURE TO PROVIDE BETTER ANSWER TO INTERROGATORY

PLAINTIFF Donald Trump moves this Honorable Court for an Order finding Defendant Danny Defendant in contempt of this Court for failing and refusing to abide by two 2 of this Court's orders to provide a better answer to one of plaintiff's interrogatories, stating in support:

1. On or about 13 December 2012 plaintiff served defendant with plaintiff's First Set of Interrogatories.

2. Defendant failed and refused to answer one of plaintiff's interrogatories.

3. Plaintiff subsequently file a Motion to Compel Better Answers that was heard on 19 January 2013.

4. At the 19 January 2013 hearing this Court entered an Order compelling defendant to provide a better answer to plaintiff's interrogatory within 10 days of entry of that Order.

5. Defendant failed and refused to obey this Court's 19 January 2013 Order.

6. On 31 January 2013 plaintiff filed his Motion to Show Cause and had defendant personally served with same and a Notice of Hearing set for 15 February 2013.

7. At the 15 February hearing defendant failed and refused to appear.

8. Defendant is now in violation of two 2 of this Court's orders to produce.

9. Justice and the rules controlling this Honorable Court require that the defendant be found in contempt of this Honorable Court and incarcerated until such time as he complies with this Court's lawful orders.

WHEREFORE plaintiff moves this Honorable Court to enter an Order finding defendant in contempt of this Court and directing a law enforcement officer to take him into custody until

such time as he complies with the prior two 2 orders of the Court.
RESPECTFULLY SUBMITTED this ___day of _____2014.

_____
Donald Trump, Plaintiff

[Certificate of Service]

Some people are actually stupid enough to fail to show up for this hearing, in which case the Court will not hesitate to enter an Order directing a law enforcement officer to take such person into custody and hold him until he is prepared to obey the Court's orders.

If he shows up, the judge may give him a few hours to bring his better answer directly to the judge or, in some cases, order him to bring the answer to you but allow you to file an affidavit of non-compliance that will immediately result in issuance of a Bench Warrant directing law enforcement to take your opponent into custody until he decides to obey the Court's orders, or something less drastic such as striking his pleadings or dismissing his case. This is your power.

This is the part of your court power that everyone should know about, power very few lawyers are willing to use or don't know how to use.

Depositions

Depositions are handled differently. Problems arise when:

1. The deponent witness or opposing party fails to show up,
2. Deponent fails and refuses to candidly and honestly answer questions, or
3. You ask improper questions.

Don't worry. There's a court reporter at every deposition, writing down every word that gets said unless you allow an argument to begin so the reporter cannot sort out who is saying what. Just be sure only one person is speaking at any one time so the court reporter can make an accurate record.

You Ask Improper Questions

If you try to ask your own witness *"leading questions"* or questions protected by privilege or otherwise disallowed by the rules This is covered in the chapter on Evidence. Your opponent or his lawyer will object, and at a deposition there is no judge to rule on those objections.

What do you do? The best thing is to re-phrase your question.

If you believe your question is allowed by the rules, ask it again and demand an answer.

Your opponent can take it up with the judge at a later hearing on his motion to strike the deponent's answer from the record. Or, if the deponent refuses to answer a question you believe is permitted by the rules, you can take it up with the judge at a later hearing on your *Motion to Show Cause. See suggestions below.*

Don't be pushed around by the other side during depositions. There are only a few things that are out of bounds at depositions. Don't be overwhelmed by intimidating lawyers.

In most jurisdictions, protocols for examining and cross-examining deponents at depositions are looser than at trial where rules of evidence are strictly enforced. If the other side begins to object to every question you ask, request a conference with the other side outside the room, away from the deponent's hearing.

Ask what the point of the objections is. If your opponent remains obstreperously unruly, direct the court reporter to record you saying, *"We are terminating this deposition until further notice due to the opponent's refusal to abide by the rules of evidence, and we will be filing a Motion to Show Cause."*

Make absolutely certain this statement terminating the deposition and giving the cause therefor is in the court reporter's record.

If the other side abuses the rules by interrupting with objections you believe are improper under the rules, terminate the deposition, file a *Motion to Show Cause*, set it for hearing, and get a ruling from the Court before again attempting to re-notice the deponent for continuing deposition.

If you continue a deposition deprived of your right to get what you want because of the other side's unruly and unlawful objections, you may not get another bite at the apple and forever lose your chance to get facts you need before trial.

If you are represented by a lawyer, make certain your lawyer does not allow the other side to interrupt without good cause.

Allow no weasel room for a deponent to give half-answers or evasive responses. If a deponent begins to weasel, pin him down. If you can catch him in a lie, you may gain valuable ground in your lawsuit that otherwise would be missed.

Motion to Show Cause

If your deponent refuses to answer questions, terminate the deposition on the record with the court reporter writing everything down stating that you are terminating the deposition due to the deponent's failure to answer questions allowable under the rules. State you will be filing a *Motion to Show Cause* stating your reasons for why the deponent should be held in contempt of court. Set your motion for hearing, and serve the deponent using the Sheriff if state court or U.S. Marshal if federal court so there can be no complaining on the part of the deponent that he did not know when the hearing was scheduled.

Follow the same procedures and modify the motion documents accordingly.

If the deponent shows up, be prepared to argue why the deponent should answer the questions you were asking and have an excerpt from the court reporter that includes those questions and the deponent's refusal to answer so it is not your word against his.

In all likelihood, if the deponent shows up for the hearing he will be ordered to appear for deposition at a later time and at that time to answer your questions.

If the deponent does not show up for the hearing, make an *ore tenus* motion which means a *spoken motion* then and there, and state he should be held in contempt and ask for a bench warrant to be issued for his arrest.

Remember, you used the Sheriff or U.S. Marshal to serve him with the motion and notice of hearing, and there will be in the court file a copy of the *Return of Service* affidavit attesting to his having been served at such and such place at such and such time, and he is without excuse.

Motion for Contempt

If your *ore tenus* motion does not elicit a bench warrant from the judge, file a *Motion to Show Cause* and follow the format document above and set it for hearing. And, of course, have the deponent served by the Sheriff or U.S. Marshal so there is a Return of Service affidavit in the file. At the contempt hearing the judge should issue a bench warrant for the deponent's immediate arrest and incarceration until such time as he or she is prepared to

answer your questions, or the court may strike or dismiss your opponent's case at the court's discretion.

This is your power, paid for by the blood of too many who gave their lives so you could have liberty through the exercise of judicial power. Use your power.

Subpoenas and Other Court Orders

Subpoenas are orders of the court compelling a witness to appear either at trial, at a hearing, or for deposition and, in some cases, to bring certain designated documents and/or things with them.

Failure to abide a subpoena or any other court order is contempt of court.

The process for you to follow is as explained above.

1. Motion to Show Cause
2. Motion for Contempt

Once a judge or the Court Clerk or other officer of the court acting upon judicial authority orders a thing to be done, failure to comply comprises contempt of court per se and may be punished by severe fines and jail terms.

File your motions, set them for hearing, have them served on the offending persons by Sheriff or U.S. Marshal so there is a Return of Service affidavit in the court file apprising the trial judge that the offending party is without excuse if he or she fails to appear for hearing.

Get what the law promises. Do it for yourself and for those you love. Take no prisoners. Bring your axe.

In summary…

Of all the chapters in this book, this chapter on compelling evidence is perhaps the most important though, of course, you won't know what evidence is or understand the tools available to get at it, if you don't study the other chapters.

Discovery is how you win in court.

But, getting your opponent or reluctant non-party to comply is essential, or all your efforts at discovery are a waste of time.

Discovery is the hardest part of winning in court because your opponent will resist every effort you make to get evidence into the record where that evidence is likely to weaken your opponent's case.

Fortunately, using the foregoing methods to-the-letter and without hesitation or apology, you will get the evidence you need.

You have the rules of court and this book on your side. Be prepared to fight every step of the way. Never give up. Never give in.

Litigation is an axe fight. The foregoing methods to compel evidence are your axe. Don't be afraid to use them.

If you don't demand justice, don't be surprised if you don't get any.

You cannot win without all the evidence you need to win.

Use what's taught here to compel evidence.

THE SHOW CAUSE PROCESS

Your Battle Axe

Your power to enforce your legal rights is the power to send them to jail. You may need this power to force bad actors to obey the rules so you can get justice in court.

If your opponent or a witness refuses to obey a court order or fails to follow the rules of court, you have power to force them to do so, if you follow the step-by-step process explained in this chapter.

If your opponents or others defy judges' orders or ignore the rules of procedure and rules of evidence, you must exercise this power to get justice.

This is your duty. A judge will not help until you move the court to enter the proper orders in the proper sequence.

This chapter shows you how to move the court to enter orders that force bad actors to obey the law.

Good news for good people. Bad news for bad actors. You have the right to send bad actors to jail.

Hopefully, you will use what you've learned in other chapters without having to send someone to jail. However, if your opponent or a non-party witness like a bank officer or phone company employee, refuses to obey a court order or fails to do what the rules of court require, follow the steps in this chapter to get an order sending them to jail where they can stew behind bars until they decide to obey the law.

Court orders are LAW.

When court orders are ignored or disobeyed, the first step is a *Motion to Show Cause*.

That's how you enforce court orders. Enforcement is what the courts are for.

Without power to require judges to enforce the law especially their own orders in your favor, going to court would be a waste of time and money, because bad actors are way too common in our court system, and justice is impossible if bad actors are permitted to get away with deceitful law-evading practices.

Know how to use this power. This is your right.

Motions to Show Cause in General

The first step when someone disobeys a court order, fails to show up for a hearing or deposition, refuses to provide documents or other things listed in a subpoena, or otherwise violates the rules of court is to file a *Motion to Show Cause*.

This is the first step in a step-by-step process. Follow the process step-by-step.

Do not file a *Motion for Contempt* until you file and get a favorable order on your *Motion to Show Cause*.

Show cause motions take various forms depending on the bad act you want the judge to fix. However, the fundamental idea is the same no matter why you need the court to order someone to show cause.

It is always used to get the court to force someone to do something, or stop doing something. Either that someone disobeyed a rule of court, disobeyed a court order, or committed a crime that caused you damage like lying under oath, like committing perjury.

Here are some common issues requiring the show cause process.

Failure to Obey a Subpoena

A common purpose for filing a show cause motion is failure or refusal of non-party witnesses to appear for a hearing or deposition in response to a court-issued subpoena.

A *duces tecum* subpoena orders witnesses to bring documents or other things with them when they appear *duces tecum* meaning simply bring with you.

If they do not show or do not bring what the subpoena requires, you need to file a *Motion to Show Cause* why they should not be held in contempt.

You, as a pro se litigant, cannot issue a subpoena, but you can get your *local court clerk* to issue a subpoena for you upon proper request Consult local rules for this procedure.

A subpoena issued by a court clerk carries the same power as a subpoena issued by a judge, it is a court order with power of the court to imprison people who refuse to obey.

Suppose you schedule the deposition of a non-party say a bank officer, serve the non-party with the clerk's subpoena *duces tecum* identifying the place and time for appearing along with a list of specific documents the non-party witness is to bring, notice your opponent of the time and place set for the deposition and, when the time arrives, your non-party witness fails to show.

Clearly, the non-party witness has disobeyed a court order, the *subpoena duces tecum*.

Can you file a motion for contempt?

Not yet.

Proper procedure is to file and serve a *Motion to Show Cause*, set it for hearing, serve a *Notice of Hearing* explained in the Motions chapter, on the non-party witness and your opponent, attend the hearing to explain to the judge that you are entitled to interview the witness and examine the listed documents and that the non-party witness failed or refused to appear after being duly served with timely notice.

Failure to Attend

The same applies when you make arrangements with your opponent or his or her lawyer to obtain his or her testimony at a deposition by serving a *Notice of Taking Deposition* or at an evidentiary hearing by serving a *Notice of Hearing* after clearing the date/time with your opponent or his or her lawyer.

If your opponent fails to show, you first politely try to find out why and, if your polite attempt hits a stone wall as such attempts often do these days, file your *Motion to Show Cause,* set it for hearing, and attend the hearing to explain to the judge you are entitled to obtain your opponent's testimony and that your opponent failed or refused to appear after being duly served with timely notice.

Failure to Respond to Lawful Discovery

A third common necessity is when an opponent or non-party witness fails or refuses to respond to lawful discovery, interrogatories, request for production, subpoena, etc. within the time required by the rules.

The process is the same as above.

File a *Motion to Show Cause*, set your motion for hearing, then attend the hearing and explain to the judge why you are entitled to the requested discovery and that your opponent either failed altogether or failed to respond in good faith according to the rules.

If the discovery is interrogatories, file *Motion for Better Answers to Interrogatories*, set your motion for hearing after clearing with your opponent or opposing counsel, attend the hearing, explain why you are entitled to better answers and that your opponent failed or refused to answer under oath within the time required by the rules. If this fails, file a *Motion to Show Cause* and set it for hearing.

If the discovery is request for production, file a *Motion to Compel Production*, set your motion for hearing again, after clearing with your opponent, attend the hearing, explain why you are entitled to see the documents or things requested and that your opponent failed or refused to produce within the time required by the rules. If this fails, file a *Motion to Show Cause* and set it for hearing.

NOTE: The foregoing is explained in more detail in the chapter on Compelling Discovery.

Lying Under Oath Perjury

If your opponent or a witness lies under oath or files a verified i.e., sworn paper containing false statements e.g., interrogatories, that person is guilty of perjury if the false statement is material, i.e., it affects or could affect the outcome of your case.

File a *Motion to Show Cause*.

For this process to succeed, the statement must

1. Be false
2. Be known to be false when made
3. Materially and adversely affect your rights and
4. Be proven by admissible evidence

Proof may be in the form of an official transcript of a hearing or deposition where the witness was sworn, supported by external evidence the statement was false, known to be false, and material to the outcome of your case.

When this happens, it happens far more often than most people make an issue of it, as they should. The procedure in this chapter should be followed to the letter, because lying under oath undermines your constitutional right to due process and utterly prevents you from getting justice.

If proper show cause procedure is presented to the court and the perjurer continues asserting false statements under oath, your work should result in a contempt order followed by a bench warrant, arrest, and incarceration meaning jail, not to mention possible favorable sanctions striking the perjurer's pleadings or immediately granting judgment in your favor.

Service of Show Cause Motion and Notice of Hearing

To obtain the court's assistance in show cause proceedings, it's essential you be able to prove the bad actor had actual notice of your motion and the time and place where the bad actor is required to appear before the judge to show cause why he or she should not be held in contempt.

Otherwise, bad actors will claim they didn't know about any motion or where and when they were supposed to appear before the judge, they will claim they never received actual notice and try to wiggle out of their problem. That's how bad actors act, they try to squirm out of it.

You can control bad actors, if you follow the steps in this chapter.

The idea of show cause proceedings is to enforce behavior by those who refuse to behave as the law requires. Show cause proceedings always involve people who tend to lie, cheat, evade, and do all they can to avoid acting in good faith. In most cases they are hiding something. The process set out in this chapter can force them to stop hiding. It is an essential tool in your arsenal.

The key to your success is being able to prove to the judge that the bad actor knew about your *Motion to Show Cause* and knew he or she was noticed to appear in court to show cause why he or she should not be held in contempt.

I've had a lot of success using the Certified Mail with Return Receipt and including it in my firm mailing book. However, if you believe the bad actor is going to skate, you would want to use the Sheriff or the U.S. Marshal depending if the case is in State or Federal court.

The very best way to serve bad actors with show cause motions and notices of hearing or, for that matter, with any other papers you need to prove were received by bad actors is to use your local sheriff department's service of process deputies who file sworn affidavits with the court stating when and where the bad actors were served.

If your case is in federal court, the best service will be with a U.S. Marshal who'll file a sworn affidavit stating when and where the bad actor was served.

Another, less certain method, is to use a certified process server, however this is recommended only when no other method of service is available to you.

Since show cause proceedings move toward holding a bad actor in contempt of court and ultimately locking them up if they don't sooner agree to behave, the judge in your case will demand proof the bad actor had actual notice of your motion and notice of hearing alerting him or her to the severe consequences that will result from failure to appear and show cause why they should not be held in contempt.

This is critical. Do not fail to follow this process.

Sworn proof of service of your motion and notice of hearing creates a duty in the bad actor to respond accordingly or pay the consequences.

Absent creation of that duty and its subsequent breach, it is unlikely the court will do anything more than grant bad actors a chance to correct what was done or not done and give you a black eye for not being able to prove actual notice of the motion and notice of hearing.

Don't waste the court's time or your own.

Make absolutely certain the bad actor you wish to control has actual notice of your motion and notice of hearing.

The Point of a Show Cause Hearing

The object of a show cause hearing is to obtain an Order requiring the defaulting party to do something, or, if they refuse, to put them in jail.

If a show cause order is granted signed and filed with the clerk the action required by that order must be done, or contempt proceedings follow.

Only in the rarest circumstance would a *Motion to Show Cause* result in an immediate *Order* finding someone in contempt of court and directing a bailiff or other officer to haul that person off to the jailhouse.

Typically, what happens at the hearing if the bad actor shows up is for the judge to order the person to explain why they failed, refused, or ignored, etc.

If that person gives a reasonable excuse, the judge will typically give them a set number of days to cure the problem. Expect something like 10 days or perhaps more, depending on what the problem was.

If, after hearing testimony and arguments of counsel, the judge signs a formal *Order to Show Cause,* the person against whom that order is directed is now in jeopardy of being held in contempt if the show cause order is not obeyed strictly to the letter.

Now the game changes.

We are no longer dealing with merely ignoring a subpoena, failure to attend a hearing or deposition, or refusal to respond in good faith to discovery.

The bad actor is now under a direct court order.

Failure or refusal to obey this order will most assuredly result in an order finding that person in contempt of court.

They may not go directly to jail, since in most cases they will be given yet one more bite at the proverbial apple before the judge takes the extreme step of putting them behind bars, but only a fool would disobey an *Order to Show Cause* that contains language warning the bad actor that jail time will follow if the order is not obeyed pursuant to its precise terms.

This is serious business.

At this point the former issue has been laid to rest. The court already decided the person now under its *Order to Show Cause* should have done what was not done. The previous issue will not be revisited. The bad actor either does what is now ordered or be held in contempt and possibly jailed for failure to do so.

Judges are human. Judges do not react well when orders are ignored. Judges are proud of their power. Judges will do whatever they must to see that their orders are obeyed.

If that means sending someone to jail, they only need to pick up their pen, sign the order, and off goes the bad actor for a comfy vacation behind cold iron bars.

If bad actors with actual notice of a motion and notice of hearing fail to show for the hearing, judges will almost certainly issue an order finding that person in contempt.

Otherwise, show cause hearings will not normally result in more than an *Order to Show Cause* that usually does little more than require an explanation why the bad actor failed to do what was previously required.

The reason for this laxity is that the next step will not go well for anyone who refuses to obey the show cause order precisely as the order requires.

Service of Show Cause Orders

If the bad actor appears for the hearing and fails to give a reasonable explanation for his or her failure to obey, the judge will probably make a verbal order typically giving the bad actor a certain number of days to comply.

However, if this happens you should move the court to enter a written order filed with the clerk.

Bad actors, being what they are, may later claim they didn't understand what the judge said at the hearing, and judges have so many cases on their calendar it's extremely unlikely any judge can remember what was said or done at a hearing several weeks earlier.

A written order is needed. Be sure to move the court to enter one if the court doesn't write one without being moved to do so.

If the judge gives you a certified copy of the written order, then and there, put that certified order in your briefcase, take it home, make a copy for your files, and have the certified copy served on the bad actor so actual notice is given.

If the judge will not give you a certified copy but agrees to sign a written order to be filed with the clerk, go to the clerk's office to get a certified copy, put it in your briefcase, take it home, make a copy for your files, and have the certified copy served on the bad actor so actual notice is given.

Notice that the bad actor needs to receive a certified copy of the order, and the process server deputy or Marshal preferably needs to file an affidavit of service stating it was a certified copy that was served along with stating when and where it was served on the bad actor.

The order should require the bad actor to re-appear before the court at a stated time to satisfy the terms of the order.

If the bad actor appears for the subsequent hearing and satisfies the judge, he or she has done what was required, you have your remedy, and nothing more is needed. The process succeeded.

If, on the other hand, the bad actor fails or refuses to attend the subsequent hearing, an order finding him or her in contempt may issue immediately along with a bench warrant for his or her immediate arrest and incarceration.

Motion for Contempt

If the bad actor fails to appear for the subsequent hearing, or the judge fails to issue an order finding him or her in contempt, you should file a *Motion for Contempt* stating why the court should issue an order finding the bad actor in contempt.

This is similar to a *Motion to Reconsider* in that your *Motion for Contempt* should spell out the law and facts, explaining why the bad actor should be held in contempt, seeking to have the court do what should already have been done.

The judge should have entered the order already.

If the judge will not enter the order, you need to make the record clear for possible appeal. Doing so requires this additional motion that should include all that you will want the appellate court to know if the judge refuses to grant your motion.

You do want the bad actor to be compelled to obey, don't you? You do want to win your case, don't you? File the motion. If it upsets the judge, that's too bad. Do it anyway.

Justice sometimes must be fought for tooth and nail.

Judges are human, as already stated. Some are timid believe it or not. Many are simply afraid to exercise their awesome power it is awesome when it comes to unlimited contempt power. Move the court.

Service of Motion for Contempt and Notice of Hearing

Set a hearing for your *Motion for Contempt* and serve your motion along with its *Notice of Hearing* as outlined above. Motions and setting hearings explained in the chapter on motions and hearings.

The same principle applies here that applied to your *Motion to Show Cause* and the necessity of being able to prove to the judge that your bad actor has actual knowledge of your new motion and notice of hearing.

Make certain the affidavit of service clearly states what was served, on whom, when, and where, and that the affidavit is in the court file before the hearing.

The bad actor is now in a bad place.

Contempt Hearings

If the bad actor fails to appear at the hearing on your *Motion for Contempt* after receiving actual notice and an affidavit of same being in the court file, the judge may still give him or her a chance to cure.

Taking away someone's liberty is serious business indeed. Because it's so serious, judges will give people every possible chance to avoid sending someone to jail for contempt.

If the bad actor does appear for hearing on your *Motion for Contempt,* the judge will in all likelihood give the same chance to cure.

The chance to cure could be an additional day or two, perhaps more, but now the fire is burning hot, and most judges will not hesitate to find the bad actor in contempt of court if this final order is not obeyed to the letter and on time.

If the judge refuses to follow through when you have made the record show clearly that you are entitled as a matter of law to entry of a contempt order and its powerful consequence to enforce your right to obtain justice from the court in spite of bad actors trying to evade the law, it's time for you to file a *Notice of Appeal* . Start studying the chapter on appeals in this workbook along with familiarizing yourself with the official appellate forms and rules that control the courts in your jurisdiction.

This probably will not be necessary, since the judge will probably issue a bench warrant in almost all cases at this stage of the show cause proceedings.

Bench Warrant

If the court issues a bench warrant, your bad actor will be arrested and taken to the local jail where he or she can decide to remain behind bars or do what should have been done in the first place.

Understand that jail time for contempt is at the discretion of judges and will be enforced, so long as it is reasonable under the circumstances. A bad actor could be released after a few hours if he or she complies with the court's contempt order, or a very foolish bad actor could sit in jail eating white bread cheese sandwiches and drinking black coffee for a very, very long time, depending on how the judge feels that day.

Far too many young lives were sacrificed on bloody battlefields to purchase your right to get justice in our courts, so if sending someone to jail for a few hours or days is required to

secure for you the benefit of the laws of justice in this nation, then the foregoing is how you go about it.

What to Expect

As stated above but repeated here to emphasize and set your mind at ease, it is unlikely anyone will be sent to jail as a result of your motions until the bad actor has been given a reasonable period of time to cure the issue preventing you from getting justice.

Go along with this graciously. Do not get angry if a judge gives your bad actor multiple chances to cure. Remain calm.

Proceed as stated above, step-by-step, patiently.

The wheels of justice grind slowly, but they grind surely if you are patient and follow the proper steps in order.

In summary...

Too many pro se litigants lose heart, grow weary, or end up being afraid to use their legal power to obtain the justice they deserve. They become impatient and think the judge is going to do what they say because they demand it.

Also, far too many licensed lawyers drop the ball when it comes to pressing the court to get justice for their clients when the opposing party or a non-party witness refuses to follow the rules. After all, the lawyers' lives go on no matter whether they fight tooth-and-nail for you and offend judges they must come before throughout their careers or simply let things slide, confident most of their clients won't know what could have been done to win for them or what should have been done to win.

This is sad commentary on the legal profession.

Faint hearts also seldom win in court. Fight for your justice. Nobody will hand it to you on a silver platter.

It's not a judge's job to fight for you. The judge's job is merely to enforce the rules of court. Never believe otherwise. Never hope for help. You might get it, but more likely you won't.

Legal proceedings are axe fights. Show cause is your axe.

COURT ORDERS
This is the real goal

Everything you do. Planning, pleadings, discovery, motions, hearings, trial and if necessary, appeals, must get Orders.

You need Orders to tilt the balance in your favor. Nothing else

matters. If you cannot get Court Orders, you cannot win.

Understanding Orders and what Orders must say, is more important than anything else you learn in this course.

Every pleading must seek an

Order. Every motion must seek

an Order. Every hearing must

seek an Order. Every trial must

seek an Order.

Every appeal, if appeal is necessary, must seek an Order.

And all those Orders must say certain things. If they aren't done right, you lose.

What is a Court Order

Court Orders are the Power of the Court.

As you've been taught in school, governments in most nations are divided into three power branches:
Executive, Legislative, and Judicial.

Many people fail to realize the only branch that has power over the other two is the Judicial branch, the courts.

Courts create common law when they enter Orders on the record.

For example, take the familiar *Miranda v. Arizona*, 384 U.S. 436 1966. This is an Order of the United States Supreme Court decided in 1966 that created the common law right to remain silent and
be warned, *"Anything you say can and will be used against you in a court of law,"* if you are arrested. The law comes from the Court, not the legislature. The Order creates the Law.

Most cases, of course, don't go to the Supreme Court, but even small-town cases result in Court Orders, and those Order become Law, at least for the parties involved in the case.

Court Orders command that certain things be done OR that certain things stop

being done. Most result in a command that one party owes another a certain sum

of money.

Some result in a command that one party do something that party does not wish to do.

Others result in a command that one party stop doing something that party wishes to continue to do.

All must be obeyed, if the prevailing party does what this course teaches and obtains orders

according to what this chapter explains.

Court Orders are not optional.

If a Court Order is not obeyed, the disobedient party can be thrown in jail until he or she decides to obey; the jail term continues until ordered party decides to obey.

This is the power of the courts. This is YOUR POWER when you know how to use it.

Why are Court Orders Important?

If you cannot get a favorable Court Order, you lose. It's that simple. Court Orders decide whose claims become rights.

Claims are claims. They do nothing. You can claim you own the Brooklyn Bridge. You can claim you have the right to yell Fire. in a crowded theatre. You can claim you have a right to be provided with a new automobile every year without paying for it.

You can claim anything at all.

However, claims are not rights, and rights are worthless if they cannot be enforced by

Court Orders. We all have rights, but until they are enforced, they are just ideas.

Rights are made enforceable by Court Orders, nothing else.

You can complain about your rights being violated until the cows come home, but until a judge signs an Order enforcing your rights, your complaints gain you nothing whatever.

Having rights is one thing. *Having rights enforced is quite another*.

Merely claiming that you have rights is a waste of breath. Wise people know how to get courts to enforce their rights.

Without Court Orders, Liberty and Freedom are empty concepts.

Sure, we all enjoy Liberty and Freedom, so long as nobody does us harm and we are not charged with a crime.

Life is good until disaster strikes as a lawsuit or criminal charge. Then where is Liberty and Freedom without a favorable Court Order?

It doesn't exist.

Without a favorable Court Order, you become a victim. Your rights disappear. Ask anyone in jail or prison.

Ask anyone who's lost their home, their children, or their life savings because they couldn't get a favorable Court Order.

As this chapter is being written, more than 4 out of 5 people cannot afford to hire a lawyer when they are sued or charged with a crime. They desperately need a judge to sign an Order securing their rights and restoring their Liberty and Freedom.

If they cannot hire a competent lawyer, their rights evaporate when some judges sign an Order against them.

When good people get favorable Court Orders, the world becomes a little bit better for all of us.

When good people suffer at the hands of unscrupulous lawyers employed by the rich and powerful to trample upon their rights, we all suffer.

That's why Court Orders are important.

What Does a Court Order Do?

Court Orders are commands.

If an Order is not obeyed, another Order can command law enforcement to force obedience, either by seizing property or locking people behind bars until they obey. Here is an example:

IN THE THIRTIETH JUDICIAL CIRCUIT COURT
IN AND FOR SUNSHINE COUNTY, FLORIDA

DONALD TRUMP,
Plaintiff,

Case No. 2012-123
Judge Benchwarmer

v

JOE XI JING PING,
Defendant.

ORDER

TO ALL AND SEVERAL the Sheriffs of Sunshine County, Florida:

You are hereby commanded to locate and take into custody Angry Andy of 792 Front Street, Our Town, Florida and return confirmation of same to this Court forthwith.

DONE AND ORDERED this ____ day of _____2021.

_____
Hon. Barry Benchwarmer, Circuit Judge

This Order will be obeyed by the Sheriff.

Orders may be as simple as this or comprise several pages describing individuals, property, evidence obtained by the court, special circumstances, almost anything.

They all are commands, if they are properly written.

Who Writes Court Orders?

Orders are frequently written by a judge or a judicial staff member.

Most judges take notes during hearings or at trial, and in most cases their orders are complete and correct; but that is not always the case. Sometimes an order does not comply with what was actually said at a hearing or trial.

In a criminal case, a party that disagrees with what an Order says will likely be required to file an appeal promptly to avoid an unwanted and disagreeable outcome. A criminally accused cannot write orders.

In a civil case a party that disagrees with what an Order says may file a Motion for Rehearing or Motion to Reconsider to correct what the order says. If such a motion is denied, the unhappy party may be required to file an appeal covered in another chapter in this course.

The preferred procedure in civil cases is to offer to write the order. This will result in a fight, of course, because your opposing party will also wish to write the order.

In my 37 years of legal practice this has been the cause of problems that can require quite

a bit of back- and-forth haggling, so the following is recommended.

#1, At the conclusion of any proceeding that result in the judge's making a decision, ask, if it please the Court, is your final Order that the defendant shall within 10 days provide plaintiff with copies of his phone records for the year 2020?

As emphasized throughout this course, you will always have a court reporter or assurance that an electronic recording of everything said will be available to you along with the ability to have a certified transcript. Failure to do this undermines everything you attempt, because the judge will know you cannot appeal if you have no transcript.

After asking the judge to confirm what you understand the judge's decision to be, offer to write the order. Expect your opponent to object. Remind the judge that the court stenographer has accurately

recorded what the judge just confirmed and that you will accurately and honestly provide the written Order as it stands, without adding or subtracting anything.

Here is a sample order.

IN THE THIRTIETH JUDICIAL CIRCUIT COURT
IN AND FOR SUNSHINE COUNTY, FLORIDA

DONALD TRUMP,
Plaintiff,

Case No. 2012-123
Judge Benchwarmer

v

JOE XI JING PING,
Defendant.

ORDER TO PRODUCE

THIS CAUSE having come before the Court upon the motion of Defendant JOE XI JING PING for an Order requiring Plaintiff to produce documents, and the Court having heard argument of the parties and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED that

1. Defendant's motion is granted.

2. Plaintiff is directed to produce copies of plaintiff's bank records for the entire year of 2020, including but not limited to all records of deposits, withdrawals, checks, and correspondence between plaintiff and plaintiff's bank.

3. Plaintiff is hereby directed to comply within 10 days from entry hereof.

DONE AND ORDERED this ___ day of _____2021.

_____
Hon. Barry Benchwarmer, Circuit Judge

Copies to:
DONALD TRUMP, 9 Happiness Lane, Anywhere, Florida 33333
JOE XI JING PING, 99 Innocence Avenue, Anywhere, Florida 33333

[envelopes provided]

If you are pro se acting without a lawyer, you may have a difficult time if the other side has hired an attorney, since attorneys are supposed to be honest in their dealing with judges

but certainly are not in every case. If your opponent is also pro se, there should be no valid reason for the judge to deny you, since you are the one who requested the court to confirm what the Order needs to say.

