FULL OUTLINE

Bar Exam Doctor

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CIVIL PROCEDURE

FEDERAL CIVIL PROCEDURE
CALIFORNIA CIVIL PROCEDURE

I. PERSONAL JURISDICTION

a. Do federal courts need personal jdx over the parties? Yes

b. How is it assessed?

i. The same as in state ct.

c. Basic idea

i. Whether there's personal jdx is a two-step analysis:

1. Satisfy a statute (e.g., a state long-arm statute), AND
2. Satisfy the Constitution (Due Process).

d. In personam jdx

i. Statutory analysis

1. Most states have a series of statutes that allow personal jdx in a variety of contexts, such as personal jdx over Ds who
   a. Are served with process in the state; or
   b. Are domiciled in the state; or
   c. Do certain things (commit a tortious act, enter a K, conduct business, etc.) in the state; or
   d. Otherwise consent to jdx.
2. In CA, the statutory analysis is easy because the statute reaches to the constitutional limit, so we have to look to the constitutional analysis.

ii. Constitutional analysis

1. Test
   a. Does D have such minimum contacts with the forum so that exercise of jdx does not offend traditional notions of fair play and substantial justice?
2. Easy cases
   a. If D is domiciled in the forum or consents, or is present in the forum when served with process (at least if not forced or tricked into forum), those are ***traditional bases*** and almost always meet the constitutional test. Tougher cases involve lesser contact.
3. Factors in the constitutional analysis:
   a. Contact

i. There must be a relevant tie between D and the forum state. There are 2 factors to be addressed here:
    1. ***The contact must result from <u>purposeful availment</u>***: D's voluntary act.
        a. D must reach out to the forum. Must direct activities to the forum in some way.
        b. Examples: trying to make money in the forum, using the roads there, causing some effect there.
    2. ***Foreseeability***
        a. It must be foreseeable that D could get sued in this forum.

b. Fairness (fair play and substantial justice)

i. If there is a relevant contact, now we assess whether the exercise of jdx would be fair or reasonable under the circumstances.

ii. <u>Factors</u>:
    1. **Relatedness** between the contact and P's claim
        a. We assess the quality of D's contact with the forum.
        b. Ask: does P's claim arise from D's contact with the forum?
            i. If yes, the ct might uphold jdx even if D does not have a great deal of contact with the state. Where the claim is related to D's contact with the forum, it is called ***specific personal jdx***.
            ii. If the claim does not arise from D's contact with the forum, jdx is OK Only if the ct has ***general personal jdx*** → D must have ***continuous and systematic ties with the forum***.
            iii. A D with continuous and systematic ties with the forum may be sued there for a claim that arose anywhere in the world, but a D with limited ties with the forum can only be used there for a claim arising from those activities. Continuous and systematic ties: domicile, incorporation, doing continuous business, etc.
    2. **Convenience**
        a. D may complain that the forum makes it tough to litigate because it's far from D's home and maybe it's tough to get D's witnesses and evidence to the forum.
        b. <u>Standard</u>

i. The forum is OK unless it puts D at a ***severe disadvantage in the litigation***. This is almost impossible to show.

3. State's interest (ALWAYS MENTION THIS)

a. E.g., provide forum for its citizens.

SUMMARY OF CONSTITUTIONAL TEST

My Parents Frequently Forgot to Read Children's Stories

Minimum contacts	**Fair play and substantial justice**
Purposeful availment	Relatedness of contact and claim
Foreseeability	Convenience
	State's interest

Special note about the internet: interactive website can be purposeful availment; passive websites, which only provide information, in another state, is probably not a relevant contact with the forum.

e. **In rem and quasi in rem jdx**

i. Here, the jurisdictional base is not the person, but her property. The statutory basis is an attachment statute, e.g., allowing Π to attach property owned by non-resident.

ii. Constitutionally, all exercises of jdx, even in rem and quasi in rem, must satisfy the International Shoe test (constitutional analysis). Despite this statement, constitutionality probably depends on whether dispute is related to the property attached.

1. If dispute related to property, constitution probably satisfied by presence of property in the forum.
2. If claim is unrelated to the property attached, the Π's contacts with the forum must satisfy the International Shoe test.

II. SUBJECT MATTER JURISDICTION

a. Basic idea

i. Will P sue D in state ct or federal ct?

1. Fed'l cts can only hear certain types of suits:
   a. Diversity of citizenship and
   b. Federal question.

b. Diversity of citizenship cases

i. Two requirements:

1. ***The action must be between citizens of different states (or between a citizen of a state and a foreign citizen); and***
2. ***The amount in controversy must EXCEED $75,000.***

ii. Complete diversity rule

1. There is no diversity if ***any P*** is a citizen of the same state as ***any D***.

iii. Citizenship

1. A natural person who is a US citizen → citizenship is the state of her ***domicile***.
   a. ***Domicile*** is established by 2 factors:
      i. Presence in the state; and
      ii. The subjective intent to make it her permanent home.

1. For intent, look at all the relevant info: instate tuition, voting, etc.

b. We test for diversity when the case is filed. A later change is irrelevant.

2. Corporations → citizenship equals:
   - ***a. State where incorporated; AND***
   - ***b. The one state where the corp has its principal place of business (PPB).***
     i. To determine PPB, use 2 tests:
        1. ***Nerve center*** → where decisions are made, which is usually the headquarters; and
        2. ***Muscle center*** → where the corp does more stuff than anywhere else.
           - **a. Usually nerve center unless all corp activity is in one state.**
3. Unincorporated associations (like partnerships, LLCs) → use the citizenship of ALL members (that includes general and limited partners)
4. Decedents, minors, and incompetents → look to ***their*** citizenship, NOT the citizenship of their representative

iv. **Amount in controversy**

1. Must EXCEED $75,000
2. Whatever the P claims in good faith is OK unless it is ***clear to a legal certainty*** that she cannot recover more than $75,000 → very rare, such as a statutory ceiling on recovery
3. ***What P actually recovers is irrelevant, but a P who wins less than $75,000 may have to pay D's litigation costs.***
4. Aggregation
   a. Adding 2 or more claims to meet the amount requirement.
   b. We aggregate claims if there is ONE PLAINTIFF against ONE DEFENDANT.
      i. The claims don't have to be related to each other.
   c. BUT for joint claims use the total value of the claim; the number of parties is irrelevant. Ex: P sues joint tortfeasors, X, Y, and Z for 76,000. This is OK.
5. Equitable relief
   a. P sues D for an injunction to tear down part of his house that blocks P's view.
   b. ***Two tests*** (if either is met, most cts say it's OK):
      i. ***Plaintiff's viewpoint***: does the blocked view decrease value of P's property by more than 75k?
      ii. ***Defendant's viewpoint***: would it cost D more than 75k to comply with the injunction?

v. Exclusions

1. Even if the requirements for diversity of citizenship jdx are met, federal cts will not hear actions involving issuance of divorce, alimony or child custody decree or to probate an estate.

c. <u>Federal question cases</u>

i. Complaint must show a right or interest founded substantially on a federal law.

ii. The claim ***arises under federal law***.

iii. <u>Well-pleaded complaint rule</u>

1. P's claim, properly pleaded, must be based on federal law.
    a. Properly pleaded means the complaint would set forth only a claim and nothing else. So, in assessing whether there is federal question jdx, the ct ignores any extraneous stuff that has nothing to do with the claim itself.
2. ALWAYS ASK: IS P ENFORCING A FEDERAL RIGHT?
    a. If yes, the case can go to fed ct under FQ jdx.

iv. IMPORTANT: if P's claim invokes diversity or FQ jdx, the *case* is in federal ct. But there may be additional claims in the case. ***For every claim joined in federal ct, always ask whether it invokes diversity or FQ.*** BUT if such a claim does not meet diversity and does not meet FQ, try:

1. Supplemental jdx

a. It lets a federal ct hear a claim that does not meet diversity and does not meet FQ.

b. <u>The test</u>

i. The claim we want to get into federal ct must share a ***common nucleus of operative fact*** with the claim that invoked federal subject matter jdx. This test is met by claims that arise from ***the same transaction or occurrence (T/O)*** as the underlying claim.

c. <u>The limitation</u>

i. ***In a diversity case, P cannot use supplemental jdx to overcome a lack of diversity.***

ii. But P can use supplemental jdx to overcome lack of diversity in a federal question case.

iii. And P can also use supplemental jdx to overcome a lack of amount in controversy for a claim in a diversity case.

iv. And any party but P can use supplemental jdx to overcome either a lack of complete diversity or amount of controversy in any case (diversity or FQ).

d. So a non-federal, non-diversity claim can be heard in federal ct if it meets the same transaction or occurrence test UNLESS it is:

i. Asserted by P

ii. In a diversity of citizenship (not FQ) case AND

iii. Would violate complete diversity.

d. <u>Removal</u>

i. Allows Ds ONLY to have case filed in state ct removed to federal ct.

ii. Removal is a one-way street: it goes ONLY from a state trial ct to a federal trial ct.
iii. If improper, fed ct can remand to state ct.
iv. General test
1. ***D can remove if the case could be heard in federal ct (invokes diversity or FQ jdx).***
v. Where?
1. The case can only be removed to the federal district embracing the state ct in which the case was originally filed.
vi. When?
1. Must remove no later than 30 days after ***service*** of the first removable document.
2. Usually, this means 30 days after initial service of process. But some cases are not removable then and only become removable later. ***D has 30 days from service of the document that <u>first</u> made the case removable.***
3. **<u>In a diversity case ONLY, no removal if any D is a citizen of the forum.</u>**
   a. Ex: P (GA) sues D-1 (CA) and D-2 (AL) in an Alabama state ct for $500,000. Can D-1 and D-s remove? No, because D-2 is from Alabama.
4. **<u>In a diversity case ONLY, there can be no removal more than one year after the case was filed in state ct.</u>**
   a. You have 30 days to remove after the case becomes removable, but it cannot be more than 1 year it was filed in state ct.

vii. Procedure for removal
1. D files notice of removal in federal ct, stating grounds of removal; signed under Rule 11; attach all documents served on D in state action; copy to all adverse parties. Then file copy of notice in state ct.
2. If removal was procedurally improper, P moves to remand to state ct; she must do so within 30 days of removal. But if there is no federal subject matter jdx, P can move to remand *anytime* because there is no time limit on raising lack of subject matter jdx.
3. A D who files a *permissive* counterclaim in state ct probably waives the right to remove. Filing a *compulsory* counterclaim in state ct, however, probably does not waive the right to remove.

