Common Law & Court Procedure

A free people [claim] their rights as derived from the laws of nature, and not as the gift of their chief magistrate. - ***Thomas Jefferson, Rights of British America, 1774***

❖ First edition - December 27, 2012

We have been robbed of our heritage, (God, self-rule, and justice), this e-book offers the beginning of a re-founding of the true meaning of freedom. And "only" through your commitment and endurance will liberty be available again, by way of virtue alone, to you and your posterity ... but first you must "realize" that understanding is power!

Hear; for I will speak of excellent things; and the opening of my lips shall be right things. For my mouth shall speak truth; and wickedness is an abomination to my lips. All the words of my mouth are in righteousness; there is nothing froward or perverse in them. They are all plain to him that understandeth, and right to them that find knowledge. Receive my instruction, and not silver; and knowledge rather than choice gold. For wisdom is better than rubies; and all the things that may be desired are not to be compared to it. I wisdom dwell with prudence, and find out knowledge of witty inventions. The fear of the LORD is to hate evil: pride, and arrogancy, and the evil way, and the froward mouth, do I hate. Counsel is mine, and sound wisdom: I am understanding; I have strength. By me kings reign, and princes decree justice. By me princes rule, and nobles, even all the judges of the earth. I love them that love me; and those that seek me early shall find me. **Prov 8: 6-17**

"My people are destroyed for lack of knowledge": **Hosea 4:6**

Preface -

"If a people expect to be ignorant and free they expect what never was and never will be." - ***Thomas Jefferson***

"Liberty is a great privilege (from God), so the obligations and responsibilities that go with liberty are also great". - ***Common Law Maxim***

This book, and the collection of files that accompany it, was written and assembled to assist the people to achieve access into "their" court system, and justice. I have labored in the hope of spreading liberty through this instructional book and offer it free of charge, because we the people have been robbed of our judicial process, without which, the knowledge of Liberty shall be lost. I am therefore duty-bound to offer my work for free and trust that those who can help support this work, to save our Liberty for ourselves and our posterity, will make financial contributions. So, those who can donate $25, $100, or more and/or monthly to support this work, it would be greatly appreciated.

How to approach this course *- This book should give the reader a rounded understanding of court procedure, it should be read from cover to cover and then used as a reference book as you put it into practice. There are also lectures and interviews (MP3's) in the collection which will instruct you in common law and a court of record, together they will empower the people to take back their judicial process. Where there are contradictions in procedure between common law (court of record) and the procedures taught in this book, obviously the common law should prevail, it is necessary to understand both procedures and to comply whenever possible to the procedures common to the state and federal courts. For those who pioneer this process it will be an up-hill battle but as you achieve a few wins in your county Justice and Liberty will be available to all that follow the path that you forge. [If you have a copy of this book and not the files that accompany it please visit > http://newyorkcommitteemen.org/common/court/access.html for a complete and up to date copy of this course]*

Although this book is structured around New York State it is adequate for use in any state and federal district, you need only replace the rules, codes and state case-law. For more information, conference calls and other tools necessary for freedom, and to donate please visit our website www.TakeBackTheRepublic.net. Donations can be made by clicking on the donate button or you can contact me directly from my contact page. Thank you.

John Darash

There are three issues, that our servant government has deceitfully expunged from our American education, which are the very "Principles of Liberty";

(1) ethics (biblical principles and practice, God),
(2) justice (judicial principles and process, common law) and,
(3) political science (political principals and process, rule by consent of the people).

By nature people fear, and feel overwhelmed by what they do not understand, the orchestrators of America's 20th century exploited this human flaw by eliminating these doctrines from our education, and used entertainment, and the media to advance this fear to the point of total avoidance: The goal of this age old ruse is, keep the slaves ignorant so that they are powerless to act in any constructive way, and rebel against their masters.

People simply do not discuss these taboos in any serious way, for fear of revealing their ignorance, and may be forced to face the fact, that they know nothing worthwhile knowing at all, while being deluded into believing they are smarter than the people before them, if it wasn't so sad, it would be comical.

Once the foundation of American thought, that defines liberty, these "three American taboos" are shied-away from, by design people are ignorant of them, and when confronted, they have been programmed to get a priest, hire a lawyer; or join a party so that they can be told how to pray, plead, and vote!

Occasionally people have a moment of clarity and come face to face with the decision of illusion or reality, and in a "moment of composure" we sometimes break through the psychological barrier of fiction and set course on the journey for truth.

The "Principles of Liberty" has three points of order, in order; remove one and you lose liberty;

(1) Light (God)
(2) Justice (Judicial process)
(3) Rule of destiny (political process):

Light the first point of order, maxim's[1] of law avows that justice and virtue are synonymous[2], before a man can implement justice he must first possess virtue, the Bible declares virtue flows from the Lord[3] alone and defines virtue as whatsoever things are true, honest, just, pure, lovely, and of good report[4]; Without justice man cannot rule his destiny, and without God man cannot achieve justice, these three are interconnected and man's rule of destiny is not possible without the other two.

Thomas Jefferson understood this when he said: "*God who gave us life gave us liberty. And can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that These liberties are of the gift of God? That they are*

[1] MAXIM. [Black's Law 4th edition, 1891] Coke defines a maxim to be "conclusion of reason," and says that it is so called "quia maxima ejus dignitas et certissima auctoritas, et quod maxime omnibus probetur." Co.Litt. 11a. He says in another place: "A maxime is a proposition to be of all men confessed and granted without proofe, argument, or discourse." Id. 67a.
[2] JUSTICE. [Bouvier's Law, 1856 Edition] Virtue
[3] Luke 6:19 And the whole multitude sought to touch him: for there went virtue out of him, and healed them all.
[4] Phil 4:8 Finally, brethren, whatsoever things are true, whatsoever things are honest, whatsoever things are just, whatsoever things are pure, whatsoever things are lovely, whatsoever things are of good report; if there be any virtue, and if there be any praise, think on these things.

not to be violated but with His wrath? Indeed, I tremble for my country when I reflect that God is just that His justice cannot sleep forever".

George Washington understood this when he said: "*The favorable smiles of Heaven can never be expected on a nation that disregards The eternal rules of order and right which Heaven itself has ordained*".

Benjamin Franklin understood this when he said: "*Only a virtuous people are capable of freedom. As nations become corrupt and vicious, they have more need of masters*".

John Adams understood this when he said: "*Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other*".

Patrick Henry understood this when he said: "*It cannot be emphasized too strongly or too often that this great nation was founded, not by religionists, but by Christians; not on religions, but on the Gospel of Jesus Christ. For this very reason peoples of other faiths have been afforded asylum, prosperity, and freedom of worship here*".

James Madison understood this when he said: "*We have staked the whole future of American civilization, not upon the power of government, far from it. We have staked the future of all of our political institutions upon the capacity of mankind for self-government; upon the capacity of each and all of us to govern ourselves, to control ourselves, to sustain ourselves According to the Ten Commandments of God*".

Noah Webster understood this when he said: "*No truth is more evident to my mind than that the Christian religion must be the basis of any government intended to secure the rights and privileges of a free people*". (Father of American Scholarship and Education)

Justice the second point of order, the remedy is already in the law, people already possess the power of nullification[5], they need only understand it, and demand it.

All of the "illusionary" statutory laws[6] that deny man's unalienable rights can become powerless, literally "overnight", if only the people understood the principles of "Jurisdiction"! The answer is so subtle you might miss it, and so powerful you might fear it, and without your "moment of composure" you might deny it!

[5] Nulification - KENTUCKY RESOLUTIONS. A series of resolutions drawn up by Jefferson, and adopted by the legislature of Kentucky in 1799, protesting against the "alien and sedition laws," declaring their illegality, announcing the strict constructionist theory of the federal government, and declaring "nullification" to be "the rightful remedy."

[6] The common law is the real law, the Supreme Law of the land, the code, rules, regulations, policy and statutes are "not the law", [Self v. Rhay, 61 Wn (2d) 261]; * "All laws, rules and practices which are repugnant to the Constitution are null and void" [Marbury v. Madison, 5th US (2 Cranch) 137, 180]; * "Laws are made for us; we are not made for the laws." [William Milonoff]

The people[7] have jurisdiction[8] over the servant government as "ordained[9]" by the people **FOR** the United States, not **FOR** the people. The peoples function is that of King "ordaining", our rights and our laws are unlimited, they are whatever we say they are[10]. Statutes, codes, rules, regulations and policies, when applied directly upon the people, are all fiction!

The US Constitution provides for two criminal Jurisdictions[11] one is Admiralty or Maritime law and the other is Common law and since we are not at sea the only option the court has is Common law. In Common law in order for a court to have jurisdiction over you the court must produce an injured party, and if they cannot then they do not have jurisdiction. A court does not have the authority to claim the state is the injured party because the state cannot be judge and prosecutor, and an officer of the state cannot be a witness, nor is the state one of the people possessing rights. There are also courts of equity created by right of contract.

The United States has jurisdiction over its citizens[12] (subjects), created by right of contract, citizens do not have rights, they have privileges, congress has power to write statutes, which for citizens is law, the patriot act is a statute for citizens, not people; marriage licenses, drivers licenses, gun licenses are all for citizens, not people. Up until 1868 with the passing of the fraudulent 14th Amendment there was only people, not citizens, and the purpose of statutes was to control the servant government; bureaucrats, municipalities, elected and appointed officials, corporations, interstate commerce, and admiralty law.

So, how did this happen - All of our trial courts are controlled by judges and lawyers who are taught by bar association schools. All these judges and lawyers are taught that statutes are law,

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[7] PEOPLE. People are supreme, not the state. [Waring vs. the Mayor of Savanah, 60 Georgiaat 93]; The state cannot diminish rights of the people. [Hertado v. California, 100 US 516]; Preamble to the US and NY Constitutions - We the people ... do ordain and establish this Constitution...; ...at the Revolution, the sovereignty devolved on the people; and they are truly the sovereigns of the country, but they are sovereigns without subjects...with none to govern but themselves... [CHISHOLM v. GEORGIA (US) 2 Dall 419, 454, 1 L Ed 440, 455, 2 DALL (1793) pp471-472]: The people of this State, as the successors of its former sovereign, are entitled to all the rights which formerly belonged to the King by his prerogative. [Lansing v. Smith, 4 Wend. 9 (N.Y.) (1829), 21 Am. Dec. 89 10C Const. Law Sec. 298; 18 C Em.Dom. Sec. 3, 228; 37 C Nav.Wat. Sec. 219; Nuls Sec. 167; 48 C Wharves Sec. 3, 7.]

[8] JURISDICTION. [Black's Law 4th edition, 1891] It is the authority by which courts and judicial officers take cognizance of and decide cases.

[9] CONSTITUTION FOR THE UNITED STATES OF AMERICA: We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

[10] "The very meaning of 'sovereignty' is that the decree of the sovereign makes law." American [Banana Co. v. United Fruit Co., 29 S.Ct. 511, 513, 213 U.S. 347, 53 L.Ed. 826, 19 Ann.Cas. 1047].

* "'Sovereignty' means that the decree of sovereign makes law, and foreign courts cannot condemn influences persuading sovereign to make the decree." [Moscow Fire Ins. Co. of Moscow, Russia v. Bank of New York & Trust Co., 294 N.Y.S. 648, 662, 161 Misc. 903].

[11] Two Criminal Jurisdictions - The constitution grants US Court two different criminal jurisdictions one is a criminal jurisdiction under common law and the other is criminal jurisdiction under admiralty law or military tribunal from Article 1 Section 8 clause 17 of the US Constitution.

[12] The Fourteenth Amendment. Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

thereby serving the NWO agenda. Although occasionally you might get a judge, like judge Napolitano who understands the game, and adjudicates constitutionally.

Most Appellate court judges are readers, they understand jurisdiction and adjudicate accordingly under the jurisdiction agreed to in the trial courts, when one studies case law it is apparent that the appellate courts understand and consistently rule according to "jurisdiction". So if you argue and/or challenge jurisdiction in the trial courts the Appellate courts will overturn the trial courts for not having jurisdiction. And they will do this for one of three reasons either: (1) they do not want to be the one to upset the balance of case law and thereby seen as unjust, and overturned by a higher court; (2) they are just; or (3) they fear you because in the trial courts you will quote US Codes 18; 241, 242 & US Code 42; 1983, 1985, 1986 which are laws written by righteous men to punish all officers, including judges that participate in the conspiracy against your rights, not privileges. They know that there are two more courts above them, the state court of appeals and the federal district courts, that will enforce the code, and they could go to jail for 10 years.

The question, how did things get to this state is a study onto itself and cannot be covered here. You can go to www.FamilyGaurdian.com to learn more about this. Although their site is a rich resource it is also extremely overwhelming, especially to a beginner. I will endeavor to write a short paper on this in the near future.

In order to win in the appellate court you must stay on point, challenging the court's jurisdiction and defending your jurisdiction, you cannot do this with a lawyer. Once this battle is won in your town and/or county court others will have an easier time.

So you see the remedy is already in the law, We the People already possess the power of nullification, we need only understand it, and demand it, some have already enjoined the battle and are forging a path to justice we now need the masses to follow.

Rule of destiny the third point of order, our founders have set in place a process called the committeeman process, these are the "consentors"[13] elected by the people to represent the will of an election district. There are 16,300 election districts in NYS with one committeeman for each district. There are 62 counties and 994 cities and towns in NY., therefore there is an average of 293 committeemen for each county and about 16 committeemen per town. These are the people who are to guard the elections, recall out of control politicians, and police for corruption. Presently all 16,300 districts are controlled by a handful of corrupt party bosses who receive their power from private associations. This is why we have an out of control government.

If we the people, educated in the "three points of order", take back the committeeman process we could have an obedient servant government with minimum corruption, and end destructive politics.

[13] Declaration of Independence - We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.--That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed

All of this rests on the winning of a court case requiring the NYSBOE to obey the law[14] and allow the elected committeemen to take back the power from the private Associations that presently control our out of control government.

But in order to accomplish this, we need leaders with integrity that are willing to invest the time in learning, and exercising the three Principles of Liberty. These people need to prepare now, so that we can take action when the court case is won. If we wait until we win we will lack the discipline necessary to achieve our goals.

"*The fate of unborn millions will now depend, under God, on the courage of this army* (Tea Party)*, Our cruel and unrelenting enemy leaves us only the choice of brave resistance, or the most abject submission, We have, therefore to resolve to conquer or die*". - George Washington

"*It is the duty of every man to render to the Creator such homage…Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe…*" - James Madison

The parasites that have seized control of our nation are organized, active, and focused on a well planed orchestrated objective. They control our religions, political process, courts, media, entertainment and education. It may appear that liberty doesn't have a chance but that's not necessarily true.

- Against all odds, 40 men penned the Bible, changed the world, and gave us hope.
- Against all odds, 12 men preached Christ, changed the world, and gave us virtue.
- Against all odds, 25 men enforced the Magna Carta, changed the world, and gave us justice.
- Against all odds, 56 men started a revolution and changed the world, and gave us liberty

The one thing these 133 men had in common was God, the vehicle God armed these 133 men with was knowledge and virtue.

Join us, Take back the Republic > **http://newyorkcommitteemen.org**

[14] § 6–118. Designation and nomination by petition; Except as otherwise provided by this article, the designation of a candidate for party nomination at a primary election and the nomination of a candidate for election to a party position to be **elected at a primary election** shall be by designating petition.