If your opponent ends up being directed to write the Order, move the court to require your opponent to provide you a copy of the proposed order at least 3 days prior to the judge's signing it, because the proposed order may not say what the judge confirmed. Yes, this does happen.

Must Court Orders be Obeyed?

Some attorneys will say yes. In fact, my law professor would say yes. However, the Supreme Court has already ruled anything that is unconstitutional is NULL and VOID on its face therefore, the private people do not have to do it.

Anyone can disobey. And such persons may get away with it, if their feet are not held to the fire by parties who know what this course teaches.

A typical judge may sign dozens of orders in a single day. The judge does not check with the clerk every day to see which orders were obeyed and which had noses thumbed at them. Unless a judge takes a particular interest in a case and checks his files to see if a particular order was obeyed, nothing will be done if the order is ignored.

It can be up to you to make certain court orders in your favor are obeyed. How to do this is covered in the chapter on Show Cause Proceedings.

1. Motion to Show Cause
2. Hearing on the Motion to Show Cause
3. Entry of an Order Granting the Motion to Show Cause and re-ordering the delinquent party to obey.
4. Failure of the delinquent party to obey the second order.
5. Motion for an Order of Contempt
6. Hearing on the Motion for an Order of Contempt
7. Entry of an Order Granting the Motion for Order of Contempt
8. Arrest Order commanding the Sheriff to take the delinquent party into custody until such time as the Court's several orders are obeyed.

This is your power when you know what this workbook explains.

What is Entry of an Order?

In most jurisdictions this is an important point to remember. A judge merely signing an order does not make the order fully effective.

Orders need to be filed with the court clerk, and be officially entered in the court record, before being fully effective.

An order cannot be appealed until it is entered in the court record.

This may not often become an issue in your case, but it is worth remembering.

What is a Certified Order?

Certified copies are as effective as the original, commanding all who have notice of them that the Court has ruled and penalties await those who disobey or ignore such Orders.

When an Order is entered in your favor in a case, it may sometimes be a good idea to apply to the Clerk for at least one certified copy to retain in your files, and another to be re-recorded in the property clerk's office if the Order is a judgment declaring that you are owed money.

What is a Re-Recorded Order?

A re-recorded Order creates a lien on the property of a judgment debtor.

It will remain effective as a lien until a set number of years depends on the law of your state, after which it may be renewed for another number of years depending on the law of your state.

So long as the re-recorded Order remains on the books, any attempt by the judgment debtor to sell property will result in a search of the Public Records and turn up the Judgment that must be satisfied before the judgment debtor's property can be conveyed to a buyer with a clear deed.

If you obtain a judgment against an opponent in court, be sure to have a certified copy re-recorded with the property clerk to secure your rights as judgment creditor.

When Can You Lien your Opponent's Property?

Clearly, you cannot lien your opponent's property without an Order. Exceptions include mechanic's liens, liens resulting from work done on your property by a contractor who provided you notice of his asserting a lien until his bill is paid in full, and such like liens.

Otherwise, without due process and a court order, no lien can be imposed on your property or the property of another.

Many people mistakenly believe they can lien someone's property simply by claiming that person owes them money. This can only get you into trouble. Filing a lien without legal basis is a crime in some states and can result in severe penalties.

Once a judge signs and enters an Order adjudging someone to owe you money, and you obtain and file a certified copy with the property clerk, you have perfected your lien and can move forward on it.

When Can the Sheriff Seize Your Opponent's Property?

The technical term for this is execution which, technically, is a writ, meaning an Order from the court giving the Sheriff or Federal Marshals if it's a federal case, authority to take possession of a judgment debtor's property for the benefit of the judgment creditor.

A proper Order for this should include the words, for which let execution issue.

When Can You Send Your Opponent to Jail?

Remember to follow the proper procedures and, to save time and avoid unnecessary work, try to negotiate for the result you wish before jumping through all the hoops that are required to actually jail someone for disobeying a court order.

Never threaten anyone with jail time. Threatening can land you in jail so don't do it.

If negotiation fails, follow the procedures to obtain an order finding the rebellious order ignorer in contempt of court.

How do You Preserve Your Rights?

As you will learn throughout this course, preserving your rights is always a matter of making a written record in the court file.

Nothing else matters. Only what's in the court file has power to get you what you want. It's that simple.

In Summary....

You have power.

Very few people in this world come even close to realizing how much power they have. As a consequence, too many lose their freedoms, their property, their children, and even their lives, all because they do not understand what this course makes so easy to understand and use.

Court Orders are your Power to get Justice, and Justice is the essential ingredient to enjoy Freedom and Liberty.

TRIAL PREP AND PROCEDURES

If you have to go this far...

Trials are risky, expensive and usually, unnecessary. So why the need to go to trial at all?

The necessity usually results from one of the following avoidable causes:

- Weak pleadings that failed to properly allege facts needing proof.
- Incomplete discovery that failed to prove the facts.
- Failure to timely object to all judicial errors.
- Failure to secure a court reporter for all prior appearances.
- Failure to file motion for summary judgment when no material facts remain at issue.
- Not having a just cause or winnable case.

Nearly all “winnable cases” can be won before trial.

However, many winnable cases are lost because the case was taken to trial, instead of being won before trial with powerful pleadings, detailed discovery, and effective pre-trial motions.

If you're down to the wire, and your case is already scheduled to go to trial, there's no more time to do the things you might have done sooner to win.

Therefore, what you'll learn in this class will help you stand your ground for the last hurrah.

And, it is your last hurrah. Either you win now, or you lose. Period.

You get no more bites at the judicial apple.

You either have evidence you need by now or you don't.

You can take no more depositions. You can serve no more interrogatories, requests for admissions, requests for production, or subpoenas.

This is your final chance to prove the facts you alleged in your pleadings.

Facts you should have already proven long before trial was scheduled by doing what this course teaches to win before trial.

So, trial it is.

Since you haven't already proven the facts, you alleged in your pleadings using your five discovery tools, you must do the proving now.

And, it will be way harder with your opponent interrupting you with objections, witnesses suddenly stricken with amnesia, the judge fiddling with papers on his bench or playing games on his laptop computer, jurors taking catnaps in the box or staring at you with disbelief in all you present in favor of your cause.

Trial is no picnic in the park.

Here's what you must do: Prove the facts alleged in your pleadings.

That's why you're there. That's all you're there for.

That's what trials are for, when the winner didn't use his five discovery tools to win before trial.

Don't let anything or anyone, the judge or your opponent or an angry witness or sleepy juror, dissuade you from your one-and-only task: ***Prove the facts alleged in your pleadings.***

Do not play defense. Whether you're the plaintiff or defendant, you must prove the facts alleged in your pleadings, *aggressively, effectively, and politely*.

If you allow yourself to be run down rabbit trails instead of sticking to your purpose, you will:

- Waste valuable time.
- Confuse the judge and jury.
- Confuse yourself.
- Give your opponent advantages you cannot afford to give away.

Don't do it. Stay focused.

Trial is for one purpose and one purpose only: Prove the facts alleged in your pleadings.

That's how you win.

Types of Trial

Trials may be held with or without a jury.

Jury Trial

In trials held before a jury, the evidence presented by the parties is weighed by the jury, and the law that determines the outcome based on the jury's conclusion on the evidence is applied by the judge.

In practice, the judge gives what are called jury instructions before the jury retires to deliberate. The jury instructions explain how the law will apply to determine the outcome of the case, depending on how the jury weighs the evidence presented.

The jury weighs the evidence. The jury does not decide the law.

On TV or at the movies, it may seem the jury is issuing the verdict, when the jury foreman stands to say, *"We the jury find...,"* In fact, the jury is properly following the judge's jury instructions. A few examples of actual jury instructions are provided below in the section on *jury instructions*.

Civil Case

The burden of proof in civil cases is the greater weight of admissible evidence. Therefore, the job for the jury in a civil case is to decide who presented the greater weight of admissible evidence.

The jury instructions they receive before retiring to deliberate decides who wins.

Civil jury instructions might be something simple like, *"Ladies and gentlemen of the jury, if you find the greater weight of admissible evidence presented shows the defendant*

entered into a binding contract with plaintiff, that defendant breached that contract by failing to perform, and that plaintiff suffered money damages as a direct result, you must find in favor of the plaintiff."

The jury is instructed to weigh the evidence.

The judge decides the verdict based on law applicable to the facts.

Criminal Case

The burden of proof in criminal cases is admissible evidence beyond and to the exclusion of any reasonable doubt.

Therefore, the jury in a criminal case decides if the admissible evidence presented excludes any reasonable doubt as to whether the accused committed the acts described in the jury instructions given to them before they deliberate.

The jury instructions they receive before retiring to deliberate decides whether to acquit or find the accused guilty.

Criminal jury instructions might be something simple like, *"Ladies and gentlemen of the jury, if you find, based solely on the admissible evidence presented, that there is any reasonable doubt whether the accused intentionally caused the victim's death by gunshot wound, you must find the accused not guilty. If there is no reasonable doubt, based solely on the admissible evidence presented, that the accused did intentionally cause the victim's death by gunshot wound, then you must find the accused guilty."*

The jury is not deciding whether the accused is guilty or not guilty.

The jury is weighing the evidence and deciding if there is any reasonable doubt.

When the jury announces the verdict, they are simply following the specific instructions given to them by the judge.

The judge, ultimately, decides the verdict based on law applicable to the facts.

Bench Trial

Trials without a jury are called *bench trials*, they are decided entirely from the judge's bench.

The judge weighs the admissible evidence, applies the law, and enters the verdict.

Bench trials may be used in civil or criminal cases.

Equitable remedies such as injunctions, rescission, etc., are almost always bench trials.

Setting Trial

In most jurisdictions trial can be set or scheduled on the court's calendar, as soon as the pleadings are closed that means, when the last pleading is filed and the last motion directed to a pleading has been disposed of.

Trial can be set in several ways.

By a Party

Once the pleadings are closed, either party may file a motion to set the trial.

If there are no objections, the court will schedule a hearing sometimes called a *docket call* at which the court and the parties will agree to a date and the duration of trial or the length of time the parties and the court believe will be necessary.

By the Court

If the court finds upon reviewing its docket that a particular case is ready to be set for trial, the court may set the date and duration *sua sponte (of one's own accord)* or notice the parties for a *docket call* to discuss what date and duration is best.

Once set, it is very difficult to change a trial date.

Trial Sequence

Like pretty much everything else, the best outcome usually results from a clear understanding of the process, step-by-step.

Here is the sequence of steps at trial in most jurisdictions. Consult the official rules in your jurisdiction to make certain this sequence applies where you are. It should go like this:

- Jury Selection
- Opening Statements
    - Plaintiff prosecutor in criminal case goes first.
    - Defendant accused in criminal case goes second.
- Presentation of Evidence
    - Plaintiff prosecutor in criminal case goes first.
    - Defendant accused in criminal case goes second.
- Renewal of Objections
- Motions for Directed Verdict
- Closing Arguments
    - Plaintiff prosecutor in criminal case goes first.
    - Defendant accused in criminal case goes last.
    - Plaintiff prosecutor in criminal case may be allowed rebuttal if closing argument by defendant/accused included false statements of material fact or was inflammatory and inappropriately prejudicial.
- Jury Instructions
- Verdict
- Polling the Jury

Each of these steps is explained in the sections below.

Jury Selection

Jury selection is sometimes called by the French *voir dire*. *Voir dire* means speak truth.

It is, simply, a time when both parties are permitted to ask questions of various members of the jury panel a larger number than what will be required for trial in an effort to decide when members will be favorable or unfavorable to the cause.

If you've ever received a notice to serve on a jury, you may already know that the court calls a number of potential jurors in excess of the number ultimately empaneled for the court.

From this larger number, the respective parties are permitted to battle for the jurors they wish.

There are, as you probably also know, self-styled specialists who charge professional fees to assist in jury selection. These people operate on various theories by which they claim to be able to predict how an individual juror is likely to react to a particular party's cause, evidence, argument, and objective.

They cannot, however, predict with any absolutely certainty how any juror is going to deal with the dog-and-pony show about to be presented. In the long run, whether they use advanced computer algorithms and complex measurements of body language and facial expressions or a Ouija board and crystal ball, the best they can do is always based on hypothetical hunches and a general sense of human nature and its quirks that ultimately defy any definite prediction.

Humans are human. They are unpredictable at best.

What it finally comes down to is understanding:

- The issues in your case.
- Your common-sense knowledge of what kind of juror you want for your case.
- What particular jurors might already believe about the issues in your case.
- What particular jurors might be biased against you.
- What particular jurors might lean favorably to your benefit.

Do not insult them. Treat them as if each is an old friend, wise, honest, kind. You don't want some accidental slur or unpleasant facial expression to turn them against you.

If yours is going to be a jury trial, those people need to believe YOU ARE THEIR FRIEND.

Opening Statements

Each side is permitted but is not required to make opening statements before evidence is presented in an effort to prepare the trier of fact for the evidence that will be presented.

The proper way to make opening statements is seldom followed by lawyers and, unfortunately, judges allow wide variations from the proper way. So, let’s examine the proper way first and then learn what to do when your opponent varies from the proper way, which is all too likely as you will no doubt eventually discover.

Opening Statements, The Proper Way

In the first place, the proper way to give an opening statement is to tell the court:

1. You appreciate their time, patience, and attention.
2. They are going to hear testimony and see documents and other evidence.
3. The judge will instruct them on how to apply the law to the evidence they will see.
4. You appreciate their time, patience, and attention.

That's it.

The meat-and-potatoes of opening is what they are going to hear and see.

You don't jump to conclusions. That's for them to do. Lead them to those conclusions.

Tell them what they are going to see and hear, things you believe will lead them to the conclusions you wish them to reach.

Don't treat them as if they weren't smart enough to reach their own conclusions.

You might tell them, *'You'll hear George Generous explain what he saw and heard at the scene of the accident. You will see the shredded tire that Dr. Does Right, an expert in tire technology, will tell identify as the cause of the accident. You will examine the record of defendant's multiple convictions for criminal fraud and forgery."*

Opening Statements, The Wrong Way

You don't tell them; Ned Nasty knew the tire he installed on my motorcycle was defective and would likely cause an accident. Ned Nasty cannot be trusted. Ned Nasty owes me for my injuries.

No.

Lead the jury or judge, if it's a bench trial to reach the conclusion you desire.

Do not insult the court by telling it what conclusion it should reach.

Presentation of Evidence

Presentation of evidence is just that. Each side has an opportunity to call witnesses, question those witnesses, and present documents and other things as evidence tending to prove the facts alleged in their own pleadings and disprove the facts alleged in the opponent's pleadings.

Having excellent evidence is important.

However, how you present your evidence can be just as important.

And, the order in which you present your evidence is critical.

Let's make this really easy for you.

What is it we need to prove at trial assuming we failed to win before trial?

Do you remember from the earlier tutorials?

Of course, you do.

You remember both parties made certain allegations of ultimate fact in support of the essential elements.

- Plaintiff in support of the elements of his causes of action.
- Defendant in support of the elements of his affirmative defenses.

So, what do you think we need to prove at trial? See?

I told you this was easy.

The only facts you need to prove at trial are the facts you alleged in your pleadings.

Why let anyone trick you into running down some other rabbit trails?

They will, you know. Trust me.

The typical lawyer you're going against will try to make a big deal over some non-essentials, facts that cannot possibly have any bearing on the outcome. By tricking you into trying to prove things that ultimately don't matter he will take you off your game when you should be concentrating all your energy and skill on proving only those facts you alleged in your pleadings.

Nothing else matters but those facts and the weight of supporting evidence.

Go to court some afternoon for entertainment. Stick your head in a few courtrooms and take a seat while the lawyers battle it out. You will see exactly what happens.

Lawyers will argue over non-essentials to take their opponent off his game or even just to waste time and charge their clients more money. After all, if they'd done what they should have done what this course teaches in such a way that any average eighth grader can fully understand they wouldn't have to be in trial in the first place, if they had a winnable case to begin with.

It's all smoke-and-mirrors, an expensive dog-and-pony show.

For interesting reading about lawyers and how they drag cases out for money, enjoy some novels by Charles Dickens, e.g., Bleak House, Hard Times, and even Barnaby Rudge. Lawyers get a bad rap for a reason.

Don't be distracted.

If you must go to trial, know this: You are there to present the greater weight of evidence in support of nothing other than the facts alleged in your pleadings.

Oh, and of course you're allowed to present evidence tending to dis-prove the facts alleged by your opponent.

Prove what you alleged. Disprove what your opponent alleged, if you can.

Emphasize the proof of your own facts. Scoff at your opponent's facts.

Convince the jury or judge in a bench trial that your evidence outweighs the evidence presented by your opponent.

That's what trial is for.

Doesn't that simplify things for you? Keep focused, and fear of failing will fade away.

Who Goes First?

The order of presentation is determined by local law and, in some jurisdictions, according to the judge's discretion. Consult official rules in your jurisdiction for details.

Generally, the order of presentation is:

- Plaintiff or prosecutor in a criminal case goes first.
- Defendant or accused in a criminal case goes second.

Demand that the order set out in the official rules for your jurisdiction be followed.

If the order is not followed, make your objections and corrective motions on the record. Cite the official rule to set the stage for a successful appeal if the judge's error turns out to be materially harmful to your cause.

Jury Instructions

Before the jury is empaneled, the parties should decide what particular instructions will be given to the jury by the judge.

In many cases, jury instructions may be helpful to assist the jury to properly apply the law to their decision on the weight and reliability of admitted evidence.

The court may require its own jury instructions like *Standard Jury Instructions* for issues frequently litigated, such as automobile negligence, breach of contract, etc. The judge will

provide the jury with *Standard Jury Instructions,* if there are such that apply to the issues being tried.

Either party may move the court to include additional jury instructions or to amend the *Standard Jury Instructions*.

If there are no *Standard Jury Instructions* for a particular set of material issues, either party may move the court to adopt jury instructions desired. Of course, there will be a knock-down drag-out fight if opponents cannot agree, but jury instructions are extremely important and should be fought for so the jury understands how to rule on the facts presented to them.

Jury Charge

The judge will charge the jury with instructions. Pay attention to what the judge says to the jurors.

If you hear something that should not have been said, stand to your feet and politely but forcibly say, *"Your Honor, may we have a sidebar."* After receiving the courts permission, advance to the bench with your opponent and, out of hearing of the jury, explain why the jury charge given is incorrect and the jury needs a corrective instruction.

Addressing the Jury

Throughout the proceedings, the jury is watching you.

From the moment they are admitted to the jury box, they are watching you.

They will judge you by your facial expressions more than anything, but they will also judge you perhaps unconsciously but nonetheless certainly by your body language, your posture, the clothes you wear, your tone of voice, your sincerity, whether you are polite in your manner, and whether you seem like a good guy whom they should favor.

There's no predicting what the jury will believe about you. There is one thing for absolutely certain. They will judge you.

Govern yourself accordingly.

Demand Order.

You are entitled to law and order. You cannot make your case in an atmosphere of chaos.

Do not allow interruptions, except objections by opposition and directions from the judge.

The judge is supposed to maintain order.

Do Not Allow Interruptions

Your opposition will play every dirty trick in the proverbial book. Interrupting is one of the most commonly used dirty tricks.

Just when you're getting to the most critical evidence, they will interrupt with some diversion to throw you off your track.

Only one person should be allowed to speak at-a-time.

In practice you will be interrupted by your opposition just to unfairly throw you off your game. It happens. Routinely. Expect it. Do not tolerate it.

As soon as it happens and it will happen move the court then-and-there for an order directing your opposition not to interrupt except to state an objection.

If the judge denies your motion, object, taking a quick glance at the court reporter to make certain your objection gets into the official court record so you have grounds for appeal.

The judge is obligated to maintain Order in the Court.

Each and every time your opposition interrupts, move the court for an order directing him to cease and desist.

If the judge denies your motion again, object again. Make your record.

You are entitled to order, just as much as you are entitled to law.

Some experienced lawyers are so clever and deceitful, they will try to turn an orderly courtroom proceeding into an all-out, no-holds-barred, back-room brawl.

The result will be your failing to prove the facts alleged in your pleadings.

Do Not Allow Direct Argument

Your opposition will try to argue directly with you. They will speak directly to you, instead of to the court. Don't allow it. Never allow the other side to speak to you directly. ***Never.***

If it happens, calmly move the court for an order directing the other party to stop speaking to you directly and to address their comments to the court, not you. Take a glance at the court reporter to make certain your motion goes on the record; in case you must appeal.

"Your Honor, I move the Court to Order my opponent to direct his comments to the court or to witnesses, not to me."

Make Your Opponent Wait His Turn

Instead of following proper procedure and presenting their evidence when it's their turn to do so, your opposition will try to present their evidence during your turn.

Don't allow it. You'll see many times two lawyers overtalking each other and trying to get their evidence in as the last word. You usually don't hear either of them moving the court to tell the other guy to stop interrupting. They're on the same team and that isn't your team, remember?

Trial is not like a family argument in the kitchen, where anything goes, no holds barred.

But you should expect your opponent to rattle your cage every chance he gets.

It isn't right. But, it's quite common and only you can stop it.

The judge will wait for you to object or make a curative motion for an order stopping it.

Play fair and make everyone else play fair.

In Summary

Trial can be easy, or trial can be your worst nightmare you've ever known.

The key to making it easy is the question we asked near the beginning of this workbook.

Why are you here? What are you trying to prove? What are you trying to disprove?

All that technical stuff about who goes first, jury instructions, and *voir dire* is really quite mechanical and relatively unimportant in comparison with why you are here.

The most important task for all parties at trial is to:

1. Present the greater weight of evidence tending to prove the facts alleged in your pleadings.

2. Present the greater weight of evidence tending to disprove the facts alleged in your opponent's pleadings.

Stay focused on what truly matters, and you'll do fine.

APPEALS

This is how you hold Trial Judges accountable

When judges make mistakes, this gives you an option to appeal the ruling. Judges make mistakes all the time and are appealed, many times successfully.

Everyone is supposed to play by the rules, especially judges.

A trial judge's job is to: enforce controlling law and the rules of court.

Appellate justices' job is to: hold trial judges accountable to the law and the rules.

Trial judges commit errors when they fail or refuse to follow controlling law and enforce the rules of court. If a trial judge commits an error, you might be able to appeal.

But in order to appeal, you must preserve the error for appeal, and *not all errors are appealable.*

Preserving the Record

Other chapters in this workbook emphasized the necessity of having every proceeding before a judge recorded by an official court stenographer and to know in advance that an official transcript of the proceeding will be available if appeal is necessary. That is your Number 1 priority.

Your second priority is to make absolutely sure the judge was made aware of his mistake and given an opportunity to cure the mistake. If you don't do this, you will find the appellate courts reluctant to correct the trial judge's error if the judge was not given a chance to correct the error without being ordered by the appellate court to do so.

Making sure the judge is aware of his error is done by:

- Courtroom Objections
- Motions to Reconsider
- Motions for Rehearing
- Motions for New Trial

Objections

Objections, of course, must be made in a timely manner, in other words, as soon as possible after the error occurs. Do not wait 20 minutes to say, *"Oh, by the way, your Honor, I'd like to object to what you did twenty minutes ago."* That dog won't hunt.

Objections should be made immediately, stating clearly the grounds upon which the objection is made. Study the chapter on *Objections* if you haven't already.

Objections give the judge an opportunity to cure and preserves the record for appeal.

Motions to Reconsider

A *Motion to Reconsider* can and should be made immediately if an objection is overruled and you know your objection and its grounds were valid and should have been sustained.

This motion may also be written, in which case it should be filed as soon as possible after the judicial error, and it should contain information that buttresses your argument so that information will also be available to the appellate court if you must appeal.

This motion gives the judge an opportunity to cure and preserves the record for appeal.

In some jurisdictions, this motion does not extend the deadline to file your *Notice of Appeal*. Consult local rules.

Motions for Rehearing

A written Motion for Rehearing should be made as soon as possible after an improper order is entered at the conclusion of a hearing.

This motion must be made in writing, because the hearing is over, and it is another great opportunity to present information that buttresses your argument, information that will be available to the appellate court if you must appeal.

This motion gives the judge an opportunity to cure and preserves the record for appeal.

In some jurisdictions, this motion does not extend the deadline to file your *Notice of Appeal*. Consult local rules.

Motion for New Trial

If the judge makes an error during a trial, and if your courtroom objection is overruled, make a spoken *Motion for New Trial* then and there. Do not wait.

If your spoken *Motion for New Trial* is denied, renew the motion in writing.

This motion gives the judge an opportunity to cure and preserves the record for appeal.

In some jurisdictions, this motion does not extend the deadline to file your *Notice of Appeal*. Consult local rules.

What It Takes to Get an Appeal

Think of appeals as judicial correction fluid. To be effective a lot of work must be done to erase the damage caused by a trial court judge's error and set things straight again.

This takes time, and a lot of work. But, none of the work of appeal is too difficult for you or anyone having average intelligence and the ability to write simple sentences in the English language.

Only a “materially harmful error” is appealable, however, and *only* when preserved in the record by timely objection and/or motions giving the judge an opportunity to cure.

If you read through the other chapters, you already know 99% of what you need to file an effective appeal. The remaining 1% is mostly following format and a few procedural steps that will be new to you but not difficult.

You already know about elements, evidence, argument, objections, motions, making the record, citations to legal authorities, etc.

All you need now is how to transmit the record and follow prescribed forms.

This is not differential calculus or quantum physics.

An appeal is simply a process of showing an appellate court all of the following are true:

- Your trial judge made an error.
- The trial judge's error was materially harmful to your case.
- You preserved the error with motions to cure and/or timely objections.
- The appellate court should repair the damage caused by the judge's error.

What It Isn't Appealable

An Appeal is not another bite at the judicial apple. You cannot present your evidence again, make additional arguments, cross-examine witnesses, take more depositions, or do any of the things you did or should have done in the lower court.

Your trial court effort is water under the bridge. Many people think they can appeal just because they lost. They're wrong.

Losing alone does not give you the right to appeal.

Your right to appeal depends on your preserving the trial judge's *materially harmful error*.

If the trial judge did not make any materially harmful error or you failed to preserve the trial judge's error with timely objections and/or motions to cure the error, you have no right to appeal except in certain extreme circumstances discussed later.

To get your appeal before the appellate justices for review, you must demonstrate that you preserved the trial judge's error by timely objections and/or motions to cure and you lost because of the trial judge's materially harmful error.

- Not the error of a witness.
- Not the error of your opponent.
- Not the error of your opponent's lawyer.
- And not any error of your own.

You may petition the appellate court to review the record and put things right again if and only if the trial judge committed a materially harmful error meaning, one that caused you to lose or unjustly denied you an opportunity to present your case and you preserved the error on the record with timely objections and/or motions to cure.

You have to meet deadly deadlines and follow specific forms for papers you file, but other than that, what you need to know to do a good job is mostly knowledge you've already learned hopefully by studying this workbook.

If you have not yet finished the other chapters, go back now. You must know how to identify judicial errors before you can appeal them, and you should have already learned that from the other chapters.

How to identify judicial errors, make effective objections, and move the court to cure its errors has already been covered in the other chapters and will not be reviewed here. Please go back and read the other chapters, if you have not yet finished them.

Presenting Arguments

Presenting your arguments to appellate justices is no different from presenting facts and law to a trial judge in the lower court. It's just a different format. Most folks including many lawyers tremble at the thought of appeal. There's a formidable mystique that comes from not knowing how easy it really is.

Winning on appeal is no more
difficult than winning at the trial level
in the first place.

In fact, it's a whole lot easier.

Most appellate justices are not called
judges. They're called “Justices” on
the appellate bench and are fair-minded individuals committed to doing what's right and just. They are there to correct trial judges who make materially harmful errors.

If a trial judge makes materially harmful errors that threaten your case, threaten appeal.

Winning on appeal is mostly a matter of

- Having made a winning record for appeal in the lower court.
- Meeting deadlines in the appellate court.
- Following proper formats in the papers you file.
- Making logical legal arguments.
- Supporting your arguments with citations to controlling legal authorities.

Some appellate courts require colored paper. Some require briefs to be bound, not stapled.

Some require everything to be sent in by email. An increasing number require everything on CD.

These formal requirements, however, have nothing to do with how you make your arguments.

Formalities differ from court to court, but the meat-and-potatoes of appellate argument is even simpler than the knock-down, drag-out battle that most trial level fights require.

Deadlines, filing formats, paper color, binding methods, and such like can be found by referring to the official *Rules of Appellate Procedure* for your jurisdiction, state, etc.

These *formalities change suddenly without warning*, so always check the most
recent official rules for your jurisdiction before diving in head-first.

Forewarned is forearmed.

Paperwork

There are no witnesses to call. No drawn-out discovery battles to fight. Usually, no hearings to attend. In the appellate arena, you file papers and wait for a ruling.

No depositions. No subpoenas.

Only a few papers telling the appellate court:

- Your trial judge erred ruling on evidence, the law, or both,
- The judge's error was materially harmful to your case,
- You gave the judge every reasonable opportunity to correct the error,
- You preserved the record to show the judge's failure and refusal to cure, and
- The appellate court is obligated to repair the damage.

Most appeals are fought entirely on paper.

1. Losing party waits until order in error is filed with the trial court clerk.

2. Losing party now “appellant” files a *Notice of Appeal* identifying order in error.

3. Appellant arranges for court record to be forwarded to the appellate court.

4. Appellant files his *Initial Brief*.

5. Winning party now “appellee” responds by filing optional *Answer Brief*.

6. Appellant may respond with optional *Reply Brief*, if appellee files *Answer Brief*.

7. Both parties wait for appellate court to rule.

No rocket science here. All paperwork. Nothing beyond an average eighth-grader's ability to understand.

Here are the steps in more detail:

1. Order loser doesn't like is entered signed and filed by clerk in the court's official record and first deadline-clock starts ticking.

2. First deadline requires loser to file a *Notice of Appeal* sample form later in this class within a certain number of days after order is entered. Deadline varies with jurisdiction and is fatal. If loser fails to file *Notice of Appeal* on time, his right to appeal is lost forever. There are no take-backs, no second-chances. *Notice of Appeal* is usually a single page identifying order in error by court, file number, date of entry, etc. and declaring that loser intends to appeal the order. Easy to do, but must be done on time.

3. Filing *Notice of Appeal* starts second deadline-clock ticking.

4. Once *Notice of Appeal* is filed, loser/appellant has a certain number of days to file his *Initial Brief* sample form later in this class. Deadline varies with jurisdiction and is fatal.

5. When loser/appellant files his *Initial Brief* another deadline-clock starts ticking.

6. Winner/appellee has a certain number of days to file optional *Answer Brief* sample form later in this class. Deadline varies with jurisdiction and is fatal. Appellee's optional *Answer Brief* if one is filed rebuts appellant's arguments with supporting citations to legal authorities and presents additional arguments if necessary to refute appellant's claims. Optional *Answer Brief* is *highly recommended*.

7. Filing *Answer Brief* starts another deadline-clock ticking. Deadline varies with jurisdiction and is fatal.

8. Appellant may if he chooses file an optional *Reply Brief* sample form later in this class in which he may refute/rebut any *new* issues raised by appellee - but only new issues raised by appellee. He may not raise new issues he failed to raise in his *Initial Brief*.

9. There are no further briefs.

10. If appellate court allows oral argument on the motion of either party or on appellate court's own initiative, the parties may explain their arguments in person at a hearing. At this appearance, justices question the parties for clarification. *This is rarely allowed* except in cases where issues are extremely muddy and confusing.

11. Appellate tribunal decides the outcome and issues its order.

That's all there is. It's a piece of cake.

The only hard part is making absolutely certain you meet the deadlines, follow required forms, make well-reasoned legal arguments in your briefs, and support your arguments with citations to controlling legal authorities.

Here are the steps again:

- Entry of Court order to be appealed - first clock starts ticking.
- Appellant files *Notice of Appeal* - second clock starts ticking.
- Appellant files *Initial Brief* - third clock starts ticking.
- Appellee files *optional Answer Brief* - fourth clock starts ticking.
- Appellant files *optional Reply Brief*.
- Justices read briefs, review record, and issue order.

That's it. There are no other filings.

And, usually, there are no hearings to attend.

There may be a few motions in special circumstances e.g., motion for enlargement of time, motion to reconsider, etc.

But basically, it's just filing arguments in proper format, and on time.

Four Questions for Appeal

Before filing, you need to answer four questions:

1. What error did the trial judge make?
2. How was the error materially harmful?
3. What legal authorities agree with me?
4. What should the appellate court do?

If you're an appellant, these are the points you must argue successfully. If you're an appellee, these are the points you must oppose successfully.

You're probably thinking, *"There must be more to it than that."* Nope.