e. <u>The Erie doctrine</u>
i. Easy ones: these are clearly substantive, so state law governs in a diversity case on these issues:
1. Elements of a claim or defense
2. Statute of limitations
3. Rules for tolling SoL
4. Choice of law rules

ii. If not an easy one, ask: ***is there a federal law*** (like federal constitution or statute or FRCP or Federal Rule of Evidence) ***<u>on point</u> that <u>directly conflicts</u> with state law?***

1. If so, apply the federal law, as long as it is valid (because of the Supremacy Clause).
2. An FRCP is valid if it is ***arguably procedural***. None has ever been held invalid.

iii. If not an easy one and there is no federal law on point, but federal judge wants to do something other than apply state law:

1. If the issue is one of substantive law, she must follow state law. Analyze the facts per these 3 tests and come to a reasonable conclusion:
   a. <u>Outcome determinative</u> → would applying or ignoring the state rule affect outcome of case?
   b. <u>Balance of interests</u> → does either federal or state system have strong interest in having its rule applied?
   c. <u>Avoid forum shopping</u> → if the federal ct ignores state law on this issue, will it cause parties to flock to federal ct? If so, should probably apply state law.

f. <u>California SMJ</u>

i. Basic idea

1. There is one basic trial ct in CA – the Superior Court.

ii. The Superior Court

1. The Superior Court has general subject matter jdx, which means that it can hear ANY case.
2. <u>Exception</u>
   a. Those very few federal question cases that invoke exclusive federal jdx, such as bankruptcy, federal securities and antitrust, and patent infringement cases.
3. <u>Different classification of cases within the Superior Court</u>

Limited Civil Cases

i. These are civil cases in which the amount in controversy does NOT exceed $25,000.

ii. Limited civil cases are governed by statutes that limit various procedural devices, notably pleadings and discovery. In a limited case, no claimant can recover more than 25k.

b. Unlimited civil cases

i. These are civil cases in which the amount in controversy exceeds 25k. Here, a claimant can recover ANY amount.

c. Small claims cases

i. These are heard in a small claims division of the superior ct. procedures are simple.

ii. The amount in controversy:

1. If P = an individual → 7,500 or less.
2. If P = entity → 5,000 or less.

iii. Classification and reclassification

1. P initially determines what kind of case it is.
    a. In doing so, P considers the amount of the demand, or the recovery sought, or the value of the property, or the amount of the lien, that is in controversy. It does not include attorney's fees, interest on the claim, or costs.
    b. If P files a limited civil case, she must note the classification in the caption of the complaint. No such requirement for unlimited cases.

2. Reclassification
    a. If a case is misclassified or if subsequent events make it clear that the original classification should be changed, the ct does not lose SMJ; the case is reclassified.
    b. Automatic
        i. If P amends her complaint in a way that changes the classification (raises or decreases the amount in controversy from limited to unlimited or unlimited to limited), the clerk of ct reclassifies the case.
    c. On motion
        i. A party can move to reclassify or the ct can reclassify on its own motion. The ct must give notice to all parties and hold a hearing.
        ii. In determining whether to reclassify, the ct cannot consider the merits of the underlying claim → ***it will not try the case to determine the amount***. But it may consider materials beyond the pleadings, such as judicial arbitration awards, settlement conference statements, etc.
    d. If there is a motion to reclassify, the ct may reclassify from unlimited to limited when the judge is convinced that the matter
        i. Will necessarily result in a verdict of 25k or less; OR
        ii. More than 25k is virtually unobtainable.

3. Effect of multiple claims
    a. The entire case is either limited or unlimited.
    b. P asserts 3 separate claims against D – one for 12k, one for 8k, and one for 6k. This can be filed as an unlimited civil case because we aggregate claims if it's 1 P against 1 D.
    c. P-1 asserts a claim of 26k against D and P-2 asserts a claim of 14k against D in the same case. This can be filed as an unlimited civil case because P-1's claim is unlimited, so the case is unlimited.
    d. P sued D for 20k in a limited civil case. D files a cross-complaint against P for 26k. The entire case is reclassified as unlimited.
    e. P sued D for 26k in an unlimited civil case. D filed a cross-complaint for 12k. The entire case is unlimited.

III. VENUE

a. Basic idea

i. Venue tells us exactly in which federal ct we can sue. P is suing in federal ct and wants to lay venue in a proper district.

b. Local actions

i. Actions re ownership, possession or injury (including trespass) to land must be filed in the district where the land lies.

c. If it's not a local action, it is called transitory

i. In any transitory case (diversity or FQ), P may lay venue in ***any district where***:

1. ***ALL Ds reside; or***
2. ***A substantial part of the claim arose.***

ii. Special rule

1. ***Where all Ds reside in different districts of the same state, P can lay venue in the district in which any of them resides.***

d. Where do Ds reside for venue purposes?

i. **Humans** → residence basically equals domicile, so usually same place as citizenship for diversity of citizenship purposes.

ii. **Corporations and other business associations** → reside in ALL districts where they are subject to personal jdx when the case is filed.

e. **Transfer of venue**

i. Can only send a case from one federal district ct to another federal district ct where case ***could have been filed*** → a district that is a proper venue and has personal jdx over D.

ii. If venue in original district is proper, may transfer to another federal district, based upon convenience for the parties and witnesses and the interests of justice.

iii. Ct has discretion to order transfer based upon:

1. Public factors → what law applies, what community should be burdened with jury service; and
2. Private factors → convenience, e.g., where witnesses and evidence are.

iv. The ct to which case is transferred under this statute applies the choice of law rules of original ct.

f. Forum Non Conveniens

i. If there is a far more appropriate ct elsewhere, a ct may dismiss (usually w/o prejudice) to let P sue D there.

ii. Dismiss because the more appropriate ct is one to which transfer is impossible because it is in a different judicial system (e.g., a foreign country).

iii. FNC dismissal almost never granted if P is resident of the present forum

g. California Venue

i. Basic idea

1. In a federal ct, we lay venue in an appropriate federal district. For laying venue in state ct, you look for ***an appropriate county***.

ii. Local actions

1. For recovery of, or determination of an interest in, or for injury to real property, lay venue in the county where the land lies.

iii. If it's not a local action, it's a transitory action

1. Venue is OK in the county where ANY D resides when the case is filed.
2. Additional venue in K cases
   a. Venue is *also* OK in the county where the K was entered or to be performed.
3. Additional venue in personal injury or wrongful death cases
   a. Venue is *also* OK in the county where injury occurred.
4. If D is a corp or other business association, venue is OK in the county where
   a. It has its PPB
   b. Where it entered or is to perform a K; or
   c. Where the breach occurred or liability arises.
5. If all Ds are non-residents of CA, venue is OK in ANY COUNTY.

iv. Transfer of venue

1. From the Superior Court in one county in CA to the Superior Court in another county in CA:
   a. If original venue is improper → D can move to transfer to a proper county.
   b. If original venue is proper → ct may, on motion, transfer if:
      i. There is reason to believe impartial trial cannot be had in original venue; OR
      ii. Convenience of witnesses and ends of justice would be promoted; or
      iii. No judge is qualified to act
      1. Transfer is to a county on which the parties agree; if the parties agree, ct picks the county.

v. Forum non conveniens

1. As in federal ct, this is where a ct dismisses because the far more convenient and appropriate cts is in a different judicial system.
2. By statute in CA, state cts may dismiss or stay on motion by a party or by the ct itself. It must find that in the interest of substantial injustice an action should be heard in a forum outside CA.
3. The ct looks at the same sorts of public and private factors as in federal ct.
4. If the ct grants the motion, it may do so on condition, e.g., that D waive a personal jdx or SoL objection in the other forum.

IV. SERVICE OF PROCESS

a. <u>Basic idea</u>

i. In addition to personal jdx, must give notice to D. Deliver to D:
   1. A summons; and
   2. A copy of the complaint.

ii. These 2 docs are called process.

iii. Serve within 120 days of filing case or case dismissed without prejudice (not dismissed if P shows good cause for delay in serving).

b. Who can serve process?

i. Any nonparty who is at least 18 years old.

ii. Need not be appointed by the ct.

c. How is process served?

i. Personal service

1. Papers given to D personally anywhere in the forum state.

ii. Substituted service

1. Process is left with D's butler at D's summer home. OK if:
   a. D's usual abode
   b. Serve someone of suitable age and discretion who resides there.

iii. Service on D's agent

1. Process can be delivered to D's agent. OK if receiving service is within scope of agency, e.g., agent appointed by K or by law or corp's registered agent, managing agent or officer.

iv. State law

1. In addition, in federal ct we can use methods of service permitted by state law of the state where the federal ct sits or where service is effected.

v. Waiver by mail

1. Process is mailed to D by first class mail, postage prepaid. OK if D returns waiver form within 30 days. By doing so, D waives only formal service of process – nothing else, e.g., lack of personal jdx. If she does not return the waiver form, serve her either personally or by substituted service, and she may be required to pay the cost of such service.

d. Geographic limitation

i. Process is delivered to D in another state.

ii. QR is this is OK only if forum state law allows (for example, with a long-arm statute).

e. Immunity from service

i. D is served for a federal civil case while instate to be a witness or party in another civil case. OK?

1. No, she is immune from service.

f. Subsequent documents

i. What's above is formal service of process, by which a defending party is brought before the ct.

ii. For subsequent papers – e.g., answer, other pleadings, motions, discovery requests and responses – serve by delivering or mailing the document to the party's attorney or pro se party. If mailed, add 3 days for any required response.

g. California Service of Process

i. Basic idea

1. As in federal ct, D must be served with process, which consists of summons and a copy of the complaint.

ii. **Who may serve process?**
    1. Any non-party who is at least 18 years old.

iii. **Methods of service**
    1. Personal service
        a. Good anywhere in the state (same in fed ct)
    2. Substituted service
        a. CA's requirement is different from federal law
        b. Can only use substituted service to serve an individual if personal service cannot with reasonable diligence be had.
            i. Must be made at D's usual abode or mailing address
            ii. Must be left with a competent member of the household who is at least 18
            iii. That person must be informed of the contents; and
            iv. Process must also be mailed by first-class mail, postage prepaid to D.
                1. Such substituted service is deemed effective 10 days after the mailing.
    3. Corps and other businesses
        a. Deliver process to agent for service of process or to an officer, or general manager. These people may be served personally or left with someone apparently in charge at her office during usual office hours. Can always serve a registered agent.
    4. Waiver of service by mail
        a. Works as in federal ct, with these distinctions:
            i. Service is deemed complete when D executes the acknowledgment form; and
            ii. D must respond within 30 days after that.
    5. Service by publication
        Only on affidavit from P's attorney that D cannot be served, after demonstrating reasonable diligence to serve D in another way. This is a last resort, rarely OK.

iv. **Service outside CA**
    1. Can be made out of state in any manner allowed by CA law OR by mail, postage prepaid, return receipt requested. If by mail, deemed complete 10th day after the mailing.