INTRODUCTION TO ANATOMY OF A COURT CASE:

THE COURT PAPERS: **See chart on page 13**

PLEADINGS - A court case is no more difficult then telling your story, on paper, it starts with the Action (*aka the complaint*). The other side has 20 - 30 days to answer the complaint and then you have 20 - 30 days to answer the answer, in most cases that will end what's called the pleadings. In more complex cases this could go back and forth numerous times.

MEMORANDUMS - During this adversarial time of alleging and denying, memorandums of facts supported by evidence (exhibits), case-law, codes & statutes (*which is law to municipalities, bureaucrats and interstate commerce*), and law (*which is constitutions and maxims*) are written and submitted to the defendant(s) and the court. When this exchange ends the pleadings are over. You must keep your case simple and to the points, do not go off on tangents, a story without evidence and law supporting it is irrelevant, and will fall upon deaf ears.

MOTIONS - While you are busy with the pleadings the defendants lawyer will be wasting their time trying to have the case dismissed, unless you receive a "notice of motion" to dismiss for one point or another you can just respond to the accusation with a denial and then they have to prove it. It is only when they make "notice the motion" that you need to start preparing an answer, to prove it a lie or irrelevant. Remember if you are not in the right don't go to court, you must be in the right, and then you must go into court boldly and confident, meanwhile the other side is busy trying to get the case dismissed and/or prolong the case so that they can make more money, while the court is tries to broker a deal.

DISCOVERY - In common law once the pleadings are done the case goes to trial, there is no discovery, and unless your case is a trial by jury, the trial is over and a decision on the "pleadings" is due. Of course this is an up-hill battle because judges and the lawyers are use to dragging things out, there is more money in that, and, unfortunately, because most judges don't like to read, they want to hear the argument. Your position must always be "it's all in the paperwork your honor, have you read the paperwork?

MOTION FOR JUDGMENT ON THE PLEADINGS - If you are going to use the discovery process you should do a combined discovery as soon as the pleadings are closed and then file a motion for judgment on the pleadings, paper only, (*see example case in attached files*, *under contract*).

COURT OF RECORD - Always open your case as a "court of record" and you can make the decision how you are going to proceed as you move forward. Opening a court of record is as simple as making the following opening statement in your action - *"I, Your Name, am one of the people of New York and in this court of record sue (defendant) for money (or other) damages arising from (cause of action) by the defendant, stating in support ...."* and before your wherefore clause You also want to add "*Plaintiff asserts the law of the case attached as exhibit "I" incorporated by reference as though Plaintiff asserts fully stated herein*": You must listen to the court of record tapes accompanying this book, about 30 hrs.

That's it, ...It's that simple, it's up to you to move your case, if you don't it could take a year or more for your case to go through the system. The rest of this book is all about the elements of the above forms.

TABLE OF CONTENTS

CHAPTER 1

- Introduction
- New York State Civil Court Structure
- New York State Criminal Court Structure
- New York Judicial Departments and Districts
- United States Federal Court Structure
- On Line Resources (rules, policies, forms, fees, etc.)
- Writing skills & your word processor

INTRODUCTION

IT'S ALL ABOUT "JURISDICTION", if you want to be free you need to understand "jurisdiction", you cannot be free unless you understand and challenge jurisdiction. And once you challenge it you will succeed as long as you endure. First you must understand a few simple facts that you presently don't understand because they expunged these things from your education some 80 or so years ago.

- **Fact # 1** - The United States is a trust corporation, aka. "Nation", it was formed as a union of "States", aka. "Countries".
- **Fact # 2** - A Nation is not a country, Black's Law 4th edition, 1891 defines "NATION" as a people using the same customs, possessing historic continuity, and distinguished from other like groups by their racial origin and characteristics, and generally, but not necessarily, living under the same government and sovereignty. [Montoya v. U. S., -180 U.S. 261, 21 S. Ct. 358, 45 L.Ed. 521; Worcester v. Georgia, 6 Pet. 539, 8 L.Ed. 483; Republic of Honduras v. Soto, 112 N.Y. 310, 19 N.E. 845, 2 L.R.A. 642].
- **Fact # 3** - The 10th Amendment is clear, in that the States and the People are sovereign.
- **Fact # 4** - The Declaration of Independence is clear, in that governments are instituted and receive power from the "consent of the people".
- **Fact # 5** - In 1868 the 14th Amendment created the "United States Citizen" who are subject to the jurisdiction thereof, and are "*given*" privileges or immunities called "*civil rights*".
- **Fact # 6** - The people created the United States in 1788 by the authoring of the constitution, therefore the United States is subject to the jurisdiction of the people.
- **Fact # 7** - Black's Law 4th edition, 1891 defines "CITIZENS" as members of community inspired to common goal, who, in associated relations, "*submit themselves to rules of conduct*" for the promotion of general welfare and conservation of individual as well as "*collective rights*". [**In re McIntosh, D.C.Wash., 12 F. Supp. 177**].
- **Fact # 8** - The people of this State, as the successors of its former sovereign, are entitled to all the rights which formerly belonged to "*the King*" by his prerogative. [**Lansing v. Smith, 4 Wend. 9 (N.Y.) (1829)**]
- **Fact # 9** - People are supreme, not the state. - [**Waring vs. the Mayor of Savanah**];
- **Fact # 10** - The state cannot diminish rights of the people. - [**Hertado v. California, 100 US 516**]

So, if people were not citizens before 1868 then what were they? The only conclusion from above is, they were the people, "sovereigns"! In other words they were "kings", without subjects, with none to rule but themselves. In 1868 the enemy of liberty used the newly freed slaves as an excuse to write the 14th Amendment and when they tried to convince the people to become U.S. citizens, the people rejected because they saw the fraud. So over time the progressives co-opted our educational system through centralization, (*as they did everything else such as our judicial system, political system, economic system, news media, entertainment, religion, etc.*.), and over time taught the children of the people that they were US citizens and thereby they became subject to their jurisdiction.

As a result, when you go into court at the trial level, people are presumed "US citizens", "subject to" the codes and statutes of their creator, "*the legislators*", thereby surrendering unalienable rights for "civil" rights. Lawyers, schooled in the (bar association) co-opted colleges and universities, like the people, are taught that codes and statutes are laws, "*the common law is the real law, the Supreme Law of the land, the code, rules, regulations, policy and statutes are "not the law"* - [**Self v. Rhay, 61 Wn (2d) 261]**), when "IN FACT" they are only law if you accept them as such, in other words you "accept the jurisdiction" by pleading at an arraignment thereby acknowledging you are a US citizen, or opening an equity court and not a court of record. The appellate courts understand this perfectly, and by "*those measures*" rule on your case as to the jurisdiction in the trial court. Therefore if we have been careful to portray ourselves as one of the people, challenge their jurisdiction, open a court of record, and place them under our jurisdiction we will be immune to all their codes and statutes, and take control of the court, "*our court*"!

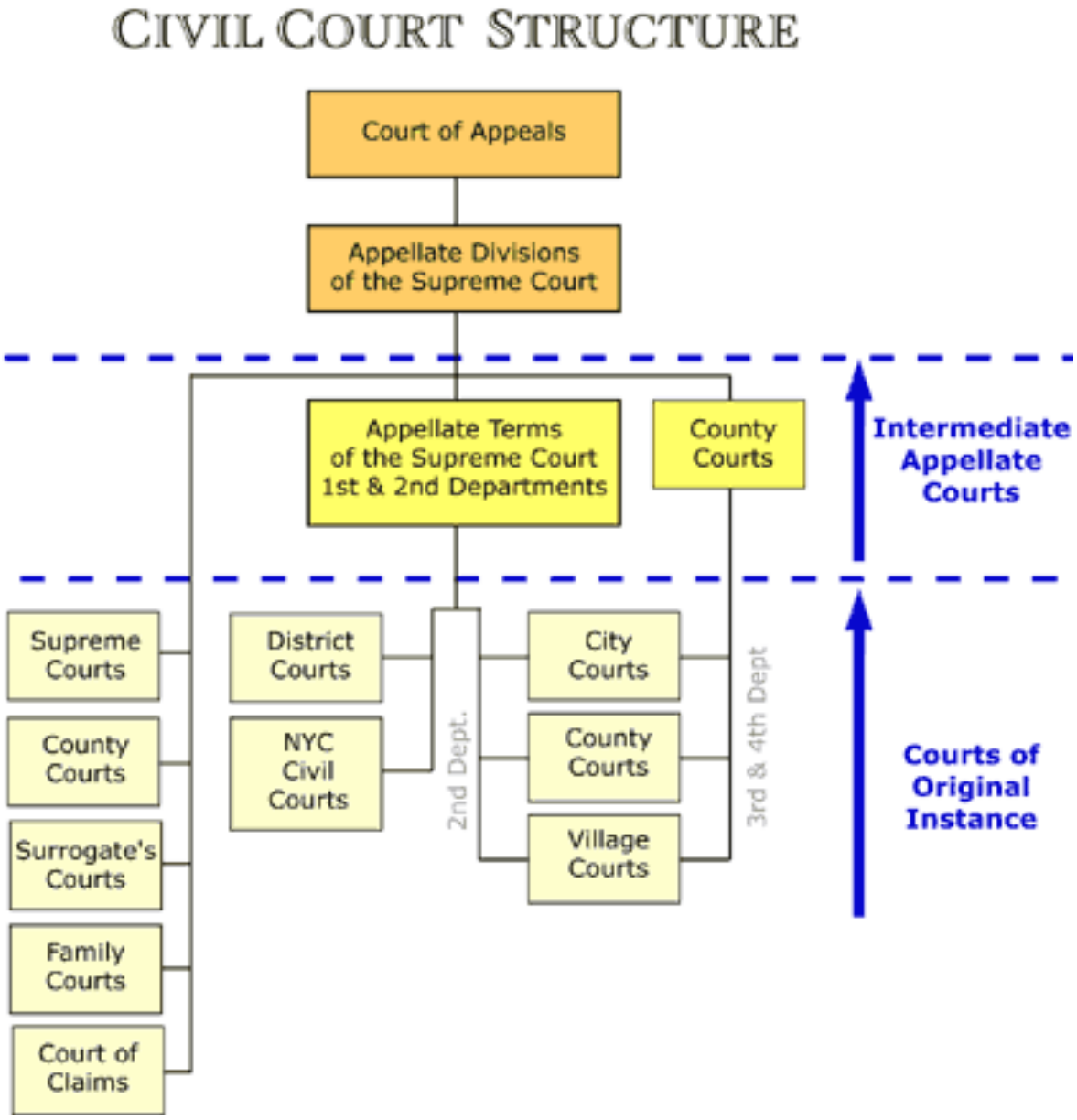
Herein comes the "power of knowledge", that everyone has been conditioned to avoid at all cost. The proof, is in that we entrust our freedoms in the hands of the lowest form of creature, a lawyer, and we even pay him obscene amounts of monies to screw us, and then we do it again! Back to knowledge, we have extraordinary help in the form of case law, statutes and US code. Yes, code and statutes have a place they are policies, procedures and law to our servants in government. Just look at the powerful case law I quoted in the 10 facts above, and shortly, as we look at US code 18 and 42, where we read about some serious consequences upon government servants, namely judges, sheriffs, clerks, and other officers of the court, for violating our unalienable rights.

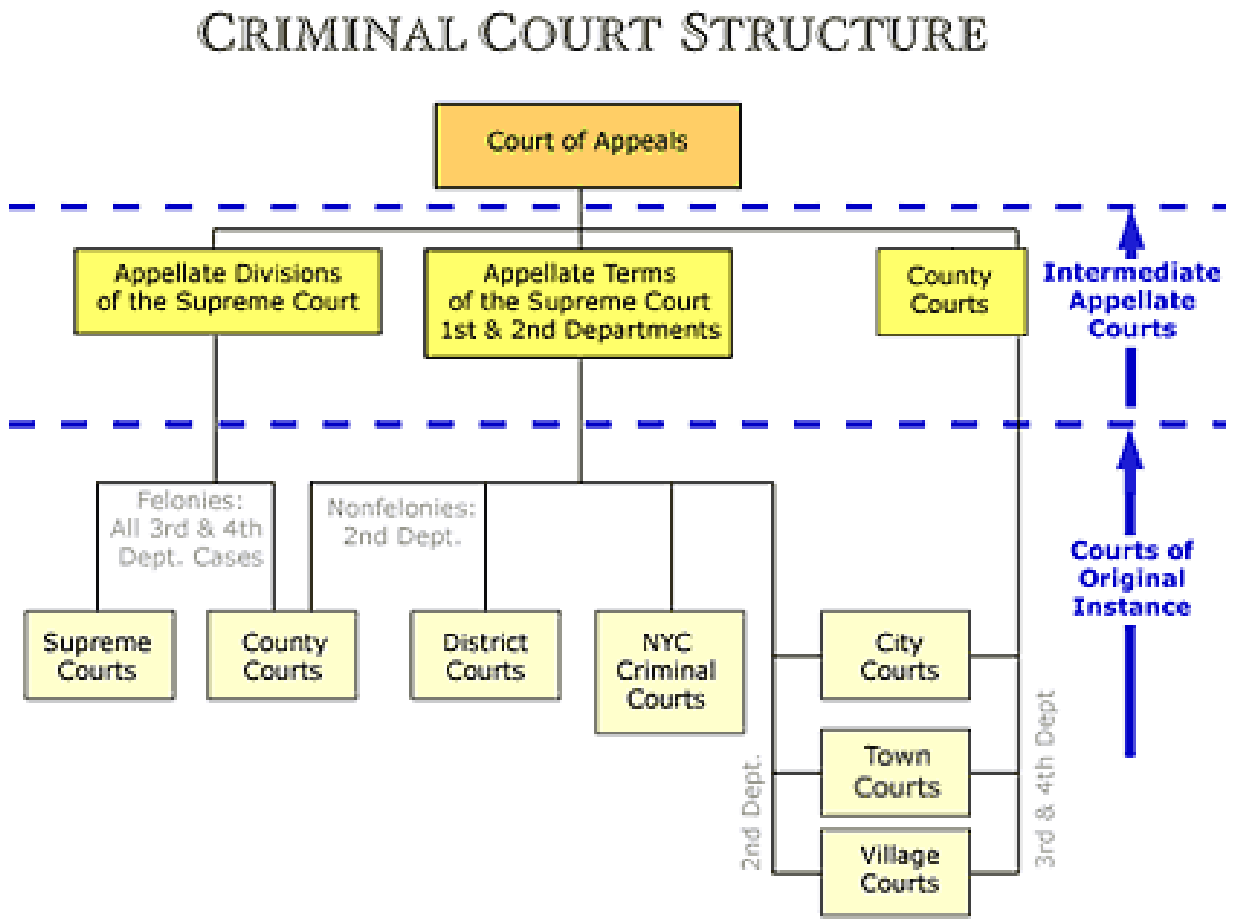
But, let's look first at the simplicity of what we are talking about. Evil is complex as it calculates, and conspires to snare us in its web of deceit. Whereas virtue is simple and honest, responding morally to each assault upon our liberty, and believe me the contrast of a case with this strategy is obvious to all, even the magistrate (judge), and this makes them uneasy as they are forced to look into the looking-glass.