As this workbook has urged so many times already, the biggest problem many people have is fearing the legal process, believing it's complicated when it isn't.

It's not complicated. Don't be afraid of it.

In most appeals, the winner prevails on a single pivotal issue by cogently, briefly, and authoritatively answering the four appellate questions.

Use these questions to stay focused and convince appellate justices to see things your way.

Don't go off on meaningless tangents.

If you're the loser/appellant, answer these four questions:

1. What error did the trial judge make?
2. How was the error materially harmful?
3. What legal authorities agree with me?
4. What should the appellate court do?

If you're the winner/appellee, answer these:

1. Did the trial judge make the error my opponent claims?
2. Was the alleged error materially harmful to my opponent's case?
3. Do the legal authorities my opponent cites support his claims?
4. What legal authorities disagree with my opponent?
5. What should the appellate court do?

This is the easy way.

Single Purpose for Appeal

Some repetitive emphasis is needed here.

- What is appealable?
- What is not?

Appeal is not another bite at the judicial apple. You had your bite already.

You had your opportunity in the lower court to:

- File solid pleadings.
- Present admissible evidence supporting your factual allegations.
- Object to inadmissible evidence offered by your opponent.
- Persuade the trial judge to apply controlling law and enforce the rules.
- *Exercise your Constitutional right to a redress of your grievances.*

You lost.

Now you want to appeal because you lost and you cannot appeal for that reason alone.

The single purpose is to: ***correct the preserved materially harmful judicial errors.***

The only legitimate ground is to: ***correct the preserved materially harmful judicial errors.*** Nothing more. Nothing less.

Memorize: Appeal to correct the preserved materially harmful judicial errors.

That's it.

The appellate court is not a forum to argue your case again. You had your chance at the trial level.

If you lost because the judge made one or more rulings that materially harmed your case and you preserved the judge's errors by making certain those errors appear in the permanent record of the lower court proceedings and you objected to those errors or filed motions to give the judge reasonable opportunity to correct his errors, you may have a chance of correcting the judge on appeal or getting the appellate court to send the case back to the trial judge with instructions.

BUT THIS IS ONLY IF YOU'VE DONE THOSE THINGS!

That's why preserving the judge's errors during the trial phase with objections and/or motions to cure is stressed so heavily in the other chapters that you should have already completed.

Pro se people who haven't studied this workbook and also many lawyers lose because they

fail to preserve the judges' errors for appeal. They fail to make certain all proceedings are recorded by an official court stenographer. They fail to object in an effective and timely manner and fail to move the court for orders correcting the judge's errors. They fail to renew their objections when required.

In short, they fail to prepare a record for appeal. When a trial judge knows he is free to decide however he wishes, without fear of appeal, he is likely to decide however he wishes.

Appellate court justices want to see you made every reasonable effort to give the trial judge an honest chance to repair his errors before you bring your appeal.

Making new objections or filing motions to cure judicial errors that should have been objected to during the lower court proceedings isn't permitted after losing at the trial level, and after exhausting all motions to reconsider and motions for rehearing.

The judge's job is to see that both sides have an equal opportunity to get their evidence into the record and that both sides fight fair according to the rules.

When a judge allows either side unfair advantage that's materially harmful to the cause of the losing side, the appellate court can review the record and correct the error.

That's what appeals are for. Nothing more.

- Can we appeal crooked tricks of opponent's lawyer? No.
- Can we appeal testimony of a witness paid to lie? No.
- Can we appeal improper questioning at a deposition? No.

What can we appeal? One thing and one thing only.

The trial judge's materially harmful errors that were properly preserved in the trial court record by objections and/or motions to cure.

If a witness lies on the stand, you have an opportunity to cross-examine the witness and offer evidence to impeach. But it isn't witness' lies you appeal. You do your best to show the witness is lying. You might move the court for an order to show cause why the witness should not be held in contempt, if you can prove the witness is lying. But the witness's lies are non-appealable.

However, if the judge is shown by admissible evidence that the witness is, indeed, lying, and still the judge refuses to act according to the essential requirements of justice, then the judge's failure to act according to the essential requirements of justice is what you appeal, if the judge's failure to act was materially harmful to your case.

You appeal judges' materially harmful errors, not witness' lies.

If your opponent or his lawyer violates the rules or behaves in appropriately at a deposition, you have an opportunity to stop the deposition then and there and bring the issue before the trial judge at once to demand the deposition be taken according to the rules.

You cannot appeal your opponent's behavior or his manner of taking depositions, but you can appeal a judge's refusal to grant your motion for an order requiring your opponent to conform to the rules for taking depositions, if the judge's refusal to grant your motion is shown to be materially harmful to your case.

Once more: Losing alone does not give you the right to appeal.

If you lost and cannot convince an appellate court the lower court judge made at least one materially harmful error that was preserved in the record, you lost PERIOD.

So sad. End of story. Appeal will be denied. It's over.

You can't go over the appellate court's head.

You cannot take it to the U.S. Supreme Court.

You lost. Get a band-aid.

However, if you follow the tactics and strategies taught in this course, meet all deadlines, format your briefs according to the official *Rules of Appellate Procedure* in your jurisdiction, and transmit all pertinent parts of the trial court record to the appellate court clerk so the justices can see where the judge made at least one materially harmful error, you might still win, even after losing.

Don't believe there's more to it. There isn't. There's work to do and lots of it.

Like anything worthwhile you set out in life to accomplish, there is work to do. Most of the work on appeal, however, is writing and researching for citations to controlling legal authorities.

Whose Rules Rule?

No judge is free to shoot from the hip. Any judge who claims, *"I'm the law here,"* is a liar and a traitor to our nation's creed and heritage. Such behavior on the bench must be opposed with full force and effect. It is dishonor. It is a crime.

Whether it's the lowest county magistrate or the *en banc* panel of nine justices on the United States Supreme Court, men are never the law.

The Written Constitution is the law, not what some pompous judge barks down from his bench. The written "corporate statutes" are the law they have to abide by because they sit on the bench and put themselves in that box. Make them adhere to it.

Every judge is obligated to obey legal authorities:

- Constitutions state and federal
- Statutes also sometimes called code or ordinances
- Case law previous appellate court decisions expressed in written opinions
- Rules of Court

Even wild west hanging judge Roy Bean was subject to legal authorities, for it is legal authorities that authorize what judges do.

Judge Bean, who called himself "*The Law West of the Pecos,"* presided for many years as Justice of the Peace in a makeshift courtroom set up in his saloon in a South Texas town before his death in 1903.

You might have seen the 1972 movie, *The Life and Times of Judge Roy Bean* starring Paul Newman. Bean followed an 1879 edition of the *Revised Statutes of Texas* some claim he used later versions as kindling. Without legal authority, nothing Bean did, could be lawful or binding, and a higher court could step in and overrule if he were appealed. Unfortunately, neck-stretching tends to deter the enthusiasm of would-be appellants.

Nothing any judge can do is lawful or binding if it violates legal authorities.

Judges are not legal authorities.

Some of the more arrogant ones might think they are, but they aren't.

Judges are people who took or should have taken an oath to uphold the law and follow the rules according to legal authorities.

Everything depends on legal authorities that bind or should bind the trial judge.

To win as appellant, you must cite and argue legal authorities that demonstrate that the trial judge made materially harmful errors.

To win as appellee, you must cite and argue legal authorities that demonstrate that the trial judge did not make any materially harmful errors.

The Record

Appellate courts resist receiving evidence or hearing testimony that was not first presented to the trial judge and made part of the trial court's official record.

You cannot create a court record after-the-fact.

Whatever is in the court record when appeal is necessary, is what's in the record for appeal.

You cannot object for the first time on appeal. You cannot move for curative orders for the first time on appeal. You cannot examine witnesses for the first time on appeal.

You cannot take depositions for the first time on appeal.

Either you did these things during the trial phase and made a record of doing so, or they are forever barred.

The other chapters in this workbook have sufficiently emphasized this fact that nothing additional need to be said here other than the necessity of making certain the court record is complete before filing *Notice of Appeal* or, at least, immediately thereafter before the clerk forwards the record to the appellate court.

If there are deposition transcripts or selected excerpts that need to be reviewed by the appellate justices, they should be paid for at once and filed with the trial court clerk before the record is forwarded to the appellate court.

If there are exhibits that have not yet been admitted into evidence and placed in the court file, they should be filed with the trial court before the record is forwarded to the appellate court.

You cannot win on appeal without a complete record of the lower court proceedings.

Standards of Review

An appellate court review here is what an appellate court considers to reach its decision.

The court uses what's called *standards of review*.

The standard of review on appeal depends on what the trial judge decided:

- Law or
- Fact

If the trial judge made a decision about fact regarding evidence, credibility of a witness, etc. the appellate court generally refuses to second-guess the trial judge and will let his decision stand.

If the trial judge made a decision about application of law such as what law controls, what the law means, etc., the appellate court will not hesitate to ignore the trial judge's decision and impose their own ruling.

Boiling everything down to the simplest view, there are two primary standards of review:

- *De Novo* - meaning the court will review the entire case from the beginning without any regard to the previous court's legal conclusions or assumptions

• *Abuse of Discretion* – there is a plain error, discretion exercised to an end not justified by the evidence, a judgment that is clearly against the logic and effect of the facts as are found.

There may be many nuances and different names, but essentially these are the two standards of review. You may, however, encounter them in different forms and called by different terms. In its essence, however, the question comes down to whether the trial judge made a ruling based on his interpretation of the law or on his opinion of the evidence, such as based on facts.

De Novo

The de novo standard is simply a start over kind of attack, a fresh look by which appellate justices are not required to give deference to trial judges' decisions but may impose their own decisions to set the matter straight.

Appellate courts owe no deference to trial judges' decisions on questions of law.

Where facts are not in dispute, and the only issue before the appellate court is an appellant's challenge to the trial judge's application of law to fact, the appellate court must ignore the trial judge's decision and apply the law properly.

If appellant raises an issue of law in his appeal, the appellate court may take what is called a *de novo* look at the record and decide what the lower court's legal decision should have been, not based on the trial judge's idea of what the law says, but solely on the appellate court's own legal opinion and interpretation.

Frequently, the law to be decided has already been determined by an appellate decision of the very court where the appeal has been taken. A particular law and its legal interpretation may have been made clear by prior opinions of the same court. In such a case, there will be no patience with a contrary interpretation of the law by a trial level judge.

In other cases, the law may have been interpreted by another appellate court, whose opinion should be upheld by the justices called upon to rule. *If that other court is the highest court of the state or the United States Supreme Court, there is nothing to be argued about*. The trial judge's contrary opinion of the law will be quashed. RE-READ THIS AGAIN FOR ALL OF YOU WHO ARE SAYING YOUR CONSTITUTIONAL RIGHTS ARE BEING TRAMPLED AND THE COURT IS NOT LISTENING TO PREVIOUS CASE LAW!

If the other court is a sister appellate level court, the court reviewing the case is not obligated to agree but may enter its own opinion of the law and whether the trial judge was in error.

Abuse of Discretion

The abuse of discretion standard requires the appellate justices to give deference to the trial judge's decision and refuse to impose their own decisions unless there is no credible, substantial evidence to support what the lower court decided.

Different appellate courts may invent different names and apply various nuances to these two primary standards of review, however to avoid confusion you should learn these two and then, if you're in a jurisdiction where other names or nuances are applied, you'll understand that they are only local variations or mixtures of these two standards.

Under this standard, an appellate court must affirm the trial judge's orders i.e., let them stand unless it determines the lower court judge made a clear error of judgment or applied

an incorrect legal standard. *Alexander v. Fulton County, 207 F.3d 1303, 1326 11th Cir. 2000.*

Only rarely will appellate courts set aside a trial judge's findings of fact.

Appellate courts aren't set up to hear witnesses testify or receive documentary evidence directly from parties, so review of evidence is seldom done under this standard of review.

The reason is common-sense and promotes fairness and judicial efficiency.

Lower court decisions frequently depend almost entirely on whether the trier of fact believes a party or his witnesses are telling the truth.

Facial expressions, body language, nervous tics, and other non-verbal activity can't be reviewed by appellate courts by reading the court reporter's transcript. Behavior, however, conveys volumes in court. But words alone are what goes in the official record.

Smiles or sneers, sincerity or sneakiness are silent signs we read subconsciously from behavior. A trial judge, having opportunity to consider behavior as well as words in reaching decisions, is thus presumed to have acted on information the appellate court cannot normally review unless you make a point of verbalizing such behavior in a way the court reporter can enter into the record. *See sidebar.*

Since appellate courts almost never take live testimony from witnesses whose demeanor they can observe first-hand, they rarely challenge trial judges' findings based on credibility.

Appellate courts give great deference to trial judges' findings of fact, unless appellant makes a convincing argument showing the trial judge's findings of fact were, in fact, as appellate courts sometimes put it, clearly erroneous.

In such cases an appellate court may rule the trial judge abused his discretion.

In general, however, it is extremely rare for appellate justices to second-guess a trial judge on findings of fact.

Which Standard to Apply

Which standard of review to apply depends on what was decided by the trial judge:

- Questions of Law
- Questions of Fact
- Mixed Questions of Law and Fact
- Questions of Equity

Questions of Law

The standard of review when an appellant challenges a trial court's application of law to undisputed facts is called *de novo*.

On questions of law, where facts are not in dispute, appellate courts give no deference to a trial court's conclusions.

If an appellate court is reviewing a trial judge's finding as to the application of law to fact and finds the law was misapplied, it must apply the law correctly.

Application of law to undisputed facts is the exclusive province of appellate courts.

Questions of Fact

The standard of review when an appellant challenges a trial court's decision as to the weight or credibility of evidence, i.e., facts, is called abuse of discretion.

It is exactly what its name suggests.

Trial judges have wide discretion to make decisions based on fact, but their discretion may not be abused.

On questions of fact i.e., decisions based on examination of evidence, credibility of witnesses, etc. appellate courts are required to presume the trial judge acted correctly and give great but not unlimited deference to his decisions unless clearly erroneous.

Unless the trial judge's decision based on record evidence was clearly erroneous, the lower court decision must stand.

Appellate courts must accept a trial court's findings of fact unless the appellate court has a definite and firm conviction that a mistake has been committed. *Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844, 855 1982*. *Concrete Pipe and Prods. v. Construction Laborers Pension Trust, 508 U.S. 602, 623 1993*.

An appellate court may examine evidence in the record and the trial judge's decisions drawn from that record evidence to determine if the trial judge's decision was an abuse of the trial judge's wide discretion.

Appellate justices might not see record evidence in the same light. Based on their own personal opinions, they might be tempted to second-guess the trial judge.

However, if there is substantial evidence to support the trial judge's decision, it must stand.

Substantial evidence is more than a mere speck. It is evidence sufficient to persuade a reasonable mind to accept it as adequate to support a conclusion. *Richardson v. Perales, 402 U.S. 389, 401 1971*.

It is rare for a trial court's decisions on evidence to be set aside on appeal.

To put it more strongly, appellate courts will not set aside a trial judge's fact-based decision if there is any credible record evidence to support the trial court's decision.

To put it yet another way, appellate courts will only set aside a trial judge's fact-based decision if it is arbitrary, fanciful, or unreasonable and no reasonable person would take the view of the trial court. *Reynolds v. State, 934 So.2d 1028, 1031-32 Fla. 2006*.

Mixed Questions of Law and Fact

When an appellant challenges a trial judge's decisions on both questions of fact and questions of law, the appellate court deals with the decisions separately.

On questions of fact, the appellate court will give deference to the trial judge's decisions, applying the abuse of discretion standard of review.

On questions of law, the appellate court will give no deference to the trial judge's decisions, applying the *de novo* standard of review.

Questions of Equity

On questions of equity, appellate courts apply the abuse of discretion standard of review.

Equitable decisions on issues such as clean hands, estoppel and laches are primarily based in fact i.e., credibility of witnesses, reliability of tangible evidence, etc. and are, therefore, presumed better decided at the trial level unless clearly erroneous.

Rehear & Reconsider

These two are not the same. If you don't like what a trial judge's order says, you can:

1. File a *Motion to Reconsider*, moving the court to reconsider his ruling in light

of arguments and case law cited in your written motion and supporting memorandum.

2. File a *Motion for Rehearing*, moving the court to allow you another bite at the apple by scheduling a second hearing so you can make clearer on the record what the issues are that the judge mistakenly overlooked, issues you make clearer in your written motion and supporting memorandum.

It is always a good idea to file one or both of these motions after receiving an adverse ruling from a judge.

Even if the judge denies your motions, they will strengthen your record for appeal by showing how you tried your very best to get the judge to do the right thing before appeal.

They also give you another opportunity to put favorable facts and law in the record citations to legal authorities.

Every opportunity to make your record can only help your case. Use every opportunity whenever possible.

But, do not assume either motion tolls the time to file your *Notice of Appeal*.

When your time to file your *Notice of Appeal* runs out, your appeal is gone forever.

Motions Not the Same

These two motions are not the same.

Consult your local jurisdictions official rules and case law to determine if either one tolls the deadline to file *Notice of Appeal.*

Assuming the deadline is tolled by a motion when it isn't will be fatal to appeal.

Even experienced lawyers get mixed up.

To make matters worse, they aren't treated the same in all jurisdictions.

This is why you must, before relying on either one to toll the deadline, consult the rules and case law in your jurisdiction.

Some courts even use the terms interchangeably, in error, of course.

In general, the following will help you sort out the muddle.

Motion to Reconsider

It is a long-established principle in all jurisdictions that a court may modify or rescind its own orders at any time before final judgment.

If a judge enters an order denying a motion to dismiss an interlocutory order, i.e., one made before final judgment the court retains power to modify or amend its order at any time.

It can do this on its own initiative or in response to a *Motion to Reconsider*.

A *Motion to Reconsider* may be filed any time in response to non-final interlocutory orders when it appears the judge did not consider arguments properly. Trial judges have broad discretion to grant such motions, because they retain jurisdiction to control all non-final orders prior to entry of final judgment.

Depending on the rules and case law in your jurisdiction, there may be a time limit on filing a *Motion to Reconsider*. Once that window closes, the motion may be denied as untimely.

Trial judges have broad discretion whether to consider reconsidering and order.

A trial judge may choose to reconsider and voluntarily reverse or revise a non-final order or, he may just ignore the motion altogether.

Denial of motions usually cannot be appealed. Appeals of orders denying motions are routinely denied.

It's pretty much entirely up to the judge whether he will consider the arguments in a *Motion to Reconsider* and reconsider the reasoning and conclusions he made in his non-final order. He can just as easily choose to simply ignore your motion and stick with the decision he's already made; confident his decision will not be reversed on appeal.

Moreover, if the non-final order is one of those rare types of orders that may be appealed or to which a petition for *writ of certiorari (an order to the lower court to deliver its record in a case so that the higher court may review it,)* may be directed. Your motion to reconsider will not stop the appellate deadline clock from ticking.

If you need to appeal a non-final order, do not make the fatal mistake of thinking a *Motion to Reconsider* is a substitute for timely filing your *Notice of Appeal*.

If you miss the deadline to file your *Notice of Appeal* you will be deemed to have waived your right to appeal, and that's the end of that.

From this there is no reprieve, no forgiveness, no second-bite.

The rules generally require a *Motion to Reconsider* a final judgment to be filed within a particular number of days from entry of the final order. Failure to file within this time window acts just like failure to file a *Notice of Appeal* before the deadline.

If a *Motion to Reconsider* a final judgment is not filed on time, the trial judge lacks jurisdiction to rule on it.

If judges have discretion to grant, deny, or ignore a *Motion to Reconsider,* what value does such a motion have?

Much in every way, as stated above.

Remember how the other chapters urge you to be constantly preparing for appeal?

A *Motion to Reconsider* is a great way to make appellate arguments before filing your *Notice of Appeal*.

By filing a *Motion to Reconsider* you are able to set forth cogent, written arguments and cite controlling legal authorities favoring your anticipated appeal and have a much better chance for appeal, if the judge's refusal to reconsider makes appeal necessary.

Moreover, by filing a *Motion to Reconsider,* you just might convince the judge to do what you're asking - to reconsider and change his order the way you wish.

It's a win-win effort and highly recommended.

Your motion gives the judge every reasonable opportunity to correct his ruling.

Some appellate courts are even reluctant to entertain appeals where the appellant failed to file a *Motion to Reconsider*.

The point here is always file a *Motion to Reconsider* even if you believe there's little chance for your motion to be granted.

- Some appellate courts require it.
- It gives you another opportunity to put your arguments and citations in writing.
- It might convince the judge to reconsider and rescind or modify his order.

After all, giving the judge advance notice of the arguments and citations you'll be using if he puts you to the effort of appealing his order multiplies your chances that appeal will not be necessary. Remember, Judges hate to be reversed on appeal.

Your *Motion to Reconsider* may not be granted, but it will demonstrate that you understand the law and facts of your case and that the judge does not. Putting that in the official court record will help you no matter what the trial judge decides.

By filing a *Motion to Reconsider* every time the court enters an order you don't like whether the order is directly appealable or not you strengthen your case by clarifying the record. Always a good thing.

Your *Motion to Reconsider* makes clear on the record what's wrong with the non-final order you dislike and how prior controlling appellate court opinions differ from the position taken by the judge.

Then, if you're required to appeal, you'll already have the citations you need and the appellate arguments you can easily put together again and file in your *Initial Brief*.

Remember: Filing a *Motion to Reconsider* may not stop the appellate deadline clock from ticking. Always check your jurisdiction's official rules. They vary from court to court and are subject to frequent amendment.

Motion for Rehearing

A *Motion for Rehearing* is an entirely different animal. Though in some ways similar to a *Motion to Reconsider* Both respond to entry of an unwanted order and both ask the court for another bite at the judicial apple. they are otherwise quite different. One should never be confused with the other.

A *Motion for Rehearing* may be filed in response to both final and non-final orders.

A *Motion for Rehearing* seeks more than reconsideration.

A *Motion for Rehearing* asks the court for another opportunity to appear in court and argue facts and law once again, i.e., another formal hearing.

In some jurisdictions, a *Motion for Rehearing* stops the clock, delaying the time within which you must file a *Notice of Appeal,* but check the official rules to make certain this is true in your jurisdiction.

If your jurisdiction does not toll the time to file a *Notice of Appeal* when a *Notice for Rehearing* is filed, and if you fail to file your *Notice of Appeal* before the deadline, you are dead.

The rules of various jurisdictions differ on many points. You must rely only on the official rules as to whether and when the appellate deadlines are tolled and when they are not.

If you haven't already guessed, motions for rehearing are almost never granted.

To have any chance whatsoever, a *Motion for Rehearing* should include the same arguments and legal authorities you will be required to present to the appellate court if the motion as you may expect it to be is denied or ignored altogether.

What, then, is the advantage?

The same as with a *Motion to Reconsider*.

- You give the trial judge another chance to correct his error.
- You gain an opportunity to prepare your appellate arguments in advance.
- You make it clear on the record what's wrong with the order you dislike.

All this effort helps by making the record that much clearer why you should win.

Your *Motion for Rehearing* will cite controlling authorities that support the arguments you will make on appeal if the judge denies your motion.

By timely filing a *Motion for Rehearing* as with a *Motion to Reconsider* you set the stage for a successful appeal if one becomes necessary and, by doing this little bit of extra research and writing, you increase the odds that the judge will see clearly that you're going to win if you file your arguments and citations with the appellate court. If you do a good job, the trial judge will be inclined to grant your motion and allow you another bite at the apple, rather than risk the embarrassment of being corrected by an appellate tribunal.

Judges hate to be reversed on appeal.

Never forget the human element in all this.

Adverse Rulings

It's a sad day when you receive an adverse ruling from a trial judge, file a *Motion for Rehearing* or *Motion to Reconsider,* thinking there's no immediate need to file a *Notice of Appeal* until your motion is been ruled upon.

The deadline clock keeps ticking while your case goes down the deadline drain.

If you are in a jurisdiction where these motions do not stop the deadline clock, and the deadline ticks past without a *Notice of Appeal,* there's no point filing late. Late filing will be refused by the appellate court clerk.

There is no wiggle-room. The right to appeal is waived if you miss the deadline. Being late on appeal is fatal error from which there is no reprieve. You would have to go through a different lawsuit or accept the judgment.

Nothing can resuscitate a late appellate case.

The judge could have been completely wrong. The ruling of the lower court could have intentionally deviated wildly from the essential requirements of justice.

But, if time runs out before you file your *Notice of Appeal,* there'll be no appeal.

Your error will forever remain a lesson to remember.

Beware and be wise.

Which Court is next?

If your case was initially heard in a United States District Court, you appeal to the appropriate U.S. Circuit Court of Appeals.

If your case was initially heard in a state court, you appeal to the next higher state court authorized to hear appeals. Since the various states have different names for their lower courts, you need to refer to your state court name system to see which court is the appeals court for a lower court.

The first step is choosing the correct appellate court to file your appeal to.

If you file your appeal in the wrong appellate court, your appeal will be denied automatically.

If filing your appeal in the wrong court results in lost time so you miss the fatal deadline to file in the correct court, your chance for appeal is lost forever.

The following table shows levels of court authority.

Names of the state courts may differ , for example, in New York trial level court is called Superior Court instead of Circuit Court as in Florida and most other states, but the priority for state courts shown here is generally applicable in all states.

The priority for federal courts shown here applies in all federal jurisdictions.

Federal Court Priorities	State Court Priorities
United States Supreme Court	United States Supreme Court
Circuit Courts of Appeal	State Supreme Court
Districts Courts *trial level*	District Courts of Appeal
	Circuit Courts *trial level*
	County Courts
	Small Claims Courts

Federal Courts

Cases that can be filed originally in federal court and therefore must be appealed in federal appeals courts include:

- Crimes under statutes enacted by Congress
- Most cases involving federal laws or regulations e.g., tax, Social Security, FCC regulations, civil rights, etc.
- Cases involving interstate and international commerce.
- Cases involving securities and commodities regulation
- *Admiralty cases – see Admiralty law – not the same for SPCs*
- Patent, copyright, and other intellectual property issues
- Cases involving rights under treaties, foreign nations, foreign nationals
- State law disputes where diversity of citizenship exists Diversity cases have a minimum jurisdictional limit of $75,000 as of the time of this writing and can only be maintained between parties residing in separate states. A corporation or other business entity like Coca Cola® that does business in every state need not be sued in federal court under diversity but can be sued in any state where the plaintiff is injured.
- Bankruptcy
- Disputes between States
- *Habeas Corpus actions*
- Minor infractions occurring on federal property

Cases brought in the federal jurisdiction are filed initially and are first ruled upon in a District Court the federal trial level court.

A particular state may have several U.S. District Courts.

For example, Florida has three at present:

- U.S. District Court for the Northern District of Florida
- U.S. District Court for the Middle District of Florida
- U.S. District Court for the Southern District of Florida

Each District Court may have one or more Courthouses. For example, the U.S. District Court for the Southern District of Florida has its primary offices in Miami but operates federal courthouses as of this writing in Key West, Miami, Fort Lauderdale, West Palm Beach, and Fort Pierce. You can look in your own area to see where the nearest court is located.

If appeal is taken from a federal District Court, the proper appellate court is the Circuit Court of Appeals that oversees and controls the District Court.

Here are the U.S. District Courts of Appeal with locations of principal courthouses.

- U.S. Circuit Court of Appeals for the First Circuit
  Boston Maine, Massachusetts, New Hampshire, Rhode Island, Puerto Rico.U.S. Circuit Court of Appeals for the Second Circuit nhattan Connecticut, New York, Vermont.
- U.S. Circuit Court of Appeals for the Third Circuit
  Philadelphia Delaware, New Jersey, Pennsylvania
- U.S. Circuit Court of Appeals for the Fourth Circuit
  Richmond Maryland, North Carolina, South Carolina, Virginia, West Virginia.
- U.S. Circuit Court of Appeals for the Fifth Circuit
  New Orleans Louisiana, Mississippi, Texas.
- U.S. Circuit Court of Appeals for the Sixth Circuit
  Cincinnati Kentucky, Michigan, Ohio, Tennessee.
- U.S. Circuit Court of Appeals for the Seventh Circuit
  Chicago Illinois, Indiana, Wisconsin.
- U.S. Circuit Court of Appeals for the Eighth Circuit
  St. Louis Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, South Dakota.
- U.S. Circuit Court of Appeals for the Ninth Circuit
  San Francisco Alaska, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington.
- U.S. Circuit Court of Appeals for the Tenth Circuit
  Denver Colorado, Kansas, New Mexico, Oklahoma, Utah, Wyoming.
- U.S. Circuit Court of Appeals for the Eleventh Circuit
  Atlanta Alabama, Florida, Georgia.
- U.S. Circuit Court of Appeals for the District of Columbia
  Washington, D.C.
- U.S. Circuit Court of Appeals for the Federal Circuit
  Washington, D.C.

The U.S. Circuit Court of Appeals for the Eleventh Circuit, for example, has appellate jurisdiction over federal trial cases originating in the federal District Courts of Alabama, Florida, and Georgia. The Eleventh Circuit operates from its Courthouse in Atlanta with satellite courts in Miami, Jacksonville, and Montgomery.

State Courts

Cases that can be filed originally in state court and therefore must be appealed in the state appellate courts include:

- Crimes under state legislation
- State constitutional issues
- Cases involving state laws or regulations
- Family law issues
- Property issues including foreclosures, etc.
- Private contract disputes
- Professional malpractice
- Issues involving disputes within businesses
- Personal injury lawsuits
- Workers' injury lawsuits
- Probate and Guardianship
- Minor infractions not occurring on federal property

It's difficult to list court hierarchy in all states, since many states use different names for various levels of court. However, the following applies generally in all states:

Trial Courts of Limited Jurisdiction

As the name implies, these courts are limited to certain issues and/or dollar amounts. Here are the more common courts of limited jurisdiction.

- Small Claims Court usually over small amounts of money, e.g., less than $5,000
- County Court intermediate between small claims and general jurisdiction court
- Family Court divorce, child custody, etc.
- Probate Court estates of decedents, guardianship, etc.
- Municipal Court offenses against city ordinances

Depending on a state's rules and constitutional provision for court jurisdiction, appeals from trial courts of limited jurisdiction are taken to the trial court of general jurisdiction. Thus, an appeal from a county court decision would be taken to the circuit court.

Trial Courts of General Jurisdiction

The state trial court of general jurisdiction is commonly called Circuit Court though, as stated, some states use different names. The name is not what's important. The type of cases the court is authorized by the state's constitution to hear is what counts, i.e., the types of cases over which the state trial court has constitutional jurisdiction.

If the amount in controversy in a civil case exceeds a certain amount, or if a civil case involves an application for equitable relief injunction, rescission, etc. the trial court of general jurisdiction is the exclusive place to seek a remedy.

If the matter is a criminal case involving felony charges, the trial court of general jurisdiction is the exclusive state forum.

If the matter involves questions of constitutionality, the trial court of general jurisdiction is

also usually the place to seek a remedy.

Appeals from rulings of trial courts of general jurisdiction are taken to the state appellate court that controls the particular trial court.

In Florida, for example, trial level cases are normally appealed to the District Court of Appeal for the district in which the trial court sits.

For example, in Florida, appeals from circuit courts sitting in Martin County, Okeechobee County, Palm Beach County, and Indian River County are taken to the Fourth District Court of Appeals that sits in West Palm Beach.

Criminal appeals in capital cases involving the death penalty may be taken directly from the trial court to the State Supreme Court. In nearly all other cases, appeals are taken from the trial court to the district court of appeals.

Some smaller states do not have District Courts of Appeal. In these states appeals are taken from the trial court directly to the State Supreme Court.

Types of Decisions

There are several types of appellate decisions.

Affirmance

If the appellate justices find no harmful error with a trial judge's ruling, the higher court will enter its own order affirming the lower court's order, i.e., the trial judge's order is affirmed, and the appeal fails.

The affirmance will be published in the printed reporters and online databases with or without a written opinion.

Whether or not the affirmance is explained with a written opinion depends on whether the justices feel their reasons for affirming are sufficiently unusual or important to justify telling the legal community why the lower court's order should stand.

Per Curiam Affirmance

If the appellate justices feel their reason for affirming the trial court's order is routine and of no consequence to the community, they refuse to write an opinion, leaving parties in the dark as to why the lower court's decision is allowed to stand and why appellant's arguments failed their purpose.

Such decisions appear in the printed reporters and online databases as *Per Curiam* or *Per Curiam Affirmed,* from the Latin meaning *"for the court."*

Lawyers abbreviate such opinions "PCA," both noun and verb.