Immunity
    1. CA has abolished this immunity.

V. PLEADINGS

a. <u>Basic idea</u>

i. These are documents setting forth claims and defenses. In theory, federal cts use ***notice pleading*** – you only need enough detail to allow the other side to be on notice and make a reasonable response.

b. Rule 11

i. Requires attorney or party representing herself to sign all pleadings, written motions and papers (except discovery docs, which are treated by another rule).

1. With signature, the person is certifying that to the best of her knowledge and belief, after reasonable inquiry:
    a. The paper is not for an improper purpose
    b. Legal contentions are warranted by law (or nonfrivolous argument for law change), and
    c. That factual contentions and denials of factual contentions have evidentiary support (or are likely to after further investigation)
2. This certification effective every time position is presented to the ct → continuing certification.
3. Sanctions may be levied (discretionary) against attorney, firm or party.
    a. Rule 11 sanctions are meant to deter a repeat of bad conduct. Can be non-monetary sanctions. Monetary sanctions are often paid to ct, not to the other party. Before imposing sanctions, ct must give a chance to be heard.
4. Motion for violation of Rule 11 is served on other parties but is not immediately filed with ct. Party allegedly violating Rule 11 has 21 days (safe harbor) to withdraw the document or fix the problem. If she does, no sanctions. If she does not, then the motion can be filed.
5. Ct can raise Rule 11 problems sua sponte. There is no safe harbor here.

c. Complaint

i. Principal pleading by P. Filing commences an action

1. **Requirements**:
    a. ***Statement of subject matter jx***
    b. ***Short and plain statement of the claim, showing entitled to relief***
    c. ***Demand for judgment***
2. In stating the claim, federal cts have used notice pleading, which means you only need enough detail to put the other side on notice. But since 2007, the S Ct said the standard is: ***you must plead facts supporting a plausible claim***.
3. Special matters that must be pleaded with particularity or specificity:
    a. Fraud
    b. Mistake
    c. Special damages

d. Defendant's response

i. Rule 12 required D to respond in 1 of 2 ways:

1. By motion; OR
2. By answer.
    a. Either must be within 20 days after service of process (or else risk default).

ii. Motions (Rule 12)

1. Motions are not pleadings; they are requests for a ct order.

2. ***Issues of form***
    a. Motion for a more definite statement – pleading so vague D can't frame a response (rare).
    b. Motion to strike, which is aimed at immaterial things, e.g., demand for jury when no right exists; any party can bring.
3. ***Rule 12(b) defenses***
    a. Lack of subject matter jdx
    b. Lack of personal jdx (waivable)
    c. Improper venue (waivable)
    d. Insufficiency of process (waivable)
    e. Insufficient service of process (waivable)
    f. Failure to state a claim
    g. Failure to join indispensable party
        i. These can be raised either by motion or answer.
        ii. Waivable = must be put in the FIRST Rule 12 response (motion or answer) or else they're waived.

iii. The answer

1. It is a pleading.
2. <u>Timing</u>
    a. Serve within 20 days after service of process if D makes no motions; if D does make a Rule 12 motion, and it is denied, she must serve her answer within 10 days after ct rules on the motion.
    b. If D waived service, has 60 days from P's mailing of waiver form in which t answer (waiver of service does NOT waive personal jdx or venue).
3. <u>What D does in the answer:</u>
    a. Response to allegations in complaint:
        i. Admit
        ii. Deny
        iii. State you lack sufficient info to admit or deny
            1. This acts as a denial, but can't be used if the info is public knowledge or is in D's control.
            2. Failure to deny can constitute an admission on any matter except damages.
    b. Raise affirmative defenses
        i. These basically say that even if D did all the terrible things P says, P still cannot win.
        ii. Classic examples: SoL, SoF, res judicata, self-defense.
        iii. If you don't plead affirmative defenses, you waive them.

e. <u>Counterclaim</u>

i. This is an offensive claim against an opposing party.
ii. It is to be filed with D's answer.
iii. **Two types**:

1. ***Compulsory***
    a. Arises from the same T/O as P's claim. MUST BE FILED IN PENDING CASE OR IT'S WAIVED.
    b. The claim cannot be asserted in another action.
2. ***Permissive***
    a. Does not arise from same T/O as P's claim. You MAY file it with your answer in this case or can assert it in a separate case.

iv. If a counterclaim is procedurally OK, then assess whether it invokes diversity or FQ jdx. If so, it gets to federal ct. If not, then try supplemental jdx.

f. <u>Cross-claim</u>

i. This is an offensive claim against a co-party.
ii. It MUST arise from the same T/O as the underlying action.
iii. Need not be filed in the pending case because there is no such thing as a compulsory cross-claim.

g. <u>Amending pleadings</u>

i. Right to amend

1. P has a right to amend ***once*** before D serves his answer.
    a. If P amends, D must respond within 10 days or the amount of time remaining on his 20 days, whichever is longer.
2. D has a right to amend ***once*** within 20 days of serving his answer.

ii. If there is no right to amend

1. Seek leave of ct
2. It will be granted ***if justice so requires***.
3. Factors: delay and prejudice.

iii. Variance

1. This is when the evidence at trial does not match what was pleaded.
2. We want the pleadings to reflect what was tried.
3. P sues for breach of K; D answers. At trial, P introduces evidence that D assaulted him. D doesn't object. OK?
    a. Evidence of assault admitted into evidence because D didn't object.
    b. At or after trial, P can move to amend the complaint to conform to the evidence to show the assault claim. We want the pleadings to reflect what was tried.
4. Same case, but D does object. Evidence of assault inadmissible because it is at variance with the pleadings.

iv. Amendment after the SoL has run (relation back)

1. <u>To join a new claim</u>
    a. Amended pleadings relate back if they concern the same conduct, transaction or occurrence as the original pleading.
    b. Relation back means that you treat the amended pleading as though it was filed when the original was filed, so it can avoid a SoL problem.
2. <u>To change A D after the statute has run</u>
    a. This will relate back if:

i. It concerns the same conduct, transaction, or occurrence as the original;
ii. The new party knew of the action within 120 days of its filing; and
iii. She also knew that, but for a mistake, she would have been named originally.

b. This applies when P sued the wrong D first, but the right D knew about it.

h. California Pleadings

i. Basic idea

1. As in fed ct, these documents set forth claims and defenses. But timing and terminology are different in state ct. In state practice, we have complaint, answer, demurrer, various motions, and cross-complaint.

ii. Fact pleading

1. State cts require more detail in pleadings than federal ct.

iii. Frivolous litigation

1. There are 2 general statutes in state practice:
   a. CA has a statute that mirrors Rule 11. It works just like it with 1 exception: the 21-day safe harbor applies not only in motions brought by a party, but also when the ct raises the issue on its own.
   b. Another CA statute allows the ct to order a party or his attorney or both to pay expenses and attorneys' fees incurred by another party because of bad-faith or frivolous tactics in litigation. Frivolous means completely without merit or for the sole purpose of harassing an opposing party:
      i. The bad behavior must be in litigation
      ii. There is NO safe harbor here.
   c. There must be a motion by party or the ct and opportunity to be heard.

iv. Complaint

1. Pleading by P. As in fed ct, filing commences the action.
2. Contents
   a. Statement of facts constituting the cause of action, stated in ordinary and concise language → ultimate facts.
   b. Demand for judgment for the relief to which the pleader claims to be entitled.
      i. Remember the complaint in a limited civil case must state it is limited.
      ii. If P seeks damages, she generally must state the amount.
         1. ***Exceptions***
            a. Personal injury and wrongful death cases
            b. Whenever P claims punitive damages, she CANNOT state the amount.
         2. ***So in a personal injury or wrongful death case, how can D find out about actual or punitive damages?***
            a. D requests the P's statement of damages (SOD)

b. P must provide the SOD within 15 days
c. P must serve the SOD on the D before taking the D's default.

3. Same steps for punitive damages

3. Remember the requirement of fact pleading
   a. P must allege the ultimate facts on each element of each cause of action.
4. Heightened pleading requirements
   a. These things must be pleaded with particularity: circumstances constituting fraud, civil conspiracy, tortious breach of K, unfair business practices, and product liability claims among multiple Ds resulting from exposure to toxins.
5. Verified pleadings
   a. These are signed under penalty of perjury by the party. They are rare, but are required, for example, in shareholder derivative suits and for suits against government entities. Remember, verified pleadings can be treated as affidavits.
6. Fictitious Ds
   a. If P is genuinely unaware of the identity of a D, she may name the D as a Doe D. She must also allege that she is unaware of the D's true identity and must state the cause of action against the Doe D (that's a charging allegation).
   b. P is hit by a car driven by D-1, who was rear-ended by a car driven by D-2, who fled the scene and had been driving a stolen car. P sues D-1 by name and sues D-2 as a Doe D. If she makes a charging allegation against the fictitious D and files the case before the SoL runs, she may be able to amend the complaint to name D-2 when she discovers his identity, even after the SoL runs. She might get relation back.

v. D's response

1. D must respond in an appropriate way within 30 days (20 in fed ct) after service of process is deemed complete.

2. General demurrer

a. This can be used to assert 2 defenses.

i. The most important one: the P failed to state facts sufficient to constitute a cause of action.

1. LOOK OUT FOR CROSS-OVER; this is a great way to test the elements of any claim.
2. This is like FRCP 12(b)(6) motion to dismiss. So the ct takes all allegations as true and limits its assessment to the complaint and matters of which it takes judicial notice. If sustained, usually the ct will let P try to allege again.

ii. Lack of SMJ (extremely rare)

b. These defenses can be raised in the answer instead or they could be asserted in a motion for judgment on the pleadings (general demurrer).