So as we build our case and the lawyers and judges in their arrogance boldly deny anything but the status quo, their blatant attitude overtime begins to turn to fear and uncertainty when they finally get around to reading our papers, O' didn't I mention they don't read our papers?, well, when they finally do, it is then when they realize that they are about to be held in contempt, and this in most cases will not roost until we go before the appellate court after which we "will" have "round 2" in the trial courts as we sue these "officers of the court", in a court of record, for violating **US Code 18.241** & **US Code 42 1985** conspiracy against our rights, **US Code 18.241** & **US Code 42 1983** deprivation of rights under color of law, and **US Code 42 1986** neglecting to prevent the assault upon our rights. But you can only do this if you go to court in your own person as one of the people, in a court of record, if you bring a lawyer to court with you, you have about a snowballs chance in hell, of surviving.

When they are finally awakened to reality that they are not immune from prosecution because they over stepped their jurisdiction, whether it is in the trial court, or the appellate, they become controlled by the fear of jail and civil suit, and it is now that you finally achieve "*Jefferson's Liberty*", a government that fears the people. And this is how we take back the Republic, it's all about "*Jurisdiction*"!

The following court structure is for New York, you will need to look up your state structure on the internet, each state is structured a little different, you should also read your state constitution on Judicial Powers.

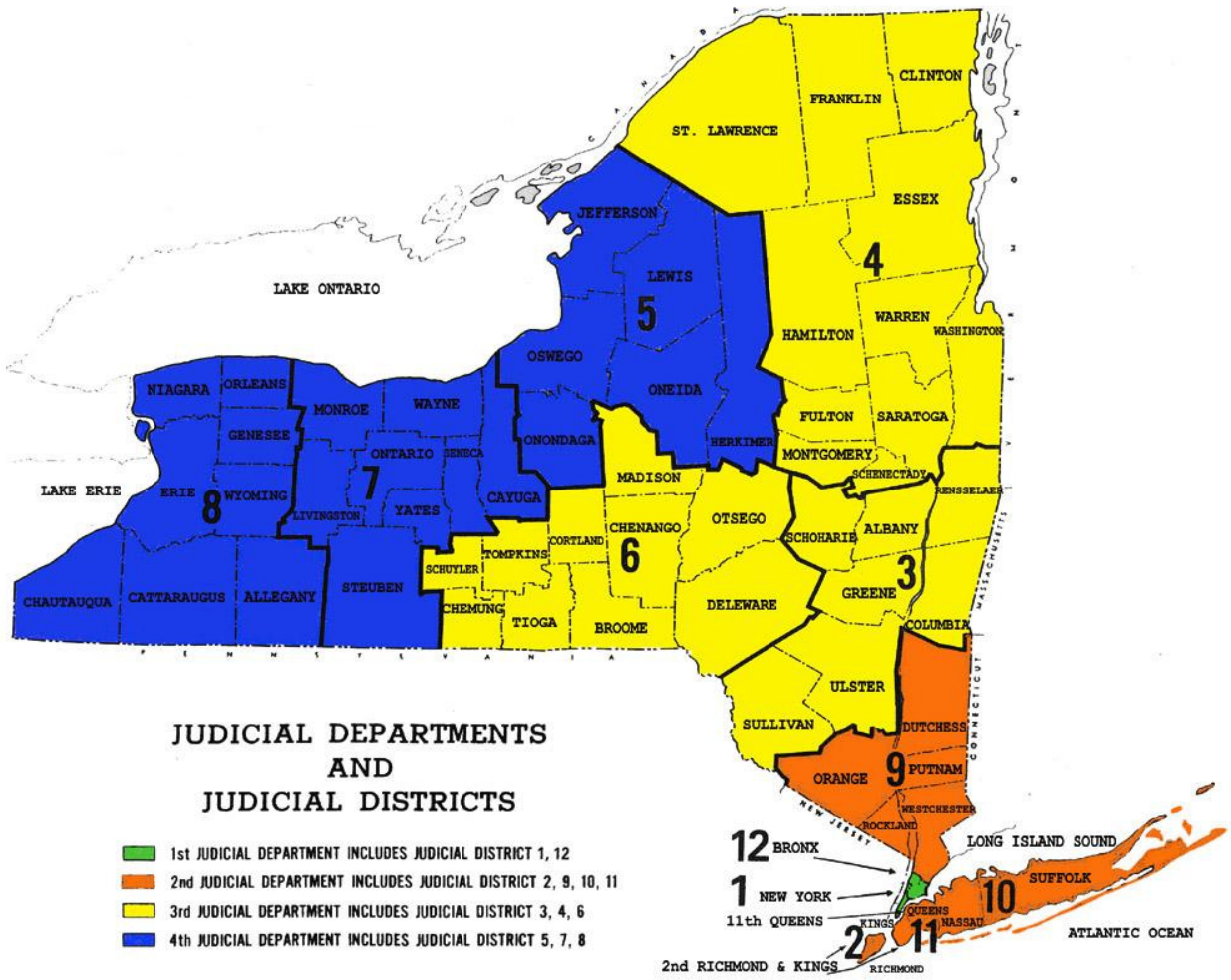


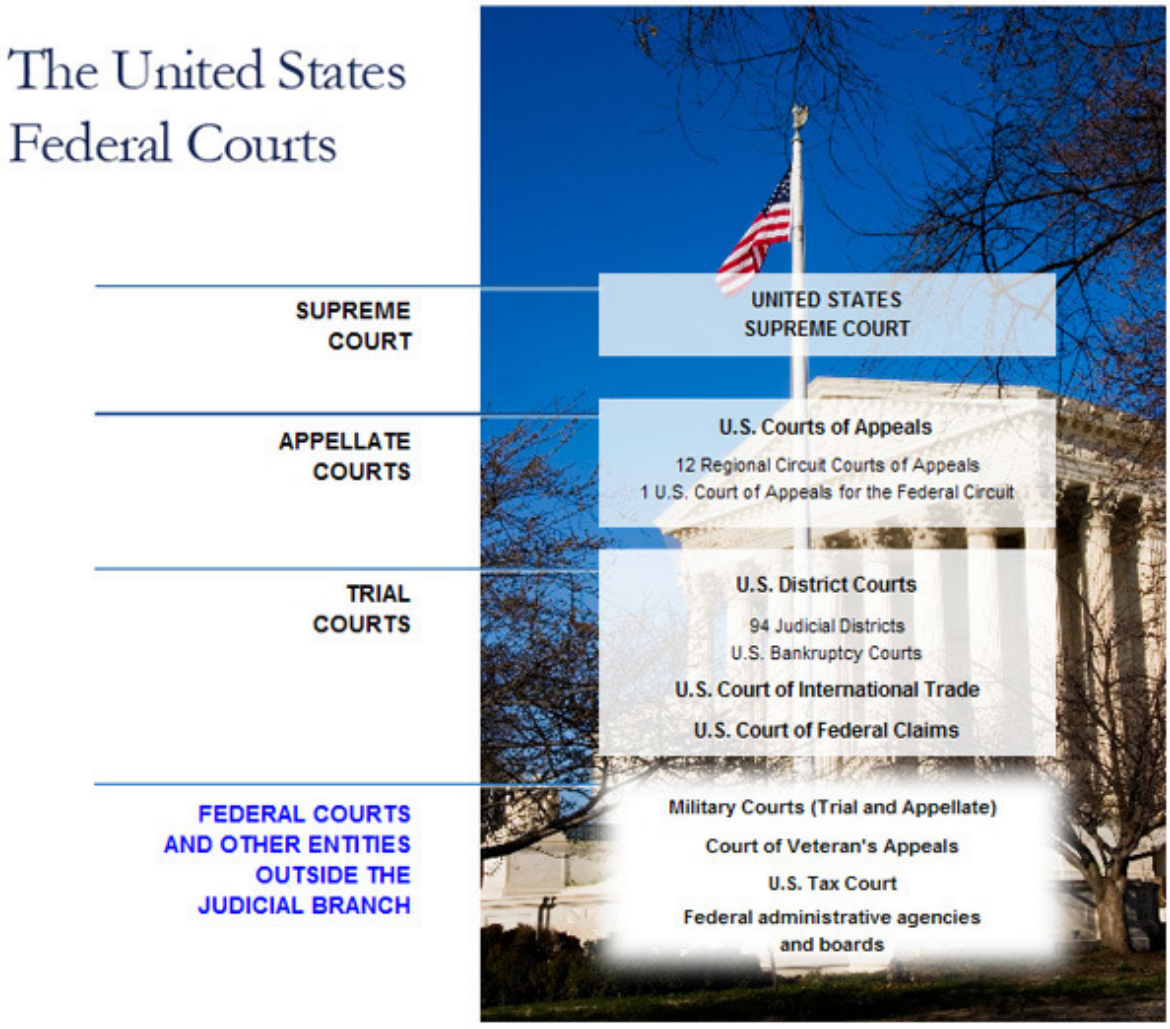


NEW YORK STATE APPELLATE DIVISIONS

There are four Appellate Divisions of the Supreme Court, one in each of the State's four Judicial Departments. These Courts resolve appeals from judgments or orders of the superior courts of original jurisdiction in civil and criminal cases, and review civil appeals taken from the Appellate Terms and the County Courts acting as appellate courts.

Find your county below in order to determine which Appellate Department has jurisdiction over your locality.


JUDICIAL DEPARTMENTS
AND
JUDICIAL DISTRICTS
1st JUDICIAL DEPARTMENT INCLUDES JUDICIAL DISTRICT 1, 12
2nd JUDICIAL DEPARTMENT INCLUDES JUDICIAL DISTRICT 2, 9, 10, 11
3rd JUDICIAL DEPARTMENT INCLUDES JUDICIAL DISTRICT 3, 4, 6
4th JUDICIAL DEPARTMENT INCLUDES JUDICIAL DISTRICT 5, 7, 8
LAKE ONTARIO
LAKE ERIE
ST. LAWRENCE
FRANKLIN
CLINTON
ESSEX
JEFFERSON
LEWIS
HAMILTON
WARREN
WASHINGTON
OSWEGO
ONEIDA
NIAGARA
ORLEANS
MONROE
WAYNE
GENESEE
ONTARIO
SENECA
ONONDAGA
HERKIMER
FULTON
SARATOGA
MONTGOMERY
SCHENECTADY
RENSSELAER
MADISON
ERIE
WYOMING
LIVINGSTON
YATES
CAYUGA
CHENANGO
OTSEGO
SCHOHARIE
ALBANY
CORTLAND
TOMPKINS
SCHUYLER
GREENE
CHAUTAUQUA
CATTARAUGUS
ALLEGANY
STEUBEN
CHEMUNG
TIOGA
BROOME
DELEWARE
COLUMBIA
ULSTER
SULLIVAN
DUTCHESS
ORANGE
PUTNAM
WESTCHESTER
ROCKLAND
12 BRONX
1 NEW YORK
11th QUEENS
2nd RICHMOND & KINGS
KINGS
QUEENS
NASSAU
RICHMOND
LONG ISLAND SOUND
SUFFOLK
ATLANTIC OCEAN
PENNSYLVANIA
CONNECTICUT
MASSACHUSETTS
NEW JERSEY



• Southern District of New York www.nysd.uscourts.gov/

The district is comprised of Bronx, Dutchess, New York, Orange, Putnam, Rockland, Sullivan, and Westchester Counties.

• U.S. District Court - Northern District of New York www.nynd.uscourts.gov/

• Eastern District of New York | United States District Court www.nyed.uscourts.gov/

The district comprises the counties of Kings, Nassau, Queens, Richmond, and Suffolk

• Western District of New York | United States District Court www.nywd.uscourts.gov/

ON LINE RESOURCES

The following links should be clickable, or you can copy and paste.

Federal Court

- United States Courts (rules, policies, forms, fees, etc.) - **www.uscourts.gov/**
- US Code - **http://www.law.cornell.edu/uscode/text**

State Court

- New York State Supreme Courts (rules, policies, forms, fees, etc.) - **http://www.nycourts.gov/**
- Civil Practice Law and Rules (CPLR) - **http://codes.lp.findlaw.com/nycode/CVP**
- NY Statutes - **http://public.leginfo.state.ny.us/menugetf.cgi?COMMONQUERY=LAWS** (statutes are not law to the

Legal Information

- Legal Information Institute - **http://www.law.cornell.edu/**
- Common Law Grand Jury - **http://commonlawgrandjury.com/**

Dictionaries

- On-line Legal Dictionary - **http://legal-dictionary.thefreedictionary.com/**
- On-line Webster's Dictionary - **http://www.webster1828.com/**

Introduction and lectures (MP3's) to Common Law

- Court of Record Lectures - **http://newyorkcommitteemen.org/common/common/law.html**

WRITING SKILLS & YOUR WORD PROCESSOR

- UNDERSTANDING - The key to learning how to write is reading, read to understand don't worry about remembering that will come on its own. Read our course from beginning to end, read it twice. Then read through the files that accompany this e-book, read our file called footnotes, read our example cases, read our web site particularly **http://newyorkcommitteemen.org/common/law.html**, watch our videos, listen to our MP3 Lectures and interviews listen to understand, again, don't worry about remembering that will come on its own. Just immerse yourself as much as possible download the MP3's play them when you drive, exercise, etc.. Come together with others in your local liberty group to discuss these topics and work together in solidarity in each other's court case. Remember in a court of record under common law you will need two witnesses that should accompany you to court and write affidavits including yours concerning all the conferences and events that they witness. These affidavits, min three (3) per event, should become part of your record. I promise if you follow these instructions you will be successful and be able to handle any court case you endeavor to undertake, the only limitations are the ones that you set, anything is possible if you believe!

- WRITING - Writing comes with time, from reading, you can start a case by using a case from our files, accompanying this e-book, as a template and alter the facts according to your case. All of our forms and cases are saved in MS Word, all you need to do is open the word file and then click on "save file as", give it a new name and save it to a different folder, you are then ready to alter the file according to your case and you will still have the original file for future reference or purposes. You will also notice that some words are in red so that you don't forget to change them. Also all of our PDF's allow for cutting and pasting and all the links should be clickable if not you can cut and paste.

- WORD PROCESSOR - How to! There are a few things you will need to know about using your word processor, as follows.

- **Numbering** - You should always choose the multilevel tab in case you need to create sub categories
  1. Go to the Format menu and select Bullets and Numbering. The Bullets and Numbering window opens.
  2. Click the Outline Numbering tab.
  3. Select one of the eight list formats available (only one is a multilevel bullet selection).
  4. Go to the List Numbering section of the window and select "Restart numbering," if this is a new list, or "Continue previous list," if this list is continued from earlier in the document.
  5. Click OK. The first (first-level) number in your list will appear in your document and the cursor will be positioned to the right of the number.
  6. Type the first item in your multilevel list and press Enter (PC) or Return (Macintosh). The next (first-level) number in your list appears.
  7. Press the Tab key to insert a second-level number in your multilevel list.
  8. Type the text for this item and press Enter or Return.
  9. Press the Tab key again to insert the third-level number in your multilevel list.
  10. Type the text for this item and press Enter or Return.

11. To decrease the list level, click the Decrease Indent button on the Formatting toolbar (next to the numbered list button).