A PCA is an affirmance of the trial court order without a written opinion. To *"PCA"* is to affirm the lower court without a written opinion.

Affirmance with Modifications

On occasion, the appellate court may affirm the overall scope and effect of a trial court's order i.e., the outcome in general but write an opinion requiring modification of the lower court order in some way, clarifying or adjusting certain terms or conditions of the trial court ruling.

Such decisions leave the controlling effect of the lower court order intact while adjusting in some way the holdings and findings of the lower court in accordance with the view of the appellate tribunal.

Reversal

If the appellate court decides a trial judge should have reached an opposite decision e.g., plaintiff should have won, instead of defendant, the court will reverse the trial court ruling.

In such cases, the appellate court will have either reviewed the evidence in the record, or considered the legal arguments of both sides, or both, and determined that the wrong side won.

A reversal will invariably be explained with a *written opinion* published in the reporters and online databases, so the community is informed how the trial court committed reversible error.

Remand

If the appellate court decides the trial judge made errors that should be corrected so the parties may continue their case in the trial court according to the appellate court's opinion as to how things should have been done in the first place, the justices may remand the case back to the trial court with instructions.

Remand will invariably be explained with a published written opinion.

Finality of Appellate Rulings

Appellate court rulings are almost always final. Unless the written opinion of one appellate court conflicts with the written opinion of another appellate court in the same jurisdiction or in criminal cases where the death penalty is involved there is generally no appeal to a higher appellate court, e.g., state supreme court or United States Supreme Court.

If you lose in the trial court and subsequently lose your appeal in the first level appellate court, you cannot except in extreme circumstances further your appeal to the State Supreme Court or the United States Supreme Court.

Appeal of Non-Final Orders

If your case has not crossed the finish line, meaning no final order has disposed of all pending issues but the trial judge has committed error that will harm your cause substantially if the case is allowed to move forward under influence of the error, you may be able to file an interlocutory appeal.

The word *interlocutory* derives from Latin to *interrupt speaking*, because such an appeal interjects itself in the middle of a case, i.e., before the final judgment.

During an interlocutory appeal, the lower court proceeding is put on hold while the appellate court decides if the interruption merits their review and a curative order.

Petition for Writ of Certiorari

My law professor once represented a lady sued by both of her elderly parents.

His client did not understand why her parents were suing her and, in particular, wished to discover to what extent their lawsuit was instigated by a jealous brother.

It was, of course, his client's right to use discovery to determine what influence her brother had in the matter, so a *Notice of Taking Deposition* was sent to the parents' lawyer, intending to depose the mother. Her mother was one of the two plaintiffs.

His client's mother was under a physician's care, however, and so her lawyer filed a *Motion for Protective Order,* claiming she was too ill to be deposed.

He responded with *Memorandum in Opposition to Motion for Protective Order,* explaining that he interviewed the mother's primary care giver who assured him there was

no medical reason why the lady could not be deposed adding that the deposition could be scheduled at the doctor's office or such other place as would afford necessary medical safeguards. He wanted only to learn from the woman's sworn testimony that, as his client assured him, she did not even know a lawsuit had been filed.

The opposition's lawyer would have nothing of it and sent me *Notice of Hearing* on his *Motion for Protective Order*.

My law professor fully expected the judge to see his point of view and that of the woman's doctor.

To his surprise, the trial judge entered a *Protective Order*, barring him from taking the deposition of a party to the lawsuit.

So, he had to file an interlocutory appeal in the form of a *Petition for Writ of Certiorari*.

In less than a week the district court of appeal granted his petition and ordered the matter remanded to the trial court with instructions commanding the trial judge to allow the deposition or require the mother to withdraw as plaintiff to the suit.

Fees & Costs

Appeals cost money and expose you to the liability to pay the other side's attorney's fees and costs if you lose. You need to count the costs before you begin.

You need to plan very, very carefully if you do not have the money to continue.

On the other hand, if you aren't worried about funds, you have little to risk by appealing if you can pay the costs because judgment against you for the costs and fees paid to the other side's lawyer will be uncollectible. After all, you may have a chance to win, if you succeed with the appeal.

Either way, you need to understand about costs and fees, who's responsible to pay them, and what you can do to keep your financial risk at a minimum.

Costs

In general, h*e who seeks legal relief from some harm by filing a case whether in a trial court or an appellate court is obligated to pay certain fixed charges* assessed by the court to at least partially allay the court's expenses.

Remember: It is we, the people, who pay through taxation to support the judicial system, and those who seek the benefit of that system provided by the people should be responsible to pay at least some reasonable amount to cover the costs.

Typically, filing fees and other costs paid by litigants for the privilege of arguing their private civil legal battles in the presence of government employees we call judges, are only a tiny percentage of the tremendous expenses required to maintain and operate the judicial system at the state or federal level.

In most jurisdictions, however, those people who are dragged into court unwillingly by others who are suing them do not have any responsibility to pay costs. It was not their idea to use the courthouse, and they would gladly forego the experience, so the courts generally do not require them to pay any costs unless they are costs related to some particular relief that financially impacts the court directly e.g., making certified copies, providing special services, etc.

Usually, what we call court costs are miniscule in comparison to other costs and fees associated with most lawsuits.

Court Reporter Fees

The best advice is to hire your own court reporter for any case at all times. If there was any chance at all that a judge might make a ruling adverse to your case, you need to make sure you have every word on the record. Without it, you don't have an appeal.

Court reporters are about $50 an hour plus trip charge if you're beyond the city limits out in a small town. It might seem expensive, but it could be more expensive if you don't have the proper documentation of each and every interaction with the court.

Even if a hearing lasts only ten minutes, the court reporter will generally charge for a whole hour, at least, and that's a hefty chunk of change.

But, count the cost of not having a court reporter present to make a record of the judge's perverse ruling, and the price begins to take on a more reasonable perspective.

If there is no official court reporter to record the proceedings, there will be no way to get an official transcript of the proceedings and no way to show the appellate court what was said, how you objected, how the judge ignored your objections, how you objected again, and how the judge told you to sit down and shut up or whatever transpired.

If there's not written record, you've literally got nothing to appeal. Get your own court reporter.

The nice thing about it, however, is that you only need to pay for a transcript if it turns out that you actually need one. If nothing bad happens that needs to be preserved for appeal, you pay the court reporter for attending, the court reporter stores the file and that's the end of it. If you need it, you pay the court reporter to get the transcript.

Many times, after a hearing where the judge ruled from the bench that such-and-such should be done, the other side would submit a proposed order stating the exact opposite or otherwise twisting what the judge actually ruled from the bench into some version that favored them.

For this reason, you should be the first to volunteer to write the proposed orders after each and every hearing. If you're going to do this, you'll need the last few pages of the transcript only to write the proposed orders. You don't need the entire transcript.

You can say something like this, *"Your honor, just before I leave would you please confirm that your ruling today is that the other side will produce the designated bank records within ten days?"*

It's a good thing to ask the judge for clarification of the orders just to be specific. If the judge gets mad or says something ridiculous, ignore it and just get him to restate the orders so you are clear on what is being ordered. There are lawyers who will lie to the judge later, claiming the judge said A, when clearly the judge said B.

This will save you a lot of money on the transcripts because you'll only need the last few pages of the hearing or trial.

If you don't need the written transcripts, don't order them.

But, unless you are appearing before the judge for some absolutely routine matter that cannot possibly result in an adverse ruling, make certain the proceeding will be recorded and that you will have access to a transcription even if you have to pay for it.

If you must scrimp on lunch, scrimp on lunch.

But do not try to save money by going to court without a court reporter to take down every word when there is any likelihood whatever that the trial judge will make a ruling adverse

to your interest or that the other side will have any opportunity whatever to pull a fast one.

The best money a litigant can spend is to make certain he has a reliable, honest, and experienced court reporter who will accurately and faithfully record every word that is spoken by you, by the other side, by witnesses, and most importantly by the judge.

Transcript Costs

As stated above, one need not pay for transcripts unless they are going to be needed to prove what was said during a proceeding.

If the court hearing your case provides its own recording, you should make it a point to find out well in advance of any hearings just whom you must see and how much you must pay to get an official, certified copy of the transcripts if you need them.

From time-to-time people are complaining the court would not allow them to bring their own court reporter to hearings or trial, that the court recorded proceedings electronically, and that the judge would not allow them to obtain a printed copy of same after the fact.

If there is any right of the people to have access to justice in our courts, it is the right of the people to make a record of what takes place in court. *Denial of that record is a denial of due process in violation of the Fourth Amendment of the United States Constitution and this is something that should be reported to either the governing BAR association as a complaint against the judge. Filing a complaint against a judge is a serious step.*

Refusal to pay the costs for obtaining written records of a court's proceedings, on the other hand, is downright inexcusable. You will have to pay for those records.

Attorney's Fees

In most circumstances you'll encounter in court, a party is only entitled to recover the fees he pays his lawyer if a particular statute provides for the recovery of attorney's fees, such as in some states where an action is brought to recover money damages for the defendant's theft of plaintiff's property or if the underlying case is based on a contract or other instrument wherein the parties agreed that the prevailing party would have a right to recover its attorney's fees.

An exception to this rule that applies in all jurisdictions we know of, and applies at both the trial level and in the appellate courts, is where a party has taken a position on the law or facts that is entirely baseless and without merit of any kind.

Occasionally, the very rich or very corrupt will file an action just to harass an innocent person. At other times a party who has no business in court proceeds on some stupid assumption that no person in his right mind would even consider. If a party's legal argument is not in any way supported by existing law or even remotely likely to obtain a decision by the court that would change the law, or if the existing facts are so far from supporting the party's position that the case had no hope from the outset, and if the party knew or should have known these circumstances existed before seeking the court's relief, a judgment may be obtained to recover the aggrieved party's reasonable attorney's fees as well as his costs.

If you own property that is not exempt from levy, have money in the bank that can be seized to pay a judgment for fees, or enjoy a salaried income that exceeds the poverty level, know this: You may be responsible for your opponent's legal costs and attorney's fees if:

- A statute provides for an award of fees according to the issues being tried.
- A contract or other instrument signed by you agreed even if in the small print that

the prevailing party could recover judgment for his costs and fees.

• Your case is so frivolous in terms of the facts or law that there is no reasonable chance of prevailing on the merits.

In the typical lawsuit, this will amount to many tens of thousands of dollars. In an appeal, it could amount to several hundred thousand dollars.

Word to the wise. Count the cost before you begin.

Pro Se Entitlement to Recover Attorney's Fees

The answer here is simple. By definition, the *pro se* is without an attorney so he has no attorney's fees to charge against the other party.

Even if the *pro se* is a licensed member of the bar himself, the courts are unlikely to award him a money judgment for the time he spends prosecuting his own case. It just isn't done.

And the *pro se* who isn't a lawyer has no chance at all of recovering attorney's fees, since the argument resolves itself.

Many try to recover their lost wages or the value of their time that they charge to do whatever it is they do for a living, but this too will fail unless the other side is devoid of all legal understanding.

Pro se litigants simply cannot recover fees for their own time. They may receive a favorable judgment to recover their costs including but not limited to filing fees and the costs necessarily incurred for court reporters and transcripts, but they will only rarely succeed in convincing a judge trial or appellate that they should be paid for their time.

Deadlines

There is no grace period in an appellate court. If a deadline says a paper must be filed this coming Friday, then the paper must be in the clerk's office before the end of the business day on Friday. Monday is too late. One minute after the close of business is too late.

The meaning of deadline is never more definite than in appellate proceedings where one second too late is, well, too late.

The best advice to lawyers and *pro se* litigants alike is to file early.

If a paper is due on Friday, get it to the clerk on Thursday or even sooner.

Dropping it in a mail slot on time means nothing. *Mailed is not filed*. When a paper is due to be filed before a certain deadline, it must be filed before that time, not after, not even one second late. Faxed may be considered filed buy you should check and make sure before just sending this to the Court Clerk.

Late is the same as not at all.

In the lower court there are grace periods. In most jurisdictions, the courts take a very serious view of the people's right to their day in court. If someone misses the date to file a paper in response to an initial pleading in the lower court, the clerk may enter a default against that person but, if that person can convince the court that his filing late was the result of excusable neglect and that he has a reasonable chance of winning the case if given the chance to continue, the courts will generally give him another shot.

Indeed, many appellate courts have held it is an abuse of the trial court's discretion to deny him his day in court if he can show those two elements are present.

Not so in appellate proceedings. If a thing is due, it is due. If it is not in on time, it is dead and so is your case. And dead means dead. No reprieve.

If you miss a deadline, you're dead. That's why they call them deadlines.

If you fail to file your initial *Notice of Appeal* on or before the due date, you are said to have waived your right to appeal. Waived it. Gave it up. Abandoned your legal right.

Time is your enemy and will continue to be your enemy until the appellate battle is finally concluded.

The ticking clock should haunt you every step of the way, because you cannot, and I do mean absolutely cannot, be late not ever.

Computation of Time

There are general rules for computing the available time between the triggering event e.g., the entry of an unwanted order and the filing of some paper e.g., a *Notice of Appeal, Motion for Rehearing,* etc. Always consult your local rules for the exact timetables and rules for computation of time.

Most jurisdictions follow the federal rules.

At the time of this writing, *Rule 6 of the Federal Rules of Civil Procedure* set out the following rules for timely filing:

> 1. The date of the triggering event is not counted.
>
> 2. If the due date falls on a weekend or legal holiday, filing is due on the following regular business day. *NOTICE: Never rely on this rule. If the due date falls on a weekend or legal holiday, file before such date to avoid the anticipated hassle of being required to argue the rule with the opposition's opportunistic lawyers who will try everything, they can to harass you, even when they know they are wrong*.
>
> 3. Legal holidays include the following: New Years Day; Birthday of Martin Luther King, Jr.; Washington's Birthday; Memorial Day; Independence Day; Labor Day; Columbus Day; Veterans Day; Thanksgiving Day; Christmas Day; and any other day appointed as a holiday by the President or Congress of the United States or by the state in which the court is situate.
>
> 4. When the period of time is less than 11 days meaning 10 days or less, do not count weekends or legal holidays. *See the following rule:*
>
> 5. If the office of the clerk in which a paper is due to be filed is closed on the last day in which a paper is due to be filed because of inclement weather or other preventing condition, or the office of the clerk is inaccessible due to inclement weather or other preventing condition, then the due date is the next day on which the office is open and accessible. Inaccessible does not mean inconvenient. It means the office cannot be reached through the exercise of reasonable diligence.

If there is anything whatever to be taken from these rules it is that filing deadlines are best met by not waiting until the last possible day.

Filing is putting paper into the hands of the clerk of court.

Filing the same thing as service. In brief, service is putting paper into the hands of a party or witness, not the clerk.

Here's a tip that might help you later. When it's critically important that a paper be filed with the clerk whether it's time-critical or not hand-carry it to the courthouse, file it in person.

Do not mail it. Do not send your secretary. Do not hire a courier. Do not trust anyone to take that paper to the clerk. Take it yourself.

Walk right up to the clerk's counter, ask for the filing clerk, hand the filing clerk the paper and say, *"Please file this."*

Then, before turning to walk away, politely ask the clerk to make you a copy and time-stamp it for you. Do not leave the clerk's office until you have that time-stamped copy in your hands. The clerk may charge you a couple of dollars or so, but this is cheap insurance to protect you against the always anticipated high-jinks of lawyers on the other side who are usually looking for every little sneaky chance they can find to attack you for even the slightest misstep on your part.

Clerks are supposed to time-stamp all the papers you file anyway.

But, just in case the clerk is lazy, new to the job, or God forbid on the take, get a time-stamped copy bearing the clerk's signature so you can prove if the lawyer on the other side tries to pull a fast one that the filing was made on such-and-such date at such-and-such time.

Filing is not mailing. Mailing is not filing. Never rely on the post office. If you mail, use Certified Mail with Return Receipt and if you know how, the Firm Mailing Book for Accountable Mail.

Especially when dealing with appellate deadlines, when failure to file on time is lethal to your cause, you cannot afford to have a single paper lost by the post office or delayed in transit. It may present some temporary hardship to jump in the car and drive a few miles to the courthouse to file papers in person and it may cost you a few dollars to have copies time-stamped and signed by the clerk but, in the long run, the extra effort will prevent unwanted legal heartaches and expensive lost opportunities.

As all good lawyers say in the small print, Time is of the essence, and nowhere is this truer than in the appellate arena.

Notice of Appeal

In most jurisdictions the appellate process begins when appellant files an original of his *Notice of Appeal* along with one or more copies and the filing fee if required.

The *Notice of Appeal* is filed with the trial court clerk. The *Notice of Appeal* is typically one page.

It takes but a few minutes to prepare, but it must be filed before the deadline for filing or the appellant's right to appeal forever disappears.

The *Notice of Appeal* should be filed with at least two conformed or certified copies of the order being appealed.

And, of course, there's a filing fee to be paid. Check the official rules to see if more is required in your jurisdiction. Here's an example of an appeal:

IN THE NINETEENTH JUDICIAL CIRCUIT COURT
IN AND FOR SUNSHINE COUNTY, FLORIDA

File No. 12-1234

DONALD TRUMP,
Plaintiff/Appellee,

v.

JOE XI JING PING,
Defendant/Appellant.
_____/

NOTICE OF APPEAL

NOTICE IS GIVEN that JOE XI JING PING, defendant/appellant, appeals to the Fourth District Court of Appeal the Order of this court rendered 10 July 2012.

The nature of the order is a final order granting judgment to plaintiff with costs.

_____
JOE XI JING PING
123 Main Street
Anywhere City, Florida 33333
813-555-1212

Deadline: Entered or Rendered

The deadline for filing the *Notice of Appeal* is very strict. In most jurisdictions it's a set number of days after the order complained of is filed.

This is not the moment when the judge states his order verbally. Nor is it the moment when the judge puts his pen to paper and signs the order.

The appellate deadline clock starts ticking when the signed order is filed in the court record, i.e., goes on the docket.

In some jurisdictions including federal courts as of this writing when a signed order is filed in the record it is said to be entered, and the deadline clock starts ticking from the date of entry.

In other jurisdictions when a signed order is filed in the record it is said to be rendered, and the deadline clock starts ticking from date of rendition.

No matter what term is used, the deadline clock starts ticking when the signed order is filed in the court record.

If the deadline clock runs out before appellant files his *Notice of Appeal* mailing doesn't count the consequence is fatal. The appellant's right to appeal expires. It doesn't matter how valid appellant's cause was or how dreadfully his inability to appeal impacts the health and welfare of his family. The appellate court lacks jurisdiction to consider an appeal if the *Notice of Appeal* is filed late.

File early.

Designating the Record

The Trial Court Clerk's Job

Once a *Notice of Appeal* is filed, the trial court clerk should assemble pertinent documents in the trial court's record transcripts, pleadings, exhibits, etc. and promptly forward these to the appellate court with a copy of the *Notice of Appeal*.

Though the trial court clerk should do this automatically when a *Notice of Appeal* is filed, you should make certain this gets done correctly and in a timely manner.

Do not leave this vital job to chance.

Go in-person to the trial court clerk's office as soon as possible after the *Notice of Appeal* is filed to ensure everything you need from the record is included and that you have a detailed list of all that's being forwarded to the appellate court by the clerk's office.

Assume nothing.

If you file your *Notice of Appeal* in person at the clerk's office, you can begin this essential process with no delay and get your list of documents with little trouble.

Be exceedingly polite with deputy clerks.

Most clerks, trial and appellate court, are pleasant and anxious to help *pro se* filers.

But people demanding attitudes or chips on their shoulder shouldn't expect much help.

If you bump into an obstinate counter attendant insisting you must be a licensed attorney to get help or giving any other reason why you cannot inquire into the process of forwarding the record on appeal ask to see the Clerk immediately.

Clerk's offices are manned by deputy clerks, who work for the Clerk who is an elected official in many jurisdictions. If you can't get anywhere with the deputies, *ask to see the Clerk.*

If that doesn't work, demand to see the Clerk.

If all necessary documents from the record are not forwarded properly, you'll be fighting your appeal with one hand tied behind your back.

Appellant's Job

There's only a small window of time varies with jurisdictions for appellant to ensure that everything in the trial court record necessary to win on appeal is forwarded to the appellate court. This may be as short as 10 days or, in some jurisdictions, perhaps even less.

If appellant needs documents the clerk's office has not designated to be forwarded, he must direct the clerk's office to include such additional documents to be transmitted.

If there are documents that are not yet in the trial court record e.g., deposition, hearing, or trial transcripts and exhibits it is the appellant's job to see that these are designated also and that they are timely provided to the trial court clerk for forwarding.

Appellant must obtain any transcripts he needs from the court reporter who recorded the relevant proceedings, paying for those transcripts as necessary. This is part of appellant's cost and is recoverable if he wins on appeal and timely moves for an award of such costs to be taxed against the appellee. And he must direct the clerk's office to include these with the record being forwarded or to ensure that they are forwarded to the appellate court in some other method acceptable according to the rules.

Failure to ensure that a complete record is available to the appellate justices is fatal to appellant's cause. No take-backs or second-chances are allowed.

Appellee's Job

Appellee then has another small window of time varies with jurisdiction to designate any documents or transcripts of proceedings that were not designated by appellant but are needed by the appellee to make his arguments on appeal.

Once the record is complete, the next job is for the parties to brief their arguments.

Did the trial just make a materially harmful error or not?

The Briefs in Brief

There are only three 3 possible briefs and two are optional.

The three briefs are:

1. Appellant's *Initial Brief*.
2. Appellee's *Answer Brief* optional but highly recommended.
3. Appellant's *Reply Brief* optional but see below.

For an appeal to be heard and ruled on, only the appellant's *Initial Brief* is required.

The *Answer Brief* and *Reply Brief* are optional.

Appellant's Initial Brief

As stated above, the first brief filed is the appellant's *Initial Brief*.

It is, of course, filed by the party who believes the trial judge made a materially harmful error the appellate court should investigate and correct.

The *Initial Brief* tells the appellate justices what the trial judge did, why it was wrong citing legal authorities to make his point, instead of arguing his own opinions which, in this axe-fight business, are worth absolutely nothing, and what the appellate justices should do so justice may prevail.

Format

The format for an Initial Brief as with the other two is somewhat strict, but the sample briefs that follow will simplify the process.

The reason you want to follow the recommended format is to make things easy for the appellate justices to find your strongest points, get through your legal arguments and citations without having to flip pages, and compare your position with that of your opponent by placing the briefs side-by-side so to speak.

Theoretically, you could file an appellate brief in the form of a personal letter. So long as your letter contained the essentials to show the trial judge committed a materially harmful error contrary to law, justice, and the American Way, they might, if they were in a particularly good mood, read your letter and, possibly, rule favorably. I strongly urge you not to do this.

Your opponent will follow proper format. Your opponent will make it easy for the appellate justices to spot his arguments and citations to authorities without difficulty. The justices will see quickly what your opponent says about the lower court proceedings and why your opponent says the trial judge's order should be left to stand.

Your ridiculous “I hope this letter finds you well…” letter might be the subject of back-room laughter for a while, but soon it's like to be forgotten, and you will wish you'd followed recommended format.

Appellate justices are extremely busy people. They don't have time to muddle through disorganized documents.

Imagine waking before dawn, reading briefs with your breakfast cereal instead of enjoying a few pleasant moments with the morning paper's sports and funnies. Imagine reading briefs all morning. Imagine reading briefs all afternoon. Imagine the only break you have from reading briefs is reading published appellate opinions cited by opposing parties seeking your favorable confirmation of their arguments.

Would you want to wander dolefully through some novelist version or speed through a well-structured presentation that sets out facts, argument, and citations in a format you're familiar with - a format that makes your life simpler?

If your brief is drafted according to the prescribed format, the justices see at a glance what your issues are, what your arguments are, what legal authorities support you, and hopefully why they should rule in your favor.

If your brief reads like a letter to your Aunt Ada, rambling about this and that, never quite getting to the point, spattering citations across multiple pages with no rhyme or reason, using run-on sentences like this one that never seems to come to the point or tell you anything you might possibly remember when you finally get to the period that is somewhere down below at the end of the paragraph, where you might finally manage to take a weary reader if you work hard at it, putting in a few dozen unnecessary stops along the way to examine a wide variety of topics and considerations that poke and prod at the problem like a blind farmer trying to find his favorite milk cow in the dark, you'll not likely curry favor from those over-worked souls who might otherwise have assisted you in life by granting the appellate relief you could have gotten if you'd only been kind enough to make your writing simple, succinct, and according to the specified format.

Did you get that? You literally just read an extremely long run-on sentence.

Follow the format shown in the samples that follow this section.

Format for the *Initial Brief* applies also to the *Answer Brief* and *Reply Brief*.

The Initial Brief is typically laid out like this:

1. Caption
2. Table of Contents
3. Table of Authorities
4. Statement of Jurisdiction
5. Statement of the Issues
6. Statement of the Case
7. Standard of Review
8. Summary of the Argument
9. Argument and Citations
10. Conclusion

To summarize, the list above will serve you well.

Additional sections may be required by certain jurisdictions, e.g., Cover Page, Certificate of Font Compliance, Certificate of Service, etc. Refer to the official rules for your jurisdiction to see what else may be required.

Drafting the Initial Brief

Appellant has a relatively large window of time after filing his *Notice of Appeal* to draft his *Initial Brief*. Again, refer to the official rules for deadlines.

During this time, he should carefully review the record to make himself intimately familiar with those portions of the record that pertain to his particular arguments but also those portions he anticipates the appellee may dwell upon.

He should complete any unfinished research to find additional legal authorities he can cite in support of his arguments.

And he should write, re-write, and re-write once again until his brief is perfect.

Misspellings and bad grammar telegraph to the justices that the writer either isn't very smart or lacks respect for the tribunal, either way working against you. In these days of spell-checking, grammar-checking word-processors, there really is no excuse.

Similarly, improperly formed citations to legal authorities conveys sloppiness and disrespect for the appellate tribunal.

Unless appellee files an *Answer Brief* to which appellant wishes to file a *Reply Brief* in rebuttal, or either party or the appellate court on its own initiative moves for oral argument, the appellant's work is finished.

There's nothing more for appellant to do but wait.

Appellee's Answer Brief

Though appellee is not required to file an Answer Brief, wise appellees do religiously.

Even if appellee believes appellant's Initial Brief is so poorly drafted and so utterly unsupported by legal authorities that it requires no rebuttal in response, an Answer Brief should always be timely-filed.

Even if appellant hasn't the proverbial snowball's chance of winning, an Answer Brief should be filed.

Tell why appellant is full of yada-hoo hoo.

- Show how appellant's brief mischaracterizes cited legal authorities,
- Cite other authorities to reveal flaws in appellant's legal reasoning,
- Cite other authorities to show the trial judge made no materially harmful error,
- Move the appellate court to affirm the trial court order.

The only difference in form between the Answer Brief and Initial Brief is that a Statement of Jurisdiction is not needed, since the appellant already took care of it. If appellee believes the appellate court lacks jurisdiction, he should file a Motion to Dismiss for Lack of Jurisdiction. Motions are covered later in this class.

Appellant's Reply Brief

Appellant's Reply Brief is also optional and limited in scope. If appellee's Answer Brief raises new issues not raised by appellant's Initial Brief; appellant should always file a Reply Brief rebutting the newly-raised issues.

The Reply Brief may only address issues raised for the first time by the appellee's Answer Brief. Appellant may not use his Reply Brief to re-argue or amplify issues already raised by him in his Initial Brief.

A Reply Brief may only be used to rebut new issues raised for the first time in appellee's Answer Brief.

Appellee is not permitted to file a response to appellant's Reply Brief.

This is like the opportunity you have to re-examine a direct witness at a hearing, trial, or deposition. Once you use direct examination to question your own witness, the other side is permitted to cross-examine your witness about facts and issues raised by you on direct.

If, as is usually the case, the cross-examiner ventures into new territory with the witness, digging into facts or issues you did not explore during your direct examination, the court will allow you to redirect the witness, inquiring into those newly raised facts and issues brought before the court for the first time on cross.

During redirect as with appellant's Reply Brief you must constrain your questions to facts and issues raised for the first time on cross-examination.

If you find upon reflection you omitted some important issue during direct examination of a witness, you may not go back and try to introduce for the first time that forgotten point during redirect.

Similarly, you cannot use redirect to re-emphasize points made on direct. You had your chance to make those points when you first began to question the witness.

The purpose for redirect like the purpose for appellant's Reply Brief is to rebut only those arguments raised for the first time by your opponent, i.e., arguments that were not part of your initial bite at the apple, and only those arguments.

The Sample Briefs

The following sample briefs are excerpted from actual appellate briefs filed in the United States District Court for the 11th Circuit.

NOTE: These samples are provided solely for instructional purposes to show you general format and syntax for arguments on appeal. They are offered as a general guide. Refer to official rules for current format requirements.

Substantial portions of these samples were omitted to save space, including many citations, footnotes, and much of the argument and statements of fact.

The actual briefs from which these samples are taken listed dozens of citations, ran to some 30 pages, and made multiple arguments not included in the samples.

All but two of the appellant's six arguments were removed to save space.

Names are changed, arguments and citations omitted, but enough remains to provide you a clear idea what you must do when it's your turn to appeal or defend an appeal.

Page numbers have been replaced with x, since the samples are presented on a web page here with no provision for page numbering. Pages of actual briefs are numbered, and entries to Tables of Contents referenced accordingly.

The original briefs used copious footnotes as your briefs may also, however they too are omitted here to save space.

The general layout of these shortened samples will guide you to draft your own briefs and

present your own legal arguments and supporting citations to legal authorities.

Appellant's Initial Brief

The following abbreviated, heavily-edited sample Initial Brief is offered solely to guide you with format and show you how a clever appellant argues persuasively to win on appeal.

This brief won for appellant. Learn from it.

United States Court of Appeals, Eleventh Circuit.

Charles Jones, Plaintiff-Appellant,

v.

XYZ Transportation, Inc., Defendant-Appellee.

No. 12-12345
February 30, 2012

Appeal from U.S. District Court for the Northern District of Georgia, Atlanta Division

INITIAL BRIEF

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INTRODUCTION

Plaintiff's Initial Brief demonstrated how the Trial Court committed prejudicial error that demands reversal and a new trial. In contrast, Defendant's Answer Brief fails to rebut Plaintiff's arguments and misstates the relevant facts and law.

STATEMENT OF JURISDICTION

Jurisdiction is pursuant to 28 U.S.C. § 1291 because this appeal is from a final order and judgment that disposes of all parties' claims.

STATEMENT OF THE ISSUES

1. Was it error for the District Court to admit a video showing testing of subject railcar and a recreation of the event using that car without requiring a proper evidentiary foundation?

2. Was it error for the District Court to refuse to instruct the jury that reasonable care is not a defense to a claim premised on negligence per se?

STATEMENT OF THE CASE

This is an appeal from a jury verdict in favor of the Defendant/Appellee. Doc 553

Appellant filed suit claiming a defective handbrake on a railroad car allowed it to become a runaway and cause him grave injury. Doc 1 pg. 3-4

Appellee called neither of its identified experts at trial. Instead, over Appellant's objection, Appellee played a videotape referred to as the Fox Video. T 732

Appellant filed a Motion in Limine to prohibit display of the Fox Video until a proper foundation was provided. Doc 471 The District Court denied this motion.

Over timely and detailed objections, Appellee played the Fox Video during opening statement T 133, cross examination of Appellant's witnesses T 302, T 418, direct examination of its own witness T 813, and in its closing argument. T 931

Appellant's objections to admission of the Fox Video on the grounds that XYZ had not laid a proper foundation, were overruled. T 131, T 298-299, T 368

The District Court refused to instruct the jury as to the legal effect of reasonable care as a defense. Doc 523, Appellant's Charges #18 and 19; T-952

On October 15, 2012 the jury returned a verdict for the Appellee. Doc 553

STATEMENT OF THE FACTS

This case is about a defective brake system on a railcar XYZ 1234, which was transported, inspected and maintained by Appellee XYZ Transportation.

The crucial question of fact was whether Appellee delivered XYZ 1234 with a braking system that was capable of holding the railcar in place.