3. ***Special demurrer***
    a. This can be used to assert a great many defenses.
        i. ***The complaint is uncertain, ambiguous or unintelligible.***
            1. This is like the federal motion for more definite statement.
        ii. ***The complaint is unclear about which theories of liability are asserted against each of the Ds.***
        iii. ***Lack of legal capacity***
        iv. ***Existence of another case between the same parties on the same cause of action***
        v. ***Defect or misjoinder of parties***
        vi. ***Failure to plead whether a K is oral or written***
        vii. ***Failure to file a certificate (required to sue for professional negligence).***
    b. These can be raised in the answer instead because they are affirmative defenses.
    c. If not raised by demurrer or answer, they are generally considered waived.
    d. As with the general demurrer, the ct treats allegations as true and limits assessment to what is in the complaint and matters of judicial notice.
    e. Special demurrers are NOT available in limited civil cases.
4. ***Motion to quash service of summons***
    a. Used to assert the following defenses:
        i. Lack of personal jdx
        ii. Improper process
        iii. Improper service of process
    b. This is a special appearance.
    c. This motion must be made BEFORE or WITH the filing of a demurrer or a motion to strike or else D waives these defenses.
    d. Typo: P sues D. D files an answer in which he asserts the affirmative defense of lack of personal jdx. D has waived the defense of lack of personal jdx.
        i. An answer is a general appearance and the defense is waived.
    e. If the ct denies the motion to quash, the moving party can ONLY seek appellate review by writ of mandate from the Ct of Appeal within 10 days of service of the written notice of entry of the order denying her motion.
5. ***Motion to dismiss or stay for inconvenient forum***
    a. The timing is the same as the motion to quash service of summons.
6. ***Motion to strike***
    a. D can file this to strike all or part of a complaint. The ct may strike ***irrelevant, false or improper matter***.
    b. <u>Anti-SLAPP motion to strike</u>
        i. The legislature has been concerned about strategic lawsuits against public participation (SLAPP), which are suits brought to chill the valid exercise of free speech and petition. When P sues D for an

act D took in furtherance of her free speech right or right to petition the government on a public issue, D can make an anti-SLAPP motion to strike.

ii. D must make a showing that P's c/a arises from protected activity. If D makes that showing, the burden shifts to P to show a probability of winning on the merits.

iii. A D who wins an anti-SLAPP Motion can sue the person who sued her for malicious prosecution.

iv. The anti-SLAPP motion is not available if P's case is truly in the public interest or on behalf of the general public.

7. Answer

a. This is like the answer in fed ct, in which D responds to allegations of the complaint and raises affirmative defenses. Same as federal about responding by admitting, denying, or stating that lack information to admit or deny. Same as federal about admission of allegations not denied.

b. General denial

i. This is a short document, in which D simply denies each and every allegation of P's complaint. This is permitted if D can do so consistent with rules about frivolous litigation.

c. In stating affirmative defenses, be careful about stating ultimate facts sufficient to constitute an affirmative defense.

d. If D's answer is insufficient, P can demur to the answer.

e. If P filed a verified complaint, D must file a verified answer

8. Timing

a. No later than 30 days after service of process is deemed complete, D must file an answer or demurrer or one of the motions noted in order to avoid default.

b. If a demurrer or motion is denied, D must answer within 10 days after the ruling. But a motion to strike does not extend the time in which to answer or demur.

vi. Claims by D

1. As in fed ct, D can assert a claim against the P, against a co-D, against an impleaded third party D. In CA state cts, all 3 of these claims have the same name: cross-complaints

2. Cross-complaint against P

a. Same as federal counterclaim. This is to be filed before or at the same time as the answer.

i. It is against an opposing party

ii. It is compulsory if it arises from the same transaction or occurrence as P's claim against D

3. Cross-complaint against co-party

a. Same as federal cross-claim. May be filed anytime before the ct has set a trial date.

i. It is a claim against a co-party.
ii. It MUST arise from the same T/O as underlying dispute
iii. It is NEVER compulsory. The party may assert it here as a cross-complaint or may sue in a separate case.

4. Cross-complaint against third-party defendant

a. Same as federal impleader, third-party complaint. May be filed anytime before the ct has set a trial date.
i. A defending party, third-party P, may join a non-party (TPD) to the pending case.
ii. It is NEVER compulsory. The party may assert it here as a cross-complaint or may sue in a separate case.
iii. The TPD in an impleader cross-complaint may raise defenses that the defending party could have raised against the P.
iv. *Difference from federal* → the right to join the TPD is broader in state ct. It works not just for indemnity or contribution, but for any claim that the TPD is liable on the underlying case, if it arises from the same T/O as the claim against the defending party or involves an interest in the controversy which is the basis of the underlying claim.

b. The person against whom any cross-complaint is asserted must respond within 30 days.

c. If the cross-complaint is asserted against one who has not yet appeared in the case, it must be served with summons (same as impleader).

vii. <u>Amending pleadings</u>

1. P has a right to amend before D files an answer or demurrer. After demurrer but before trial on the issue raised by demurrer, a party may also amend once as a matter of course.
2. Any party can seek leave to amend anytime. It will be granted unless there is delay or prejudice.
3. Amendment to conform to the evidence is available.
4. After sustaining a demurrer or granting a motion to strike, the ct will usually do so with leave to amend. This allows P to try again. If the ct sustains a demurrer or grants a motion to strike without leave to amend, P cannot try again.
5. Relation back is available to add new claims after the SoL has run, but only if the new claim relates to the same general facts as originally alleged.
6. Relation back to change a D after the SoL has run is OK If there was a misnomer – P sued the wrong D but the right D knew about it.
7. Relation back and fictitious Ds OK if:
   a. Original complaint was filed before the SoL ran and contained charging allegations against the fictitious Ds
   b. P was genuinely ignorant of the identity of the Doe Ds; AND
   c. P pleaded that ignorance in the original complaint.
      i. If P substitutes true D within 3 years of filing, it relates back.

VI. JOINDER OF PARTIES

a. <u>Proper Ds and Ps. These are folks who *may* be joined.</u>

i. Curly, Moe and Larry are injured when the taxi in which they are riding crashes. May they sue together as co-Ps? Yes, because their claims:
   1. Arise from same T/O; and
   2. Raise at least 1 common question.

ii. Then assess subject matter jdx.

b. <u>Necessary and indispensable parties</u>

i. Some absentees (non-parties) must be forced to join the case because they're necessary or required.

ii. Who's necessary?

1. An absentee (A) who meets ANY of these tests:
   a. Without A, the ct cannot accord complete relief (worried about multiple suits);
   b. A's interest may be harmed if he isn't joined (practical harm); or
   c. A claims an interest which subjects a party (usually D) to multiple obligations.
2. Joint tortfeasors are NOT necessary.

iii. After determining that A's necessary, see if joinder is feasible.

1. It is feasible if:
   a. There's personal jdx over him; and
   b. Joining him will not make it impossible to maintain diversity.
2. If joinder is feasible, the absentee is brought into the case, and the ct decides whether he's brought in as a P or as a D.
3. **If joinder is not feasible, the ct must either proceed without the absentee or dismiss the whole case. It looks at these factors:**
   a. Is there an alternative forum available? (watch for state ct)
   b. What is the actual likelihood of prejudice?
   c. Can the ct shape relief to avoid that prejudice?
4. If ct decides to dismiss, we call that absentee party ***indispensable***.

c. <u>Impleader</u>

i. A defending party wants to bring in someone new (third party defendant, TPD) for one reason: the TPD may owe indemnity or contribution to the defending party on the underlying claim.

ii. Right to implead within 10 days after serving answer; after that, need ct permission.

iii. Steps for Impleading the TPD in the pending case:

1. File third-party complaint naming that party as TPD; and

2. Serve process on the TPD (so must have personal jdx over TPD).

iv. After TPD is joined, P can assert a claim against TPD if the claim arises from the same T/O as the underlying case.

v. After TPD is joined, TPD can assert a claim against P if the claim arises from the same T/O as the underlying case.

vi. **Subject matter jdx**

1. Assume there is no FQ and all claims exceed 75k. P is a citizen of CA. D is a citizen of NV. TPD is a citizen of CA.
    a. Is there SMJ over D's claim against TPD?
        i. Yes, it meets diversity and more than 75k.
    b. Is there SMJ over TPD's claim against P?
        i. No diversity and no FQ. But supplemental jdx is OK because the claim meets the T/O test and the special limitation in diversity cases does not apply to claims by non-Ps.
    c. Is there SMJ over P's claim against TPD?
        i. No diversity and no FQ. No supplemental! Even though it meets the T/O test, P cannot use supplemental to avoid lack of diversity in a diversity case.

d. <u>Intervention</u>

i. Absentee wants to join a pending suit. She chooses to come in either as P or as a D. The ct may re-align her if it thinks she came in on the wrong side. Application to intervene must be timely.
    1. Intervention of right
        a. A's interest may be harmed if she is not joined and her interest is not adequately represented now.
    2. Permissive intervention
        a. A's claim or defense and the pending case have at least one common question. Discretionary with ct; OK unless delay or prejudice.
    3. Suppose we have a diversity of citizenship case and that the P intervenor is not diverse from the D (or D-intervenor is not diverse from the P). Is there supplemental jdx over a claim by or against an intervenor? The cts generally say no.

e. <u>Interpleader</u>

i. One holding property forces all potential claimants into a single lawsuit to avoid multiple litigation and inconsistency.
    1. Person with property is called the stakeholder.
    2. Folks who want it are called the claimants.

ii. Two types of interpleader in federal ct:
    1. Rule (FRCP 22
    2. Statutory

iii. In each, the stakeholder is not sure who really owns the property and wants to avoid multiple liability or suits. The types have different standards for diversity of citizenship, amount in controversy, venue, and service of process. In each, the ct can enjoin claimants from suing elsewhere. Remember: rule interpleader is a regular diversity case.
    1. To determine diversity of citizenship:
        a. Under rule interpleader: stakeholder must be diverse from every claimant.

b. Under statutory interpleader: one claimant must be diverse from one other claimant (don't care about stakeholder's citizenship).

2. Amount in controversy
   a. Under the Rule, must exceed 75k. Under the statute, $500 or more.
3. Service of process
   a. Under the rule, treated as a regular lawsuit. Under the statute, nationwide service (so no personal jdx problems over claimants in US).
4. Venue
   a. Rule, like a regular case. Statute, any district where any claimant resides.

f. <u>The class action</u>

i. Initial requirements. Must demonstrate ALL of these:

1. <u>Numerosity</u>
   a. Too many class members for practicable joinder.
2. <u>Commonality</u>
   a. There are some questions of law or fact in common to class
3. <u>Typicality</u>
   a. Representative's claims/defenses are typical of those of the class
4. <u>Representative is adequate</u>
   a. The class representative will fairly and adequately represent class.

ii. Next step: must fit case within 1 of 3 types

1. <u>Prejudice</u>
   a. Class treatment necessary to avoid harm either to class members or to party opposing class. An example is many claimants to a fund. Individual suits might deplete the fund, leaving some without remedy.
2. <u>Injunction or declaratory judgment (not damages) sought because class was treated alike by other party</u>
   a. Example: employment discrimination
3. <u>Damages</u>
   Common questions predominate over individual questions; and
   b. Class action is the superior method to handle the dispute
      i. Example: mass tort

iii. The ct must determine at an early practicable time whether to certify the case to proceed as a class action.