❖ **Footnotes -**

1. Place your cursor where you want the footnote to be, and click there.
2. Click "Insert," then "Footnote" on the drop-down menus in Microsoft Word. This will place the number of your footnote at the end of your sentence, and create a space at the bottom of the page for additional information.
3. Write your sentence, explaining the topic set off by your in-text footnote.
4. Keep your footnote concise. If you need to explain more than can fit into a sentence, create another footnote.
5. Make sure to cite any information in your footnote in a parentheses as you would in the main body.

❖ **Justify -**

1. Open an existing Word document or create a new one.
2. Select the text to be justified by highlighting it with your mouse.
3. Choose the type of alignment (center, right, justify) found on the standard toolbar as seen below.
4. Click the type of alignment icon with your mouse. For this exercise, I chose "justify," which equally aligns the text on both the left and right side of the document.

❖ **Set 1' Margins -**

1. Open Microsoft Word. If you're setting margins on an existing document, click the "File" tab. Click "Open." Navigate to the document and double-click its filename to open it.
2. Click the "Page Layout" tab and select "Margins."
3. Click the "Normal" option, which is second from the top. If you opened an existing document, changing the margins may shuffle the flow, making it longer or shorter.

❖ **Double Space -**

1. You have two choices as to when to set the double spacing up in your document. You can type your document and set the double line spacing after you are finished typing, or you can set the line spacing before you begin typing.
2. Highlight the area to change to double spacing by moving the cursor over the area while holding down the left button of the mouse. This will double space the paragraph you highlighted. If you want to double space the entire document, do not highlight.
3. Hold the "Ctrl" button down while you press the "2" key on the keyboard. If you want to change it back to 1-line (or single) spacing, hold the "Ctrl" button down while you press the "1" key on the keyboard. This is the shortcut.
4. Click "Format" in the horizontal menu at the top of the screen. This is another way to double space the line spacing. Since the shortcut will only work for double or single line spacing, the format method provides for more line spacing options.
5. Click on "Line" and then "Spacing" on the drop-down menu that appears under Format.
6. Set the line spacing to "2.0" in the menu that appears and click "OK." If you want to choose a different line spacing, such as 1 1/2 or 3 spaces, you can also do that here.

CHAPTER 2

- Strategy & Mind-set
- Anatomy of a Court case
- Causes of Action
- Pleadings
- Action at Law Structure
- Affidavit Structure
- Answer Structure
- Motions
- Discovery
- Check List

STRATEGY & MIND-SET

This book is written from the vantage point of the plaintiff, if you are the defendant you must make yourself a plaintiff by filing a counter-suit or by challenging jurisdiction.

You must answer a summons if you are the defendant or the answer if you are the plaintiff within 20 days if your are personally served or 30 days if you are served by proxy. If you fail to answer you agree and your opponent wins by default. Any statement made by your opponent that goes unanswered means you agree. In common law you "must" present your entire case, facts and exhibits, before the pleadings end. And a good rule to follow is "swear to everything", there is a maxim that says "truth is expressed in the form of an affidavit. Also do not give your opponent the ability to say "I never received that", always get a certificate of service for everything you serve on your opponent.

When going to court to defend justice, you must stand on righteousness, have a resolute mind-set, with an attitude that losing is not an option, this will have a psychological effect upon your adversaries, you must mirror the following;

- You are one of the People, found in the pre-amble of the US Constitution;
- The US Constitution is "for" the federal government, "not for" the People;
- You are the People that "ordained" the constitution, therefore you are above it;
- You receive your rights directly from God, only He can revoke them;
- You are not a 14th Amendment US Citizen that has privileges and civil rights;
- The People, being the creator of the government, own the government;
- The government, being the creator of the US Citizen, own the citizen;
- Statutes are written as policies and procedures for bureaucrats, municipalities, government agencies, corporations, and citizens;
- Statutes are not law, governments cannot write law that govern the People;
- People are sovereign , governments are subservient;
- For a court to have jurisdiction over a sovereign there must be an injured party;
- Freedom requires maturity and responsibility;
- If a Judge exceeds his authority he loses judicial immunity;
- "*If a people expect to be ignorant and free they expect what never was and never will be*". **Thomas Jefferson**
- "*I would rather be exposed to the inconveniences attending too much liberty than to those attending too small a degree of it*". **Thomas Jefferson**
- "*Government is not reason; it is not eloquent; it is force. Like fire, it is a dangerous servant and a fearful master*". **George Washington**
- "*Truth is treason in the empire of lies*", **Ron Paul**

ANATOMY OF A COURT CASE:

THE COURT PAPERS:

1) Pleadings - are done by paper, there are three phases to the pleadings
    a. Complaint (paper)
    b. Answer to the complaint (paper)
    c. Answer to the answer (paper)

2) Motions (paper) - The other side will play every dirty trick in the book to dismiss your action with motions.
    a. Motion to dismiss
    b. Motion to strike
    c. Motion to require a more definite statement

3) Memorandums (paper) - Brevity - Brevity - Brevity
    a. Facts, supporting
    b. Law, supporting
    c. In support of motions
    d. Contrast opponents citations with yours
    e. Explain how opponents citations don't count

4) Discovery - is not part of common law but you can take advantage of the process, because the other side, namely lawyers, are 99+% of the time ignorant to common law proceedings.
    a. Request for admissions (paper)
    b. Request for Productions (paper)
    c. Interrogatories (paper) (questions)
    d. Depositions (paper) (pre-trial interviews)
    e. Court process (paper) (summonses, etc)

5) Motion for judgment on pleadings (paper)
    a. Bill of particulars (paper)
    b. Note of Issue and certificate of readiness for trial (form)

TRIAL - unless your case is a jury trial, the **papers** above is your trial.

That's it! It's up to you to move your case ...

CAUSES OF ACTION

The basis of a lawsuit founded on legal grounds and alleged facts which, if proved, would constitute all the "elements" required by statute. Examples: to have a cause of action for breach of contract there must have been an offer of acceptance; for a tort (civil wrong) there must have been negligence or intentional wrongdoing and failure to perform; for libel there must have been an untruth published which is particularly harmful; and in all cases there must be a connection between the acts of the defendant and damages. In many lawsuits there are several causes of action stated separately, such as fraud, breach of contract, and debt, or negligence and intentional destruction of property.

Knowing the elements of causes of action and common defenses is half the battle of winning lawsuits. The rest is common-sense, effective discovery, and above all being the person who *should* win!

The following list of cause of actions are not exhaustive, and can serve as a beginning reference point to write your pleadings. The bottom line, to be argued, in common law is that for every injury there must be a remedy, and a sovereign cannot be unsuited. Therefor if the facts prove that you have been -

(1) injured,

(2) the injury was cause by the defendant, and

(3) you can prove the damages suffered, you have a case under common law, and a right to justice.

ABUSE OF PROCESS - There is said to be an abuse of process when an adversary, through the malicious and unfounded use of some regular legal proceeding, obtains some advantage over his opponent. Wharton. Employment of process for doing an act clearly outside authority conveyed by express terms of writ. Shane v. Gulf Refining Co., 114 Pa.Super.87, 173 A. 738, 740.

- The gist of an action for "abuse of process" is improper use or perversion of process after it has been issued. Publix Drug Co. v. Breyer Ice Cream Co., 347 Pa. 346, 32 A.2d 413, 415.
- Holding of accused incommunicado before complying with warrant requiring accused to be taken before magistrate. People v. Crabb, 372 Ill. 347, 24 N.E.2d46, 49.
- Warrant of arrest to coerce debtor. In re Williams, 233 Mo.App. 1174, 128 S.W.2d 1098, 1105.
- A malicious abuse of legal process occurs where the party employs it for some unlawful object, not the purpose which it is intended by the law to effect; in other words, a perversion of it. Lauzon v. Charroux, 18 R.I. 467, 28 A. 975. Vybiral v. Schildhauer, 265 N.W. 241, 244, 130 Neb. 433; Silverman v. Ufa Eastern Division Distribution, 236 N.Y.S. 18, 20, 135 Misc. 814.

- Thus, where the purpose of a prosecution for issuance of a check without funds was to collect a debt, the prosecution constituted an abuse of criminal process. Hotel Supply Co. v. Reid, 16 Ala. App. 563, 80 So. 137, 138.
- Regular and legitimate use of process, although with a bad intention, is not a malicious "abuse of process." Priest v. Union Agency, 174 Tenn. 304, 125 S. W.2d 142, 143.
- Action for "abuse of process" is distinguished from action for "malicious prosecution," in that action for abuse of process rests upon improper use of regularly issued process, while "malicious prosecution" has reference to wrong in issuance of process. Clikos v. Long,231 Ala. 424, 165 So. 394, 396; McInnis v. Atlantic Inv. Corporation, 137 Or. 648, 4 P.2d 314, 315; Lobel v. Trade Bank of New York, 229 N.Y.S. 778, 781, 132 Misc. 643.

Elements - Plaintiff must establish the following elements and prove each and every essential fact necessary to allege all the elements.

(1) Defendant illegally or improperly perverted the legal system against plaintiff.

(2) Defendant had ulterior motive or purpose exercising such perverted use of the system.

(3) Plaintiff suffered damage as a direct result.

ACCORD AND SATISFACTION - An agreement between two persons, one of whom has a right of action against the other, that the latter should do or give, and the former accept, something in satisfaction of the right of action different from, and usually less than, what might be legally enforced.

- When the agreement is executed, and satisfaction has been made, it is called "accord and satisfaction." Rogers v. Spokane, 9 Wash. 168, 37 P. 300.
- It is discharge of contract, or of disputed claim arising either from contract or from tort, by substitution of agreement between parties in satisfaction of such contract or disputed claim and execution of the agreement. Nelson v. Chicago Mill & Lumber Corporation, C.C.A.Ark., 76 F.2d 17, 100 A.L.R. 87.
- "Accord and satisfaction" results where there is assent to acceptance of payment in compromise of dispute, or in extinguishment of liability uncertain in amount, or where payment, coupled with condition whereby use of money will be wrongful if condition is ignored, is accepted. Hudson v. Yonkers Fruit Co., 258 N.Y. 168, 179 N.E. 373.
- Regardless of whether claim is liquidated or unliquidated. May Bros. v. Doggett, 155 Miss. 849, 124 So. 476, 478.
- Settlement of claims under insurance policies. Lehaney v. New York Life Ins. Co., 307 Mich. 125, 11 N.W.2d 830, 832.
- Accepted amount tendered by insurer as cash surrender value of policies. Greenberg v. Metropolitan Life Ins. Co., 379 Ill. 421, 41 N.E.2d 495, 497, 140 A.L.R. 775. See, also, Sierra & San Francisco Power Co. v. Universal Electric & Gas Co., 197 Cal. 376, 241 P. 76, 80.
- More recently, a broader application of the doctrine has been made, where one promise or agreement is set up in satisfaction of another. Continental Nat. Bank v. McGeoch, 92 Wis. 286, 66 N.W. 606.

- An "accord and satisfaction arises" where parties, by a subsequent agreement, have satisfied the former one, and the latter agreement has been executed. The execution of a new agreement may itself amount to a satisfaction, where it is so expressly agreed by the parties ; and without such agreement, if the new promise is founded on a new consideration, in which case the taking of the new consideration amounts to the satisfaction of the former contract.
- A dispute or controversy is not an essential element of some forms of accord and satisfaction, as an accord and satisfaction of a liquidated claim by the giving and acceptance of a smaller sum and some additional consideration, such as new security, payment of the debt before due, payment by a third person, or where property or personal services are accepted from an insolvent debtor in satisfaction.Burgamy v. Holton, 165 Ga. 384, 141 S.E. 42, 47.
- "Composition settlement" contemplates agreement not only between debtor and creditors, but also among creditors, whereas "accord and satisfaction" is agreement between debtor and single creditor. Russell v. Douget, La.App., 171 So. 501, 502.
- "Novation" is a species of "accord and satisfaction". Munn v. Town of Drakesville, 226 Iowa 1040, 285 N.W. 644, 648.

Elements - Plaintiff must establish the following elements and prove each and every essential fact necessary to allege all the elements.

(1) Existence of a pre-existing dispute over an enforceable obligation.

(2) Both parties intended to settle their dispute by entering into a substitute agreement.

(3) Both parties acted in accordance with the substitute agreement, i.e., the debtor tendered and the creditor accepted the substitute performance agreed upon.

ACCOUNTING - A cause of action for an accounting arises where there is a fiduciary relationship, such as where one party has a dispute with a guardian, trustee, receiver, or other fiduciary who has control over assets of the party complaining. Accountings may also be ordered where the issues in a contract case, for example, are so complicated that it is not clear if the facts can be ascertained any other way and always where the underlying contract has provided for an accounting in the event of a dispute. When the complaining party has no separate access to the records, such as where a fiduciary like a trustee or guardian has the books, an accounting will almost never be denied, since the complaining party may have no other way to ascertain if the fiduciary has carried out his duties faithfully.

Elements - Plaintiff must establish the following elements and prove each and every essential fact necessary to allege all the elements.

1. The existence of a fiduciary relationship or contract demands that are so extensive and complicated that it is not clear that money damages alone are adequate.

2. Necessity for the accounting. The remedy sought is one in equity, therefore the court has broad discretion in whether or not it will grant the relief sought. It is important, therefore, to allege sufficient facts to make clear that justice and fairness demand that an accounting be given.

ACCOUNT STATED - This cause of action arises where parties have engaged in a prior course of dealing with each other (i.e., a history of trade and transactions between them) and debtor refuses to deny the amount claimed by creditor's invoices (or other billing notices or demands). If the debtor does anything to acknowledge the account stated in the invoices but refuses to pay, creditor can bring this cause of action to collect the debt. The longer the course of dealing and clearer the debtor's acknowledgment, the easier it is to win. This cause of action is frequently abused by people unfamiliar with its elements. Many mistakenly believe they can "invoice" someone for a debt, saying in the invoice, "If we do not hear from you within 10 days," or words to that effect, "we will assume you acknowledge the debt." This may work against naïve or poorly-represented defendants, however it will not work where the essential elements of the cause of action do not exist.

Elements - Plaintiff must establish the following elements and prove each and every essential fact necessary to allege all the elements.

1. The parties engaged in prior dealings out of which the account arose. Mere statement of a liquidated amount due on a contract for fixed price alone (that the defendant is clearly obligated to pay) does not give rise to an action for account stated.
2. At the time the account was presented, debtor had a prior liability to pay. There can be no action for account stated if, when the account was presented, the debtor had no liability to pay.
3. The defendant either expressly or implicitly promised to pay the balance of the account stated. An express promise is easy to prove. An implied promise, however, cannot be established by the defendant's mere failure to dispute the debt. There must be more, such as a well-established practice of periodic billing in the regular course of dealing to which no objection is made within a reasonable1 time.

ASSAULT - Contrary to popular belief assault has nothing to do with slapping, striking, biting, kicking, scratching, or any other physical touching. The cause of action arises whenever a person is placed in well-founded fear of imminent injury by the intentional threat or offer of another to cause him bodily injury by force. (The cause of action arising from injury is called battery, covered later on in this book.)