XYZ 1234 is a railcar that can be secured via its handbrake or air brake. T 255-227, T 261

A handbrake is like a parking brake on a car. T 333 It has a vertical wheel that, when rotated, tightens the handbrake chain is connected to a bell crank. T 226 When the chain is tightened, the bell crank is pulled upwards, increasing leverage and transferring force to the brake rigging. T 226-227 If the bell crank contacts the sill of the car body, however, the sill of the car acts like a brick under a car's brake pedal, preventing movement of the bell crank to apply proper brake forces to the wheels. T 239

When XYZ 1234 was delivered, the bell crank had been hitting the car sill for a long time. This condition was clearly visible after the event, also. T 186

Appellant was employed by Cereal Company and occasionally moved railcars. T 580

On June 5 Appellant had two tasks - move XYZ 1234 into the building at Cereal Company and move an empty car down the track to be picked up. T 313, T 315

He moved XYZ 1234 from track 21 to track 22 to get it out of the way with the intent to return to it so he could move it again into the building. T 320

Sometime between 30 and 45 minutes later, while Appellant was working downhill from XYZ 1234, setting the handbrake on the empty railcar, XYZ 1234 rolled free, crashed into two other railcars, and all three railcars ran over Appellant. T 323-324

If either the handbrake had held the car, it would not have rolled free. T 261, T 269

As a result, Appellant suffered numerous injuries, including amputation of both legs. T 207-210.

Expert testimony established that Appellee delivered XYZ 1234 with unsafe brakes on June 3. T 160, T 256.

Cereal Company took many photographs of the rail equipment and incident scene on the day of, and day after, the incident. T 350 One of the pictures taken the day after the event clearly shows the defect of which Appellant complained - the bell crank hitting the end sill of the car. T 352; Exhibits 205 and 16

As delivered, with the bell crank not properly adjusted, the handbrake was not in compliance with standards of applicable safety statutes and regulations, making the car unsafe. T 256 Because of these failures, the handbrake was not capable of holding the car in place. T 256

While Cereal Company's photographs show the bell crank hitting the bottom of the sill of the railcar T-264, the Fox Video created later does not. Instead, even when a tool is used to tighten the handbrake wheel with huge mechanical advantage, there is a gap between the end sill of the car and the bell crank in the Fox Video. T 440

Prior to creation of the Fox Video, the bell crank could be caused to foul against the sill of the car with the force of only one hand on the wheel, but as shown on the Fox Video there is a gap, even with handbrake tightened with considerable force. T 442.

SCOPE OF REVIEW FOR EACH CONTENTION

The standard of review for issue number 1 relating to the admission of evidence is abuse of discretion. McKnight v. Johnson Controls, Inc., 36 F.3d 1396, 1403 8th Cir. 1994.

The standard of review for error number 2 relating to the propriety of jury instruction, is de novo as such errors are errors of law. U.S. v. Campa, 529 F.3d 980, 992, 11th Cir. 2008.

SUMMARY OF THE ARGUMENT

First, admission of the Fox Video was error because there was no foundation for its admission. The expert who created the video did not testify; instead, a lay witness who admitted both general lack of railroad handbrake expertise and particular lack of knowledge as to what the Fox Video demonstrated and how the experiment was set up, was used to lay the foundation. The admission of the Fox Video was harmful because it was not only a powerful visual image, it was the Appellee's only evidence that the brakes would have held XYZ 1234 in place as required by statute and standards of reasonable care.

Second, the District Court should have instructed the jury that reasonable care is not a defense to Appellant's negligence per se claims. This was harmful error because, in absence of this instruction, the jury was free to excuse the violations if it determined they occurred despite Appellee's exercise of reasonable care.

These errors denied Appellant the right to a fair trial.

ARGUMENT AND CITATIONS

The District Court's evidentiary rulings and jury instructions harmed Appellant by admitting illegal evidence and by failing to give the jury instruction it needed to apply the law to the facts. This resulted in a verdict for Appellee although the properly admitted evidence demanded a verdict for Appellant.

I. The District Court erred by admitting into evidence the Fox Video, showing experimental testing and recreations created by a non-testifying expert without requiring a proper evidentiary foundation.

A. The Fox Video is a Recreation.

Without a witness to explain what was done during the Fox Video and with no narration it is impossible to tell exactly what the Fox Video demonstrates.

The video was used by Appellee to argue that had Appellant applied the handbrake, the car would not have rolled away from where he left it, and instead, it would have performed just like the it did in the Fox Video. T 923 As summarized by defense counsel in his closing: seven different times that brake was applied, released and applied again proving that the handbrake was efficient. T 923

The admission of the Fox Video allowed Appellee to contradict Appellant's experts' opinions that the handbrake was incapable of holding the car, and to rebut Appellant's proof that he applied the handbrake that did not hold the car as it should.

Because of the likelihood of confusion caused by the admission of this test that appears to recreate the actual event, it was necessary to have the testimony of the person conducting the test for it to be admitted. Although the District Court recognized the standard to be applied, it nevertheless admitted the evidence without requiring XYZ to put on testimony of the person who conducted the test. The District Court admitted the Fox Video as if every material aspect of the car, handbrake, air brake and track were identical at the time of the test and recreation, when in fact there was no proof to this effect at all.

For the Fox Video to have been properly admitted, it is virtually axiomatic that Mr. Fox's testimony was necessary to explain what he did and why, to lay a proper foundation for admission. In the absence of this threshold showing, the evidence should have been excluded. Fireman's Fund Ins. Co. v Canon U.S.A., Inc., 394 F.3d 1054, 1058-1059 8th Cir. 2005 applying the reliability standard of Daubert and Kumho Tire to exclude a test of a heating element, which allegedly caused fire.

Federal Rules of Evidence §702 requires any expert evidence, whether testimonial or demonstrative, to be based upon sufficient facts or data. Specifically, the proponent of any scientific evidence must provide sufficient foundation that it can support a finding that 'the matter in question is what its proponent claims' . . . the argument that allowing the demonstrative exhibit and the supporting affidavits into evidence here, the testimony of a witness who had never seen the video before would constitute the admission of unreliable, undisclosed and unsupported expert testimony raises a concern. Tritek Technologies, Inc. v. U.S., 67 Fed. Ct. 727, 734 Fed. Ct. 2005.

It was the District Court's job to consider the reliability of the evidence in its role as gatekeeper. Because the parties were prohibited from seeking the opinions, conclusions or testimony from Mr. Fox, Doc. #304 pg. 2, there was no way for the District Court to exercise its discretion to determine if Appellee had laid the proper foundation for the recreation.

That the District Court is generally given broad discretion in evidentiary rulings does not mean that the district court may do whatever pleases it. McKnight v. Johnson Controls, Inc., 36 F.3d 1396, 1403.

The phrase discretion means instead that the court has a range of choice, and that its decision will not be disturbed as long as it stays within that range and is not influenced by any mistake of law. Kern v. TXO Prod. Corp., 738 F.2d 968, 970 8th Cir. 1984.

Errors in the District Court's judgment started when, without viewing the video in-camera before trial, it compelled a non-party to produce its work product and at the same time prohibited the parties from interrogating the creator of the video or even hearing the audio.

When the video was admitted for presentation to the jury without a foundation, the District Court abused its discretion and provided Appellee with an unfair win-win situation.

As a result, there is no judicial discretion for this Court to respect.

Once the jury was permitted to see the video, there was no way to put the cat back in the bag.

It was error to completely fail to serve as gate-keeper and then require Appellant to challenge the evidence after it was admitted in an effort to correct damage already done. U.S. v. Gaskell, 985 F.2d 1056, 1062 11th Cir. 1993.

It was abuse of discretion to allow unlimited use of the video; it should not have been used in the opening and closing and to cross-examine witnesses. More importantly, it should not have gone out with the jury as doing so created a significant risk that too much emphasis was placed on it. Crossley by Crossley v. General Motors Corp., 33 F.3d 818, 822 7th Cir. 1994. Hoping for just that, Counsel for Appellee reminded the jury that you're going to have it back there with you. T 923

As many courts have noted, it is hard to overcome a visual impression. Whatever counsel or experts said to the jury about differing circumstances, the drama of the filmed recreation could easily overcome the logic of the distinctions. Fusco v. General Motors Corp., 11 F.3d 259, 264 1st Cir. 1993 affirming a district court's exclusion of a video demonstration because the demonstration was rife with the risk of misunderstanding.

There is a judicially-perceived danger that the recording is unduly persuasive because it may cause the jury to confuse the filmed event with the actual one in litigation. McCormick on Evidence, § 217.

A good reconstruction is powerful evidence - the litigator's equivalent of a roundhouse right - because it graphically shows the jury the exact manner in which the expert has testified the accident happened. Karen Martin Campbell, Roll Tape - Admissibility of Videotape Evidence in the Courtroom, 26 U. Mem. L. Rev. 1445, 1455 1996.

It is even more influential when the video evidence is used in lieu of expert testimony, in order to substantiate what the lawyer told the jury happened in a case, as here.

As the court noted in De Camp v. U.S., 10 F.2d 984, 985 C.A.D.C. 1926, a moving picture can be quite compelling and difficult to overcome. citing 2 Wigmore on Evidence, §798

II. Failure to instruct the jury that reasonable care is not a defense to a claim of negligence per se was error.

Violation of a statute or regulation intended to protect people like the Appellant from injury is negligence per se,, even without a showing of a failure to exercise reasonable care. McMichael v. Robinson, 162 Ga. App. 67, 69, 290 S.E.2d 168, 170 1982; Grubbs, v Duskin, 118 Ga. App. 82, 162 S.E.2d 762 1968.

Accordingly, the District Court should have given either Appellant's requested jury charge that it was not necessary for Appellee to be careless to be liable under negligence per se. This was particularly true as to violation of federal laws and regulations intended to ensure the proper operation of Safety Appliances on railroad cars. Myers v. Reading Co., 331 U.S. 477, 67 S.Ct. 1334, 91 L.Ed 1615 1947; Didinger v. Pennsylvania R. Co., 39 F.2d 798 6th Cir. 1930.

In the absence of this instructions, the jury was left to treat negligence per se as if reasonable care could be a defense.

The District Court instructed the jury that negligence may consist either in doing something that a reasonably careful person would not do under like circumstances or failing to do something a reasonably careful person would do under like circumstances. T 943

Accordingly, it was harmful error to Appellant for the District Court to refuse to instruct the jury that reasonable care is no defense to imposition of liability per se based on violation of a statute or regulation.

CONCLUSION

The District Court's improper admissions of evidence were abuses of discretion and irreparably harmed Appellant.

The District Court's failure to properly instruct the jury was harmful error of law, preventing the jury from applying the correct law to the facts.

As a result, Appellant was denied a fair trial and the District Court's judgment should be reversed and this matter returned to the District Court for retrial.

Charles Jones, Plaintiff/Appellant

Appellee's Answer Brief

Appellee's optional Answer Brief rebuts appellant's Initial Brief.

The format is essentially the same.

As with the sample Initial Brief, the sample appellee's Answer Brief that follows has been heavily edited to save room while retaining the educational value you need.

Read analytically as the Eleventh Circuit justices did when they rejected this argument.

United States Court of Appeals, Eleventh Circuit.

Charles Jones, Plaintiff/Appellant,

v.

XYZ Transportation, Inc., Defendant/Appellee.

No. 12-1234
March 8, 2012

Appeal from U.S. District Court for the Northern District of Georgia, Atlanta Division

Answer Brief

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STATEMENT OF THE ISSUES

1. Whether the District Court properly exercised its discretion by admitting the video recreation of the handbrake failure at trial.

2. Whether the District Court properly refused to give jury instructions that did not correctly state the law when the court's instruction as given was sufficient to instruct the jury on the issues in the case.

3. Whether Plaintiff demonstrated any harm as a result of the Court's rulings in light of the substantial evidence supporting the jury's verdict.

STATEMENT OF THE CASE

This case, contrary to assertions of Plaintiff/Appellant in his brief, is about a Cereal Company's employee taking shortcuts in railcar switching operations and his failure to set handbrakes on those railcars, resulting in his injuries.

Plaintiff makes a number of misrepresentations and omissions regarding the record evidence in his Statement of Facts Brief pp. 7-15.

XYZ will address the majority of these issues in its response to Plaintiff's assertions of error by the trial court, however, XYZ must briefly respond to certain statements in Plaintiff's brief in order to provide a meaningful factual background for review.

1. XYZ Presented Evidence to Support a Jury Finding that Plaintiff Did Not Set the Railcar Handbrake.

Plaintiff admitted he has no memory of setting the handbrake on the day of the accident T 622 and no witness testified that they saw Plaintiff set the handbrake. Moreover, testimony at trial provided ample evidence from which a jury could find that Plaintiff never set or even touched the handbrake wheel on the railcar.

It is undisputed that at the time Plaintiff claims to have tied the handbrake on XYZ 1234, the sole handbrake wheel on that railcar was visible to Plaintiff's co-worker Smith who testified he would have seen Plaintiff tie the handbrake if Plaintiff had done so but that he never saw Plaintiff touch the handbrake T 340.

2. XYZ Presented Evidence to Support a Jury Finding That No Defect Existed in The Handbrake at The Time of The Subject Accident.

The only evidence that Plaintiff presented at trial as to the existence of a defect in the railcar handbrake at the time of the accident is a photograph, identified at trial as Plaintiff's Exhibit 205,taken by an unidentified Cereal Company employee during the re-railing of XYZ 1234. This photograph shows the bell crank of the handbrake in close proximity to the railcar body, or possibly contacting the railcar body 412, 829-30.

Though Plaintiff asserted that when the picture was taken, the railcar brake rigging was in the same condition as it was before the car rolled away Brief p. 10, Plaintiff failed to disclose to this

Court that during the subject collision and derailment, the railcar's R2 brake beam came out of its guide T 809-10. Plaintiff's own expert acknowledged at trial that the bell crank striking the end sill as purportedly depicted in Exhibit 205 could be explained if the photograph was taken while the R2 brake beam was out of guide T 278.

3. XYZ Presented Evidence That Only Plaintiff's Retained Expert Was Able to Produce Contact Between the Bell Crank and End Sill.

Plaintiffs' expert testified that he observed the bell crank touching the end sill during his August 24, 2005 inspection at Cereal Company T 254, however, on cross-examination he acknowledged that his detailed notes and diagram of the brake system did not reference or depict the bell crank touching the end sill T 290.

STANDARD OF REVIEW

This Court reviews a jury's verdict to determine whether reasonable and impartial minds could reach the conclusion the jury expressed in its verdict. Parker v. Scrap Metal Processors, Inc., 386 F.3d 993, 1010 11th Cir. 2004. The verdict must stand unless there is no substantial evidence to support it. Id.

It is the unique function of the district court to determine the admissibility of evidence; admission of evidence is committed to the sound discretion of the trial court. Accordingly, the decision of a district court to admit relevant evidence will not be disturbed by this court absent an abuse of discretion. United States v. Cole, 755 F.2d 748, 766 11th Cir. 1985. The district court has broad discretion in determining whether to allow a recording to be played before the jury.

The Court applies a deferential standard of review to a district court's jury instructions. If the instructions accurately reflect the law, the trial judge is given wide discretion as to the style and wording. Wright v. XYZ Transport. Inc., 375 F.3d 1252, 1256 11th Cir. 2004. The Court will not disturb a jury's verdict unless the charge, taken as a whole, is erroneous and prejudicial. Mosher v. Speedstar Div. of AMCA Int'l, 979 F.2d 823, 824 11th Cir. 1992.

SUMMARY OF THE ARGUMENT

Plaintiff cites as error the trial court's ruling admitting a video of the subject railcar's handbrake being applied and released at the Cereal Company facility.

Plaintiff also cites as error the trial court's denial of Plaintiff's requested jury charges on negligence per se and good care.

However, the District Court's decision to admit the evidence and decline to give the jury charges was appropriate under the law of this Circuit and well within the Court's discretion.

Because the trial court's rulings on each of these issues constituted neither an abuse of discretion nor an error of law, and Plaintiff failed to demonstrate the jury would have reached a different outcome if he were able to prevail on either issue enumerated error in his brief, the jury's verdict in favor of XYZ must be affirmed.

Plaintiff's assertion that District Court abused its discretion in admitting the handbrake video is also without merit. The videotape was properly authenticated at trial by a witness who was present when it was made, and a sufficient record was established with regard to the chain of custody to find that the railcar had not been altered or manipulated. The only expert witness who testified at trial regarding the video was Plaintiff's own expert, who agreed the video appeared to show an efficient handbrake.

The jury charges proposed by Plaintiff failed to accurately state the applicable law, and therefore cannot provide grounds for reversal of the jury verdict. The trial court's charge to the jury was appropriate, and the charges requested by Plaintiff were not adjusted to the evidence.

ARGUMENT AND CITATIONS

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING THE CERIAL COMPANY HANDBRAKE VIDEO

A. The District Court Required Proper Authentication and Foundation for the Handbrake Video Prior to Admitting this Evidence at Trial

The standard of review for evidentiary rulings is abuse of discretion. Wood v. Morbark Industries, Inc., 70 F.3d 1201, 1206 11th Cir. 1995. This Court will only reverse a district court's rulings concerning the admissibility of evidence where Plaintiff can show the judge abused his broad discretion and the decision affected substantial rights of the complaining party. Here, the record reflects that the District Court used appropriate discretion and acted in complete accord with the Federal Rules of Evidence and law of this Circuit in admitting the handbrake video at trial.

In order to admit the handbrake video, the trial court first required XYZ to authenticate this evidence under Fed. R. Evid. 901. In pertinent part, Rule 901 requires a party to present evidence sufficient to support a finding that the matter in question is what its proponent claims. A witness qualifying a photograph need not be the photographer or see the picture taken; it is sufficient if he recognizes and identifies the object depicted and testifies that the photograph fairly and correctly represents it. U.S. v. Clayton, 643 F.2d 1071, 1074 5th Cir. 1981.

Here, Plaintiff was permitted wide latitude for cross-examination with respect to his speculation that the handbrake video may have been taken at an angle T 438-39, that the railcar stops depicted in the video may have been achieved by placing a penny under one of the wheels T 437, and even that XYZ or persons unknown may have sneaked onto Cereal Company's property and surreptitiously changed the brake shoes on the railcar T 431.

B. The Handbrake Video Was Not Admitted as a Recreation of The Subject Accident.

The Cereal Company Handbrake Video shows the handbrake on railcar XYZ 1234 being applied and released while the railcar was under the same load at the GM track and prior to any alteration or modification of the brake system, other than the previously mentioned brake beam repair T 372. Contrary to Plaintiff's assertions in his brief, the handbrake video is not a recreation of the subject accident Brief at pp. 18-21. Indeed, it is the dissimilarities between the events of the accident and the video which most decisively rebut Plaintiff's argument that the video was presented to the jury as a recreation.

In the handbrake video, the handbrake is applied to stop the movement of the rolling railcar, and released to permit the movement of the railcar T 409. There was no testimony at trial that the handbrake on XYZ 1234 was applied and released in such a manner on the day of the subject accident. To the contrary, as previously discussed in the Statement of Facts, there was no testimony at trial that anyone ever witnessed the handbrake being applied on the day of the accident.

II. THE DISTRICT COURT DID NOT ERR IN REFUSING TO GIVE PLAINTIFF'S REQUESTED JURY CHARGES ON NEGLIGENCE PER SE AND GOOD CARE.

In reviewing a District Court's jury instructions, this Court will find reversible error in the refusal to give a requested instruction only if 1 the requested instruction correctly stated the law, 2 the instruction dealt with an issue properly before the jury, and 3 the failure to give the instruction resulted in prejudicial harm to the requesting party. Roberts & Schaefer Co. v. Hardaway Co., 152 F.3d 1283, 1295 11th Cir. 1998 citing Goulah v. Ford Motor Co., 118 F.3d 1478, 1485 11th Cir.1997. Under Roberts, Plaintiff has failed to meet his burden to show error because the instructions requested by Plaintiff did not correctly state the law, the charge given by the Court was sufficient to put the issue of negligence per se before the jury, and there is no basis to find that Plaintiff suffered harm as a result of the charge given by the Court.

Plaintiff's Proposed Jury Charge 16 was not a verbatim recitation of the statutory subsections included in the Safety Appliance Act, but was instead a paraphrased list of eight statutes and regulations included in the Act 523. Plaintiffs' paraphrases are poorly drafted, omit material portions of the statutory provisions cited, and otherwise misstate the requirements of the cited regulations. Because the charge Plaintiff requested was not an accurate statement of law, but merely Plaintiff's interpretation of the law, Plaintiff cannot satisfy the first prong under Roberts.

Plaintiff likewise cannot show that the Charge given by the Court was insufficient to instruct the jury on the issue of negligence per se. After hearing argument of counsel on the issue and conducting its own research, the District Court chose to give a charge that specifically listed and described the Safety Appliance Act as the statute whose violation could lead to a finding of negligence per se. T 675-680, 865-870.

The charge given by the trial court stated in relevant part:

Members of the jury, the Federal Safety Appliance Act provides that: 'A railroad carrier may use or allow to be used on any of its railroad lines a vehicle only if it is equipped with efficient handbrakes.'

Efficient means adequate in performance; producing properly a desired effect. Inefficient means not producing or not capable of producing the desired effect; incapable; incompetent; inadequate.

The Plaintiff contends that the Defendant violated certain laws or regulations such as the Federal Safety Appliance Act. Such a violation is called negligence per se, which means negligence as a matter of law. It is your duty to decide whether such violation took place or not. T 941-42.

Georgia law provides there is no error in refusing to give a specific charge exactly as requested where the charges actually given substantially cover the principles contained in the request. Nails v. Rebhan, 246 Ga.App. 19, 21, 538 S.E.2d 843, 846 2000.

Jones v. Otis Elevator Co., 861 F.2d 655, 660-61 11th Cir. 1988, cited by Plaintiff in his brief, does not require a different result. In Jones, this Court found that a trial court's decision to give a negligence per se charge was harmless error where the ordinance at issue was never introduced in the case.

Finally, there is no evidence in the record from which Plaintiff can show that he suffered any harm as a result of the trial court's refusal to give the instruction Plaintiff requested.

This Court has previously held that in order to obtain relief on an appeal from the district court's denial of a requested jury charge, appellant has the burden of showing that the charge actually given failed to instruct the jury adequately. See generally Dancey Co. v. Borg-Warner Corp., 799 F.2d 717, 721 11th Cir. 1986. Although a party has the right to have the jury instructed on the applicable law, a party does not have the right to any particular instruction. Corey v. Jones, 650 F.2d 803, 806 5th Cir. Unit B 1981.

III. ANY ERROR ALLEGED BY PLAINTIFF IS HARMLESS BECAUSE SUBSTANTIAL EVIDENCE EXISTS TO SUPPORT THE JURY'S VERDICT.

Even if Plaintiff were to prevail on each enumeration of error in his brief, he has failed to rebut the substantial evidence supporting the general jury verdict. This Court will uphold a jury verdict if there is probative evidence to support the verdict. Birdwell v. City of Gadsden, Ala., 970 F.2d 802, 807 11th Cir. 1992.

As discussed in XYZ's Statement of Facts, there was sufficient evidence to support XYZ's defenses at trial and ample evidence from which the jury could have found the subject accident occurred because Plaintiff simply never set the handbrake.

On this record, Plaintiff has failed to demonstrate any reversible error on the part of the District Court, and the jury's verdict in favor of Defendant XYZ should be affirmed.

CONCLUSION

Because Plaintiff failed to demonstrate the District Court abused its discretion in admitting evidence relevant to issues determined by the jury and failed to show the Court erred in rejecting Plaintiff's jury charges that did not correctly reflect the law applicable to this case, the District Court's Judgment on jury verdict should be AFFIRMED.

XYZ Transportation, Inc., Defendant/Appellee

Appellee's job is done.

Once his Answer Brief is filed, unless one of the parties or the appellate court on its own initiative moves for oral argument, there is nothing more for appellee to do but wait.

Appellant's Reply Brief

Appellant's optional Reply Brief may be filed if, and only if, appellee raises new issues in his Answer Brief, i.e., issues not raised by appellant's Initial Brief.

In our sample case, the appellee did, in the appellant's opinion, raise issues not raised by

appellant's Initial Brief, so appellant elected to file a Reply Brief. Again, format is essentially the same.

United States Court of Appeals, Eleventh Circuit

Charles Jones, Plaintiff-Appellant,

v.

XYZ Transportation, Inc., Defendant-Appellee.

March 22, 2012

Appeal from U.S. District Court for the Northern District of Georgia, Atlanta Division

REPLY BRIEF

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INTRODUCTION

Plaintiff's Initial Brief demonstrated how the Trial Court committed prejudicial error that demands reversal and a new trial. In contrast, Defendant's Answer Brief fails to rebut Plaintiff's arguments and misstates the relevant facts and law.

STATEMENT OF FACTS

The facts tilt overwhelmingly in favor of verdict for Plaintiff.

A. Plaintiff Set the Handbrake on XYZ 1234. Defendant is wrong that Plaintiff never set or even touched the handbrake wheel.....Defendant's Brief at 1 Plaintiff said he applied the handbrake. Plaintiff's co-worker Smith was positive Plaintiff told him he set the handbrake. T.345-6 Plaintiff was referring to the handbrake, not the air brake. T. 582

Physical evidence proves Plaintiff applied the handbrake. After the crash, the handbrake was partially released. T.265 When Plaintiff first moved the car, he completely released the handbrake. T.585 The Trial Court's comment in response to Defendant's argument that Plaintiff hadn't proven he applied the brake is very telling: I'll be interested to hear your explanation of how the hand brake was in the partial release position if he didn't tie it at the top of the hill to begin with. T. 684

B. The Handbrake Was Defective.

Defendant's statement that the only evidence that Plaintiff presented at trial as the existence of a defect in the railcar at the time of the accident is a photograph identified at trial as Plaintiff's Exhibit 205 is incorrect. The overwhelming evidence, both in quality and quantity, shows the opposite.

C. Fox Video Was Only Evidence Rebutting Plaintiff's Claim Handbrake Defective.

In contrast to all of the photographic, lay, expert, and engineering testimony offered by Plaintiff establishing that the brake was applied, could not hold, and was partially released by the crash, the Fox Video was Defendant's only evidence that XYZ 1234 would stay in place after application of its handbrake.

Throughout the video, Mr. Fox, the known railroad biased expert, is shown manipulating the handbrake and using engineering tools with digital readouts to do so. His efforts included the use of technical tools that would lead jurors to believe that this was a reliable engineering experiment.

XYZ 1234 was modified for the Fox Video. XYZ 1234 was modified for the video to make the handbrake appear to be efficient. T.181 Before the Fox Video was created, the bell crank would foul against the car with ease. T.262-265, 352 During the video, the opposite was shown. Defendant did not explain this difference.

ARGUMENT AND CITATION OF AUTHORITY

I. The District Court Did Not Require XYZ to Properly Authenticate or Lay a Foundation for the Fox Video.

Defendant's response to Plaintiffs detailed argument about foundational requirements for videotapes is to call the tape a photograph. Defendant ignores the numerous cases cited by Plaintiff that establish that the Trial Court erred and that the errors demand reversal. Instead, Defendant writes about authentication of photographs, the chain of custody of drugs and blood samples, and attempts a misguided analysis.

A. Standard of Review for Admission of Fox Video Is Higher Than Abuse of Discretion.

We review de novo whether the district court employed the proper legal standard in determining whether to admit or exclude expert testimony. U.S. v. Rodriguez-Felix, 450 F.3d 1117, 1122 10th Cir. 2006.

We review the factual components of a district court's evidentiary determinations under the abuse of discretion standard, but we review the legal components of these determinations de novo. Miller v. Field, 35 F.3d 1088, 1090 6th Cir. 1994.

Here, the Trial Court failed to apply the legal standard and require Defendant to prove the underlying factors necessary to demonstrate a proper foundation for the admission of the Fox Video.

B. The Fox Video Is Not a Photograph.

Attempting to distance itself from the law relating to admission of videos, Defendant argues the video was admissible once authenticated. This argument misses the point, because a videotape is different from a static photograph. It makes an affirmative statement. A video of this nature can even be considered to constitute a learned treatise. Costantino v. Herzog, M.D., 203 F.3d 164, 171 2nd Cir. 2000. The differences between this video and a simple photograph raise all sorts of issues regarding relevance, reliability, hearsay, and unfair prejudice that demand a proper foundation.

C. The Trial Court Did Not Apply the Proper Standards.

Defendant did not rebut Plaintiff's argument that it was required to establish substantial similarity between the conditions involved in the video testing and events occurring at time of the accident. The Trial Court's discretion to admit this record of Mr. Fox's testing was conditioned on

satisfactory proof that his experiments were conducted under substantially similar conditions. Barnes v. Gen. Motors Corp., 547 F.2d 275, 277 5th Cir. 1977 emphasis added. Although the Trial Court recognized this was the standard, it did not require Defendant to prove substantial similarity T.371

MR. COUNSEL: Your Honor, at this time I would like to display the videotape to Mr. Anderson so he can authenticate this is what he saw on that day.

THE COURT: Well, you haven't laid the foundation that what they did was sufficiently similar to the conditions on the day of the accident to do that, Mr. Counsel.

MR. COUNSEL: Your Honor, I agree. I apologize. I forgot.

THE COURT: You said you were going to do that. T. 371

Amazingly, the Trial Court seemed to recognize no foundation had been laid; but failed to sustain Plaintiff's objection to the video.

Having failed to require the proper standard to be applied, it cannot be said the Trial Court exercised appropriate discretion in admitting the evidence.

When evidence amounts to something more than a mere photograph, the authenticating witness must do more than simply state what the image is; he or she must state how the image came to be. A witness must be able to testify exactly what the jury is looking at, and the opposing party has a right to cross-examine the witness concerning the evidence. State v. Swinton, 847 A.2d 921, 951-952 Conn. 2004.

Defendant asks this Court to pay special attention to Ballou v. Henri Studios, Inc., 656 F.2d 1147 5th Cir. 1981, which is fine with Plaintiff as Ballou buttresses Plaintiffs argument. Ballou concerned the admissibility of a blood alcohol test. The differences between the proponent's foundation in Ballou and Defendant's efforts in this case are enlightening. In Ballou defendant offered the testimony of the police officer who supervised the taking of the blood samples, the chemist who performed the blood alcohol test, and the mortician who took the blood samples. Id. at 1152. Significantly, defendant proffered the testimony of a qualified expert regarding the methodology used in the blood testing, as well as the extreme care taken to ensure that the sample was from the plaintiff.

In contrast, Defendant failed to offer any similar witnesses. First, unlike the Ballou defendant who had no control over the blood sample, but accounted for everyone who did, Defendant did not offer its employees including a supervisor whose men were accused of making the mistake that cost Plaintiff his legs and had access, knowledge, and motive to modify the car to show the car had not been tampered with. T.431, 781 If Ballou is the standard for admission, Defendant and the Trial Court missed the mark by a wide margin.

D. Dissimilarities Between Events and Video Required Exclusion.

In another telling admission, Defendant admits there are dissimilarities between the events of the accident and the video. Appellee's Brief, p. 26 This, alone, is sufficient for this Court to find its admission was erroneous. A rose by any other name smells just as sweet, and a recreation by whatever name Defendant tries to give it is still a recreation.

Defendant's argument has been repeatedly rejected by circuit courts addressing similar scenarios. For example, in Gladhill v. General Motors, Corp., 743 F.2d 1049 4th Cir. 1984, the plaintiffs contended the district court committed reversible error when it permitted defendants to display a videotaped demonstration of a braking test of a vehicle despite the fact that circumstances were not similar to those involved in the accident. The court found the testing inadmissible precisely because of the dissimilarities expressed by the proponent. It is easy to understand why the jury might be unable to visualize plaintiffs' version of the events after this film. Indeed, the circumstances of the accident, as alleged, are so different from this test as to make the results largely irrelevant if not misleading. Id. at 1051

It is important to note that in Gladhill, plaintiff objected only to the video of the testing, but not testimony pertaining to the testing performed. Nevertheless, the Circuit Court found the risk of misleading the jury so great that it went so far as to state that on retrial, however, we think a better approach would be to exclude all evidence generated by this experiment, including testimony pertaining thereto. Id. at 1052 This Court should do the same.

E. The Video Was Inadmissible Hearsay.

The Trial Court ruled that Gary Fox, creator of the video, would not testify and could not be examined for any reason. T.427 Thus, when Defendant first sought to play the Fox Video at trial - during its opening statement - Plaintiff objected on the grounds that there will be no foundation under 803, also 402. T. 131 Defendant was allowed an end run around the testimony of the actual witness and was allowed to admit Fox's out of court statement for the truth of the matter asserted - that the handbrake was efficient.

Defendant offered the video to demonstrate how this particular brake would have worked had it been applied on the date of the event. Defendant cannot even suggest that it was used merely to help explain its expert's testimony, because it offered no expert witness to testify to the matters covered in the video. It was inadmissible hearsay and improperly admitted over plaintiff's objection.