1. If the ct certifies the class, it must define the class and the class claims, issues, or defenses, and appoint class counsel.
2. Class counsel must fairly and adequately represent the interests of the class.

iv. Does the ct notify the class of pendency of the class action?

1. In the Type 3 class, the ct MUST notify class members, including individual notice (usually by mail) to all reasonably identifiable members.
2. The notice tells them various things, including that they can opt out, they'll be bound if they don't, and they can enter a separate appearance through counsel.
3. The representative pays to give this notice.
4. Notice is not required in Type 1 or Type 2 classes.

v. Who is bound by the judgment?
    1. All class members except those who opt out of a Type 2 class. There is no right to opt out of a Type 1 or Type 2 class action.

vi. For all 3 types of class action, settlement or dismissal of class claims in a certified class requires ct approval. Also, in all 3 types, the ct gives notice to class members to get their feedback on whether the case should be settled or dismissed. If it's a type 3 class, the ct must give members a second chance to opt out.

vii. SMJ
    1. The class could invoke FQ jdx by asserting a claim arising under federal law.
    2. For a class action brought under diversity, to determine the class' citizenship and amount in controversy, ***look <u>only</u> to the representative(s) and not the other class members.*** As long as the rep is diverse from all Ds, and as long as rep's claim exceeds 75k, it's OK.

viii. Class Action Fairness Act of 2005
    1. This act contains a grant of SMJ separate from regular diversity of citizenship jdx. It allows federal cts to hear a class action if any class member (not just the rep) is of diverse citizenship from any D and if the aggregated claims of the class exceed $5M.

g. <u>California Joinder of Parties</u>

i. Proper Ps and Ds
    1. Who MAY be joined? Basically the same as in fed ct.
    2. Ps: may join if claims arise from same T/O and raise at least one common question (same as federal) OR if they have a claim adverse to the D in the property or controversy at issue.
    3. Ds: may be joined if claims against them arise from same T/O and raise at least one common question (same as federal) OR if a claim adverse to them is asserted in the property or controversy at issue.

ii. Necessary and indispensable parties
    1. Who MUST be joined?
    2. Same as in federal practice. Do determine:
        a. If absentee is necessary
        b. If so, join her
        c. If she cannot be joined, decide whether to proceed without her or dismiss.

iii. Impleader
    1. Remember, this is a cross-complaint in state practice.

iv. Intervention
    1. Identical to federal practice for intervention of right.
    2. Similar to federal practice for permissive intervention, but statute requires the applicant have an interest in the matter in litigation, or in the success of either of the parties.

3. In permissive intervention, CA cts speak of allowing intervention if the applicant's interest is direct and immediate, as opposed to indirect and consequential, which will not support permissive intervention.

v. Interpleader

1. Procedurally the same as in federal practice.
2. In federal practice, it is clear that the person instituting interpleader may claim that she owns the property interpleaded.
3. It is not clear in CA whether that is OK – maybe the stakeholder can interplead only if she does not claim to own the property.

vi. The class action – the statute uses vastly different language than the federal rule

1. Requirements
   a. ***You must show:***
      i. ***An ascertainable class and***
      ii. ***A well-defined community of interest***
         1. The ct here will consider whether:
            a. Common questions predominate
            b. The representative is adequate
            c. The class will result in substantial benefit to the parties and the ct
2. Types of class actions
   a. Only 1 in state ct.
3. Individual notice NOT required; notice can be by publication.
   a. In state ct, the ct decided who will bear the cost of notice.
4. All class members who do not opt out are bound by the class judgment – up to the ct to allow the opt out.
5. CA does not require the ct to appoint class counsel
6. Settlement or dismissal must be approved by the ct.
7. Determining amount in controversy
   a. We aggregate ALL class claims.

VII. DISCOVERY

a. <u>Required disclosures</u> – must be produced even though no one asks for it

i. Initial disclosures

1. Unless court order or stipulation of parties differs, in most cases, within 14 days of the Rule 26(f) conference, must identify persons and documents likely to have discoverable info that the disclosing party may use to support its claims or defenses, computation of damages and insurance of any judgment.

ii. Experts

1. As directed by ct, must identify experts who may be used at trial and produce written report containing opinions, data used, qualifications, compensation for study, etc.

iii. Pretrial

1. No later than 30 days before trial, must give detailed info about trial evidence, including docs and identity of witnesses to testify live or by deposition.

b. <u>Discovery tools</u>

i. May not be used until after Rule 26(f) conference unless ct order or stipulation allows.

1. **Depositions** (questions can be oral or written)
   - ***a. Sworn oral statements by deponent responding to questions by counsel (or pro se parties), recorded by sound or video sound or stenographically. Transcript can then be made.***
   - b. Can depose parties and nonparties. Nonparty should be subpoenaed, however, or she is not compelled to attend.
   - c. Party need not be subpoenaed; notice of the deposition, properly served, is sufficient to compel attendance.
   - d. Cannot take more than 10 depositions or depose the same person twice without ct approval or stipulation. Deposition cannot exceed one day of seven hours unless ct order or parties stipulate.
   - e. Use at trial (all subject to rules of evidence)
     - i. Impeach the deponent
     - ii. Any purpose if deponent is adverse party
     - iii. Any purpose if deponent is unavailable for trial, unless that absence was procured by the party seeking to introduce the evidence
2. **Interrogatories**
   - ***a. Questions propounded in writing to another party, to be answered in writing under oath.***
   - b. Must respond with answers or objections within 30 days. Can say you don't know the answer, but only after reasonable investigation; if the answer could be found in business records and it would be burdensome to find it, can allow propounder access to those records.
     At trial, cannot use your own answers; others may be used per regular rules of evidence.
   - d. Cannot serve more than 25 (including subparts) without ct order or stipulation.
3. **Requests to produce**
   - ***a. Requests to another party (or to nonparty if accompanied by subpoena) requesting that she make available for review and copying various documents (includes electronically stored info) or things, or permit entry upon designated property for inspection, measuring, etc.***
   - b. Must respond within 30 days of service, stating that the material will be produced or stating objection.
4. **Physical or mental examination**
   - ***a. Only available through ct order on showing that party's health is in actual controversy and good cause.***

b. Person examined may obtain copy of report without making this showing, but by doing so waives the doctor-patient privilege re reports by his doctors re that condition.

5. **Requests for admission**
   a. ***A request by one party to another party to admit the truth of any discoverable matters.***
   b. Often used to authenticate documents; the propounding party will send copies of the docs to be authenticated with the request.
   c. Must respond within 30 days of service. The response is to admit or deny; can indicate lack of info only if indicate you've made a reasonable inquiry. Failure to deny tantamount to admission; can amend if failure not in bad faith.
6. **Parties sign substantive answers to discovery under oath**
   a. Every discovery request and response is signed by counsel certifying
      i. It is warranted
      ii. Not interposed for improper purpose
      iii. Not unduly burdensome
7. **Duty to supplement**
   a. If a party learns that its response to required disclosure, interrogatory, request for production or request for admission is incomplete or incorrect, must supplement the response.

c. <u>Scope of discovery (what info can we get through discovery?)</u>

i. Standard

1. ***Can discover anything relevant to a claim or defense: relevant to something in the pleadings.***
2. For good cause, it can order discovery ***relevant to the subject matter of the case.***
   a. Relevant means reasonably calculated to lead to the discovery of admissible evidence.

ii. Privileged matter is not discoverable.

1. Watch for cross-over with evidence here!

iii. Work product

1. Material prepared in anticipation of litigation.
2. Generally protected from discovery.
3. A statement by a witness, for example, prepared in anticipation of litigation is discoverable if party shows:
   a. Substantial need
   b. Not otherwise available
4. ***Mental impressions, opinions, conclusions, and legal theories are absolutely protected.***
5. The work need not be generated by a lawyer; it can be by a party or any representative of a party.

iv. Experts

1. Parties are required to produce info about experts who may be used at trial without request from party.
2. In addition, party may take deposition of any expert whose opinions may be presented at trial.

d. <u>Enforcement of discovery rules</u>

i. <u>There are 3 main discovery prbs presented to ct:</u>

1. Protective order

a. Receiving party seeks protective order

i. E.g., request is overburdensome, or involves trade secrets, or ESI is not reasonably accessible

2. Partial violation

a. Receiving party answers some and objects to others.

b. If the objections are not upheld, this is a partial violation, so we expect a light sanction.

3. Total violation

a. Receiving party fails completely to attend deposition, respond to interrogatories or to respond to requests for production.

b. This is a total violation, so we expect a heavy sanction.

ii. <u>Sanctions against a party</u>

1. The party seeking sanctions must certify to the ct that she tried in good faith to get the info without ct involvement.
2. *Partial violation* → 2 steps of sanctions
   a. Can get an order compelling the party to answer the unanswered questions plus costs (including attorney's fees) of bringing motion.
   b. If the party violates the order compelling him to answer, RAMBO sanctions plus costs (and attorney's fees re motion) and could be held in contempt for violating a ct order (except no contempt for refusal to submit to medical exam).
3. *Total violation* → one step. RAMBO plus costs (and attorney's fees re motion). No need to get an order compelling answers. Go directly to RAMBO.
4. False denial of request to admit: recover only costs and attorney's costs of having to prove the issue.
5. Failure to make required disclosure: other side can treat as partial or total violation. Party failing to make disclosure cannot use the info at trial unless failure was justified or harmless.
6. RAMBO sanctions (choices available to judge)
   a. Establishment order (establishes facts as true)
   b. Strike pleadings of the disobedient party (as to issues re the discovery)
   c. Disallow evidence from the disobedient party (as to issues re the discovery)
   d. Dismiss P's case (if bad faith shown)
   e. Enter default judgment against D (if bad faith shown)

7. No sanction if ESI lost in the good faith operation of an information system.

e. CA discovery

i. No required disclosures in CA.

ii. Discovery tools

1. Depositions
    a. Oral and written questions.
    b. Same as in fed ct as to the basics, so can depose a party or a non-party. But you should subpoena a non-party to ensure attendance. Can only depose a natural person once unless ct orders otherwise.
    c. *Different from federal*: no presumptive time limit on deposition unless ct orders; no presumptive limit on the number of depositions to be taken in the case.
2. Interrogatories
    a. Same as in fed ct as to the basics, so can be sent only to parties.
    b. There are form interrogatories approved by the Judicial Council. There is no limit on the number of form interrogatories that can be served on other parties.
    c. If a party wishes to draft specific interrogatories to serve on another party, the interrogatories may not contain subparts.
    d. The maximum number of drafted interrogatories allowed in an unlimited civil case is 35.
        i. You can serve more with a declaration supporting the need for more.
        ii. Responding party then can seek a protective order.
    e. P must obtain a ct order on showing of good cause to propound interrogatories to D within 10 days after D was served with process.
3. Requests to produce (inspection demand)
    a. These are the same as requests to produce in federal ct.
    b. There is no statutory limit on how many of these can be served without ct permission in an unlimited civil case.
    c. P must obtain a ct order on showing of good cause to propound an inspection demand on D within 10 days after D was served with process.
    d. The CA statute does not expressly permit a party to use these to get info from a non-party. But it is possible to get discovery of things from a non-party.
        i. You take the non-party's deposition and serve him with a subpoena duces tecum
4. Medical examination
    a. Same as in fed practice.
    b. In CA, if it is a physical exam, the lawyer for that person has the right to attend the examination. If it is a mental exam, the lawyer can attend only if there is a ct order allowing it.
5. Requests for admission

a. Same as in fed practice.
b. 35 is the maximum number of requests that can be served on a party in an unlimited civil case.
c. But there is NO LIMIT on the number of requests to admit the genuineness of documents.
d. P must obtain a ct order on showing of good cause to propound a request for admission on D within 10 days after D was served with process.