If I phone you from Wisconsin, while you're comfortably seated poolside at your cozy home in South Florida and say, "I will now bash in your nose," you have no action, because you've not been placed in well-founded fear of imminent injury. I cannot hit you from Wisconsin if you're lounging by your pool in sunny Florida. If I walk up to you in a tavern and, a beer bottle clenched in my uplifted fist, shout in your face, "I will now bash in your nose," you have a cause of action for assault. If you have witnesses to testify on your behalf, you'll probably win. The measure of damages you can recover, i.e., how much money the lawsuit may be worth, depends on severity of the threat and degree of fear the court believes it would cause a reasonable person in the same or similar circumstances (typically a jury decision).

Elements - Plaintiff must establish the following elements and prove each and every essential fact necessary to allege all the elements.

1. An intentional threat or offer to cause bodily injury by force, or force directed toward another, regardless of whether any injury is caused.
2. The threat was not lawful nor authorized by the plaintiff.
3. Circumstances surrounding the threat created a well-founded (i.e., reasonable) fear of imminent peril of bodily injury.
4. Defendant had apparent present ability to cause the threatened injury if not prevented.
5. Plaintiff suffered damages as a direct result.

CAVEAT - Threats to cause severe bodily injury may be justified only if made in response to a well-founded fear of imminent bodily injury to yourself. Threats to cause mortal injury by lethal force, however, are only justified in response to threats of lethal force or force capable of causing *severe* physical injury (i.e., threats that cause a well-founded fear of imminent death or *severe* physical injury). Whether the severity of a threat is sufficient to justify the responsive threat is typically a jury question.

ASSUMPTION OF DUTY - Most jurisdictions have reached the conclusion that an action taken for the benefit of another, whether for payment or reward or even when gratuitously rendered, imposes an obligation on the person taking the action to do so with reasonable care. Failure to exercise reasonable care gives rise to a cause of action for assumption of duty.

Elements - Plaintiff must establish the following elements and prove each and every essential fact necessary to allege all the elements.

1. Defendant undertook, gratuitously or for consideration, to render services to another in circumstances a reasonable man would recognize as necessary for protection of the other person or the other person's property.
2. Plaintiff suffered physical harm resulting from defendant's failure to exercise reasonable care to perform the services he undertook to perform.
3. Defendant's failure to exercise reasonable care increased risk of plaintiff's harm.
4. Plaintiff's harm resulted from reasonable and justifiable reliance on defendant's undertaking to render services.

The courts have clearly settled the issue. If you undertake to act for another's benefit in a manner reasonable persons would agree as necessary for the safety of the other person or his property, you have assumed a duty to do so with reasonable care and can be held liable for injury to that person resulting from your failure to act with reasonable care.

Good Samaritan Act - Some jurisdictions have enacted statutory clarifications that limit the liability of persons who render assistance, medical or otherwise, in "emergency" situations. These statutes do not remove liability for those who act without reasonable care but clarify the standard of care that must be observed. Be aware of these statutory clarifications in your

jurisdiction and the case law that further refines those clarifications with regard to specific fact circumstances.

Performance Not Begun - If the defendant has not actually undertaken to begin rendering service, regardless of preparatory actions taken by him, the law will not hold him liable where the assumed duty has not begun. He is only liable to act with reasonable care *after* he assumes that duty by beginning.

BATTERY - A cause of action for the tort of battery arises when the plaintiff actually suffers harm or humiliation resulting from an intentional, uninvited, offensive touching. It isn't necessary that the touch cause physical injury. Herein we are warned by the law. Some years ago a carpet-layer came to me complaining he'd been sued for battery as a result of merely touching one of his customers on the shoulder while telling her, "We don't have to finish this job, you know!" He had no intent to cause physical harm. All he did was touch her with his outstretched index finger to punctuate what he was saying in response to her unreasonable demand that he use left-over remnants from the living room to carpet her hallway (a demand outside their written contract). She had raised her voice demandingly when he refused, and he punctuated his response by touching her with his finger. That was all the excuse she needed. The woman sued him for battery, because he did intend to touch her, and part of his intent in touching her was to cause "offense", mild though it was. I was able to prevent her from obtaining a judgment, however disruption to his business and the consequent emotional strain on his family resulted in great suffering, all because he touched someone with the tip of his index finger! That's battery.

Elements - Plaintiff must establish the following elements and prove each and every essential fact necessary to allege all the elements.

1. Plaintiff suffered a harmful or offensive contact caused by defendant.
2. Defendant intended the contact and the resulting harm or offense or acted with reckless disregard for whether or not his acts would result in the contact complained of and the harm or offense caused thereby.
3. Defendant acted unlawfully or without authority or consent.
4. Plaintiff suffered damages as a direct result of the battery.

The degree of force is immaterial, except that it may be considered by the court in determining the amount of money damages to be awarded to the plaintiff. It is not the degree of force or even the degree of hostile intent that gives rise to this cause of action. The cause of action arises where the touching is not authorized!

Caveat - As stated under the heading for assault, bodily injury may be justified only if in response to a well-founded fear of imminent bodily injury to yourself. Whether severity of a threat is sufficient to justify the response is typically a jury question.

BREACH OF CONTACT - Plaintiff must establish the following elements and prove each and every essential fact necessary to allege all the elements. Existence of a contract, breach of the contract, and damages resulting from the breach. What could be simpler?

Elements - Plaintiff must establish the following elements and prove each and every essential fact necessary to allege all the elements.

1. Existence of an enforceable contract.
2. Acts of the defendant that constitute his breach of the contract.
3. Damages to the plaintiff resulting from defendant's breach.

BREACH OF FIDUCIARY DUTY - The gist of this cause of action is that one person should not be permitted to gain an advantage over another as a result of the trust that other person places in him. Thus, if the defendant acquires and abuses his influence over the plaintiff, and plaintiff is thereby injured, the plaintiff has a cause of action for breach of fiduciary duty. The term fiduciary comes from the Latin for faith. A fiduciary (e.g., a guardian, trustee, or even an attorney) is one in whom others are permitted by law to entrust their faith. If that faith is abused to the plaintiff's injury, the cause of action arises.

Elements - Plaintiff must establish the following elements and prove each and every essential fact necessary to allege all the elements.

1. Existence of trust relationship or influence based on plaintiff's faith. The plaintiff's faith in defendant must be reasonable, i.e., it must arise from circumstances that would cause a reasonable person to believe the defendant owed plaintiff the duty of acting in good faith obligation and meeting obligations of the plaintiff's trust.
2. Breach of the duty or abuse of the trust.
3. Damages to the plaintiff directly caused by the breach of duty or abuse of trust.

There is no fiduciary duty or trust arising from an arm's length agreement. The fact that two persons exchange promises and enter into a contract does not impute to them any obligation to act for the benefit or protection of the other party, nor does it require either of them to disclose facts that the other could have discovered by its own diligence. A fiduciary duty arises only where one party, either explicitly or implicitly, assumes and obligation of trust and the other reasonably reposes that trust in him. To establish a fiduciary duty, the plaintiff must allege some dependency on the defendant and prove the defendant undertook to advise, counsel, or protect him. Breach of fiduciary duty may be either intentional or negligent. The difference is in computing the amount of damages. One who intentionally breaches a fiduciary duty may be held responsible for all the plaintiff's damages and possibly for punitive damages as well. One who negligently, i.e., not intentionally, abuses the duty may be held liable for only such damages as are consistent with the degree of his negligence.

CONSPIRACY - To prevail in an action for civil conspiracy, one must prove two or more persons acted in concert to effect some wrongful result for their individual advantage. Each has to have been seeking an advantage for himself in order to be liable for plaintiff's damages. The acts

must be either unlawful, willful, or malicious (a broad range of behavior). When pleading a count for conspiracy, one is compelled to also plead at least one other count seeking damages for the wrongful act itself, such as tortuous interference with an advantageous business relationship. A count for conspiracy standing alone is without basis. Typically, the plaintiff will sue for one or more other causes of action then add a count for conspiracy, alleging the wrongs were committed in concert by the defendants acting as co-conspirators.

Elements - Plaintiff must establish the following elements and prove each and every essential fact necessary to allege all the elements.

1. Intentional commission of an unlawful act or a lawful act by unlawful means through the combined effort of more than one actor. Acts need not be criminal, so long as they are forbidden by civil or criminal law.
2. Each conspiratorial act advances or supports the goal of the conspirators. Any act that does not advance the goal of the conspiracy is not a conspiratorial act. All acts must be in furtherance of the conspiracy.
3. Overt act of each conspirator. Mere agreement or consent does not suffice.
4. Damage to the plaintiff resulting directly from the conspiracy.

The gist of conspiracy is not conspiracy itself, but the civil wrong accomplished by the conspiracy that results in damage to the plaintiff. There must be, therefore, some independent wrong that would give rise to a separate cause of action if committed by one person.

Civil conspiracy arises from an agreement, confederation, or other combination of two or more persons, each of whom must intend some benefit to himself from the wrong that results … the meeting of two or more independent minds intent on one purpose. The benefit need not be money or property. It could be advantage over a previously enjoyed circumstance. The benefit proves intent … a requisite element of the tort.

CONSTRUCTIVE FRAUD - (See also Fraud) This cause of action arises in equity where one person either occupies a fiduciary relationship to the other, or the other suffers mental weakness or similar infirmity that prevents his or her from understanding. For example, if an elderly person of weakened mental ability signs a deed transferring his or her home to another for substantially less than the home is worth, a presumption of constructive fraud arises. The action arises in equity to prevent the unjust consequence of the defendant's wrong.

Constructive fraud may exist even where the defendant had not intent to defraud. The gist of the cause arises from the duty of each of us to do justice to others. The old adage of *caveat emptor* (let the buyer beware) has been displaced by society's need to protect innocent people from unjustly enriching wrongdoers, either through ignorance or inability to understand – whether or not the wrongdoer is aware of his wrong. The duty each of us owes to all others arises from moral, social, domestic, and even personal obligations imposed by equity in our courts. If is from this duty and to protect innocent people from the wrongs of those who breach

this duty that the cause of action for constructive fraud arises. Also may be called unjust enrichment.

Elements - Plaintiff must establish the following elements and prove each and every essential fact necessary to allege all the elements.

1. Plaintiff, through no fault of his own, reposed trust in the defendant.
2. Defendant abused the trust, obtaining unjust enrichment from plaintiff's injury.

It is not necessary for the defendant to occupy a relationship of trust with plaintiff, however such a relationship does strengthen plaintiff's case, for in each case the cause of action arises from defendant's abuse of plaintiff's trust … imputed, implied, or actual. It may be based on misrepresentation or concealment, however in every case the defendant gains an improper advantage that equity abhors as a wrong. The facts that can result in an action for constructive fraud are widely varied, but in each case the defendant has taken unjust advantage of the plaintiff.

CONVERSION - The civil action of conversion is similar to criminal theft, however it involves the taking of tangible personal property only (the taking of money or real property does not give rise to this cause of action). The gist of it is exercising dominion or control over the tangible property of another (like a fountain pen, automobile, or computer system) that is inconsistent with the owner's right of possession, i.e., conversion deprives the rightful owner of his property without consent. The wrong is not in the taking but in the depriving. The depriving need not be permanent. Any wrongful deprivation of the right of an owner of property to enjoy possession of his property is (if the property is not money or real property, e.g., land and buildings attached to the land) conversion.

Elements - Plaintiff must establish the following elements and prove each and every essential fact necessary to allege all the elements.

1. Deprivation of the plaintiff's right to enjoy possession of tangible personal property, either temporarily or permanently.
2. Plaintiff's demand for return and defendant's refusal to return. (Not necessary where plaintiff can show the demand would be futile or impossible.)
3. Damages to plaintiff.

Demand and refusal is an essential element in some jurisdictions. To overcome the necessity of this element (in jurisdictions that permit it) plaintiff must show evidence that demonstrates the futility or impossibility of demand. Mere alleging it will not suffice. The element of intent may not be necessary in some jurisdictions. The damage award for conversion is the fair market value of the thing converted at the time of the conversion plus legal interest to the time of the verdict. (See Replevin)

DECLARATORY JUDGMENT - A cause of action for declaratory judgment does not seek money damages. Instead it seeks to have the court declare something, e.g., *bona fide* disputes over what is or is not covered by an insurance policy.

Elements **-** A party seeking declaratory relief must first make clear to the court that:

1. There is a *bona fide*, actual, present, practical need for the declaration sought.
2. The declaration deals with present, ascertained or ascertainable state of facts or present controversy as to a state of facts. Anticipated future controversies will not support the action.
3. Some right, power, privilege, or immunity of the complaining party is dependent on the facts or the law applicable to the facts.
4. Some person has or may have an actual, present, adverse, and antagonistic interest in the subject matter, either in fact or law.
5. The adverse and antagonistic interest is before the court by proper process or class representation.
6. The relief sought is not merely the giving of legal advice by the court or an answer to questions founded merely in curiosity.

The first question to be reached by the court (and first issue the defendant should raise to avoid or dismiss the action) is not whether the plaintiff will succeed in getting the declaration he seeks but whether he is entitled to a declaration in the first place. Each of the foregoing elements must exist and be alleged by the complaint, or the defendant can succeed on a motion to strike or dismiss the complaint. The fact that the court may refuse to declare what the plaintiff seeks or declare otherwise than what the plaintiff wishes does not divest the plaintiff of his day in court *if each of the elements is present.* Unless the plaintiff shows he has a *bona fide* need for the declaration, based on present, ascertainable facts, the court not only lacks jurisdiction to render relief sought but also lacks jurisdiction to entertain the action, which it may dismiss *sua sponte2*.

DEFAMATION - A cause of action for defamation arises from false, unprivileged communication that exposes plaintiff to distrust, hatred, contempt, ridicule, or obloquy or which causes the plaintiff to be avoided or has a tendency to injure plaintiff in his office, occupation, business, or employment. If the natural and proximate consequence necessarily causes injury to the plaintiff in his personal, social, official, or business relationships, wrong and injury are presumed or implied, and such publication is actionable *per se*3. If the publication is communicated in print, as in a letter or newspaper article, the defamation constitutes libel. If communicated verbally, as by a TV newscaster or politician making a speech, the defamation constitutes slander. Both libel and slander fall under the heading of defamation.

Elements

1. Publication (by speech or print) of a false and defamatory statement regarding a private person (as contrasted with public figures, see below).
2. Unprivileged communication of the publication to at least one other person.
3. Fault amounting to at least negligence on the part of the publisher (i.e., at least lack of reasonable care as to the truth or falsity of the communication).
4. Publication is actionable *per se* or caused plaintiff provable or presumable damages.

The most important thing to consider before filing suit on this cause of action is in determining the amount of your money damages. The fact someone calls you a thief may be defamation, however unless the defamation causes you actual, measurable damages, a lawsuit for defamation is worthless except to prove the statement false. Plaintiffs suing for defamation frequently spend many thousands of dollars on costs and legal fees only to recover a nominal amount … because they cannot prove actual damages.

CAVEAT - If you are a "public figure" (e.g., politician or professional athlete) you may be unable to sue for defamation unless you can show the publisher intended his statement to injury you, i.e., that he made the false statement about you with actual malice. This is why we so often hear comedians making fun of public figures, saying things that are certainly unlikely if not in fact untrue, yet doing so "in jest". Unless actual malice (intent to cause injury) can be proven, however, the public figure cannot bring an action for defamation.