F. Admission of the Video Was Harmful Error.

The Fox Video, with its impressive looking expert who used large tools with digital readouts, filmed from multiple angles, was surely impressive to the jury. It was the only evidence that demonstrated the purported performance of the actual handbrake, showing the handbrake would have held the car if it had been applied. In the words of Defendant's counsel in his closing, this was the most important evidence in the case. It's impossible to consider its admission was not harmful error.

This Court previously summed up the very concerns raised here in U.S. v. Gaskell, 985 F.2d 1056, 1161-1162 11th Cir. 1993: The trial court's instruction to the jury to assess the demonstration in light of the statements and testimony you have heard failed to highlight the dissimilarities of the demonstration with the events at issue. The ability to cross-examine is not a substitute for the offering party's burden to show that a proffered demonstration or experiment offers a fair comparison to the contested events. Particularly where the demonstration unfairly tended to prejudice the jury on the one genuinely contested issue, without providing any significantly probative testimony, neither the cautionary instruction nor the ability to cross-examine was sufficient to cure the error.

II. The Court's Charge to the Jury was Inadequate.

Plaintiffs initial Brief dissects every paragraph of the negligence per se charge and explains why it was a correct statement of law, fit the facts of this case, and how failure to give it harmed Plaintiff. Similarly, Plaintiff explained why his Request numbers 18 and 19 were correct and should have been given. In contrast, Defendant offers only a discussion of boilerplate rules for when a verdict should be reversed because of a bad jury instruction. These principles are not in dispute.

What is in dispute is whether a negligence per se charge that does not include all of the rules violated is adequate. Defendant offers no authority allowing that kind of shortcut.

Violation of a safety statute constitutes negligence per se. Kull v. Six Flags Over Georgia II, L.P., 264 Ga.App. 715, 716, 592 S.E.2d 143 2003 quoting Hubbard v. Dept. of Transp., 256 Ga.App. 342, 350, 568 S.E.2d 559 2002. Simply put, reasonable care is not a defense to violation of a statute. If it were, the concept of negligence per se would have no meaning.

CONCLUSION

The District Court's errors pertaining to admission of evidence and instructions to the jury demand a new trial, and Plaintiff respectfully requests that this Court reverse the Judgment below and order that the case be retried.

Charles Jones, Plaintiff-Appellant

Now everything depends on the appellate justices and their law clerks, who will read the briefs, research the cited cases and refer to cases that were not cited by either party, and reach a decision.

The decision reached on this appeal follows.

Appellate Court's Decision

So, you may see how the foregoing appellate arguments affected the appellate court, here's an excerpt from the actual published opinion of the District Court of Appeal that Reversed and Remanded the case back to the Circuit Court.

Since the foregoing sample briefs were substantially cut and edited from the originals to emphasize their purely educational purpose, names and numbers in the following opinion have also been changed.

United States Court of Appeals, Eleventh Circuit

Charles Jones, Plaintiff-Appellant,

v.

XYZ TRANSPORTATION, INC., Defendant-Appellee

Plaintiff-Appellant Charles Jones sued XYZ Transportation, Inc. XYZ seeking damages for injuries he sustained in an accident involving a railcar XYZ delivered to his employer.

After a jury trial, judgment was entered in XYZ's favor.

Jones now challenges a number of the district court's evidentiary rulings and refusal to give jury instructions he requested.

After thorough review, we reverse and remand the case for a new trial.

I.

A.

XYZ delivered a railcar identified as XYZ 1234 to Cereal Company' cereal processing plant. The railcar was loaded with grain. Two days later, Plaintiff Charles Jones and a coworker, Ralph Smith, moved the XYZ 1234 from one track to another at the plant. Smith operated a Trackmobile railcar mover. Jones worked on the ground.

After moving the XYZ 1234, Jones and Smith began working downhill from the railcar. A short time later the XYZ 1234 rolled down the track and crashed into two other railcars. All three railcars ran over Jones. Jones suffered a number of injuries in the accident, including loss of the use of his legs.

Jones filed suit against XYZ seeking to recover general and special damages under theories of negligence and negligence per se. He also asserted a claim for punitive damages.

Jones alleged his injuries were caused by the defendants' failure to deliver the XYZ 1234 to Cereal Company' Covington plant with an efficient hand brake, in violation of the Federal Safety Appliance Act and Federal Railroad Administration regulations.

Jones's case went to trial with a jury.

At trial, XYZ introduced into evidence, over Jones's objection, a video made for Cereal Company by a railroad expert for purposes of an Occupational Safety and Health Administration investigation of Jones's accident. The video had no sound. It purported to show the XYZ 1234 railcar involved in Jones's accident at two different locations at Cereal Company' plant. The first location was the site where the XYZ 1234 railcar was alleged to be located before Jones's accident. The second location was a site with a greater slope.

At both locations, the video depicted the railcar with an activated hand brake. The railcar was then separated from the Trackmobile railcar mover and stayed in place for more than twenty minutes.

After the close of evidence, the jury returned a verdict for XYZ.

Jones now challenges the district court's evidentiary rulings and its refusal to give jury instructions that he requested.

Specifically, Jones argues on appeal that the district court erred by admitting the video and refusing to give his requested jury instruction on negligence per se and the exercise of reasonable care by XYZ.

B.

We review a district court's evidentiary rulings for abuse of discretion. Proctor v. Fluor Enters., 494 F.3d 1337, 1349 11th Cir.2007. When employing an abuse of discretion standard, we will leave undisturbed a district court's ruling unless we find that the district court has made a clear error of judgment, or has applied the wrong legal standard. Corwin v. Walt Disney Co., 475 F.3d 1239, 1249 11th Cir.2007. Moreover, we will not overturn an evidentiary ruling unless the moving party establishes a substantial prejudicial effect. Perera v. U.S. Fid. & Guar. Co., 544 F.3d 1271, 127411th Cir.2008. The moving party makes that showing by demonstrating that the error probably had a substantial influence on the jury's verdict. Proctor, 494 F.3d at 1352.

A district court's refusal to give a requested jury instruction is also reviewed for abuse of discretion. Beckford v. Dep't of Corrs., 605 F.3d 951, 957 11th Cir.2010. An abuse of discretion is committed only when 1 the requested instruction correctly stated the law, 2 the instruction dealt with an issue properly before the jury, and 3 the failure to give the instruction resulted in prejudicial harm to the requesting party. Goldsmith v. Bagby Elevator Co., 513 F.3d 1261, 1287 11th Cir.2008.

II.

We first address Jones's argument that the district court erred in admitting a video made by Fox, a consulting expert for Cereal Company. He argues the video depicted a recreation of his accident.

In order for the video to be admissible, Jones asserts that XYZ was required to prove that the testing on the video was performed under substantially similar conditions as those surrounding his accident. To make that showing, Jones maintains that expert testimony from Fox was necessary.

XYZ argues in response that the video was not a recreation such that it would be subject to a heightened foundational standard. Rather, XYZ contends the video was properly admitted because it was authenticated under Fed.R.Evid. 901a, which requires a lesser showing from a witness laying a foundation for a photograph or motion picture. See United States v. Belfast, 611 F.3d 783, 819 11th Cir.2010; United States v. Clayton, 643 F.2d 1071, 1074 5th Cir.1981.

Building on this argument that the video was not offered as a recreation of the accident, XYZ goes on to assert it was unnecessary to establish substantial similarity of conditions between the testing on the video and Jones's accident. In making this argument, XYZ relies on case law suggesting that the demonstrations of mere general scientific principles do not require a showing of substantial similarity. See Muth v. Ford Motor Co., 461 F.3d 557, 566 5th Cir.2006 When the demonstrative evidence is offered only as an illustration of general scientific principles, not as a reenactment of disputed events, it need not pass the substantial similarity test.; McKnight ex rel. Ludwig v. Johnson Controls, Inc., 36 F.3d 1396, 1401 8th Cir.1994 Where the experimental tests do not purport to recreate the accident, but instead the experiments are used to demonstrate only general scientific principles, the requirement of substantially similar circumstances no longer applies..

To resolve the issue, we examine the way in which XYZ used the video at trial.

Our review of the record demonstrates that XYZ used the video to discredit Jones's theory of the case: that Jones applied the hand brake on the XYZ 1234 but it was inefficient and failed to hold the railcar in place.

Although XYZ contends the video was not offered as a recreation of Jones's accident, XYZ's statements at trial belie that assertion. XYZ repeatedly emphasized the purported similarities between the events depicted on the video and the circumstances surrounding Jones's accident. During opening statements, XYZ told the jury, You are going to see during the course of this case a video that was made of this railcar after this accident occurred. The car's in the same condition. It weighs the same. It has essentially all the same mechanical stuff.

It was placed back in the area where Mr. Jones left it before this accident happened. And you will see that it does meet the definition of efficient. It holds the railcar in place. It'll hold the railcar in

place on seven different tests of whether the car would roll or not in this area. It was an efficient hand brake, and it simply had not been applied by Jones.

During closing arguments, XYZ said, This video utilized the same car with the same load and the same mechanical condition at two locations.

While we recognize that opening statements and closing arguments are not in themselves evidence, their purpose is to assist the jury in analyzing the evidence. United States v. Hasner, 340 F.3d 1261, 1275 11th Cir.2003.

Here, XYZ highlighted the video as proof that Jones did not apply the hand brake on the XYZ 1234. XYZ did not characterize the video's contents as establishing merely the way in which a hand brake is properly applied. See Four Corners Helicopters, Inc. v. Turbomeca, S.A., 979 F.2d 1434, 1442 10th Cir.1992 If the evidence is offered to merely show physical principles, the experiment should be conducted without suggesting that it simulates actual events..

XYZ also used the video during its cross examination of one of Jones's expert witnesses. XYZ instructed the expert witness, I want you to assume that a 286,000-pound railcar loaded with precisely the same load it had on the date of Jones's accident, that the brake rigging and all of the mechanical aspects of the car are identical to the way they were on that date. And I want you to assume that the car has been placed in a position as steep or steeper than the position it was in before this car rolled away on that date. I'm now going to show you a video of those assumptions ...

After playing the video, XYZ asked Jones' expert whether the railcar on the video appeared to have an efficient hand brake. The expert responded: Based on what I see there, yes.

XYZ asked Cereal Company safety manager Anderson about the circumstances surrounding the video's creation. Anderson testified he witnessed the video being made and stated that the XYZ 1234 railcar depicted in the video was in the same condition mechanically and load-wise as on the date of Jones's accident. He also testified that the XYZ 1234 railcar was filmed at two different locations at Cereal Company plant: 1 where Jones allegedly left the railcar before the accident; and 2 a location further down the track with a steeper slope.

In addition to what was quoted from the closing argument above, XYZ showed the video to the jury and summarized its contents, saying, This video utilized the same car with the same load and the same mechanical condition at two locations. One was a location where they best thought Mr. Jones left the car, and the hand brake held it there. And then they moved it down the slope where the slope was greater. And they did it a number of times, and it held there. That, ladies, is an efficient handbrake. Again, same load, same mechanical condition.

Thus, at various points throughout the trial, XYZ expressly argued that the video recreated the incident at issue in this case, in an attempt to prove Jones did not properly apply the hand brake.

Thus, this was not a case of evidence offered to merely show physical principles. Four Corners Helicopters, Inc., 979 F.2d at 1442; see also Muth, 461 F.3d at 566; Ludwig, 36 F.3d at 1401. Rather, it is one in which the results of the experiment purported to coincide with XYZ's theory of how the accident occurred. Barnes v. Gen. Motors Corp., 547 F.2d 275, 277 5th Cir.1977; see Muth, 461 F.3d at 566 explaining that resemblance to the disputed accident gives rise to the requirement of substantial similarity. We therefore conclude that the substantially similar conditions standard the former Fifth Circuit announced in Barnes applies to the video's admission. See Barnes, 547 F.2d at 277-78.

Under that precedent, a district court generally has wide discretion to admit evidence of experiments conducted under substantially similar conditions. Barnes, 547 F.2d at 277; see also, Bish v. Emp'rs. Liab. Assurance Corp., 236 F.2d 62, 70 5th Cir.1956 explaining that evidence of an out of court experiment is admissible provided it will enlighten and assist, rather than confuse the jury, by directly illustrating and tending to establish or to disprove a material issue, and provided the experiment was fairly and honestly made under circumstances and conditions substantially similar to those attending the alleged occurrence.

The burden is on the party offering the evidence to lay a proper foundation establishing a similarity of circumstances and conditions. Barnes, 547 F.2d at 277.

For the experiment to be admissible, it is not required that all the conditions shall be precisely

reproduced, but they must be so nearly the same in substantial particulars as to afford a fair comparison in respect to the particular issue to which the test is directed. United States v. Gaskell, 985 F.2d 1056, 1060 11th Cir.1993 explaining that conditions of the experiment and the event at issue must be sufficiently similar to provide a fair comparison.

Further, experimental or demonstrative evidence, like any evidence offered at trial, should be excluded 'if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.' Gaskell, 985 F.2d at 1060 quoting Fed.R.Evid. 403.

We conclude XYZ failed to satisfy the Barnes substantially similar conditions test.

To be sure, XYZ attempted to lay a proper foundation for the admission of the video through Anderson's testimony. That testimony, however, did not establish a similarity of conditions between the testing on the video and Jones's accident. Although Anderson provided specifics about the XYZ 1234 used in the tests and where the tests were conducted, he provided no specifics about the actual tests themselves. For example, when asked about the way the hand brake was applied on the video and, specifically, whether it was torqued to higher than a normal human being can do, Anderson replied: I don't know.

We must next inquire as to whether the district court's erroneous admission of the video was prejudicial. We well recognize that no trial is ever perfect, and acknowledge that there are likely circumstances in which erroneous admission of a video could be harmless. But this circumstance is not one of harmless error.

Jones's theory of liability was premised entirely upon a defective hand brake.

The video depicted events which the jury was repeatedly told were the same as the accident resulting in Jones's injuries.

Thus, the video spoke directly to the ultimate disputed issue in the case, even though it had not been subject to the standards required for such a reenactment.

XYZ used the video to argue to the jury that Jones's accident resulted from his own negligence in failing to apply the hand brake.

XYZ's repeated references to the video underscore its centrality to XYZ's defense of the case and the important role assigned to the video in rebutting Jones's theory of the case.

By showing the XYZ 1234 staying in place when the hand brake was applied, the video purported to rebut Jones's theory that the brake was defective.

As we have recognized, demonstrative exhibits tend to leave a particularly potent image in the jurors' minds. Gaskell, 985 F.2d at 1061; see also United States v. Wanoskia, 800 F.2d 235, 237 10th Cir.1986 explaining that a court must take special care to ensure that a demonstration fairly depicts the events at issue because demonstrative evidence is highly persuasive.

As in Barnes, the video was calculated to cause the jury to accept XYZ's theory over Jones's evidence. 547 F.2d at 278. By unfairly prejudicing the jury on the pivotal issue in the case, it is likely that the video's admission had a substantial prejudicial effect, warranting reversal. See Gaskell, 985 F.2d at 1061- 62 finding reversible error where the erroneously admitted evidence went to the key issue in the case.

Having concluded that the district court committed reversible error by admitting the Fox video, we need not address Jones's other points of error. The judgment of the district court is reversed and the case remanded for a new trial.

REVERSED AND REMANDED.

Oral Argument

Upon motion timely filed by either of the parties or, upon the appellate court's own motion sua sponte the issues on appeal may be presented to the justices orally.

However, in practice, the proceedings are managed by the court, with the parties doing

more answers questions from the appellate bench rather than going on and on regurgitating the arguments presented in their briefs.

If you appear for oral argument, remember: You are there to clarify, not to amplify.

Your pleadings should completely make your arguments. There should be no need to re-argue.

Oral argument is not a right. You cannot demand oral argument nor appeal to a higher court if your oral argument motion is denied. It is entirely at the option of the appellate justices.

And, once again, its purpose is to clarify complex issues in the briefs, not to amplify them by re-argument.

You will have a moment or two to simplify your position in a few sentences, and then the questioning will begin.

Pay attention.

Don't bring a scripted outline. You shouldn't need a script at this point. You should know the facts, what's in the record, every detail of your appellate arguments, and every detail of the arguments presented by your opponent, and you should know these as well as you know your mother's name. Oral argument is not a time to rely on notes.

This is the time to clarify the complex issues involved in the parties' respective arguments. If there were no complex issues in the parties' arguments, the appellate court likely would not have allowed oral argument in the first place.

Speaking of time, you and your opponent will have a limit to how long you are up. There may be signal lights on the podium, *yellow for you're getting close to the limit, red for you're all done*. Make your best points up-front, when there's little chance of running out of time with more you want to add. When you're done, you're done.

The purpose of oral argument once more for emphasis is to clarify complex issues in the parties' briefs, NOT to re-argue what should be in the briefs already.

Listen to the justices. They will interrupt you. When they do, that's your chance to shine. That's your chance to show them why you, and not your opponent, should win.

Tell the justices, The issues in this case are really quite easy.

Then, MAKE them easy.

Be prepared to make the complex issues ridiculously easy to understand. Appellate justices rarely have degrees in chemistry, electronics, quantum physics, or higher mathematics. If such complex issues cloud your appellate position, listen carefully to the justices' questions and be prepared to answer them with simple answers, to-the-point, ridiculously easy to understand.

Extraordinary Writs

On rare occasions an appellate court may issue special appellate orders called *extraordinary writs*.

Appellate courts may issue writs on the petition or complaint of a party or on the court's own initiative whenever

- Appellate court has jurisdiction over the matter and
- Justice of the matter requires issuance of a writ

The more frequently issued writs are:

- Certiorari
- Prohibition
- Mandamus
- Habeas Corpus
- Quo Warranto

Certiorari

A writ of certiorari often shortened to cert is used to obtain immediate appellate review of lower court orders in circumstances where no other appellate remedy exists under the rules.

Certiorari is a convenient catch-all that may win the day for disgruntled litigants if the lower court order threatens to cause irreparable injury or a departure from the essential requirements of law.

If the party were required to wait until termination of the case to file appeal, grave injury or abuse of due process would result.

Examples include orders requiring disclosure of a trade secret, exhumation of a body, termination of parental rights, etc.

Judicial abuse of evidence rules may also convince an appellate court to issue the writ, such as where a trial judge refuses to allow a party to call a near-death elderly witness who may not survive until final judgment and subsequent remand on appeal.

The same would apply when any evidence was threatened with loss or destruction prior to final judgment yet was needed by a party to prove an essential element of his case.

Prohibition

An appellate court may issue a writ of prohibition stop a lower court judge from any action the lower court judge should not, in the interests of justice, continue.

By definition the writ is used to prohibit the lower court judge from some action contrary to the law and justice.

Examples include trial court action where the trial court lacks jurisdiction or where the trial judge refuses to respond to a motion for recusal, intending to continue presiding as judge over the lower court proceedings.

In criminal cases the writ may be used to forestall the lower court from proceeding where an accused would be put in double-jeopardy by further action in the lower court or where the statute of limitations on the alleged crime has run out.

Mandamus

A writ of mandamus operates essentially opposite to a writ of prohibition.

The word comes from the same Latin root from which we get the word command, and that's just what this writ does. It commands the lower court or any government official to do what the law requires.

For example, the writ may be used to

- Force a lower court judge to rule on a pending motion,
- Require a trial court judge to submit issues to a jury where jury trial is required by

law,

• Compel a court clerk's office to file documents properly presented for filing,

• Order a utility company to supply power to persons entitled to service, and

• Mandate that a government agency follow its own rules.

Habeas Corpus

The word derives from Latin meaning to ***have the body.***

A writ of habeas corpus may be used to compel release of any person being detained under conditions justice requires to be reviewed.

The writ is often used to command a prison warden or captain of a jail to present a prisoner for hearing where the legality of his further detention may be called into question.

Similarly, the writ may be used to require an asylum or other such institution to release a person committed to be restrained.

Generally, upon receipt of a petition for writ of habeas corpus the appellate court will issue an order to show cause directed to those responsible for restraining the named individual's freedom and requiring a prompt appearance before the court to give answer.

Quo Warranto

A writ of quo warranto simply asks, "*By what right ...?"*

The term is again from the Latin *"by what right."* Our word warrant comes from the same root, a warrant being the right of an officer to enter private premises or take a prisoner into custody without immediate evident cause.

The writ has been used to challenge the power of an individual claiming to have been duly elected to public office and to call into question the authority of a corporation to do business in a state where it has not been duly registered to do so.

All Writs

In addition to the foregoing, the appellate courts have broad authority to issue other writs as necessary to establish law and order within the limits of their constitutional authority.

Motions

A number of motions are encountered in appellate proceedings.

Since appellate cases move forward on the briefs, these motions aren't like the pre-trial motions you learned about in the other chapters in this course. Motions in the appellate courts do not, for example, compel the production of evidence or request that certain evidence be excluded from the record. That's all been taken care of in the lower court proceedings.

Motion for Extension of Time

When one of the parties to an appeal is faced with a real emergency or is otherwise unable to meet a particular deadly through the exercise of reasonable diligence, that party may file a Motion for Extension of Time.

In most jurisdictions the motion must include certification that the opposing party has no objection or that the opposing party has been consulted and will file an objection in due course. This is to prevent a landslide of motions to extend time by lazy or inept parties who simply want to delay the proceedings for no good reason.

If the opposing party agrees to allow the extension unopposed and this agreement is best

obtained in writing by mail, fax, or email, so there is proof in case the opponent intended a dirty trick the motion might be entitled Verified Unopposed Motion for Extension of Time, with notarial affidavit attesting to the movant's having conferred with the opponent and obtaining the opponent's acquiescence.

Even if opposed, the court will be disposed to allow the extension if good and reasonable grounds exist and extension will not unjustly prejudice the opposing party.

Remember: The deadline limit is not extended until and unless the appellate court grants the motion and enters its order in the appellate record.

Assume nothing.

Motion to Expedite Appeal

These motions are rarely granted except in extreme circumstances, such as where a lower court order affects the custody or welfare of children, termination of parental rights, and such like emergency matters requiring immediate appellate action.

The courts take the view that every party involved in an appeal is anxious to have his or her cause settled. Therefore, precedence seldom favors any party on appeal unless delay through the normal course of time would adversely threaten the safety or substantial rights of third persons.

If a motion to expedite appeal is filed, the movant should have his appellate ducks in a row and be well-prepared and ready to move forward at once if the motion is granted.

Motion to Strike

If an opponent's brief refers to evidence not in the record, a motion to strike may be filed.

Similarly, if portions of opponent's brief violate procedural rules or allege material facts known by opponent to be false at the time of filing, an appellate court may strike that portion of the brief or impose other sanctions, including dismissal.

In most circumstances, however, it is better to call the appellate court's attention to such improprieties in one's own brief. Of course, an appellee discovering same in appellant's Reply Brief is allowed to file no further brief, so his only remedy is this motion.

Motion to Relinquish Jurisdiction

Occasionally the interests of justice are best served by allowing the lower court to take some further action in a case that has been appealed.

Once a Notice of Appeal is filed in the lower court, however, jurisdiction transfers to the appellate court, and the lower court generally lacks authority to take any further action pending outcome of the appeal.

When proceedings will be expedited by temporarily granting authority for the lower court judge to take some further action e.g., explaining the reasons for a particular order or amending an order to comply with the requirements of law, this motion may speed final determination of the parties' conflict.

Motion to Dismiss Appeal

As stated earlier, an appellate court may not obtain jurisdiction to consider an appeal unless the Notice of Appeal is been timely-filed, the lower court record forwarded, filing fees paid, and the appellate court has authority over the court from which the order on appeal is taken.

When any such impropriety exists, a motion to dismiss the appeal should be granted.

Post-Decision Motions

Certain motions may be filed after the appellate court has ruled and issued its opinion.

Motion for Rehearing

A motion for rehearing here is the same in essence as a motion for rehearing in the lower court proceedings.

The movant must present in his motion or supporting memorandum cogent reasons why the appellate court missed the mark, case law that was misread, portions of the record that were overlooked, etc.

If granted, of course, the tribunal will consider the briefs once again and, if they agree with movant, issue a revised opinion.

Motion for Rehearing En Banc

Appeals are generally reviewed by a tribunal, i.e., three justices. The appellate court itself, however, may be comprised of a dozen or more justices apportioned accordingly.

A motion for rehearing en banc seeks to have the entire court i.e., all the justices on that particular court to review the briefs and approve or disapprove the tribunal's initial opinion.

This motion, of course, should never be filed until a motion for rehearing has been filed and acted upon.

Motion for Clarification

A motion for clarification may be used to obtain an explanation of the appellate court's opinion or some portion of it.

This is not the same as a motion for rehearing where the movant seeks to have the court take another look at the result and reach a different conclusion.

A motion for clarification seeks only to better understand the conclusion.

Motion for Certification

When the opinion of one appellate court conflicts with the opinion of one or more sister appellate courts, a motion for certification may prevail to have the issue reviewed by the next higher court, e.g., the state supreme court or even the U.S. Supreme Court.

The motion must specify the issue on which the sister courts are in conflict, providing citations demonstrating that a substantial difference exists that materially affects the rights of the moving party.

If the motion is granted, the pending appellate court's jurisdiction is suspended until the matter is resolved by the higher court, whereupon that higher decision becomes the law of the land for future cases involving the same issues.

Motion for Written Opinion

When an appellate court issues a per curiam affirmance i.e., a ruling that does no more than affirm the lower court, either party may move the appellate court to publish a written opinion explaining the court's reasoning.

This motion must show, however, that a public interest is involved or that the issues on appeal are of such importance that a published written opinion is required.

More on appellate motions, including suggested forms, will be added in due course.

Appeal Checklist

It'd be a shame to do all this and lose because you missed some tiny detail.

Therefore, here's a handy checklist of things you must do before filing.

• Obtain and thoroughly study the official Rules of Appellate Procedure for the jurisdiction where your case is pending and for the type of case from which you are taking your appeal. Omit nothing. Skip nothing. Go over and over the official rules. One simple violation of the rules, and you lose.

• Obtain and thoroughly study the record ...

• Particularly note the date of entry of the order appealed from, the critical date from which all other procedures follow, i.e., the date when all of the following are complete:

1. the trial judge's order is written,
2. the order is signed by the judge, and
3. the order is filed with the clerk of the trial court. Written. Signed. Filed.

• Prepare a time line based on the official rules. Print it on a large piece of paper. Tack it to the wall where you work. Know when each filing is due, each notice, each motion, etc. Deadlines vary between appellate jurisdictions and the type of lower court proceeding being appealed from e.g., general civil proceedings, family matters, probate and guardianship, etc. Exercise wise restraint and control, like everything else you must do to prevail in this technically-driven process, and rely on the official rules to create a strict time line you can follow religiously, so you do not miss one single filing deadline and lose your appellate arguments on an avoidable technicality.

• Make certain your page number restrictions are met. Better too few than too many.

• Make certain your paper type is as the official rules require.

• Make certain your page margins are as the official rules require.

• Make certain your line spacing is as the official rules require.

• Make sure all type is on one side of the pages only.

• Make certain your font type and size is as the official rules require.

• Make certain the pages of your brief are bound or stapled as the official rules require.

• Make certain the cover sheet is prepared as the official rules require.

• Make certain all copies are properly served and all originals filed on time.

• Make certain the necessary number of copies is filed along with the original as the official rules require.

• Do not wait until the last possible moment to serve or file papers.

Unlike the old, *"Better late than never,"* excuse, we gave our third-grade teacher when we were late for class, late is not an option on appeal.

In the appellate game, the adage is always, *better early than never*.

Missing deadlines is fatal. That's why they call them deadlines. There is no grace period. Late at all is not at all. Whenever possible, file a few days early.

If a deadline is approaching, do not count on mail. Use a courier service that will give you a

time-stamped receipt or take your papers to their destination in person and get a time-stamped receipt.

If a due date falls on a weekend or legal holiday, don't rely on a rule that says you can file on the first business day after weekends or legal holidays. File before the weekend or holiday, even if it means you're a few days early.

Do not risk everything for the sake of a few extra hours.

It isn't worth the risk.

Expect no pity if you're late. If you're late your appellate argument dies. It's dead, dead, dead. Nothing can resurrect it from that death. Better early than never.

Pro Se Favoritism

You may have heard down at the barber shop or from one of the internet legal guru wannabes that pro se litigants i.e., people proceeding in court without a lawyer, either plaintiff or defendant are entitled to special treatment from the courts.

Don't count on it.

If it happens, so much the better. If it doesn't, don't be surprised.

You might get lucky and receive special treatment at the trial level, but do not expect any assistance whatsoever from the appellate courts.

Appellate justices are not your fifth-grade teacher, and you are not a child.

At the appellate level, it is dog-eat-dog, every man for himself, the adversarial system at its very finest.

If you file the wrong documents, you lose. If you file late, you lose. There are no exceptions in the appellate courts for *pro se* parties.

Anyone who says otherwise is either confused or deliberately trying to harm your cause by giving you false hope that you needn't work quite so hard. Anyone who says the appellate courts pamper *pro se* litigants is mistaken.

If you are going into the appellate court either as an appellant appealing a trial court decision against you, or as an appellee fighting to keep the favorable judgment you received in the lower court expect the appellate court to insist on your strict adherence to the rules of appellate procedure, no exceptions.

Some people have studied a few obscure cases and reached conclusions that seem to indicate a *pro se* litigant deserves special treatment or that *pro se* litigants are entitled to favors. Don't believe it.

You and only you are responsible for the outcome of your case.

Although the Supreme Court has previous ruled *pro se* litigants are not held to the same standard as attorneys, don't fall in that hole and do your best to do your best.

A trial judge may choose to cut you some slack as a *pro se* litigant fighting alone without an expensive lawyer to push the buttons for you, but if your case goes up to the higher court on appeal, it is absolutely certain that strict adherence to the rigid rules of appellate procedure. Again, it's rigid but not complex.

The rules are easy, once you learn them and commit to obeying them. There's a certain amount of work to do, if you want to win on appeal, but there is nothing that is too difficult for the average person to understand. Just make certain you obey the rules and meet all the deadlines as I explain in this class. will be demanded of everyone ... whether they are

represented by a licensed attorney or not.

If you hire a lawyer to represent you, it is nonetheless essential for you, yourself i.e., personally to learn and understand the rules and how they must be applied to win. Otherwise, you put the future of your case in the hands of someone the lawyer whose interest in your case may rise no higher than the money he expects to earn and, in some cases, whose interest in currying favor from a judge whose errors you wish him to attack may outweigh his willingness to fight to the death for you.

Very few lawyers will commit career suicide to win cases for their clients.

You would not be the first litigant sold down the proverbial river by a lawyer unwilling to risk losing favor with a trial judge before whom he must appear year after year in the courthouse where he makes his living and earns his family's keep.

You absolutely must, therefore, know what needs to be done to win and make certain what needs to be done gets done, whether you do it yourself or demand that your expensive professional hired gun does it for you.

If a trial judge refuses to cut you any favorable slack when you're struggling as a *pro se* litigant fighting against an experienced lawyer in the lower court, you can be sure your impassioned demands for special *pro se* safe passage through the appellate court will fall on stone-deaf judicial ears.

It simply doesn't work that way, no matter what wannabe legal gurus tell you.

In our American adversarial system of justice, everyone is responsible to know what it takes to win. That's what makes America great and makes the judicial system work regardless of the “corporation” or the “common” law of the land.

The power of American Character is personal responsibility.

Tremendous opportunities and benefits flow generously into the lives of all who are willing to take responsibility for themselves, because that's how our system of law and order is built, and that's what sustains it for the benefit of everyone.

He who takes responsibility for himself wins. He who stands around waiting for a handout or a leg up loses.

You have a right to stand up for yourself and this is how you are going to do it, by learning what the “system” is using and the rules they are forced to play by and enforcing those rules.

Learn how to command the courts to enforce their own official rules and don't expect any favors from a trial judge, an appellate court, or certainly the other side.

And, only you can ensure that you win in court by learning the rules and how to use them effectively to get justice for your life.

Besides, once you know what I teach in these materials and how to read and use the official rules the courts are bound to obey, you won't need to ask for special favors.

It's how the game of litigation must be played, if you want to win.

In Summary

This is just a very short crash course in appeals and there is a lot you can learn by studying legal books and case law.

Study all published appellate court decisions dealing with the issues in your case.

Even the most seasoned lawyers if they're worth their fees keep current with the ever-

changing case law in his chosen field.

Your advantage is having but one field of law that concerns you: *The law of your case*.