6. Discovery in limited civil cases
   a. Only 1 deposition can be taken.
   b. Only a combined total of 35 interrogatories, inspection demands, and requests for admission is each party allowed to propound to another party.
   c. Parties can get additional discovery only with a ct order.
7. Supplemental discovery – in UNLIMITED cases only
   a. Unlike in fed ct, in CA cts there is no standing duty to supplement discovery responses as long as the info given was accurate and complete when given.
   b. Instead, the requesting party can propound supplemental interrogatories, which elicit later-acquired info bearing on answers previously made.
   c. Also, she can propound supplemental demands for inspection, which demand inspection of later-acquired or later-discovered docs or things.
   d. A party can propound supplemental interrogatories or requests for production twice before a trial date is set and once after that.

iii. Scope of discovery

1. Standard
   a. ***Can discovery anything relevant to the subject matter involved in the pending action.***
2. Relevant includes material that is reasonably calculated to lead to the discovery of admissible evidence.
3. As in federal ct, privileged matter is not discoverable. When a discovery request would intrude on privileged matter, the responding party must object with particularity.
4. In CA, that means she must identify the document for which privilege is claimed, its author, the date of preparation, all recipients, and the specific privilege claimed. This record is sometimes called a ***privileged log.***
5. Privacy
   a. The CA Constitution recognizes a right of privacy, which can be claimed to limit discovery. Not absolute: ct balances need for discovery against the need for privacy.
6. Work product
   a. Here, it must be generated by an attorney or her agent.
   b. A writing that reflects an attorney's impressions, conclusions, opinions, or legal research is NEVER discoverable.

c. Other work product of an attorney is discoverable only if the ct determines that denial of discovery will unfairly prejudice the party seeking discovery or will result in injustice.

7. Experts
   a. Any party may request the simultaneous exchange of expert witness info.
   b. This requires each party to exchange a list of experts he expects to offer at trial, a declaration of the nature and substance of testimony, and the expert's qualifications. The demand can include a request for reports by the expert. A party may then take a deposition of the expert.
      i. If a party does not exchange this info, the ct may exclude the expert from testifying.
      ii. There is no discovery of *consulting* that will not testify at trial.

iv. Enforcement of discovery rules

1. Parties generally must meet and confer to work out problems before seeking ct orders. A party failing to do so is subject to monetary sanction of expenses, including attorney's fees, incurred by the other party as a result of the failure to meet and confer.
2. The only time you don't have to meet and confer and therefore seek sanctions right away is when there is a total failure to respond.
3. CA law prohibits misuse of discovery such as not playing by the rules, making unjustified objections, abusive motions, failing to confer, refusal to respond, etc. By statute, a ct may sanction any person – including parties and attorneys – guilty of misusing the discovery process.
4. The person to be sanctioned must be given notice and a chance to be heard.
5. Sanctions include:
   a. Monetary sanction
   b. Establishment order
   c. Refusal to allow party to support its position with evidence at trial
   d. Striking pleadings
   e. Entering default judgment
   f. Dismissing claim
6. A party may seek a protective order to protect against unwarranted annoyance, embarrassment, oppression, burden or expense. Balance need of discovery against party's interest.

VIII. PRETRIAL ADJUDICATION

a. Voluntary dismissal

i. May be allowed on ct order (and P may have to pay D's costs). But sometimes P has a right to do so simply by filing a written notice of dismissal.
ii. You only get 1 free voluntary dismissal. After that, it is dismissal with prejudice.

b. Default and default judgment

i. Default is a notation by the ct clerk on the docket sheet of the case. A claimant gets a default by showing the clerk that D has failed to respond within 20 days after being served with process. D can respond anytime before the default is entered.
ii. Getting the default does not entitle the claimant to recover. She needs a judgment to enforce and recover money or other remedies. The clerk of ct can enter judgment if:
    1. D made no response at all
    2. The claim itself if for a sum certain in money
    3. Claimant gives an affidavit of the sum owed; AND
    4. D is not a minor or incompetent.
iii. But if any of those 4 is not true, the claimant must go to the ct itself (judge) for the judgment. The judge will hold a hearing and has discretion to enter judgment. D gets notice of that hearing only if she made some appearance in the case.
iv. Default judgment cannot exceed what the claimant demanded in her complaint (or be a different kind of relief).
v. D may try to set aside a default by showing good cause and a viable defense. Good cause usually means excusable neglect. D may try to set aside a default judgment on the same basic showing.

c. <u>Failure to state a claim</u>

i. Under 12(b)(6), D moves to dismiss for failure to state a claim. It tests only the sufficiency of P's allegations.
ii. **Standard**: the ct assumes all allegations are true and asks this: if P proved all she has alleged, would she win a judgment?
iii. This tests to see whether the facts alleged state a claim that the law would recognize.
iv. In ruling on this motion, the ct only looks at the face of the complaint.
v. The same motion, if made after D has answered, is called motion for judgment on the pleadings.

d. <u>Summary judgment</u>

i. Moving party must show
    1. ***There is no genuine dispute as to material issue of fact and***
    2. ***That she is entitled to judgment as a matter of law.***
ii. The motion can be for partial summary judgment, e.g., as to one of several claims.
iii. Ct can and usually does look at evidence.
iv. It generally views the evidence in the light most favorable to the nonmoving party.
    1. Note: affidavits are sworn statements, so they can be evidence. Pleadings are not evidence unless they are verified pleadings.
v. You never weigh credibility on summary judgment.

e. <u>Pretrial adjudication in CA</u>

i. Voluntary dismissal

1. P can move to dismiss anytime before trial actually commences. The decision is for the ct to make and it is also up to the ct to decide whether such a dismissal is without prejudice.

2. If P moves for voluntary dismissal after trial starts, it may be granted only with prejudice, unless the parties stipulate otherwise or the ct finds good cause to dismiss without prejudice.

ii. Involuntary dismissal

1. All cts (federal and state) have authority to dismiss for failure to prosecute, failure to abide by ct orders or rules and, of course, for the various reasons that can be raised by demurrer, motions to quash or dismiss, etc.
2. The ct has discretion to dismiss if the case has not been brought to trial within 2 years after filing.
3. *Mandatory dismissal*
    a. The case must be dismissed if:
        i. Not brought to trial within 5 years of filing
        ii. Process is not served within 3 years after filing.

iii. Default and default judgment

1. D fails to respond to the complaint within 30 days of the effective date of service of process on her. The procedure is very similar to that in fed cat, with these differences:
    a. D must be given notice of the application for entry of default
    b. Default judgment can be entered by the clerk without a judge's involvement if:
        i. D made no response at all
        ii. The claim is on a K or judgment
        iii. The claim is for a sum certain in money
        iv. D was not served by publication AND
        v. P provides an affidavit stating relevant facts
    c. But if any those is not true, the claimant must go to the ct itself for the judgment. The judge will hold a hearing and has discretion to enter judgment.
    d. Default judgment cannot exceed what the claimant demanded in her complaint or be a different kind of relief.
    e. D may move to set aside default or default judgment and for leave to defend the action if service of process did not result in actual notice of the suit to D within the time to respond. Notice of motion must be accompanied by an affidavit attesting the lack of notice was not the result of trying to avoid notice or of inexcusable neglect.
    f. Motion must be filed within reasonable time, not to exceed the earlier of these: 6 months after service of written notice of default or default judgment or 2 years after entry of default judgment.

iv. Failure to plead facts constituting a cause of action

1. Raised in state ct by general demurrer.

v. Motion for summary judgment

1. Standard is the same as in fed ct.
    a. Burden-shifting

i. If D moves for SJ and shows P's cause of action lacks merit, or if P moves for SJ by showing there is no defense to the cause of action, the burden shifts to the opposing party to demonstrate that a triable issue of fact exists. She must produce evidence.

b. Moving party must file and serve a separate statement of material facts she claims to be undisputed, with supporting evidence for each fact. If she does not, the motion can be denied.

c. If the moving party files and serves such a statement and evidence, the opposing party must respond by indicating the facts she believes to be in dispute and supporting evidence for each fact. If she does not, the ct may grant SJ.

d. Moving party must serve all papers at least 75 days before the hearing on the motion. Opposition papers must be filed at least 14 days before the hearing. Reply papers by the moving party must be filed no more than 5 days before the hearing.

IX. CONFERENCES AND MEETINGS

a. Rules 26(f) conference

i. Unless ct order says otherwise, at least 21 days before scheduling conference (or scheduling order is due), parties discuss claims, defenses and settlement. Must form discovery plan and present it to the ct in writing within 14 days.

b. Scheduling order

i. Unless local rule or ct order says otherwise, the ct enters an order scheduling cut-offs for joinder, amendment, motions, etc.

c. Pretrial conferences

i. The ct may hold pretrial conferences as needed to expedite the case and foster settlement. Final pretrial conference ***determines the issues to be tried and evidence to be proffered***. Recorded in pretrial conference order that basically supersedes the pleadings; may be amended ***to prevent manifest injustice*** (a tough standard).

X. TRIAL, JUDGMENT AND POST-TRIAL MOTIONS

a. <u>Jury trial</u>

i. Right to jury trial in federal ct

1. 7th Am, which applies ONLY in fed ct, preserves the right to jury in civil actions at law, but not in suits at equity.
2. If a case involves both law and equity, the jury decides the facts underlying the law claim, but not the equity claim.
3. Jury issues are tried FIRST.

ii. Requirement of demand

1. Must demand in writing no later than 10 days after service of the last pleading raising jury triable issue.

iii. During voir dire, each side has unlimited strikes for cause. Each side also gets 3 peremptory strikes.