ABSOLUTE PRIVILEGE - Allegedly defamatory statements made in judicial proceedings are privileged. If this were not so, every party prevailing in a lawsuit could sue the other party for making false statements during the case. Statements made "out in the hall", however, are not privileged.

DURESS - Duress is a cause of action and a defense. It arises where one person "forces" another to take some action damaging to himself in circumstances that allowed no other reasonable course. Coercion is not a proper way to get others to do things, and if one party coerces another to do something injurious to the other, then the injured party has a cause of action for duress to recover his damages. If, on the other hand, one is coerced into signing a contract, for example, and the person coercing sues the person coerced for breach of contract, then the person sued has the defense of duress, i.e., an opportunity to argue that he should not be bound by the contract, since the contract was obtained by coercion, i.e., duress.

Elements - The elements are simple to explain but difficult of proof.

1. One side involuntarily accepted the terms of another.
2. Circumstances permitted no reasonable alternative.
3. Circumstances resulted from the coercive acts of the other.

FRAUD - In order for fraud to give rise to the right to sue (i.e., a cause of action) defendant must do more than merely state a falsehood. It's true that making a false statement is fraud, however it is not "actionable fraud", i.e., merely lying doesn't by itself give rise to a right to sue. In order for a plaintiff to have a cause of action he can sue upon, it is necessary that the lie be coupled with other elements. Only then can a court give the plaintiff a remedy by way of a money judgment for damages that resulted from the fraud. Moreover, the underlying facts pled in a complaint for fraud must be very specific in setting out the elements. General statements will likely result in a motion to dismiss for failure to state the cause of action. The plaintiff must specify the facts that set out each of the essential elements of this cause of action. Fraud may be called misrepresentation or fraud in the inducement. The elements that must be alleged in

the complaint and proven by a greater weight of the evidence are the same, regardless of the name.

Elements

1. A false statement (verbal or in writing).
2. The false statement concerns a material fact, i.e., a fact that goes to the heart of the plaintiff's damages.
3. Defendant knew the statement was false at the time he made the false statement.
4. Defendant intended the plaintiff to act in reliance on the false statement.
5. Plaintiff reasonably relied on the statement and acted upon it. (Some authorities say the reliance must be "justified". Reasonable or justified, it is the same meaning, and the plaintiff must act in reliance on the false statement of material fact.
6. Plaintiff suffered damages by relying on the false statement.

GOODS SOLD - A cause of action for good sold arises when plaintiff has sold *and delivered* goods to the purchaser defendant who fails or refuses to pay for the good received. In certain jurisdictions the plaintiff may be entitled to interest on the unpaid price from the date when payment was due.

Elements

1. Plaintiff sold and defendant agreed to pay for described goods.
2. Plaintiff delivered and defendant accepted delivery of described goods.
3. Defendant failed and refused to pay for the goods.
4. Plaintiff suffered damages as a direct result.

INJUNCTION, PRELIMINARY - Injunctions are classified as (1) temporary or preliminary and (2) permanent. This section deals with preliminary (or temporary) injunctions. The next section deals with permanent injunctions, typically granted to continue preliminary injunction after plaintiff shows the necessity of making the preliminary or temporary injunction permanent. All injunctions derive from the inherent equitable power of courts to issue writs and warrants to sheriffs (or other law enforcement officers) who then have legal authority to use force, if necessary, to carry out the court's order. Injunctions enjoin action, i.e., they either order that action be taken or that it not be taken. Injunctions are used in many and varied circumstances to effectuate a court's judgments. Temporary injunctions are typically entered (or denied) at the start of a lawsuit in which the plaintiff seeks some remedy for damages he has not yet proven.

Elements

1. Imminent likelihood of irreparable harm if a temporary injunction is not issued.
2. Unavailability of adequate remedy at law, i.e., an award of money damages alone will not restore the plaintiff's threatened loss.
3. Threatened harm to plaintiff (petitioner) outweighs any possible harm to defendant (respondent).
4. Granting of injunction will not contravene the public interest.

5. Plaintiff (petitioner) has a substantial likelihood of success on the merits of underlying case, i.e., the cause for which plaintiff seeks an injunction is likely to be proven. The granting of a preliminary injunction is an extraordinary remedy that should be granted only sparingly upon presentation of adequate proof of the essential elements.

Defenses Unclean Hands

An injunction, being an equitable remedy, should not be granted when the party seeking it has not acted in good faith. The maxim in equity is, "He who comes to equity must come with clean hands." Thus, if a plaintiff (petitioner) has wrongfully defrauded the defendant (respondent) when he seeks an injunction, the court should deny him, if the respondent pleads unclean hands as an affirmative defense and explains in his pleading why the plaintiff (petitioner) has unclean hands.

Totality of the Circumstances

The court should not merely consider the allegations of the pleadings when asked to grant an injunction. Other factors should be considered:

- Nature of the interest to be protected.
- Relative adequacy of other available, less-restrictive remedies.
- Unreasonable delay of plaintiff (petitioner) to seek the remedy.
- Relative hardship likely to be caused to defendant (respondent).
- Possible prejudice to defendant (respondent) of defending in underlying lawsuit.
- Related misconduct of plaintiff (petitioner).
- Interests of third persons and of the public.
- Practicality of framing and enforcing the injunction.

BREACH OF CONTRACT - Injunctions typically do not issue to enforce contracts. The proper action is for specific performance, covered elsewhere, in which case (if sufficient proof is shown) the court may issue an injunction to require the defendant (respondent) to perform provisions of a legally-binding contract.

Covenant Not-to-Compete

Non-compete provisions in written agreements (e.g., contracts for employment) are typically enforced by injunctions (if sufficient proof is shown). Restrictions apply if services of the party to be enjoined are of particular value to the community (e.g., doctor or other medical services provider). Further, if the conditions of the covenant (e.g., length of time or size of geographic area) are unreasonable, courts will not enforce the covenant. Injunctions to prevent unauthorized use of trade secrets, or solicitation from proprietary customer lists are typically granted.

Futile Act

No court process can lawfully enforce the performance of a futile act. If requiring or prohibiting an action will have no reasonably foreseeable benefit, the court is without jurisdiction to lawfully enter an order.

Irreparable Harm

If the wrong sought to be prevented by an injunction could be compensated by an order awarding money damages to the injured person, an injunction should not issue. The decision is not based on whether the defendant (respondent) possesses sufficient means to satisfy a money judgment but whether money alone would (if available) restore plaintiff (petitioner) to his original status. If a money amount cannot be calculated to restore the injured party, an injunction is proper.

INJUNCTION, PERMANENT - To obtain a permanent injunction, one is generally required to offer a much higher degree of proof and clearly demonstrate necessity. Further, where a temporary injunction may issue without notice or hearing, a permanent injunction can only issue after notice and pleadings have been served on the defendant (respondent) who must then be given a reasonable opportunity to respond and present evidence in defense. The elements are the same but for one additional essential: success on the merits of the underlying case (see previous section).

Elements

1. Imminent likelihood of continuing irreparable harm if permanent injunction not issued.
2. Unavailability of adequate remedy at law, i.e., an award of money damages alone will not restore the plaintiff's threatened loss.
3. Threatened harm to plaintiff (petitioner) outweighs any possible harm to defendant (respondent).
4. Granting of injunction will not contravene the public interest.
5. Plaintiff (petitioner) has prevailed in the underlying case, i.e., plaintiff has proven the facts on which he seeks the permanent injunction.

The granting of a permanent injunction is an extraordinary remedy that should be granted only sparingly upon presentation of adequate proof of all essential elements.

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS - The gist of this cause of action is to compensate victims of conduct that inflames the sense of human decency, whether inflicted intentionally or with a reckless disregard for the consequence to others.

Elements

1. The defendant's acts were performed intentionally or with reckless disregard.
2. The defendant knew or should have known the acts would foreseeably cause plaintiff severe emotional distress.
3. The conduct was outrageous, indecent, atrocious, odious, uncivilized, or intolerable.
4. Plaintiff suffered severe emotional distress as a direct result.

INVASION OF PRIVACY -

Like defamation, this cause of action can bring more problems to the plaintiff than merely letting the matter go by, for litigation only tends to re-publicize facts that may be better left alone. Still, the cause of action exists, and the essential elements follow.

Elements **-** To properly state a cause for invasion of privacy, the plaintiff must allege:

1. Defendant publicized a matter concerning the private life of plaintiff.
2. The matter would be highly offensive to reasonable persons.
3. The matter is not one of legitimate concern to the public.
4. Plaintiff suffered damages as a direct result.

- Intrusion, e.g., photographing plaintiff sun-bathing in her own backyard behind a privacy fence.
- Public disclosure of private facts, e.g., publishing the existence of great wealth that exposes plaintiff to foreseeable injury at the hands of thieves and con-men.
- False light in the public eye, e.g., publishing false facts about plaintiff, a variant form of defamation.
- Commercial exploitation of the property value of plaintiff's name.

Hypersensitivity

The measure of sensitivity that gives rise to the cause of action is that of a man of reasonable sensitivity. A person of unusual sensitivity is not protected.

Laches is a defense that rests on the concept that one who delays unreasonably in pursuing his remedy in court, especially where his voluntary delay prejudices the other party, should not be permitted to sue. The decision is based on elements, just as causes of action are.

Elements

In order for defense of laches to lie, defendant must prove each of the following elements:

1. Some genuine basis for the plaintiff's lawsuit, i.e., conduct on the part of the defendant giving rise to the complaint (otherwise the defense is not necessary).
2. Plaintiff had knowledge of defendant's conduct giving rise to the complaint for an unreasonable time before filing suit.
3. Plaintiff had a reasonable opportunity to file suit sooner.
4. Plaintiff unreasonably delayed filing suit.
5. Defendant lacked knowledge plaintiff would assert the right on which suit is filed.
6. Injury or prejudice to defendant if relief is granted on the complaint.

Excuse **-** Once a defendant has succeeded in showing the elements of this defense exist, the burden then shifts to the plaintiff to show his delay in filing suit was through no fault of his own. Perhaps he was unable to sooner obtain necessary evidence. Perhaps he knew of the wrong but did not know the identity of the wrongdoer. Under such circumstances as these, the plaintiff may be excused from filing sooner, and the defense of laches fails.

Infants **-** An infant (which term in law generally means anyone younger than the statutory minimum age required to bring suit) is excused from filing suit during the period of his

incapacity, however as soon as he is of age the law imputes to him a duty to timely file an action against those who he claims caused him injury during his minority. For details, see local statutory authority and case law.

Comments **-** Laches is an affirmative defense that must be raised by the responsive pleading (i.e., the answer) or (if permitted in the jurisdiction) reasonably soon thereafter. If it is not affirmatively pled at the beginning of the case, it is deemed to have been waived. The burden of proving each and every element of this defense is, of course, on the defendant, and in most jurisdictions it must be proved by clear and convincing evidence (as opposed to the greater weight or predominance of evidence). Unlike statutes of limitations that apply to actions in law, laches is a defense in equity that looks behind the scenes, so-to-speak, to examine the prejudicial effect of the delay and applies the defense to prevent injustice. Statutes of limitations simply tick off the time and more or less mechanically bar suits at law thereafter. Laches only bars suits in equity when not to do so would cause an injustice because of plaintiff's unreasonable, unexcused delay. Application of the doctrine depends on the facts of each individual case. The mere passage of time does not give rise to this defense. Each of the elements must be alleged and proven.

MALICIOUS PROSECUTION - Malicious prosecution is available to award damages to those who successfully defended a previous lawsuit that was brought without sufficient legal justification. It does not arise until the successful conclusion of the previous case, i.e., until the defendant in the previous case has prevailed and, additionally, can show that plaintiff in the previous case had no probable cause to sue in the first place.

Elements **-** The essential elements that must be alleged (and ultimately proven) are:

1. A prior proceeding against the present plaintiff was commenced (criminal or civil).
2. Defendant in the present case was the direct cause of prior proceeding. Defendant in the present case need not have been plaintiff or prosecuting party in prior case, if he was person substantially responsible for commencement or continuation of the prior case that was ultimately found to be without meritorious foundation.
3. The prior proceeding terminated favorably to the defendant there (plaintiff here).
4. There was no *bona fide* probable cause or legal justification for the prior case.
5. Defendant in the present case caused the prior case with actual or legal malice.
6. Plaintiff in the malicious prosecution case suffered damages from the prior case.

Absolute Immunity **-** Government prosecutors are entitled to absolute immunity from prosecution for malicious prosecution, however individual private actors are not, and that includes actors who for malicious purposes and without probable cause instigate criminal actions against others, who then have the remedy of this cause of action in civil court.

Dismissal on Technical Grounds **-** If prior case terminated for any reason other than innocence or lack of liability of defendant therein (plaintiff in malicious prosecution case) the cause of action will not lie, because the result does not constitute termination favorable to the

defendant in the prior case, i.e., it was not determined that the defendant was without guilt, culpability, or civil liability. In order for defendant in the prior case to have a cause of action for malicious prosecution, the prior case must have adjudicated him without fault. Dismissal or other termination on technical grounds (or even a stipulated settlement, unless the stipulation states the defendant was without fault) does not give rise to this cause of action.

Bona Fide Termination **-** Another point to hold in mind when considering this cause of action is whether in the prior case the plaintiff there (defendant here) was afforded a reasonable opportunity to prosecute his claim. If prior plaintiff was unable to complete discovery, for example, it may be found that his failure to prove the plaintiff here (defendant there) at fault was not the result of justice but circumstances beyond his control. As stated above, in order for this cause of action to lie, the prior case must be terminated in favor of defendant there, and termination must be *bona fide*, i.e., in good faith, with the plaintiff there (defendant here) having been allowed his "day in court".

Counterclaim **-** Malicious prosecution may not be pled as part of a counterclaim, since it must be first proven that defendant in the prior case was without fault, and that requires complete *bona fide* termination of the prior case.

MALICE - Malice may be either "actual", i.e., the state of mind of the prior plaintiff to harm the prior defendant or "legal", i.e., inferred from circumstances, such as absolute lack of probable cause that a reasonable person would recognize, even though no evil intent can be proven.

Nolle Prosequi If the government prosecutor in good faith enters a nolle prosequi or declination to prosecute in the prior proceedings, the essential element of a *bona fide* termination in the prior defendant's favor is satisfied.

NEGLIGENCE - Negligence is simply failure to exercise reasonable care under the circumstances. When I was still in law school, a classmate suffered a debilitating disease making it extremely difficult for him to maintain his balance when walking. During the first day of our first year I came up behind him in the hall after our first contracts class, slapped him on the back to congratulate him for the masterful way he responded to our crotchety old professor, and was mortified to watch as he crumpled to the floor! He asked me only to help him get nearer the wall, where he managed to pull himself erect again by working against the vertical surface until he was standing on his own like the rest of us. He waved off my anxious apologies, and we became good friends afterward, however I never forgot the lesson. I had no idea my good-natured congratulatory slap (that would have no effect on an otherwise healthy person) would cause my friend to collapse. Nonetheless, I was negligent and legally responsible for the consequence of my action. It doesn't matter if the defendant intends to harm the plaintiff. If his act causes harm (as mine in slapping my classmate on the back), the defendant is liable for injury that directly results from his act. The common law adage, "A defendant takes his plaintiff as he finds him," applies in all cases and should cause us to exercise a greater degree of caution to protect others from the consequence of our negligent acts. You are responsible for damages

caused by what you do, even when the person damaged was unusually susceptible to injury. This is known as the "eggshell skull" doctrine, a principle that arose in a case where a man with an unusually thin skull was seriously injured by an accidental blow to the head so slight that it could not have caused a healthy man so much as a headache. Nonetheless, the act resulted in harm, and the actor was liable. Each of us owes all others a duty to act with care. Failure to carry out this duty in a responsible manner is the essence of a cause of action for negligence.