The law of your case could change in mid-stream, right in the middle of your case. It cannot be too strongly stressed how attentively you must keep up with current case law dealing with your appellate issues, even after filing your briefs. so, you'll be prepared if the appellate court decides to hear oral argument.

Never stop learning.

The same must also be said about the rules. Though the rules change rarely, they change unexpectedly. You'll be bound by the rules in effect at the time of your appeal, just as you are bound by the rules in effect at all times during the lower court proceedings. If the rules change in mid-stream, *you must change your tactics*.

Keep the trial judge on his toes by doing everything possible to show him that at all times that:

- You are making an excellent record for appeal.
- You will appeal if he allows errors.
- You know how to appeal successfully.

DEPOSITIONS
Extracting the Truth

Get Testimony Under Oath Before Trial

Interrogate witnesses under oath before trial. Falsified testimony can be punished by jail time.

Failure to appear can be punished by jail time. Deposition evidence can be used at trial. Depositions are great. You'll want to use them when they will help you win.

But, there's a lot to know before you try.

Depositions are an excellent way to get evidence, but they can also be dangerous. If you use them at the wrong time or in the wrong way, they can backfire.

Whether you're taking depositions or being deposed you need to study.

What is said at a deposition can be binding evidence at trial. That can be a good thing, if the evidence favors your side of the battle. It can be a disaster, if the evidence goes against you.

If you're taking a deposition, you want to get as much evidence as possible.

If you're being deposed, you want to say as little as possible when you are asked questions.

There's a right time and a wrong time to take depositions. They should not be taken too early. Initial steps should be taken in preparation. Many lawyers take depositions too soon, instead of at the proper time.

Depositions are a powerful tool. They can be used by you to gain an advantage. They can be used by your opponent to sink your ship.

When to Take and Why

Many lawyers like to take depositions early in a case. Some lawyers make taking depositions the first thing they do. This is stupid.

Lawyers do it to find out what the case is about which is something they should have done before taking their clients' money in the first place.

Depositions are not how you find out what the case is about. If you don't know what the case is about and a whole lot more than that before you take a deposition, then you're wasting one of the most powerful tools in your legal toolbox.

As explained more fully in the chapter on Discovery, depositions should be taken only after you have learned as much as possible about the witnesses, the documents, the things, and everything else you can find out about the case before taking the first deposition.

In many cases, if you do the early work first, you may not need to take depositions, because you will already know all you need to win before trial as explained elsewhere.

In other cases, however, you may need to take depositions to clean up the loose ends and fill in the blanks.

The best time to do this, of course, is just before trial, not at the beginning of the fight when you won't know enough about the case or the witnesses or the evidence to frame powerful evidence-eliciting questions for the deposition witness to answer.

Preparing for a Deposition

Do not allow anyone in the room where the deposition is being taken other than the witness, the court reporter, your opponent, and your opponent's lawyer if your opponent has one.

In some states this is called "*invoking the rule.*" No deposition or trial witness should be permitted to hear what any other deposition or trial witness has to say when being questioned. Failure to invoke the rule will result in witnesses planning what they will say, and that is never good for your side.

If bathroom breaks must be taken, ensure that witnesses have no opportunity to tell other witnesses what questions you have asked or what questions your opponent has asked. The same applies if it is necessary to break for a meal.

Always best to start a deposition first thing in the morning or first thing after lunch. There should only rarely be any need for a deposition to last more than four hours. If the deposition lasts longer it is because either you have asked more questions than needed or your opponent has wasted time asking questions for which you should have objected and put a stop to the delays.

Remember: Lawyers get paid by the hour and will try to drag out any and all proceedings so they can bill their client for the extra time. Do not put up with it.

Do not speak too rapidly, nor allow your witness to speak too rapidly, nor allow any interruptions whatsoever that might tend to prevent the court reporter from getting absolutely everything into the record. The court reporter is not a magician. It is not humanly possible to properly record speech when multiple people are talking at the same time. Do not allow it.

Preparation is simply a matter of knowing in advance, what questions to ask of the *deponent* - the deposition witness.

As you've learned in other classes in this amazing course, facts that meet all requirements of the essential elements are *essential.*

You are not limited to asking questions about facts that would be admissible as evidence at trial. At a deposition you may ask any questions reasonably calculated to lead to the discovery of admissible evidence.

This is extremely important, because your opponent's lawyer will likely try to trick you into believing you cannot ask questions about facts that would not be admissible at trial. Do not be deceived.

Consult the local rules in your jurisdiction and you will find those rules confirm this all-important fact. Depositions, like all your discovery tools, need not seek facts that would be admissible at trial, so long as those facts are reasonably calculated to lead to the discovery of admissible evidence.

Leading v. Direct Questions

When deposing your own witnesses, you may not ask leading questions, i.e., questions that suggest what the answer is.

For example, *"Isn't it a fact you were in Chicago on July 1st, 2019?"* This is a leading question. It suggests the answer and requests the witness to confirm. This rule applies at hearings and at trial as well as at depositions.

When deposing your own witnesses, you must ask direct questions. Direct questions cannot suggest the answer.

An example is, *"Where were you on July 1st, 2019?"* That question does not suggest the answer. The witness must supply facts without being prompted as to what facts the interrogator seeks.

Direct questioning needs a lot of planning. When you intend to depose your own witness, it's a good idea to decide in advance what facts your witness can provide.

NEVER ask your own witness a question if you do not already know what the answer will be. The answer may be far from what you want the court to hear. It can quickly work against you and, in some circumstances, torpedo your case. ***KNOW*** what your witness is going to say before you ask questions.

Coaching

Do NOT coach your witness. You may meet with your witness to instruct him or her how to answer. For example, the most important thing to make clear to your witness before the deposition or trial is to answer each question as briefly as possible then shut up. If you allow any witness to go into what we call the narrative mode, telling some long-winded story, adding facts that go far beyond the facts you need, your case can quickly blow up in your face.

Another reason not to coach your witness is the likelihood your opponent's lawyer will cross-examine your witness asking, *"Did my client's opponent tell you what answers to give today?"* If your witness tells the court, you requested certain answers to your questions, the value of your witness's testimony in the eyes of the court will be greatly diminished. The court wants to hear what your witness knows, not what you told your witness to say.

Be prepared but also be forewarned. Depositions are a fantastic way to get evidence into the record before trial, however they can backfire if you don't prepare properly and carefully follow what's taught in this class.

What Questions to Ask

As stated above, there are certain facts you should have alleged in your pleadings whether in your complaint as plaintiff or in your affirmative defenses as defendant.

Nothing else matters but those facts, the facts you need to prove to win.

Unless a fact will help you get at other facts that prove what you alleged in your pleadings, *leave it out*.

If you are defending a foreclosure case and the witness represents the lender or other party bringing the action, ask, *"What authority do you have to bind the plaintiff with your answers today?"* Just because a witness is put on the stand as representing a corporation or similar entity does not mean that witness has authority or, for that matter, that the testimony to be given is the official position of the corporation or entity.

Make the witness state his or her authority, who gave the authority, and what they know firsthand about the testimony they are about to give.

Ask if the witness is on any medication that might impede the ability to answer truthfully.

Ask if the witness has ever been convicted of a felony or crime involving dishonesty, e.g., passing a bad check, fraud, misrepresentation, perjury, etc.

Ask if the witness is testifying of the witness's own free will and is under no undue stress or duress.

Ask if the witness understands that he or she is under oath and subject to criminal penalties for perjury.

Don't be shy. This is not a parlor game.

Above all, ask questions that will elicit testimony tending to prove the essential facts of each of your causes of action, then sit down.

If you have documents or other things you obtained through discovery, you may show those documents or things to the witness and ask questions about them, such as, *"Is that the hub cap from the front-right wheel of your Mercedes Benz?"* or, *"Tell me on what page are the alleged trade secrets in this document."*

The court reporter is recording everything.

Prior to showing documents to a deponent, hand the document to the court reporter and ask that the document be marked. For example, *"Madam Court Reporter, please mark this document as Exhibit A."* The court reporter will do as you request.

Hand the document to your witness, saying, I hand you what's been marked as Exhibit A for identification, *"Do you recognize it?"*

This also works with responses to written discovery requests *Request for Production, Request for Admissions,* and *Interrogatories*. If during questioning a deponent's testimony varies from what was obtained earlier in response to some discovery request, you will have the earlier response marked for identification.

Hand it to the witness and ask, for example, please read your response to the third interrogatory on Exhibit B. The deponent may wiggle nervously and start to sweat however, if the fact you seek is reasonably calculated to lead to admissible evidence, the deponent will be required to answer or you can take it up with the judge on a *Motion to Show Cause* why the deponent should not be held in contempt for refusing to answer.

This power belongs to every fair-minded person in virtually every court in the known universe.

What Questions Not to Ask

One of the very worst things you can do when interrogating a deponent or questioning a witness at trial is to bring facts into the record that serve no purpose and create opportunities for your opponent to muddy the waters, distracting the court from what's truly important.

Lawyers use the term *dispositive* to *describe facts that tend to dispose of issues in a case*. If what someone had for dinner on a certain day will tend to dispose of a material issue in the case, by all means ask. If it can have no bearing on the case and will not lead to the discovery of facts that will dispose a material issue, don't ask.

Anything that doesn't belong will serve only to give your opponent opportunities to make an issue of it, bringing disruptive smoke and mirrors into the contest where there ought to be bright focused spotlights on the dispositive facts and a complete absence of anything else.

If it's a dog bite case, for example, and the witness is the dog owner whose dog bit your child, ask, *"Has your dog ever bitten anyone?"* Perhaps the dog has bitten several people. Perhaps there have been previous cases brought to court by people who've been bitten by the dog. You need to know.

You should not ask, *"Does your dog like to sit on your lap?"* because it gets you nothing and gives your opponent an opportunity to go off on a wild goose tangent distracting from what needs to be in the record for you to win.

Don't ask any question if you don't want the wrong answer or a lengthy surprising and disappointing answer.

What Questions to Answer

If you are being deposed, follow this simple rule: *Say as little as possible, then shut up.*

For example, you may be asked where you were on Tuesday the 23rd of June 2020. The answer is, *"I was in Chicago,"* or wherever you were on that day.

Do NOT say, *"I was buying tickets to a Cubs game at Wrigley Field with my friend John Sticky Fingers O'Toole, who was just released from prison that morning."*

DO NOT GIVE MORE INFORMATION THAN IS REQUIRED!

Tell the truth, the whole truth, and nothing but the truth, but do not go beyond precisely what the question asks.

Let the person taking your deposition dig for the information he or she wants from you. Do not volunteer anything unless you know for absolutely certain it will help you. If in doubt, add nothing.

If you are asked any question that might tend to put you in criminal jeopardy, say, *"I refuse to answer on the grounds that it might tend to incriminate me."* Nothing more. Say *might* tend, not will or would.

The word incriminate comes from the root word criminal, so anything that might tend to incriminate you is anything that might be used against you as grounds for criminal proceedings, whether you did anything wrong or not.

Just because you didn't do something doesn't mean people won't use something you say to put you behind bars. If in doubt, *Plead the Fifth*.

Beyond that, if you do not candidly answer questions at a deposition you may find yourself squirming later under a *Motion to Show Cause* why you should not be held in contempt for refusing to answer candidly. Stay true.

Noticing Depositions

Noticing depositions is a procedure by which you

1. Contact opponent* to agree on time and place
2. Contract court reporter to take the deposition
3. Prepare Notice of Deposition *(see below)*
4. File original Notice with the Court
5. Serve copy on intended witness
6. Serve copy on opponent*

* or opponent's lawyer if opponent has one

If the intended witness is a party e.g., your opponent there's no need to pay a process server to serve the notice. You simply serve the party with a *Notice of Taking Deposition* just as you do with other papers like motions, discovery requests, etc.

If the intended witness is not a party e.g., phone company, bank, disinterested witness, the following procedure should be used.

1. Attempt to communicate directly with the witness to agree on time and place.
2. Offer to take deposition at non-party's place of business, home, or other location preferred by witness.
3. Explain what the deposition is for without in any way coaching the witness.
4. In a friendly way attempt to get agreement for time and place.
5. If no agreement possible, use process server to serve Notice of Taking Deposition with a subpoena issued by the clerk.

Non-party witnesses should be subpoenaed to appear for deposition. That way witnesses are subject to contempt if they don't show up or show up and refuse to answer questions. The court must issue subpoenas for *pro se* litigants. Learn more in the Discovery class.

The following form will work when you wish to depose your opponent, i.e., a party. You can file and serve this form yourself. Don't forget the certificate of service explained elsewhere in the workbook.

IN THE THIRTIETH JUDICIAL CIRCUIT COURT
IN AND FOR SUNSHINE COUNTY, FLORIDA

Case No. 2012-123
Judge Benchwarmer

DONALD TRUMP,
Plaintiff,

v.

JOE XI JING PING,
Defendant.

NOTICE OF TAKING DEPOSITION

YOU ARE HEREBY NOTIFIED that the undersigned will take the deposition of DONALD TRUMP at the offices of Esquire Deposition Services, 515 North Flagler Drive, West Palm Beach, Florida 33401 800-330-6952 at 9:30 a.m. on 12 June 2012.

This deposition is for discovery and for use at hearings and at trial.

TIME RESERVED is six 6 hours.

GOVERN YOURSELVES ACCORDINGLY.

_____
JOE XI JING PING, Defendant

[Certificate of Service]

In Summary

Depositions are powerful tools to get evidence if they are used correctly.

When you are being deposed, the other side will likely try every dirty trick possible to get you to say things hurtful to your case. Say as little as possible. Say nothing that is beyond the scope of discovery. Speak only the truth.

If you are deposing others, use written discovery tools first, if time allows, to get as much information about the case as possible. There are not many things more enjoyable than handing a deponent some document your opponent doesn't want in the record and saying, I hand you what's been marked as Exhibit A. *"Is that your signature on page 3?"*

Stick to the facts that support the causes of action in the case, and don't let your opponent go on a fishing expedition.

Doing depositions, the right way is just common sense. What needs to be proven is the goal, not to dig dirt. Do not depose your witnesses too early.

CONTRACT LAW
Your Foundation for All Legal Systems

Contracts Are Biblical

In the Gospel of Matthew, Jesus teaches a simple lesson about contracts every schoolchild should be taught before 8th grade. It's the Parable of the Vineyard.

It is fundamental contract law this world sorely needs to learn.

It teaches one of our fundamental civil rights that's in jeopardy each day in the hands of liberal politicians and the self-interest of crooked lawyers.

The Vineyard Workers

A land owner went early one morning to hire men to work in his vineyard. He found a man who agreed to work all day for a penny and sent him into his vineyard to prune the vines.

A few hours later he saw another man standing idle nearby and sent him also to work in the vineyard, promising to pay whatever amount was right.

At mid-day he hired still another man to work, again promising to pay whatever was right.

Late that afternoon he hired yet one more man, promising to pay whatever was right, rather than have the man stand idle and earn nothing.

At the end of the day, he sent his steward into the field to pay the laborers, and all received a penny.

When the man hired early that morning came for his pay, he complained bitterly, claiming he should be paid more, because he worked longer than the others.

But the land owner answered, *"I do you no wrong, friend. You agreed to work all day for a penny. Is it not lawful for me to do as I wish with what is mine? Take what is yours and go.*

The Twin Pillars of Law

This little story is the root of contract and the soul of property law, the twin pillars on which all legitimate legal systems are erected and from which all concepts of human liberty are derived.

The twin pillars of law are:

- Contract Law
- Property Law

These two are the foundation of all law.

It should be lawful for you to contract with anyone who agrees with you on the terms and conditions, providing, of course, both parties:

1. understand what is being bargained for,

2. enter the agreement willingly, and

3. the agreement is not unlawful, for example a contract to murder.

Once a bargain is made which becomes a contract, the contract entered both parties owe a duty to each other. The parties are said to be *bound* by their contract.

The duty arises from their agreement:

- promise for a promise
- offer and acceptance

The contracted parties are bound to perform the agreed upon bargain fully, no matter what deals they may make with others or what excuses they come up with later.

Ink & Glue

Before you is a lengthy document tightly packed with words you do not recognize. At the top you see the title: *"Contract."*

A confident voice assures you, *"No need to read the small print. It's just boilerplate legal mumbo-jumbo. Nobody ever reads that stuff. Here you go. Sign your name."*

And *there you go*. You're stuck tight by a tiny bit of ink. What have you done? Can you get out of it? If the other side doesn't perform, can you take him to court? Did you read the *small print* anyway? What do you *really* know about contracts?

Most people *think* they know all they need to know before entering into contracts. Indeed, hardly a day goes by that you don't enter some kind of contract such as ordering products on the Internet, signing up for home newspaper delivery, renting a car, buying an airplane ticket.

Contracts are an integral part of our lives.

The list is endless, as are the heartaches and disappointments that punctuate the lives of those who don't understand contracts.

Courts jammed with angry litigants prove most people don't really know much about contracts at all. You can change this right now.

In this workbook, you're going to learn a brief lesson on contracts. You'll learn:

- When a contract is formed
- What it takes to make a contract binding enforceable in court
- How to get out of a bad contract
- What to do when the other guy doesn't do what his contract promised
- How to make contracts work for you

What is a Contract?

Like a marriage between two lovers, every contract begins with a promise offered and a promise returned. Every contract is nothing more than an exchange of promises. It can be as simple as:

- silent agreement bound by knowing nod or handshake,
- spoken pledge witnessed by friends, or
- formal agreement signed in blood on unblemished parchment, decorated with official seals and colorful ribbons

An exchange of promises. A bargain for a bargain. A promise for a promise. Offer and acceptance.

Popeye's always hungry friend Wimpy used to say, *"I'll pay you tomorrow for a hamburger today."*

This is the golden key to understanding contracts. Every contract is a promise for a promise.

Don't lose sight of this simple concept. Everything depends on it. A promise for a promise.

At the heart of every contract written, spoken, or silently acknowledged one party promises to do something in exchange for the promise of someone else to do another thing.

If an exchange of promises is not made, there is no contract.

It doesn't matter what's written in blood on parchment, signed in deep blue ink, or decorated with seals and ribbons.

If promises aren't exchanged, there's no contract between the parties and therefore nothing for a court to enforce.

Suppose I promise to mow your lawn for $5. You turn on your heel with a huff and hastily enter your home, slamming the door behind you, giving no indication you've accepted my promise.

Are you obligated to pay me $5 if I mow your lawn? Is there a contract? Can I sue for breach if I mow and you don't pay? Absolutely not.

There was only what we call a *"unilateral contract, a one-sided promise."* **One-sided promises do not a contract make.**

To form a contract our courts will enforce, there must be an exchange of promises.

- I promise to mow your lawn for $5.
- You promise to pay me $5 if I do the job.

That's a contract.

It doesn't have to be in writing to be enforceable in court, as you'll learn as we get into this interesting subject further, however it must be a willing, knowing exchange of promises, a promise for a promise, a bargain for a bargain, a duty for a duty.

This will save you money and protect you from common problems that arise when people who don't understand contracts get hurt.

It'll protect you when the other guy doesn't perform his end of the bargain.

Contracts in General

Contracts, and the reasonable expectation of performance that goes with them, are the life-blood of every economy.

Without some degree of certainty that people will perform the promises they make, the world of commerce would grind to a sickening halt.

Things we take for granted every day would cease to exist.

Business relies on exchanges of promises that can be enforced in court if one side breaches a binding exchange of promises.

People enter agreements every day without a single thought. Most people perform their promises, and life goes on without a hitch.

People go to work each Monday with confidence they'll get their check as usual come Friday.

Yet, behind the scenes, all these things are regulated and made possible because one party promises to do something in exchange for the promise of someone else to do another thing.

Most of us rely on promises without a second thought *because we know the courts will back us up if the other side tries to back out*. At least we *hope* so.

Here are the questions that need to be answered in order to understand contracts:

What does it take to make an enforceable contract?

When is a contract made?

When is a verbal agreement binding?

What should a written contract include?

Understanding contracts is simple once you understand a few fundamental principles that control all contracts.

Fail to grasp these fundamental principles, however, and you are fair game for the dishonest wolves out there who see their opportunity in your naïve willingness to trust them.

Understanding contract law gives you law-power to protect yourself.

Successful businesses use written contracts as the rules of engagement.

Employers promise to pay employees and offer benefits like health insurance and a safe working environment in exchange for employees' promises to faithfully perform services, arrive at work on time, protect their employers' trade secrets, etc.

How many employees would work for a company that refused to promise paychecks for labor? How many employers would hire workers who refused to promise work for pay?

Farmers bargain better prices for produce and enter contracts that ensure prices based on buyers taking delivery at the farm, or a price that includes that farmers' cost of delivery to a pre-determined silo or warehouse. Point of delivery is a critical term in many commercial contracts.

A young man or woman signs up for military service, in exchange for the promise of higher education or technical training.

A company in New York orders a computer part from a distributor in New Zealand. A landlord hands the keys to a new tenant. An airline sells you a ticket to Jamaica. Promises in exchange for promises. The world relies on them.

Businesses that don't use contracts to determine how much is to be paid, how much work is to be done, where goods are to be delivered, and similar issues of commerce soon discover profits disappearing into the pockets of lawyers as they fight in court over who promised what.

It's so much easier and cheaper to use binding, written contracts that clearly spell out what the respective parties' promises are, *than to leave it up to an expensive, time-consuming fight in court.*

The staggering costs of litigation in the United States profits only lawyers.

The result of poorly worded bargains contributes to the inflation of prices the public must pay for goods and services.

Elements of Contract

Offer & Acceptance

Before there can be a promise for a promise, someone must make the first promise.

Popeye's friend Wimpy was uncommonly fond of hamburgers. He frequently promised Popeye, *"I will gladly pay you tomorrow for a hamburger today."*

Wimpy went first. Wimpy made Popeye a promise. No contract yet.

His unilateral or one-sided promise could be accepted or refused.

Until a promise is accepted, it's just a promise, it is not a contract.

To form a contract, the first promise must be accepted by a return promise.

In Wimpy's case, the offer was generally refused. Popeye knew his friend's promise was unreliable. An unaccepted promise or refused promise is no contract at all.

Suppose, however, Popeye accepts Wimpy's offer by promising him a hamburger today. Popeye might say, *"I accept your offer, Wimpy. I'll give you a hamburger today."*

Offer accepted. Promise for a promise. Contract Formed.

Wimpy, who made the first promise, is called the "offeror." He made an offer.

Popeye, who made the second promise, is called the "offeree." He accepted the offer.

Wimpy made an offer to pay Popeye tomorrow for a hamburger today.

Popeye accepted the offer by promising a hamburger today.

Both are now bound by contract.

Popeye owes Wimpy a hamburger today.

If Popeye gives Wimpy a hamburger today, Wimpy will be bound by contract to pay Popeye tomorrow.

If Popeye waits and gives Wimpy a hamburger tomorrow, instead of today, Wimpy owes nothing as far as contract law applies, since Wimpy's promise was to pay tomorrow for a hamburger received today.

Wimpy is obligated to pay Popeye tomorrow if and only if Popeye gives him a hamburger today.

Even if Wimpy isn't hungry when Popeye brings the hamburger later the same day, Wimpy must accept the hamburger and will be obligated to pay Popeye tomorrow.

Once Popeye accepts Wimpy's offer, Wimpy cannot get out of the contract without Popeye's consent.

A deal is a deal.

It begins with the offeror's initial promise called *"the offer."*

It is formed when offeree accepts or demonstrates acceptance by performing.

If Popeye hands Wimpy a hamburger instead of promising a hamburger, a contract is formed by performance. Popeye has met his obligation. Wimpy now owes but need not pay until tomorrow.

If Popeye accepts Wimpy's offer by promising a hamburger today but doesn't deliver a hamburger today, Popeye has breached the contract by defaulting, and Wimpy doesn't have to pay tomorrow or any other day.

In the real world, great harm can result when an offeree accepts an offeror's promise by promising to perform but fails to do so. Take for example the following situation.

The skipper of a commercial fishing vessel far at sea calls an ice house in port by shortwave radio, promising to pay $100 per ton for 5 tons of ice to be delivered to the skipper's pier at 6 a.m. the following morning. The ice house accepts the offer by promising to have 5 tons of ice at the pier at 6 a.m.

Contract made.

What if the ice house fails to deliver on time or never shows up?

What if several thousand dollars' worth of fresh fish in the vessel's hold are spoiled? Clearly this is much more serious than the contract between Wimpy and Popeye.

Offer Made + Offer Accepted = Contract

Wimpy could have made a better offer. He might have said, *"I will pay you tomorrow for a hamburger delivered in the next 5 minutes, provided if you don't deliver within 5 minutes you pay me $5 today for my trouble."*

Of course, Popeye would refuse to accept such an offer, and Wimpy would remain hungry the rest of the day.

- Wimpy as offeror controls the terms of the contract.
- Popeye as offeree controls the making of the contract.

No one is ever obligated to accept an offer.

When two parties agree with an exchange of promises or one promises and the other accepts by performing a contract is formed.

Contracts create reasonable expectations that make business possible in a complex and unpredictable world.

- The offeror's promise controls the terms.
- The offeree's promise binds the deal.

The Offeror

An offeror needs to be careful with his offer. Very careful. Offeror is "author of the deal."

Offeror is legally bound as soon as offeree accepts.

Except where an offeree makes a counter-offer modifying, restricting, or expanding the terms of the offeror's offer the offeree can, by accepting offeror's offer, bind offeror to the deal he offered.

An offer gives others the right to *bind* the offeror to a contract merely by accepting the offer.

Offeror cannot later complain, once his offer is accepted, *"But, I didn't really expect him to accept my offer."* Offeror is stuck with the terms of the deal he proposes, unless he withdraws his offer
before the offeree accepts.

In deals involving written contracts, offeror must carefully include all terms and conditions he intends to bind the offeree. He must above all make certain his offer is clear as to terms and conditions and not vague or ambiguous.

He needs to be clear about what he is promising and clear about what he expects from the party who may accept his offer.

Dates, times, places, names, addresses, cancellation, consequences in case of breach by either party and, of course, prices and methods of payment should all be specified in sufficient detail so the offeree cannot complain there was no meeting of the minds.

The Offeree

Offeree is the party who accepts offeror's offer. The offeree seals the deal. If offeror offers, and offeree accepts, the offeror is bound to perform his offer.

Acceptance may be made verbally, in writing, or by beginning to perform the acts bargained for e.g., starting to mow the offeror's lawn after being promised $20 to do the work.

Contracts are formed by the offeree's acceptance of the offeror's offers.

Counter-Offers

When Able makes an offer to Baker and Baker accepts without trying to change the offer, a contract is formed and is binding on both parties.

If Baker responds with a counter-offer however, Able's offer completely disappears, it's gone.

If Able refuses Baker's counter-offer, Baker cannot revive Able's original offer by saying, *"I asked too much in my counter-offer. I accept your original offer."*

Can't do it. Original offer disappeared.

Every offer, no matter what for, is extinguished by a counter-offer as if no original offer was ever made.

You'll want to think about this the next time someone offers you a deal you want to change a bit more in your favor.

If you feel they might offer more and are willing to risk making a counter-offer, remember that your counter-offer wipes away your right to enforce the first offer in court.

The first offer is gone completely, unless the original offeror is willing to re-offer the same terms as his first offer.

The original offeror cannot be forced to re-offer. He can just walk away.

Meeting of Minds

The old lady affixing her cat's signature to an agreement possibly promising to use the litter box or not to climb on the sofa doesn't know much about contract law. Cats can't read.

For an agreement to be legally binding, there must be a meeting of the minds as to the terms of the agreement.

Cats are smart, but they're not that smart. Forced paw prints are not binding on cats or human beings.

The Case of Hadley v. Baxendale

Hadley owned a grain mill in Gloucester, England, making and selling flour.

The main shaft of his mill broke, shutting down the mill.

Hadley hired Baxendale to deliver the shaft for repairs by a certain date.

Baxendale failed to deliver the shaft on time.

Hadley sued for lost profits resulting from his mill being unable to grind without the shaft.

Baxendale's defense was not knowing failure to deliver the shaft for repairs by a certain date would result in Hadley's lost profits.

An English Court in 1854 established a legal doctrine still adhered to in our courts: Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, or as according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

Or, to collect damages for breach of contract, the damages must have been *"within the contemplation of both parties"* at the time of making the contract.

Hadley may be able to recover Baxendale's delivery charges, since Baxendale certainly knew the contract contemplated delivery by a certain date.

But, Baxendale cannot be thought to have contemplated he would be responsible for Hadley's lost business if he was delayed. Indeed, if Baxendale had been told that delay in delivery would make him liable for Hadley's lost business, he probably would not have agreed to deliver the shaft to begin with or, certainly, would have made greater effort to do so in a timely manner.

Contract is all about mind-meetings. Where minds don't meet, courts don't enforce.

Bargained for Consideration

For a contract to be enforceable, both promises must have real value. The respective values are called consideration for the bargain.

Consideration for a bargain is what each party considered he would be required to give and what each considered he would receive in return.

If either promise lacks consideration i.e., real value that promise is said to be gratuitous, i.e., a gift and not bargained for consideration. Without consideration an exchange of real value there is no contract.

One cannot enforce a gift.

The Case of Kirksey v. Kirksey

An Alabama court in 1845 decided this case. The doctrine is still followed today.

Mr. Kirksey owned a farm. Mr. Kirksey had a married brother living 60 miles away.

The brother died, leaving a homeless widow.

Mr. Kirksey wrote to the widow, promising her a place at his farm if she chose to accept.

The widow accepted and moved to her brother-in-law's farm.

After two years Mr. Kirksey kicked her out. We can only imagine why.

The widow sued for breach of contract. The court decided there was no contract.

Mr. Kirksey's promise was gratuitous. There was no consideration asked for or promised in return.

Although this may look like a contract on the surface, it wasn't.

If Mr. Kirksey had written, *"If you will feed my chickens and hoe the corn, I'll let you stay*

at my place," then if and only if the widow did feed the chickens and hoe the corn responsibly, she would have performed the bargained for consideration Mr. Kirksey requested, and she could perhaps enforce the contract in court.

But, no consideration was requested by Mr. Kirksey.

He merely offered the bereaved widow of his late brother a comfortable place to stay.

He asked nothing in return. No consideration. No contract.

Counter-Offers

A counter-offer does not accept an offer. A counter-offer does not create a contract.

A counter-offer is an offer for an offer. An offer for an offer does not create a contract.

There must be acceptance to create a contract. One party offers. The other accepts. Contract created.

If the original offeror accepts the original offeree's counter-offer, however, a new contract is formed. We have an offer and acceptance in reverse. The original offeror's acceptance of the counter-offer binds the original offeree to the terms of his counter-offer. A contract is made.

If a counter-offer is accepted, we have what is called a novation, i.e., a new contract.

If a counter-offer is not accepted, we have negation i.e., no contract.

Verbal Contracts

Verbal contracts can be just as binding as written contracts. However, the terms of verbal contracts may be difficult to prove in court.

It is critically important, therefore, that people willing to bind themselves to a verbal contract take care that both parties to the agreement understand the specifics of what they are agreeing.

If performance is immediately forthcoming, a written agreement may not be needed.

If performance is anticipated to be delayed, a verbal contract may not be wise.

Statute of Frauds

Long ago and far away in a country called Merry Olde England, some wise fellows came up with the idea of limiting the ability of persons to bring their contract complaints to court if the contract is not in writing.

The result became known as the Statute of Frauds. Most civilized nations have since adopted the idea and made it law.

The statute applies to two kinds of agreements.

- Contract for Services
- Contract for Sale of Tangible Personal Property not land, houses, etc.

Contract for Services

If parties agree for services that can and are anticipated to require less than one year, for example, most states will enforce such contracts, even though they are not in writing.

If the services cannot be completed within one year, however, the courts will not enforce unless the terms are committed to a dated writing and signed by the parties.

These conditions may differ somewhat between jurisdictions, but in general this is how the statute of frauds works for services. Check your local jurisdiction for details.

Contract for Sale of Goods

If parties agree on terms for the sale of goods personal property, as opposed to real property, i.e., lands, houses, etc. and the price agreed upon is less than a particular amount set by the statute, the courts will enforce the agreement, even though it is not committed to a writing.

For example, suppose you agree to sell your bicycle to a friend for $400, and your friend promises to pay you the following Saturday. If your friend does not pay, you may bring a lawsuit because the price is below the limit set by the statute of frauds in all jurisdictions we know of at this time.

If you agree to sell your aircraft alloy racing bike to your friend for $2,500 but fail to get his signature on a dated writing setting out the terms, you probably will not be able to succeed in court with a count for breach of contract, because your opponent should win with a motion to dismiss based on the statute of frauds.