1. Peremptory strikes must be used in a race and gender neutral way.
2. No fewer than 6 jurors and no more than 12. There are no alternate jurors – all participate unless excused for good cause.

iv. Motion for judgment as a matter of law (JMOL)

1. Old name: directed verdict
2. This is an exceptional order, the effect of which is to take the case away from the jury.
3. It is brought after the other side has been heard at trial. So usually D can move twice: at close of P's evidence and at close of all evidence. P: only at close of all evidence.
4. Standard for granting motion: ***reasonable people could not disagree on the result.***
5. And the ct generally views evidence in the light most favorable to the nonmoving party.

v. Renewed motion for judgment as a matter of law (RJMOL)

1. Old name: judgment notwithstanding the verdict (JNOV)
2. Situation
   a. Judge let the case go to the jury, which returns a verdict for one party, and the ct enters judgment on the basis of the verdict. Now, the losing party files a renewed motion for judgment as a matter of law which, if granted, would result in entry of a judgment for him. Move within 10 days after entry of judgment.
3. Standard
   a. ***Reasonable people could not disagree on the result***
4. Motion for judgment as a matter of law at an appropriate time during trial is a prerequisite. IF YOU DID NOT MOVE FOR JMOL AT TRIAL, YOU CANNOT BRING THE RJMOL AS A MATTER OF LAW.

l. Motion for a new trial

i. Situation
   1. Judgment entered, but errors at trial require a new trial.
   2. Something happened that makes the judge think the parties should start over and re-try the case. Move within 10 days after judgment.

ii. Grounds
   1. Prejudicial (not harmless) error at trial makes judgment unfair
   2. New evidence that could have been obtained with due diligence for the original trial
   3. Prejudicial misconduct of party or attorney or third party or juror
   4. Judgment is against the weight of the evidence
   5. Excessive or inadequate damages

iii. Compare
   1. Grant of new trial is less radical than grant of renewed motion for judgment as a matter of law because it means the ct will start over and decide who wins.

c. **Motion to set aside judgment**
   i. Clerical error → anytime
   ii. Mistake, excusable neglect → reasonable time, never more than 1 year
   iii. New evidence that could not have been discovered with due diligence for a new trial motion → reasonable time, never more than 1 year
   iv. Judgment is void → reasonable time (no maximum)

d. **Trial, judgment, and post-trial motions in CA**
   i. **Recovery**
      1. As in fed ct, the amount claimed in the complaint does not limit the amount that can be recovered nor does it limit the type of relief that can be recovered except in default cases. In default, one cannot recover more or a different kind of relief than she sought in the complaint.
      2. In limited civil cases, no claimant can recover more than 25k.
   ii. **Right to jury**
      1. The 7th Am does not apply in state cts. The CA Constitution grants right to jury trial, largely along the same law/equity split as the 7th Am.
      2. If a case involves facts underlying a cause of action with a remedy at law and a cause of action with a remedy at equity, jury determines facts as to the law issues but not equity. But, unlike fed ct, here we try equity issues FIRST.
      3. If the complaint alleges an equity cause of action, and damages are merely incidental relief, in fed ct there is a right to have a jury determine the facts relating to damages. In CA, however, there is no jury in such a case.
         a. ***The equitable clean up doctrine*** → if the center of gravity of the case is equity, you don't get a jury and damages can be included in the non-jury trial.
   iii. **Requirement of demand**
      1. A party must announce her demand for jury at the time the case is set for trial or within 5 days after notice of setting the trial. Usually, this demand is made in the case management statement filed before the case management conference. Failure to make this demand constitutes waiver.
   iv. **Number of jurors**
      1. In state ct, there are 12 jurors in civil cases unless the parties agree in open ct to a lesser number.
      2. If a juror is excused for illness or other reason, an alternate juror takes her place. If there is no alternate, trial continues unless a party objects.
   v. **Selection**
      1. In the voir dire process, each party is entitled to six peremptory challenges and unlimited challenges for cause.
         a. Peremptory challenges may not be used on the basis of race, color, religion, sex, national origin, sexual orientation, or similar grounds.
   vi. **Verdict**

1. In fed ct, the jury verdict must be unanimous unless the parties agree otherwise. In state ct, all that is required ¾ of the jurors.

vii. Motion for directed verdict

1. Equivalent to motion for judgment as a matter of law in fed ct.
2. After the other side has been heard, a party may move for directed verdict because reasonable people could not disagree as to the result.
3. If D moves for this at the close of P's opening statement or at the close of P's evidence, it is often called a motion for non-suit.
4. Directed verdict can also be called a demurrer to the evidence.

viii. Motion for judgment notwithstanding the verdict (JNOV)

1. Equivalent to the renewed judgment as a matter of law in fed ct.
2. Jury returns a verdict and ct enters judgment on the basis of that verdict. Now the losing party makes this motion.
    a. Standard: same as directed verdict.
    b. Timing: must file notice of intention to move either before entry of judgment or the earlier of these:
        i. 15 days of mailing or service of notice of entry of judgment or
        ii. 180 days after entry of judgment.
    c. Difference from federal: party making this motion is not required to make motion for directed verdict at trial.

ix. Motion for a new trial

1. Timing is same as JNOV.
2. Basis:
    a. Same as in fed ct:
        i. Something convinces the ct that the parties should retry the case.
        ii. Proper only if the ct concludes that the error complained of has resulted in a miscarriage of justice.
3. One ground for new trial is excessive or inadequate damages: damage figure must ***shock the conscience***.
4. To avoid a new trial, the ct might order remittitur or additur.
    a. Remittitur
        i. Gives P the choice of taking a lesser figure or else having to go through a new trial.
        ii. OK in both state and fed ct.
    b. Additur
        i. Gives D the choice of paying greater amount or else having to go through a new trial.
        ii. OK in state ct, but unconstitutional in fed ct.

x. Motion to set aside judgment

1. A party may move to set aside judgment because of mistake, inadvertence, surprise, or excusable neglect. This might be possible in a default judgment case, where the party or lawyer simply goofed up and didn't respond.
2. The motion MUST include D's answer.

3. The motion MUST be accompanied by an affidavit of fault by the party or lawyer demonstrating the mistake, inadvertence, surprise, or excusable neglect. If the ground is demonstrated, the ct must set aside the judgment. It may order the party/lawyer to pay reasonable expenses and attorney's fees incurred by the other side.
4. Timing: reasonable time, no more than 6 months after entry of judgment.

XI. APPEAL

a. <u>Basic idea</u>

i. In the federal system, we appeal from the federal district ct (trial ct) to the US Ct of Appeals.

b. <u>Final judgment rule</u>

i. As a general rule, can appeal only from final judgments, which means an ultimate decision by the trial ct of the merits of the entire case. File notice of appeal in trial ct within 30 days after entry of final judgment.
ii. To determine if it's a final judgment, ask: after making this order does the trial ct have anything left to do on the merits of the case?
    1. If so, it's not final.
iii. Denial of motion for summary judgment → NOT a final judgment.
iv. Grant of a motion for new trial → NOT a final judgment.
v. Denial of a motion for new trial → final judgment; must appeal within 30 days of that.
vi. Grant of motion to remand to state ct → no, by statute.
vii. Grant or denial of renewed motion for judgment as a matter of law → final judgment.

c. <u>Interlocutory (non-final) review</u>

i. Interlocutory orders reviewable as of right
    1. Orders granting, modifying, refusing, etc. injunctions
    2. Appointing/refusing to appoint receivers
    3. Findings of patent infringement where only an accounting is left to be accomplished by trial ct
    4. Orders affecting possession of property
ii. Interlocutory Appeals Act
    1. Allows appeal of non-final order if trial judge certifies that it involves a controlling issue of law as to which there is substantial ground for difference of opinion and the ct of appeals agrees to hear it.
iii. Collateral order exception
    1. Appellate ct has discretion to hear ruling on an issue if it
        a. Is distinct from the merits of the case
        b. Involves an important legal question and
        c. Is essentially unreviewable if parties must await a final judgment.
iv. When more than one claim is presented in a case, or when there are multiple parties, the trial ct may expressly direct entry of a final judgment as to one or more of them if it makes an express finding that there is no just reason for delay.

v. Extraordinary writ
   1. Not technically an appeal, but an original proceeding in appellate ct to compel the trial judge to make or vacate a particular order.
   2. Not a substitute for appeal; available only to enforce a clear legal duty.

vi. Class action
   1. Ct of appeals has discretion to review order granting or denying certification of class action.
   2. Must seek review within 10 days of order.
   3. Appeal does not stay proceedings at trial ct unless trial judge or ct of appeals so orders.

d. Appeal in CA

i. Basic idea

1. In an unlimited case, we appeal from the superior ct to the CA Ct of Appeal. Appeal is to the district of the Ct of Appeal to which the county is assigned.
2. *Timing*
   a. Generally, the notice of appeal must be filed in the trial ct within:
      i. 60 days after service of the notice of entry of judgment OR
      ii. 180 days after entry of judgment if no notice is served.
3. Judgments in limited civil cases and small claims matters are appealed to the appellate division of the Superior Ct.

ii. Final judgment rule

1. Like fed cts, CA follows this rule: 1 one cannot generally appeal until the merits of the entire action are resolved.

iii. Interlocutory review

1. *By statute, these are appealable:*
   a. Order granting a motion to quash service of summons
   b. Order granting a dismissal or stay of a case for forum non conveniens
   c. Order granting new trial
   d. Order denying a motion for JNOV
   e. Order denying (not granting) certification of an entire class action
   f. Order granting, dissolving, or refusing to grant or dissolve an injunction
   g. Order directing party or attorney to pay monetary sanctions of over 5,000
2. *Collateral order rule*
   a. Ct of Appeal may hear appeal on
      i. An issue collateral to the merits of the case
      ii. That the trial ct has decided finally if
      iii. It directs payment of money or performance of an act.
3. *Extraordinary writ*
   a. If an order is not otherwise appealable, the aggrieved party may seek a writ of mandate (to compel a lower ct to do something the law requires) or prohibition.
   b. The writ may issue by any ct to an inferior ct.

c. Party seeking must demonstrate
    i. That she will suffer irreparable harm if the writ is not issued
    ii. The normal route of appeal from final judgment is inadequate
    iii. She has a beneficial interest in the outcome of the writ proceeding.
        1. In practice, writ is more likely if the issue involved is one of public interest, e.g., involving conflicting trial ct interpretations or a novel and important question.