Elements **-** In order to effectively plead a cause of action in negligence, the plaintiff must allege sufficient ultimate facts to show each of the following essential elements exist:

1. Defendant owed plaintiff a legal duty to exercise at least reasonable care or, in some cases, to conform to a higher standard of care.
2. Defendant breached his duty of care.
3. Plaintiff was damaged as a direct result of the breach.

Defenses - Comparative Negligence **-** In many cases, the plaintiff is at least partially responsible for his own damages. Where this is true, the plaintiff cannot recover that portion of damages caused by himself. He is said to be comparatively negligent. Therefore, if plaintiff ran a stop sign and was hit by defendant's car going 120 mph, both parties are somewhat responsible. Plaintiff for running the stop sign. Defendant for speeding. The jury will determine the degree of their comparative negligence and apply this as a percentage to determine that amount of harm caused by the defendant only.

Economic Loss Rule **-** The economic loss rule prevents plaintiffs from double-dipping. Many times plaintiffs file an action for breach of contract and also for negligence in performance of the contract. The economic loss rule prevents plaintiffs from collecting for both.

Assumption of Risk - Some activities (e.g., karate and sky-diving) are so inherently dangerous, that the courts will allow a defense against plaintiffs who voluntarily engage in such activities. If the plaintiff expressly assumes the risk of a bodily contact sport, like soccer or football, the courts deem that he has waived his right to recover damages for injury resulting from contacts inherent in the sport. The plaintiff need not sign a paper acknowledging the risk (though, of course, this creates an even stronger defense) if the court can infer from facts presented that he understood the severity of foreseeable consequences he was risking and proceeded to participate without regard for the risk. This defense does not exist, however, where the defendant was wantonly or recklessly negligent, thus exposing plaintiff to risk that was not foreseeable (e.g., the parachute club that packs old rags in a parachute bag).

Quantum Meruit **-** A cause of action for *quantum meruit* arises when one person confers a benefit on another under circumstances that would cause a reasonable person to believe he would be compensated by the other. The Latin phrase means literally, "for so much as the thing is worth."

Promissory Note - This is perhaps the easiest of all lawsuits to win. Plaintiff's possession of a signed but unsatisfied promissory note raises presumption of non-payment and shifts the burden of proof to the defendant to show he paid the note in full, on time, with interest. This can only be shown by receipts, cancelled checks, or other evidence of actual payment. If the defendant cannot prove he paid and satisfied the note, the court will grant judgment for that portion of the note that remains unpaid, together with accrued interest thereon. If the note also provides in its terms for judgment of a reasonable attorney's fee and costs, the plaintiff recovers judgment for the full amount he is owed plus the cost of bringing suit.

Elements - The elements are simple common-sense.

1. Defendant executed and delivered a promissory note on a certain date.
2. Plaintiff owns and holds the note. A copy of the original note is usually required to be filed with the complaint, and the original note will be required to be produced at trial (unless the court allows the plaintiff to establish its existence another way).
3. Defendant failed to pay some part or all of the note when payment was due.
4. Defendant owes plaintiff a certain sum based on terms of the promissory note.

Where many plaintiffs get into trouble is with acceleration of the note, i.e., they may attempt to bring suit when only one payment is late, in which case they can only recover judgment for the amount that is then due. If the note itself does not contain a provision that the full amount will become due at once and payable upon the event of any default (i.e., an acceleration clause), the full amount of the note will not be due nor the plaintiff have a cause of action to collect until the full term of the note has run. Always make sure you put an acceleration clause and a clause for attorney's fees and costs in any promissory note you accept from others.

REPLEVIN - A cause of action for replevin seeks a court order directing the defendant to return possession of specific goods, furniture, equipment, or other such personal property (not money5 or real property6) to the plaintiff.

Elements - The complaint must contain the following.

1. Description of the claimed property sufficient to identify it and its location (if known).
2. The property's value (supported by bills of sale or similar evidence, if available).
3. A statement the plaintiff lawfully owns the property and is entitled to possession.
4. A statement that defendant is wrongfully in possession of the property, how defendant came into possession (if known), and why defendant is wrongfully detaining the property (if known).
5. A statement that the property has not been taken for a tax, assessment, or fine pursuant to law.
6. A statement of other damages suffered by plaintiff as a result of defendant's wrongful retention of plaintiff's property.

A successful replevin action results in the court's issuance of a write of replevin directing the sheriff to take possession of the property and turn it over to the plaintiff, who may be required to first post a bond and pay the sheriff some reasonable fee for his trouble.

- Money can be replevied, however it must be specific money, e.g., a coin collection or a particular locked bag of cash, i.e., some specifically identifiable negotiable instruments and not merely a sum of money generally.
- Real property includes land, buildings, and other fixtures affixed to the land and, in this way, differs from personal property.

RESCISSION - Rescission is an equitable remedy whereby a party who (as a result of fraud, false representation, mutual mistake, impossibility of performance, or other cause resulting not from his own wrongs) has entered into a contract may be relieved of liability to perform the obligations of the contract or from the consequence of having already performed. Rescission is a purely equitable remedy, and for relief to be granted the plaintiff must show the court that he is clearly entitled to the court's assistance.

***Elements* -** A complaint for rescission must set out the following essential elements.

1. The making of a contract. Evidence of the contract should be attached, if available.
2. Existence of fraud, mutual mistake, false representation, impossibility of performance, or other ground for rescission or cancellation.
3. Plaintiff has rescinded and notified the other party that he has rescinded.
4. If plaintiff has received any consideration for the contract, he should state his offer to restore the defendant to the extent of those benefits, if restoration is possible.
5. Plaintiff has no adequate remedy at law, i.e., an award of money damages alone is not sufficient to restore plaintiff to his status before the fact.

If rescission is granted, the court will attempt to restore both parties, as nearly as possible, to status they enjoyed before entering the contract. This is the goal of rescission. A common cause for rescission results when an elderly person of limited mental ability unwittingly executes a deed selling his home to a person who knew or should have known the incapacity of the seller prevented him from appreciating the consequence of his acts. In such cases, the deed will be rescinded, and the buyer will be given back what he has paid, so both parties are restored as nearly as possible. If the buyer in such a case was aware of the sharp deal he was making at the other's expense, the court need not go to the trouble of restoring the purchase price! Equity may punish as well as protect. Rescission is sometimes a harsh remedy and is not, therefore, favored by courts.

***Defenses - Adequate Remedy at Law* -** If plaintiff's damages can be corrected by a money judgment alone, rescission is not the proper remedy, and the count for rescission should be dismissed.

Modification of Contract **-** If the contract has been modified after the fraud or mistake was discovered, the court will not rescind, unless the modification is also the result of fraud or mistake.

Specific Performance **-** Specific performance is, in a way, the converse of rescission. Where rescission is an action to avoid the consequence of contract, specific performance is an action to force an unwilling party to perform his obligations under the contract. Cases arise frequently in land deals, where a seller enters contract to sell, buyer performs all conditions precedent, and seller refuses to close.

Elements

1. Existence of a contract.
2. Plaintiff performance of all conditions precedent to closing.
3. Defendant's refusal to perform.
4. Absence of an adequate remedy at law, i.e., money damages alone are insufficient.
5. Plaintiff has suffered damages as a direct result.

The property need not be land. It could be an extremely unique item of jewelry or an antique painting that cannot be replaced, regardless of money available to purchase a substitute. This is the gist of specific performance. On the other hand, if the property is not unique (as might be the case with a single plot in a large subdivision, where one plot is pretty much like any other), the court may refuse to grant specific performance, since an award of money would allow plaintiff to purchase another property substantially identical.

SPOLIATION OF EVIDENCE - Until recently, this was not an available cause of action in itself, though a party was entitled to argue prejudice in prosecuting other claims against parties who destroyed evidence, negligently or with invidious intent. Today, in many jurisdictions, a plaintiff who lacks sufficient evidence to bring a case for negligence or breach of contract, for example, because the other party destroyed the evidence has a separate cause of action for spoliation. After all, what's the point of bringing a lawsuit for negligence or breach of contract if you know from the outset that evidence you need to prevail has been destroyed. Now, in many jurisdictions, you can go ahead and sue for damages you might have recovered by stating a cause of action for the spoliation of that evidence.

Elements **-** The essential elements are:

1. Existence of a potential lawsuit.
2. Defendant's legal or contractual duty to preserve evidence material to plaintiff's case.
3. Defendant's intentional or negligent destruction of the material evidence.
4. Significant impairment of the plaintiff's case as a direct result.
5. Plaintiff's damages.

TORTUOUS INTERFERENCE - Tortuous interference takes two forms, differing only in the elements necessary to plead and prevail. Tortuous interference with an advantageous business

relationship does not require the existence of a contractual relationship. Mere expectancy that the relationship would have continued but for the interference is sufficient. Indeed, the cause of action will lie even when the business relationship is based on a contract that is void or unenforceable Tortuous interference with a contractual relationship, like the name implies, results where the plaintiff is injured as a result of the defendant's interference that results in the breach of plaintiff's contract with another. The elements are similar for both.

Elements **-** For tortuous interference with an advantageous business relationship:

1. Existence of a favorable business relationship, not necessarily evidenced by contract.
2. Defendant's knowledge of the relationship.
3. Defendant's intentional and unjustified interference with the relationship.
4. Damage to plaintiff as a direct result.

For tortuous interference with a contractual relationship:

1. Existence of a contract.
2. Defendant's knowledge of the contract.
3. Defendant's intentional and unjustified procurement of the contract's breach.
4. Damage to plaintiff as a direct result.

Discussion **-** In order for either form of tortuous interference to lie, the interference must have been intentional. In most jurisdictions, negligent interference is not a cause of action. Where interference with a business relationship is lawful competition, the cause of action will fail. Where interference involves theft of trade secrets or misappropriation and use of proprietary confidential customer lists and critical information, the plaintiff is entitled to a money judgment to recover the value of the relationship prior to defendant's interference. Theft of trade secrets or unlawful use of the proprietary client information of another is not lawful competition. A temporary injunction may be obtained in some cases to prevent the interference from continuing. Interference with a contractual relationship is more severe. If plaintiff's contract is enforceable, and defendant's intentional acts interfere with that contract so that breach or other diminution of value of the contract results, plaintiff's damages are more easily determined and defendant's wrong more clearly identified. It is not lawful competition to encourage one person to breach his contract with another, and those that do so are liable to plaintiff who sue for tortuous interference with a contractual relationship.

Unconscionability - A Defense - The defense of unconscionability is related to the cause of action for rescission. The gist is that if a party has become the unwitting victim of a contract procured by fraud, overreaching, or otherwise by unjust means, the court should not enforce that contract, even though the plaintiff is a victim of his own foolishness and lack of caution.
To prevail with this defense, the defendant must show the court that the contract, in itself (i.e., aside from related factors) was outrageously unfair and that the proceedings leading up to the parties entering into the contract were also outrageously unfair. The first requirement is called substantive unconscionability, wherein the terms of the contract itself are deemed to be unreasonably favorable to the plaintiff seeking to sue on the contract.

The second requirement is called procedural unconscionability, wherein there was lack of any meaningful choice on the part of the defendant when he entered the contract. Perhaps he was too feeble, or perhaps he lacked all understanding of technical aspects of the promises made to him. Either way, there was no meeting of the minds essential to the formation of an enforceable contract, and therein lies the gist of this defense. It has been said at common law that an unconscionable contract is one that "no man in his right mind and not under delusion would make on the one hand, and no fair and honest man would attempt to enforce on the other." Some authorities refer to the respective bargaining powers of the parties and the ability of the one to understand the terms and conditions communicated by the other. Synonyms for unconscionable include "shocking the conscience", "monstrously harsh", "grossly unfair", etc. Unconscionability is an affirmative defense that must be pled at the outset of the case or it's waived.

UNDUE INFLUENCE - Undue influence is a cause of action to avoid the legal effect of a document (e.g., a will, deed, trust, or similar conveyance of rights or property) procured from a person of weakened mental ability by a person who occupied a position of trust with the person of diminished ability. The court's favorable judgment prevents the latter from gaining unjust advantage from his unduly influencing the former. The most common cases, of course, involve the greedy sibling who importunes an elder family member to "change the will", cutting the other brothers and sisters out.

Elements

1. Existence of a confidential relationship between beneficiary and grantor.
2. Beneficiary actively procured the instrument (will, trust, deed, etc.).
3. Grantor suffered some condition lessening her ability to resist the influence.

Element #3 may not be required by all courts, however it is an essential element in some jurisdictions, since it should not be argued that a grantor in perfect physical and mental health having average intelligence and understanding of the nature of his estate and the natural objects of his bounty (loved ones, family, etc.) could reasonably be said to be unduly influenced to dispose of property in a manner contrary to his free will unless he was subjected to actual duress, i.e., coercion … a different cause of action, q.v.

Comments - If the beneficiary enjoyed the requisite confidential relationship and also procured the will (or other document), e.g., taking the elderly person to the beneficiary's lawyer to have the will drafted, a presumption of undue influence arises in most jurisdictions. Once the presumption arises, the burden shifts to the procuring beneficiary to prove the absence of some or all elements of undue influence. Favorable judgment nullifies those provisions of the document procured by undue influence, restoring the situation to what it was before the document was executed.

UNJUST ENRICHMENT - The gist of unjust enrichment is similar to the cause of action for *quantum meruit* that arises when one person confers a benefit on another under circumstances that would cause a reasonable person to believe he would be compensated by the other. The

courts reason that one person should not be unjustly enriched at the expense of another so, even where there is no contract between them to spell out in detail their relative expectations, this cause of action (or *quantum meruit*) will lie to prevent the one from being unjustly enriched at the expense of the other.

Elements **-** The essential elements of fact that must be pled and proven are:

1. Plaintiff conferred a benefit on defendant.
2. Defendant either requested the benefit or knowingly and voluntarily accepted it.
3. Circumstances surrounding the transaction were such that it would be unjust for the defendant to retain the benefit without compensating plaintiff reasonably.

Defenses - Express Contract **-** This cause of action fails if the defendant can show that an express contract exists, whether verbal or in writing. The idea is that the terms of the express contract are more likely to convey the actual understanding of the parties, and they should be held to the terms of that express contract.

Burden **-** The plaintiff seeking to enforce an implied contract is required to meet a greater burden than one who uses better business sense by requiring an express contract before undertaking to render services or deliver valuable goods to another.

Payment Accepted **-** Once plaintiff accepts payment for his services or delivered goods, he cannot then sue for unjust enrichment, and a motion to dismiss will prevail.

Waiver - A Defense - Waiver is an affirmative defense that arises when plaintiff has waived the right or privilege upon which he sues. The right or privilege waived must, of course, first exist, or there is nothing to be waived, so this is one of the elements. A second element is that the waiver must be knowing, i.e., the plaintiff cannot have waived a right or privilege without knowing (or having constructive knowledge) of the fact. Finally, the plaintiff must have waived with actual intention to relinquish the right or privilege.