And, even if he does not prevail with a motion to dismiss he will nonetheless have an affirmative defense of the statute of frauds since most jurisdictions at this time set a much lower limit on contracts for sale of tangible personal property.

These conditions may differ somewhat between jurisdictions, but in general this is how the statute of frauds works for services. Check your local jurisdiction for details.

The bottom-line is, of course, if there is any doubt whatever that an agreement may be breached, get it in writing signed and dated.

Written Contracts

Contrary to popular myth, written contracts don't need to be signed in “ink to be binding. You could carve them in the bark of a tree or write them on the sidewalk in chalk.

Of course, you'd have a hard time getting a slab of sidewalk or giant tree trunk into a courtroom if you needed to sue for enforcement.

Crayon on a paper grocery bag would work well enough. Pencil is just as good as ink.

Any medium that can be clearly read and preserved with sufficient security against fraudulent alterations will suffice. Ink, of course, is best.

There are, what lawyers call *magic words* that should be included in every written contract, so at the end of the following section you'll find a sample contract with some of those magic words you can use when you want to preserve an understanding.

Drafting Contracts

Value

Since all enforceable contracts must be based on a bargained-for consideration, you should begin all contracts with the words, *“FOR VALUE RECEIVED including, but not limited to [whatever the value might be] together with the stipulated value of the terms and conditions contained herein, the parties hereto agree as follows:*

Terms

The terms should be spelled out in numbered paragraphs each containing one simple sentence, just like you learned earlier when we discussed motions and pleadings. One paragraph for each sentence, one subject, one verb, and as few adjectives and adverbs as possible.

Defining Breach

Two of the most essential terms of any contract are conditions for performance, including a date for performance to be completed.

Conditions for Performance

What someone must do is, of course, essential to a successful contract. How it must be done is important, also.

Suppose you are hiring a famous concert pianist to perform at a garden party. If your contract merely requires piano music without specifying that the famous guy is to make that music with a real piano, the contract might be performed by a beginner or even a computer-controlled keyboard. That, of course, is an exaggeration, but you get the idea.

Contract terms should include specific conditions for performance.

Setting a Date Certain

Often the most critical term is when performance is to be made.

If the when is omitted, courts will impose a reasonable time for performance and enforce the contract based on what the court decides is reasonable. If the when is important as it usually is, then a certain date for performance should be made part of the terms - and the writing should close with, Time is of the essence of this agreement.

Stipulating Damages

You already saw with Hadley v. Baxendale the miller's case discussed above how important it is for the parties to agree on what damages will be suffered by a breach.

The miller did not specify in his agreement with the wagoner that failure to deliver the broken axle on a certain date would result in lost income. If he had, the court would have reached a different result, holding the poor wagon owner responsible for whatever money the miller might have earned during the delay.

It is often wise to agree to stipulate a certain sum of money as damages in the event of breach. The miller, for example, might have required that for each day the mill remained inactive due to the wagoner's failure to deliver the axle for repairs, the wagoner would be responsible for $42.53 in stipulated damages.

Of course, in the mill case neither party anticipated a delay, but in your agreements you should always try to anticipate every possible contingency - especially where a lot of money is a stake, and put stipulated damages for breach in your written agreements whenever possible.

Consequence of Breach

The rights of the prevailing party in the event of breach should be spelled out carefully.

Typically, a tight contract will include provisions to be triggered upon breach. These may include a requirement for the dispute to be settled by arbitration or at court.

In either case, the terms should include obligating the losing party to pay the prevailing party's court costs and attorney’s fees including any costs and fees required for appeal, if necessary.

Integration Clause

Every contract should have what lawyers call the *“integration clause.”*

An integration clause is nothing more than a statement that both parties agree there is no *other* agreement between them. A typical integration clause reads as follows:

"This is a complete agreement between the parties, any other agreement not committed to a dated writing signed by them both being null and void."

The result of such an integration clause is obvious. Neither side can later claim, *"But you said blah, blah, blah..."* Whatever is said is null and void unless it is said in a dated writing signed by both parties.

Time of the Essence

As mentioned above, making time a critical term is essential. Amateurs often omit this essential phrase to their great sorrow.

A written offer, not yet accepted, should always have a date/time deadline when the offer must be accepted. Failure of the offeree to accept on time results in automatic withdrawal of the offer.

Similarly, of course, the date/time for performance must be stated clearly.

And, at the end, this famous phrase: *Time is of the essence of this agreement.*

Execution

When written agreements are signed, certain specifics are recommended.

Identifying the Parties

The parties' full names should be spelled out below the line on which they are to sign.

If the parties are not well known to each other, additional information should be included, e.g., residence address, date of birth, and even social security number depending on how likely enforcement may be required.

A certain *John Smith* may be difficult to find in a large city.

Witnesses

Witnesses are required as a matter of law on certain types of contracts.

For example, for a deed or other transfer of interest in real property to be effective in most jurisdictions, the document must be signed by witnesses attesting to the fact that they personally, observed the contracting parties' signing the document.

When witnesses are required, two are generally a minimum, however for some agreements three or more may be required.

Consult your local official statutes for number of witnesses required for specific types of written agreements, especially including deeds, mortgages, leases, and other contracts transferring interests in real property.

Notaries

Notarial certificates are not essential for most private agreements. However, if the agreement is particularly sensitive, a Notary should witness the parties' signing and, if there are witnesses, the witnesses' signing, also.

Date

That the date of signing is important is almost too obvious to mention.

However, if the offeror signs an offer on one date, then mails the agreement to his intended offeree to sign on a later date, a provision should be included in the contract to show the separate dates on which the two parties sign.

Avoiding Contracts

Overreaching

If an offeror stands in such a superior bargaining position that his offer cannot be refused like when an employer requires an employee to agree to certain conditions or lose her job the contract that results may be avoided in court on the ground that it was obtained by *overreaching*.

The overreaching offeror, by pushing his demands too far, actually shoots himself in the foot. He gives those who are forced to accept his irresistible contract the legal grounds to avoid its binding effect.

One can try to get much out of a contract.

Reasonableness is always the test of whether courts are legally bound to enforce a contract. If a contract is not unreasonable on its face, and the parties share equal bargaining power, it can be said they both entered the agreement willingly, and the court will force the parties to perform the deal they made with each other.

The fact that the offeree regrets accepting the deal and wishes he never met the offeror to whom he bound himself, makes no difference whatsoever to the courts.

On the other hand, if a contract contains unreasonably overreaching terms and conditions, the offeror in a superior bargaining position puts the offeree in a no-win situation, and the court can set the deal aside.

By forcing a contract on someone who would never otherwise agree, the overreaching offeror ultimately loses *if the offeree can make his case for overreaching in court*.

Overreaching is difficult to prove if the unfair pressure is slight.

Consider a farmer with crops in the field ready for harvest. He must bring in his produce before it rots on the stalk. But this poor farmer twisted his ankle, so he cannot do the strenuous work without help. He asks his neighbors, but they're busy with their own crops. He posts a hand-painted sign by the road, *"Help Needed."*

Early next morning a passing hitch-hiker comes up to the house, inquiring what help the farmer needs.

"There's a ripe crop in my field that needs to be brought to the barn," the farmer explains, grimacing a bit as he shifts his weight to the good ankle.

"I'll do it," the hitch-hiker offers, *"if you pay me $75 an hour."*

"You must be kidding," the farmer explodes. *"I'll do it myself before I pay you $75 an hour."* As the words leave his lips, a stabbing pain in his ankle drains conviction from the empty threat.

"That's my offer, mister. Take it or leave it."

Unable to pick the crop himself and worried he has no choice, either gather the crop into the barn or lose the season's labors, the trapped farmer unhappily accepts the offer, and a contract is made.

The hitch-hiker strolls casually to the field, as if taking a Sunday morning walk in the park. He clumsily picks one basket of produce at-a-time, carrying each basket slowly to the barn before returning without hurry to the field once more. The process continues through the heat of the day until nightfall when the last basket is finally safe in the barn.

A job that would have taken an experienced picker half a day at $8 per hour, took 12 hours at $75. When the hitch-hiker knocks on the farmhouse door he demands, *"That'll be*

$3,600, mister."

Was the contract overreaching? The courts will say, "No.

It's true the farmer was under great duress. But, the hitch-hiker was free to continue on his way without stopping to work for the farmer.

The law will not require someone to work, no matter what the need.

Here's another example.

Suppose an apartment owner rents a room to a fellow who promises to work 8 hours each week in exchange for his rent.

Now suppose this arrangement continues for several years, during which time the tenant marries and has several children.

One day the owner comes to him and says, *"If you want to keep living here, you'll have to start working 40 hours each week to cover your rent."*

Is this the same as the farmer and his crop?

The tenant may have no choice. He may have no money to rent another place. His family can't be out on the street. But, if he's required to work 40 hours each week to pay the rent, he can't hold down another full-time job. His family needs to eat as well as have a roof over their heads.

What can he do?

In this case, the court would probably allow the landlord a reasonable increase in the number of hours the tenant must work for his rent, but not allow the time to be quintupled from 8 to 40.

It isn't reasonable. It isn't fair. The apartment owner is in a superior bargaining position. The tenant is strapped. The contract is overreaching and may be set aside or modified to make it more reasonable. Law and equity are combined.

Caveat Emptor

...means *"Let the bargainer beware."* Those who think a contract is a contract, oversimplify the truth.

He who bargains should beware. Equity can temper harsh contract consequences.

The doctrine that justifies courts' setting aside overreaching contracts is called mutuality or lack thereof. If one party is required to agree upon pain of suffering unjust loss, the party forced to agree is considered not to have done so *"at arm's length."*

There is no mutuality.

If an agreement is sufficiently one-sided, courts may treat it as a nullity, it would be as if the contract never formed in the first place.

If a contract lacks mutuality, even though it may appear fair on its face, the courts can look to circumstances behind the scenes to discover lack of mutuality and nullify or modify the agreement.

Such is the power of equity.

In Summary

That's contracts in a nutshell. Promise for promise. Bargain for bargain. Agreement for agreement. The foundation of all property rights. The reasonable expectation that makes modern business possible.

ARGUMENTS

Legal Arguments Make the Point

Legal arguments are not the same as family arguments. “Because I SAID SO,” doesn't work in court.

Stomping your feet, raising your voice, or holding your breath till you turn blue might get what you want at home, but it won't work in court.

Nor will threats of withholding love and affection, being sent to bed without supper, or any of the thousands of other underhanded ploys family members use to wheedle and intimidate for what they want.

That kind of arguing won't work in court.

Family arguments obey no rules. At home you can scream, cuss, pull hair, or even slap someone silly to make your point, because there are no rules.

Courts have rules.

You need to use effective legal arguments to make your point.

Emotion has nothing to do with it. Getting angry will work against you. Attacking the judge is just stupid even if the judge is wrong. Begging for pity is a shameful waste of effort.

Winning cases depend on facts, laws, admissible evidence, and persuasive legal arguments.

Winning in court depends on facts, laws, admissible evidence, and persuasive legal arguments.

Use rock solid legal arguments to win.

Pleadings

As you learn elsewhere in this course, every case is built upon the solid foundation of proper pleadings:

- Complaint (or Petition)
- Answer and Affirmative Defenses
- Cross-Claim
- Third-Party Complaint

The pleadings on each side tell the court what each party intends to prove. Indeed, they tell the court what the winning party must prove to win.

Losers cannot prove what they allege in their pleadings.

For the plaintiff to win, the Complaint must clearly state:

- what the plaintiff wants
- why the court has jurisdiction to award what is wanted

- what facts will be proven
- what law applies
- move the court to enter a favorable judgment

For the defendant to win, the Answer and Affirmative Defenses must clearly state:

- essential facts plaintiff has not alleged
- essential facts plaintiff cannot prove
- essential facts defendant can prove
- controlling law that prevents plaintiff's victory
- controlling law that assures defendant's victory

But that's just where the arguments begin. ***Discovery***

Once the pleadings have been filed and all motions aimed at dismissing, striking, or requiring clarification of the pleadings have been ruled upon by the court, the parties begin to obtain admissible evidence in support of what their pleadings alleged.

This is called Discovery and is covered in another chapter.

Discovery is used to:

- get admissions from the other side
- get documents from the other side and third parties
- get sworn testimony from the other side and third parties
- get the court to allow the evidence obtained

Successful legal arguments must be made to persuade the court to allow evidence obtained by discovery, typically with written memoranda, at hearings, and at trial if the issues cannot be resolved before going to the trouble and running the risk of a full-blown trial.

One critical point you may have to argue is what may be obtained using discovery. Here you will rely on the *Rules of Civil Procedure* in your jurisdiction where, in all likelihood, you will find a rule for discovery that says you may obtain any fact reasonably calculated to lead to the discovery of admissible evidence.

Facts obtained by discovery methods need not be admissible in court, if they appear to reasonably lead to the discovery of admissible evidence.

When in doubt, cite the official Rule. For example, in Florida this is Rule 1.280 Florida Rules of Civil Procedure. The rule may have other names in other states, and the rule may say the same thing with different words, but the rule will be essentially the same in every jurisdiction. You are entitled to discover any fact so long as it is reasonably calculated to lead to the discovery of admissible evidence.

Rely on official rules.

Cite them often when arguing why you should be allowed to obtain discovery of facts.

Motions

Motions are legal arguments that seek entry of court orders.

Each motion should seek entry of only ONE order, and each order should deal with only ONE thing. Do not use a single motion to get the court to enter an order containing multiple commands. One motion - one order.

A proper motion states up front what order the movant wishes the court to sign and file with the clerk. The rest of the motion tells the court why the motion should be granted and the order signed and filed.

Next the motion should state what facts are already in the record and supported by admissible evidence or unopposed. This will usually include dates, things, documents, admissions, testimony, and other evidence obtained through the discovery process.

Having made clear what facts have been made part of the record as admissible evidence, the motion should cite legal authorities that require the court to enter the motion if the evidence supports. Such legal authorities include (but certainly are not limited to) statutes, controlling appellate court opinions, and maxims.

Each motion should close with a "WHEREFORE" clause. The following is an example:

> *WHEREFORE Plaintiff moves this Honorable Court to enter an Order compelling the defendant to produce the records listed herein and to grant such other and further relief as the court deems reasonable and just under the circumstances.*

Without the WHEREFORE clause, the motion carries no weight.

Memoranda

Memoranda are legal arguments typically used to either support or oppose a motion.

Memoranda can be just a few pages or may be many dozens of pages with multiple attachments and exhibits.

In general, a motion should focus on the order sought to be entered and a brief description of the facts and law that support the motion, but when the facts and law are complex or voluminous, it is better for the motion to be kept short and to the point and supported by a memorandum that goes into greater detail as to the facts and law, using direct citations to statutes, controlling appellate court opinions, and other legal authorities that should persuade the court to enter the order sought by the motion. This is the most common use of a memorandum.

When your opponent files a motion you wish to oppose, one way to make your position clear on the record is to file a *Memorandum in Opposition* to your opponent's motion, using your memorandum to list facts and cite legal authorities that should persuade the court that your opponent's motion should be denied.

Hearings

This is where the rubber first hits the road. To keep your arguments at hearings focused and persuasive, remember what you've learned in the other classes in this course about

- elements
- admissible evidence
- courtroom objections

Elements

At the end of the day, the essential elements presented by the law of the case determine what the court can or cannot do for you.

You may be a plaintiff arguing in favor of the elements of the causes of action in your complaint.

You may be a defendant arguing in favor of the elements of your affirmative defenses or attempting to show there is insufficient evidence to support the elements of the causes of action alleged in the plaintiff's complaint.

In a criminal case you may be the accused arguing to show there is reasonable doubt as to the elements of the alleged crime or the sufficiency of admissible evidence to convict.

Always the determining factors are found in the essential elements.

Admissible Evidence

Of course, evidence that is not admissible is not evidence at all. Never lose sight of this powerful truth.

Many lay people appearing *pro se,* and a surprising number of licensed lawyers, come to court with things they believe are evidence, but believing something is evidence doesn't make it admissible evidence, and if it isn't admissible, it isn't evidence.

That may seem a bitter pill to swallow, but swallow it you should and for your own good.

If you come to court with a copy of an email you received from your opponent, for example, intending to use it as evidence of what your opponent said, or what your opponent was thinking, or what your opponent intended, then, unless your opponent or his lawyer is brain dead, you will hear, *"Objection. Best evidence rule,"* or some other objection. The judge will likely say, "Sustained," and your evidence will be refused.

Complaining, *"But, your Honor. This is an email from my opponent. I received it last year. It proves my opponent is lying,"* will get you nothing.

If it isn't admissible, it proves nothing.

Courtroom Objections

When your opponent's lawyer begins to testify about facts of which he has no personal first-hand knowledge, you need to STAND and say, *"Objection. Counsel is testifying."* If he wants to tell us the facts of this case, let him take the stand and be sworn.

When your opponent's lawyer attempts to present an affidavit to prove his point, STAND and say, *"Objection. Affidavits are inadmissible hearsay."*

Such objections as these are essential to winning in court.

Making them, however, may frequently require more than just stating them. You may have to make a legal argument to support them, explaining why lawyers should not testify or why affidavits are inadmissible hearsay. Presenting the reasoning in court requires putting your arguments in proper order.

- The premise
- The legal justification
- The required action by the court

Never assume a judge will do the right thing.

Make your record.

Never go to a hearing until you have made rock-solid certain that everything said will be recorded and that you will be able, if needed, to obtain a certified transcript of the proceedings in case you need to appeal.

Trial

Trials are much like hearings, except you may have a jury to convince.

Juries are regular folks. You may find a rocket scientist in the jury box, but just as likely you will find people of average intelligence and questionable moral values. Some may be angry at you without a cause. Others may pay little attention, dreaming where they'd rather be than trapped in court to give a verdict for people they've never met and couldn't care less about.

Never tell them to, *"Use your common sense."* Some of them won't have much.

You must befriend them before you can persuade them.

If your case is too complicated for a jury of ordinary people, then you have not prepared your case properly according to this workbook, or your case may just be too complicated to be winnable.

The first rule in legal argument is: KEEP IT SIMPLE.

Try your presentation on friends and family. Order pizza and beverages. Have people over to your home. Make a game of it. Let one person be the judge. Let another be your opponent. Put the others in the jury box. Then see just how much of what you want them to understand actually gets through.

If you can't explain your case to family and friends, you certainly won't be able to get very far with a jury of regular people, half of whom are likely to have an IQ less than 100. The average IQ at the time of this writing is between 85-100.

Time is another factor. People in your jury would rather be home or playing golf or doing any of a million things other than sitting in a stuffy courtroom, so if you drag things along, instead of coming to the point, you will lose them and, possibly, make them angry for wasting their time.

If what you choose to present is not going to provide evidence for an essential element of your case, don't waste the jury's time, please. Only what provides evidence for the essential elements of your case has value. The rest only wastes time and threatens to confuse the jury.

Concentrate on making your case as clear as possible in the shortest time possible while presenting sufficient evidence to support ALL the essential elements of your case.

In Summary

You cannot win in court with arguments like those you have with family members, friends, or enemies outside the court. There are rules. Court rules must be obeyed to create a strong chain of thought.

Every link in your chain must be securely tied to every other link, or your arguments will fail.

Anything outside your chain is a waste of time and usually weakens your arguments while giving your opponent opportunities to muddy the water with non-essentials.

Only what matters should be argued.

Arguments must be calm, peaceable, logically thought out, and presented in an orderly manner, one step at a time.

Start with obvious points about which reasonable persons cannot disagree. That is your foundation.

Then build on your foundation by piling brick upon brick using admissible evidence and legal authorities to glue everything tightly in place.

Give your opponent no wiggle room. And remember, The rules are on your side.

AFFIDAVITS
Telling the Truth

To Tell the Truth

Affidavits are for telling the truth and no other purpose.

Affidavits must be signed by the person claiming the facts therein are true. This person is called the *affiant*.

Affidavits must also be signed by an official duly authorized by law to administer oaths and take acknowledgments. All affidavits are signed under oath, otherwise they are not affidavits.

To be truly effective and serve the purpose for which affidavits are intended to be used, the affiant must voluntarily subject himself or herself to criminal penalties for perjury, contempt of court, and a possibly long time locked securely behind steel bars if his or her affidavit contains statements of fact that are not strictly true.

Affidavits are used in thousands of ways. However, they are not:

- pleadings.
- motions.
- legal arguments.

They are, however, extremely powerful when used properly.

They are excellent tools to beef up your pleadings, motions, petitions, demands, memoranda, and other documents you may file alleging facts. They have a marvelous ability to encourage bad people to do what you want them to do, if you use them properly.

To use them properly, however, you need to know the essential elements that make an affidavit an affidavit. If you mistakenly use them improperly, they can get you in a horrible mess of extremely unpleasant trouble.

And, of course, an affidavit is no guarantee that facts it alleges are true. Anyone can sign an affidavit stating the moon is made of green cheese, when we all know the moon is made of yellow cheddar. Right?

Beware of false affidavits and be prepared to bring liars to justice.

Uses for Affidavits

There's really only one use for an affidavit: *to state facts under penalties of perjury by swearing they are true.*

Circumstances where you might want to state facts and swear, they are true can be almost anything when telling the truth about something or someone is important to your cause.

For example, when you file pleadings complaints, answers, affirmative defenses, or replies to affirmative defenses you allege certain facts. When those facts are sworn to, instead of

merely stated as so, they carry quite a bit more weight with judges and other officials. They also tend to make your opponent's think twice before disagreeing with you or challenging what you say.

Here's an affidavit used to verify the facts alleged in a complaint the initial pleading in a lawsuit.

IN THE THIRTIETH JUDICIAL CIRCUIT COURT
IN AND FOR SUNSHINE COUNTY, FLORIDA

Case No. 2012-123
Judge Benchwarmer

DONALD TRUMP,
Plaintiff,

v.

JOE XI JING PING,
Defendant.

VERIFICATION OF COMPLAINT

STATE OF FLORIDA
COUNTY OF SUNSHINE

BEFORE ME personally appeared DONALD TRUMP who, being by me first duly sworn and identified in accordance with Florida law, deposes and states under penalties of perjury:

1. My name is DONALD TRUMP, Plaintiff herein.

2. I have read and understood the attached foregoing complaint filed herein, and each fact alleged therein is true and correct of my own personal firsthand knowledge.

FURTHER THE AFFIANT SAYETH NAUGHT.

_____
DONALD TRUMP, Affiant

SWORN TO and subscribed before me this ____day of _____2012.

_____
Notary Public

My commission expires:

[Certificate of Service]

This form would be signed in the presence of a Notary or other duly authorized official and attached to the complaint at the time of filing. A copy would be served on the defendants along with the clerk's summons.

That *FURTHER THE AFFIANT SAYETH NAUGHT* is not required. It does impress certain kinds of politically sensitive people who are easily impressed by such displays of legal verbosity, but it isn't necessary.

Using an affidavit to verify all your papers necessary. A complaint is still a complaint, with or without a verifying affidavit, and it does what complaints must do, whether verified or not.

But, when a complaint or other paper in which you allege ultimate facts that are likely to be contested is verified with an affidavit like this example, the impact is substantial and well worth the extra effort.

Use a verifying affidavit whenever facts are critical to getting what you want.

What Affidavits Can Say

An affidavit can say anything you want it to say. But whatever your affidavit says, it had better be true if you don't want to pay a big fine and spend days, months, or maybe even years in prison.

Any fact you personally know to be true from your own firsthand experience can be alleged in an affidavit.

If you need to allege a fact that is likely to be a controversial issue in your case, swear to it with an affidavit.

If you anticipate your opponent will challenge you on a particular fact or set of facts, state those facts in an affidavit.

Here's a form for simply alleging facts under oath.

AFFIDAVIT

UNDER PENALTIES OF PERJURY the undersigned affiant states:

My name is Felix Frankfurter.

I was associate Justice of the United States Supreme Court from 1939 through 1962.

I was nominated to serve on the Court by Franklin Delano Roosevelt.

I served as advisor to the President during World War II.

FURTHER THE AFFIANT SAYETH NAUGHT.

_____
Felix Frankfurter, Affiant

STATE OF MICHIGAN
COUNTY OF SAGINAW

BEFORE ME this 1st day of April 1955 personally appeared Felix Frank further who, being by me first duly sworn and identified in accordance with Michigan law, affirmed the foregoing in my presence.

_____
Notary Public

My commission expires:

Notice that this basic affidavit begins with the words, UNDER PENALTIES OF PERJURY the undersigned ....

These words are essential. Without them the affidavit lacks the impact of voluntarily exposing the affiant to criminal penalties for false statements.

Notice also that Justice Frankfurter affirmed the facts alleged in his affidavit. He did not swear, nor is it necessary to swear. An affirmation is sufficient, since the first words of the affidavit expose him to severe consequences if what he alleges is later proven to be false, whether affirmed, sworn, stated, claimed, or otherwise.

What Affidavits Should Not Say

Affidavits should not make legal arguments. That's what pleadings, motions, memoranda, and other legal documents are for.

Affidavits should not cite controlling appellate court opinions, statutes, or other law. That's not what affidavits are for.

Affidavits should never ask questions. Affidavits are declaratory statements. They say. They do not inquire.

It is redundant to title an affidavit Affidavit of Facts or Affidavit of Truth, etc. All affidavits are statements of facts alleged to be true.

The single word *Affidavit* tells us all we need to know.

Proper Affidavit Format

There technically is no proper affidavit format as long as all the essential elements there we go again with essential elements are present.

To have maximum possible impact, facts should be stated, averred, sworn to, attested, certified, said, maintained, professed, avowed, or otherwise declared under penalties of perjury.

The affidavit must be signed by the affiant.

A copy is not an affidavit. A copy is a copy, nothing more. It may be evidence that an affidavit exists out there somewhere, but it is not an affidavit. The original may have been destroyed. A copy does not impose criminal penalties if the facts alleged are untrue. Copies of affidavits are evidence only.

The affidavit must be attested by a Notary or other officer duly authorized to take oaths, acknowledgements, attestations, etc. Court clerks usually have this authorization. So do judges currently serving on the court. Retired judges do not.

Magic Language/Syntax

There is no magic language or syntax involved in an affidavit. You should avoid everything that even remotely sounds like magic language. Do not use fancy legal terminology.

Use no words whatsoever that you've not first confirmed to mean precisely what you intend them to mean by referring to a dictionary published by a reputable company such as Webster, Oxford, or other company generally regarded as an acceptable authority on the meaning of words. Do not guess what words mean.

Do not misspell anything. Use your dictionary if in doubt.

If you write documents using a computer or similar device print those documents before filing. Read them over carefully with a red pencil. Make notes. Go back again and again to the computer, if necessary, to perfect the document before filing it.

Remember, if facts alleged in your affidavit can be interpreted more than one way, you can be sure your opponent will give you a hard time about it if you give him or her room by being sloppy.

Say things the way you would say them to a friend. Use simple everyday language that you've checked with your dictionary to confirm precise meanings.

The Jurat

You will see this term used and frequently misused on the Internet. It is simply that part of your affidavit that shows the affidavits who, what, when, and where.

The who is the person before whom you present your affidavit to be certified, i.e., a Notary or other person authorized to administer oaths and certify documents.

The what is the statement by the Notary that the affiant was properly identified and sworn or affirmed.

The when is the date sometimes even exact time, if time is critical when the affiant signed the affidavit in the presence of the Notary or other authorized officer.

The where is usually the state and county where the affidavit is signed and attested. It might also be the name of the court, e.g., Sixth Judicial Circuit Court in and for Cornfield County, Iowa.

That's all a jurat is.

Using the term jurat may impress your friends, but it adds nothing to your affidavit and helps you not at all.

Who Can Administer the Oath

As stated above, Notaries are authorized to administer oaths and take attestations in all states.

Any judge duly and presently appointed to the bench in a court having jurisdiction over your case has authority to witness and attest to your affidavit. A retired judge does not, unless she is also a Notary.

In some jurisdictions, the Clerk of Court may do this.

Your next-door neighbor cannot.

Alternatives

There are no alternatives. Only an affidavit is an affidavit. Remember: *A thing similar is never exactly the same.*

As stated above, unless your affidavit contains all the essential elements those essential elements pop up throughout this course for a reason it is not an affidavit.

A document may look like an affidavit. It may have legal sounding terminology.

It might have AFFIDAVIT written at the top of the page and fool your best friend.

But no document is an affidavit without the essential elements that make it so.

Legal Effect

The legal effect of an affidavit goes no farther than binding the affiant to unpleasant consequences if he or she lies under oath. As stated at the beginning of this chapter, affidavits are not pleadings, motions, memoranda, notices, claims, complaints, demands, nor any of the other types of documents that have certain purposes.

An affidavit is simply a statement made under oath that exposes the affiant to punishment if he or she lies.

It may have an effect on ugly, perverse people who don't want you to make a public point of their bad acts by stating how they violated the law in a way that injured you or others.

People who abuse the law or misuse authority tend to get uncomfortable and anxiously disturbed when you risk perjury penalties by calling them down for their unlawful behavior and doing it under oath.

Here's another example for illustration purposes.

AFFIDAVIT

UNDER PENALTIES OF PERJURY the undersigned affiant states:

My name is Will Fixyou, pinch hitter for the St. Louis Cardinals baseball team.

On the 11th of July 2021 at Wrigley Field in the city of Chicago, Illinois I was struck in the head by a baseball thrown by Wilson Contreras, catcher for the Chicago Cubs.

I was standing at home plate at the time, bat in hand, minding my own business when I was brutally struck.

Contreras had just caught a sneaky slider then, standing erect from his normal catcher's crouch and facing me with what I considered an evil-minded countenance, Contreras yelled, I hate all you Missouri batters.

He then threw the baseball directly at my head, instead of tossing it back to the pitcher as required by National League Rules.

I had only one ball and two strikes against me at the time and was legally entitled to another pitch and swing of the bat before retiring from the plate.

I was denied my legal right as a direct and proximate result of Contreras' using a baseball contrary to its duly authorized purpose.

Contreras' intentional and unlawful act violated National League Rules that regulate game time behavior of all National League catchers.

The forceful impact of that hard baseball striking my sensitive head caused me to fall to the ground violently, soiling my lovely uniform and causing me to suffer extreme public embarrassment as other members of the Chicago team, on the field and in the dugout, doubled up with outrageous and unwarranted laughter.

Seeing me helplessly confused and struggling desperately to regain my famous bow-legged batter's stance, Contreras retrieved the baseball from the ground next to my head, examined it with a look of disgust then, with a sly satisfied smirk on his face, tossed it to a fellow Cubs player in the dugout.

Contreras' illegal, unwarranted, and intentionally injurious act so angered the attending crowd of Cardinals fans that the game was postponed, disrupting what might otherwise have been a lovely summer's afternoon for all concerned.

FURTHER THE AFFIANT SAYETH NAUGHT.

_____

Will Fixyou, Affiant

STATE OF ILLINOIS
COUNTY OF COOK

BEFORE ME this 1st day of August 2021 personally appeared Will Fixyou who, unknown to most baseball fans but being by me first duly sworn and identified in accordance with Illinois law, attested to the foregoing in my presence.

_____

Notary Public

My commission expires:

You will modify this example, of course, to suit whatever similar circumstances your case may require.

Indeed, when anyone causes you injury by breaking the law or acting outside their lawful authority, a carefully-worded affidavit can sometimes encourage other people perhaps the Sheriff, a United States Marshal, or even a newspaper reporter to take notice and cause the bad actor to regret his or her penchant for living outside the law.

Conclusion

Affidavits take many forms, but when the dust settles, they are only statements of fact made under oath, nothing more.

If you wish to bring fire down on someone who deserves a bit of scorching, file a complaint, have them served with a summons, and verify your complaint with an affidavit.

If someone nasty tries to bring fire down on you, file an answer with affirmative defenses and possibly a counter-claim, cross-claim, third party complaint, and demand for jury trial and swear to the facts with an affidavit.

If you wish to get your Sheriff or a United States Marshal or newspaper reporter to take an interest in some unlawful behavior that's irritating you or perhaps causing you pain, suffering, distress, disappointment, upset, damage to property, financial stress, upset stomach, or other untoward unpleasantness, send them an affidavit an original, not a copy by certified mail and request their assistance.

You'd be surprised how many good people out there with power to make your life better just need to be properly told what bad folks are doing before they step up to the plate and give you the relief our laws call for, the relief you deserve.

Affidavits can be fun.

Use them as the tools they are designed to be, not as a substitute for proper pleadings, service of process, legal argument, or any of the other things in this workbook.

Wise people use the proper tool to do a proper job.

Use affidavits to tell the truth.