XII. CLAIM AND ISSUE PRECLUSION

a. <u>Basic idea</u>

i. If case 2 is in a different ct system from case 1, the law of the system that decided case 1 applies regarding claim and issue preclusion.

ii. Suppose judgment in case 1 has been appealed, or the time for appealing has not yet expired. Is that judgment entitled to claim or issue preclusion effect?
    1. Federal: yes
    2. CA: no

iii. Claim and issue preclusion are affirmative defenses, so D should raise them in her answer. Often on the bar this issue is presented in a motion for summary judgment.

b. <u>Claim preclusion (res judicata)</u>

i. Stands for the proposition that you only get to sue on a cause of action or claim once.

ii. Requirements

1. Case 1 and case 2 were brought by the same claimant against the same D. Not just same parties, but also in the same configuration

2. Case 1 ended in a valid final judgment on the merits.
    a. Unless the ct said otherwise when it entered judgment, it's on the merits UNLESS it was based on jx, venue, SoL, indispensable parties.
    b. A default judgment IS on the merits.
    c. Judgment based on discovery abuse:
        i. Federal: on the merits
        ii. CA: on the merits

3. Case 1 and case 2 asserted the same cause of action or claim
    a. Federal: claim means T/O
    b. CA: you get one cause of action for each right invaded. So if a single accident caused both personal injuries and property damage, there would be two causes of action – one for the body and one for the property. This theory is called ***primary rights***.

iii. Terminology
    1. If the claimant won case 1, res judicata is called merger.
    2. If the claimant lost case 1, res judicata is called bar.

c. <u>Issue preclusion (collateral estoppel)</u>

i. It precludes relitigation of a particular issue litigated and determined before.

ii. Requirements

1. ***Case 1 ended in a valid, final judgment on the merits.***
2. ***The same issue was actually litigated and determined in case 1.***
3. ***The issue was essential to the judgment in case 1. Without the issue, the judgment in case 1 would have been different.***
4. ***Against whom can issue preclusion be asserted? Only against one who was a party to case 1 or who was represented by a party. This is required by due process.***
5. ***By whom can issue preclusion be asserted?***
    a. Traditional view (mutuality): only by one who was a party to case 1. This is not required by due process and some cts have rejected it to allow nonmutual assertion of issue preclusion.
    b. Nonmutual defensive issue preclusion
        i. Barney, driving aunt Bee's car, is involved in a collision with Andy. Assume aunt Bee is vicariously liable for Barney's acts.
        ii. Case 1: Andy sues Barney. Barney wins, based on a finding that Andy was negligent. The ct enters final judgment for Barney.
        iii. Case 2: Andy sues aunt Bee. Can aunt Bee assert issue preclusion as to the finding that Andy was negligent?
            1. All requirements met. With respect to the by whom requirement, it is asserted by a party who was not a party to case 1. Under mutuality rule, could not be done. Under federal law and CA law, OK if Andy had a full chance to litigate in case 1.
    c. Nonmutual offensive issue preclusion
        i. Case 2 is brought by Aunt Bee against Andy to recover damages to her car. Aunt Bee wants to assert collateral estoppel as to the finding in case 1 that Andy was negligent.
        ii. Most ct would probably not allow this today. But federal and CA law will allow it if it is not UNFAIR. Factors (just throw them in):
            1. Andy had a full and fair opportunity to litigate in case 1
            2. Andy could foresee multiple suits
            3. Aunt been could not have joined easily in case 1
            4. There are no inconsistent judgments on the record. If there had been multiple litigation, and sometimes Andy was found negligent and sometimes not, it would be unfair to let aunt Bee to get issue preclusion on a negligence finding.

CIVIL PROCEDURE ESSAY (FEDERAL)

I. DOES THE CT HAVE THE AUTHORITY TO DECIDE THE DISPUTE?
    a. Does the ct have authority over the parties?
        i. Personal jdx

1. Traditional ways of asserting jdx
    a. Domicile
    b. Presence in state when served
    c. Consent
        i. Appearing in the action
        ii. By contract
        iii. Appointment of agent for service
        iv. Implied consent, e.g., non-resident motorist statutes
2. Assertion of jdx over non-residents
    a. State long-arm statute, and
    b. Minimum contacts
        i. Purposeful availment
        ii. Foreseeability
    c. Traditional notions of fair play and substantial justice
        i. Relatedness between claim and contact (less important if contact is great)
        ii. Convenience
        iii. State's interest

ii. In rem jdx
iii. Quasi in rem jdx
iv. Notice – service of process

b. Does the ct have authority over the subject matter?
    i. Subject matter jdx
        1. State cts are generally cts of unlimited jdx. The only limits are statutory.
        2. Federal cts only have jdx over 2 types of claims:
            a. Federal questions
            b. Diversity actions
                i. Complete diversity
                ii. Good faith allegation over 75k
        3. Removal
        4. Supplemental jdx

c. Is the ct the proper place to resolve the dispute?
    i. Venue in fed cts
        1. District where any D resides, if all Ds in same state
        2. Where a substantial part of the claim arose, or
        3. If no district meets 1 or 2
            a. In diversity cases, district where any D is subject to personal jdx or
            b. In other cases, where any D may be found
        4. Improper or inappropriate venue
            a. Transfer
            b. Forum non conveniens

II. WHAT LAW GOVERNS THE DISPUTE?
    a. Erie doctrine

i. Federal cts are required to apply state substantive law to nonfederal causes of action
ii. The necessary and proper clause allows federal cts to apply federal procedural rules. In addition, federal cts will apply some state procedural rules when those rules have no bearing on the mechanics of the fed ct system

III. ARE THE PLEADINGS PROPER?
a. Federal cts use notice pleading – the pleading must put the opposing party on notice of the claim. By contrast, some states use code pleading
b. Complaint
i. Statement of SMJ
ii. Statement of the claim
iii. Demand for relief
c. D's response
i. Answer
ii. Rule 12 motion (watch waivable defense)
d. Counterclaim
i. Compulsory
ii. Permissive
iii. Supplemental jdx (if needed) for compulsory
e. Cross-claims – supplemental jdx if needed
f. Amendments and supplemental pleadings
g. Rule 11
i. Certification
ii. Sanctions

IV. ARE THE PROPER PARTIES AND CLAIMS BEFORE THE CT?
a. Joinder of parties
i. Compulsory joinder – necessary parties should be joined if possible
ii. Permissive joinder – if joinder of necessary party not feasible (e.g., would destroy diversity) ct must either proceed without absentee or dismiss the case. If dismiss, call absentee indispensable.
b. Joinder of claims
i. Class actions
1. Initial requirements
a. Class is so numerous that joinder of all members is impracticable
b. Questions of law or fact common to the class
c. The claims of the representative parties are typical of the class
d. The representative parties will fairly and adequately protect the interest of the class
2. Types
a. Prejudice
b. Injunction/declaratory judgment
c. Common question predominate
ii. Intervention
1. Intervention as of right

2. Permissive intervention
3. Supplemental jdx if needed for intervention of right or D

iii. Impleader
1. Indemnity or contribution
2. Other claims: TPD v. P and P v. TPD
3. Supplemental jdx if needed for impleader and TPD v. P

iv. Interpleader
1. Rule 22 interpleader
2. Statutory interpleader

V. HAVE THE PARTIES PROPERLY PROPOUNDED AND REPLIED TO DISCOVERY?

a. Types of discovery
i. Depositions
ii. Interrogatories
iii. Requests to produce
iv. Physical or mental examinations
v. Requests for admission
vi. Required disclosures

b. Scope of discovery
i. Anything reasonably calculated to lead to admissible evidence
ii. Privileged matter not discoverable
iii. Work product

c. Enforcement of discovery rules (sanctions)
i. Total or partial failure to provide discovery: motion to compel plus costs and certify good faith attempt to obtain discovery
ii. Sanctions include
1. Treat matters as admitted
2. Disallow evidence on an issue
3. Establish the issue adverse to the violating party
4. Strike the pleadings
5. Dismiss the cause of action or the entire action (bad faith)
a. Enter a default judgment (bad faith)
b. Hold in contempt, except for refusal to submit to physical or mental exam
6. Immediate or automatic sanction

VI. CAN THE DISPUTE BE RESOLVED WITHOUT A TRIAL?

a. 12(b)(6) – failure to state a claim

b. Dismissal
i. Voluntary
ii. Involuntary

c. Summary judgment
i. The moving party must show that there is no triable issue of fact and entitled to judgment as matter of law
ii. Partial summary judgment can be granted

VII. IF THERE IS A TRIAL, WHO WILL DECIDE THE MATTER?

a. 7th Am guarantees a right to jury trial for actions at common law, but not for equitable actions. State constitutional provisions and statutes also guarantee jury trials.
b. Written demand
c. When an action contains legal and equitable claims, legal claim tried first to jury
d. The verdict can be a general verdict, a special verdict or a general verdict with interrogatories
e. If there is a jury, can the jury be disregarded?
    i. Nonsuit
    ii. Judgment as a matter of law
    iii. Renewed motion for judgment as a matter of law
    iv. Motion for a new trial

VIII. CAN THE DECISION BE APPEALED?

a. The final judgment rule requires a final judgment of the entire case before an appeal may be taken
b. Exception to the final judgment rule
    i. Pretrial orders involving temporary remedies
    ii. Final judgment on collateral matters
    iii. Interlocutory orders of great importance that may be determinative of the ultimate decision

IX. IS THE DECISION BINDING IN FUTURE CASES?

a. Res judicata
    i. When there is a final judgment on the merits, res judicata prevents re-assertion of the claimant's cause of action
    ii. On the merits is any judgment except one based on jdx, venue, or indispensable parties or if first said it was not on merits
b. Collateral estoppel
    i. Issues of fact actually litigated and essential to judgment in a first action are conclusive in a subsequent, although different, action between the P and D or their privies
    ii. Default and consent judgments do not involve litigation of the merits and therefore do not give rise to collateral estoppel
c. Who is bound by the judgment?
    i. Parties
    ii. Privies to parties are also bound including those who control the litigation and will be affected by the outcome
    iii. Strangers are not bound, but may take advantage of collateral estoppel if jdx rejects mutuality doctrine
    iv. Other jdx
        1. The constitution requires full faith and credit be given to public acts, records, and judicial proceedings of sister states. Federal statutes compel recognition of federal ct judgments.
        2. Full faith and credit is only required when the ct had personal jdx over the parties and the ct issued a final judgment on the merits.
        3. Full faith and credit is not required for foreign country judgments.