Elements **-** In order to successfully assert this defense, the defendant must allege (in his initial response to the complaint) that

1. Plaintiff possessed a right or privilege upon which he has brought his lawsuit.
2. Plaintiff waived the right or privilege.
3. Plaintiff knew or should have known he waived the right or privilege.
4. Plaintiff intended by his waiver to relinquish the right or privilege.

For the court to imply the waiver from the plaintiff's conduct, facts relied upon to demonstrate that the waiver occurred must be clear and convincing. Mere inferences are not enough, however probable they might be. In the absence of direct facts demonstrating waiver, the defendant must meet a heavy burden for the court to imply a waiver. In some jurisdictions, particular waivers cannot be established unless evidenced by some express writing that demonstrates knowledge of the act and its consequence.

Conclusion - The meat-and-potatoes of every lawsuit are (1) the laws and (2) the facts. The right to sue on laws and facts, however, depends on the plaintiff's having at least one valid cause of action the courts in his jurisdiction recognize. Although there are a few causes of action not listed in this tutorial, we have covered those that include most of the cases you'll encounter. Others arise from particular statutory enactments and deal with particular fact circumstances that affect only a rare few. Of course the right to sue can be challenged by valid defenses, and we've listed a few of the more common affirmative defenses and the elements that must be pleaded to defeat the plaintiff's intentions.

PLEADINGS

REQUIRED ELEMENTS TO FILE A COMMON LAW CASE. (*check list, to be served on all defendants and a copy filed with the county clerk, under your index number, you must maintain all originals*)

- ✓ **SUMMONS**
- ✓ **ACTION AT LAW -** aka Complaint
  - ❖ **LAW OF THE CASE**
  - ❖ **AFFIDAVIT IN SUPPORT** - one or more
  - ❖ **AFFIDAVIT OF SERVICE** - served by the sheriff or process server, cost about $45.00
- ✓ **MEMORANDUM** - facts and law, tell the story
  - ❖ **ALL YOUR EVIDENCE**
- ✓ **File** a copy of the Affidavit of service with the clerk - copy to the defendant(s)
- ✓ **INDEX NUMBER FORM**, purchase from the county clerk, $215.00 - copy to the defendant(s)
- ✓ **RJI FORM**, file with the county clerk $95.00 - copy to the defendant(s)

Frame your pleadings by addressing everything, keep it simple and don't get lost on tangents, comb through your papers numerous times wordsmithing, and eliminating all redundancies. In Common Law there is no discovery, put "**everything**" in your complaint and attach "**all**" your evidence, Prepare your case as if you are going to appeal, make a record, be persnickety. Then you must move the court; the court will not move itself.

COMPLAINT
- Title (Complaint)
- Preamble (opening sentence or short paragraph)
- Jurisdictional allegations
- Cause(s) of Action
- General allegations (one noun one verb)
- Closing (final prayer, date, signature)

● **Memorandum** - (support General Allegations with a more complex position a summary or outline of a subject under discussion, reasons for or against some action, etc.

The defendant's lawyer, and, unfortunately, the judge usually will do everything they can to throw you out, if the status quo is threatened, with a motion, of what they think is their court, usually at a conference, whereas you need to remind them of their rules namely, a motion must be served allowing at least 8 days for you to respond, it's called due process; They have forgotten that the court belongs to the king (people). We need to remind them at every turn **(a)** this is a court of record; **(b)** this case is to proceed according to common law; **(c)** the common law maxim "for every injury there must be a remedy"; **(d)** the court is "the person (plaintiff) and suit of the sovereign;" **(e)** the plaintiff cannot be unsuited: Do not let them get away with anything! We will cover this strategy under "what to do/say at a hearing".

STRUCTURE - ACTION AT LAW (see file examples for more)

Caption & Title

NEW YORK STATE SUPREME COURT, YOUR COUNTY

YOUR NAME
Plaintiff
- against -
THEM
Defendants

MAGISTRATE _____

INDEX # 121138

ACTION AT LAW

Preamble

On and for the Record, I, **YOUR NAME**, one of the people[1] of New York, (hereinafter plaintiff), accept the oaths and bonds of all the officers of this court, and in this court of record, proceeding according to common law[2], sues, (hereinafter defendant), **THEIR NAME** for...

Body

~ Jurisdiction ~
~ General Allegations (one noun one verb) ~
~ Cause of action (at least one must be stated) ~

Closing

WHEREFORE plaintiff demands:

i) restitution ...
ii) punitive damages ...
iii) court costs, and expenses ...
iv) to be let alone[3] ...
v) etc...

_____
Your Name, Plaintiff

~ VERIFICATION ~

---

[1] PEOPLE. People are supreme, not the state. [**Waring vs. the Mayor of Savanah, 60 Georgiaat 93**]; The state cannot diminish rights of the people. [**Hertado v. California, 100 US 516**]; Preamble to the US and NY Constitutions - We the people ... do ordain and establish this Constitution...; ...at the Revolution, the sovereignty devolved on the people; and they are truly the sovereigns of the country, but they are sovereigns without subjects...with none to govern but themselves... [**CHISHOLM v. GEORGIA (US) 2 Dall 419, 454, 1 L Ed 440, 455, 2 DALL (1793) pp471-472**]: The people of this State, as the successors of its former sovereign, are entitled to all the rights which formerly belonged to the King by his prerogative. [**Lansing v. Smith, 4 Wend. 9 (N.Y.) (1829), 21 Am. Dec. 89 10C Const. Law Sec. 298; 18 C Em.Dom. Sec. 3, 228; 37 C Nav.Wat. Sec. 219; Nuls Sec. 167; 48 C Wharves Sec. 3, 7**].

[2] Common law - As distinguished from law created by the enactment of legislatures [admiralty], the common law comprises the body of those principles and rules of action, relating to the government and security of persons and property, which derive their authority solely from usages and customs of immemorial antiquity, or from the judgments and decrees of the courts recognizing, affirming, and enforcing such usages and customs; and, in this sense, particularly the ancient unwritten law of England. [**1 Kent, Comm. 492. Western Union Tel. Co. v. Call Pub. Co., 21 S.Ct. 561, 181 U.S. 92, 45 L.Ed. 765; Barry v. Port Jervis, 72 N.Y.S. 104, 64 App. Div. 268; U. S. v. Miller, D.C.Wash., 236 F. 798, 800.**];
* As distinguished from ecclesiastical law, it is the system of jurisprudence administered by the purely secular tribunals. As concerns its force and authority in the United States, the phrase designates that portion of the common law of England (including such acts of parliament as were applicable) which had been adopted and was in force here at the time of the Revolution. This, so far as it has not since been expressly abrogated, is recognized as an organic part of the jurisprudence of most of the United States. [**Industrial Acceptance Corporation v. Webb, Mo.App., 287 S.W. 657, 660**].

[3] "...the right to be let alone — the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment". [Olmstead v. U.S., 277 U.S. 438, 478 (1928)

Use lots of footnotes, leave nothing for them to interpret to mean something it doesn't, and make every paper you write an affidavit. Remember the maxim, and remind the court, "Truth is expressed in the form of an affidavit".

STRUCTURE - DEFENDANT'S ANSWER

Caption & Title

NEW YORK STATE SUPREME COURT, YOUR COUNTY

_____

YOUR NAME

Plaintiff

- against -

THEM

Defendants

_____

MAGISTRATE _____

INDEX # 121138

DEFENDANT'S ANSWER

DEFENDANT, Your Name, answers the complaint of Peter Plaintiff and, in response to each numbered paragraph thereof, states:

1. Denied.
2. Admitted.
3. Without knowledge.
4. Denied.
5. Denied.
6. Denied.

~ Counterclaim ~

VERIFICATION

Your Name, being duly sworn says that he has written the foregoing and knows the contents thereof, and is familiar with the facts and circumstances therein, and that all of the allegations in those documents are true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to the matters deponent believes them to be true.

_____
Your Name, defendant

NOTARY

State of New York, County of Dutchess on this _____ day of the _____ month of 2013 before me _____, the subscriber, personally appeared **[Your Name]** to me known to be the living man/woman describe in and who executed the forgoing instrument and sworn before me that he executed the same as his free will act and deed.

_____
Notary

My commission expires: _____
(Notary Seal)

STRUCTURE - PLAINTIF'S ANSWER

Caption & Title

NEW YORK STATE SUPREME COURT, YOUR COUNTY

_____

YOUR NAME

Plaintiff

- against -

THEM

Defendants

_____

MAGISTRATE _____

INDEX # 121138

PLAINTIFF'S ANSWER

DEFENDANT, Your Name, answers the complaint of Peter Plaintiff and, in response to each numbered paragraph thereof, states:

1. Denied.
2. Admitted.
3. Without knowledge.
4. Denied.
5. Denied.
6. Denied.

~ Support with a Memorandum ~

VERIFICATION

Your Name, being duly sworn says that he has written the foregoing and knows the contents thereof, and is familiar with the facts and circumstances therein, and that all of the allegations in those documents are true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to the matters deponent believes them to be true.

_____

Your Name, Plaintiff

NOTARY

State of New York, County of Dutchess on this _____ day of the _____ month of 2013 before me _____, the subscriber, personally appeared **[Your Name]** to me known to be the living man/woman describe in and who executed the forgoing instrument and sworn before me that he executed the same as his free will act and deed.

_____

Notary

My commission expires: _____

(Notary Seal)

STRUCTURE - AFFIDAVIT (see file example for more)

Affidavit of Your Name

I Your Name, Affiant, being of lawful age, qualified and competent to testify to and having firsthand knowledge of the following facts to hereby swear that the following facts are true, correct and not misleading:

Your sworn story here, be specific with times & places or, about. Do not refer to exhibits or laws here.

FURTHER THE AFFIANT SAYETH NAUGHT.

_____

Print Your Name

NOTARY

State of New York, County of _____ on this ____ day of the _____ month of 2013 before me _____, the subscriber, personally appeared _____ to me known to be the living man describe in and who executed the forgoing instrument and sworn before me that he executed the same as his free will act and deed.

_____

Notary

My commission expires: _____

(Notary Seal)

MOTIONS

A motion is the means by which a party to an action requests a court order. Written motions are filed either as an order to show cause or as a notice of motion. Motions may be made before trial, during trial, or after the trial has concluded. Most pretrial and post-trial motions are written, but it is common to make oral motions during a trial. Motions must somehow relate to the case and be a request for something that cannot wait until trial. A motion requesting something that is outside the scope of the pending trial will be denied, as will a motion that requests something that is properly decided at trial.

Motions will generally be made on notice to the opposing party. (i.e., the opposing side will have advance notice before the motion is filed). Sometimes advance notice is impractical (ex. an order for service of a summons by publication) or would defeat the purpose of the motion (i.e. a restraining order). When no notice is given, it is called an ex parte motion. When ex parte relief is granted, courts will almost always give a very short return date so the other side may respond. On that date, the ex parte relief will often be reconsidered.

1) **The Components of a Written Motion -** All written motions will generally consist of three sets of papers, **(a)** the motion itself, which will either be a Notice of Motion an Order to Show Cause, file by the moving party. **(b)** Second will be the affirmation (or affidavit) in opposition, filed by the party opposing the motion. **(c)** Third is the reply, filed in support of the motion and responding to the claims made in the affirmation in opposition. The reply on a motion should not be confused with the verified reply which is part of the pleadings. Despite the same name, they are two very different things.

   a) A motion itself will generally consists of the following:
      i) A notice of motion or the order to show cause, which contains the caption of the case, the court where the motion will be made, the date and time of the motion, and what the motion is seeking; For an order to show cause only, any ex parte court order, For an order to show cause only, the manner of service as ordered by the court,
      ii) The party's affidavit, which is a sworn statement which provides the factual reasons for the motion.
      iii) Memorandum of law, which contains any factual statements, and supporting case law.
      iv) Any exhibits in support of the motion. Exhibits are used to help collaborate the facts stated in the movant's affidavit.
      v) At least 8 days notice is required, with an additional 5 days if the motion is served by mail.

b) The affirmation in opposition will consist of:

i) The party's affidavit, which responds to the claims made in the motion. Should the party wish the court to issue an order on its behalf, a cross motion is necessary.
ii) The attorney's affirmation
iii) Any exhibits use to support the affidavit.

c) The reply will consist of:

i) An affidavit if necessary
ii) An affirmation if necessary
iii) Exhibits
iv) The reply is limited in scope to address only those issues raised in the affirmation in opposition.

In Supreme Court, there is a $45 filing fee for all motions and cross motions. In addition, if a judge has not yet been assigned to the case, a Request for Judicial Intervention (RJI) must be filed as well. There is no fee for filing a motion in Family Court, nor is an RJI required to assign a judge.

Note that an affidavit locks that party into testimony, and any affidavits made for a motion are often used by opposing counsel during cross examination at trial. The decision what to include in a supporting affidavit, and what to leave out, is an art in itself.

2) **Notice of Motion** - A notice of motion will contain notice of the date of the motion, the location of where the motion will be made, and the relief sought. The side making the motion picks the motion date, subject of course, to any local rules. Service of the motion must be made at least eight days prior to the return date. Service by mail is permitted, but an additional five days is added if mailing is used.

3) **Order to Show Cause** - An order to show cause is similar to a notice of motion, in that it can request the exact same relief as a notice of motion. It differs in that the party bringing the motion by order to show cause can submit the motion to the court before the motion is served on the other side. This is generally the only way one side can communicate with the court without the other side being present. In addition, an order to show cause can request that the court issue an temporary order before the other side responds. Order to show cause is often used when time is critical, such as when a child is in danger of being removed from the jurisdiction, or when a decision is needed faster than a notice of motion, such as temporary child support or temporary maintenance.
4) **Cross Motions** - A cross motion is a motion that is filed only in response to an existing motion, and is made returnable the same day. Three days notice is required to make a cross motion. The relief sought need not be related to the initial motion.

DISCOVERY

Discovery forms fall into five categories.

- Notice of Deposition
- Subpoena
- Request for Admissions
- Request for Production
- Interrogatories

See pages 108 and 109 for notice for Notice of Deposition and Subpoena. That leaves only request for admissions, request for production, and interrogatories. These three forms are incredibly powerful if carefully thought out and drafted with an eye for what we *need* and what we *don't.* Abusive discovery requests that seek things not needed to prove your case can result in sanctions by the court. Not good. Therefore, it's always best to make a list of what you absolutely must have and then decide which of the five forms of discovery is the best way to get it. Discovery is not part of Common Law but if you need to use it, why not. If you do a notice and demand before you start a court case you can get all the information you need then and if they do not respond then they default.

REQUEST FOR ADMISSIONS - The request for admissions is very simple to write. It's very similar to a complaint, differing only in that instead of a demand for judgment at the end, the form begins with a request that respondent admit or deny the truth of certain statements of fact. Used carefully, a request for admissions can prove your case, because any fact the other party admits in his response is deemed admitted for all purposes.

- REQUEST FOR ADMISSIONS EXAMPLE -

NEW YORK SUPREME COURT, DUTCHESS COUNTY

Your Name, Plaintiff, - a - DEFENDANT, Defendant	Magistrate _____ Case No. 12345 **REQUEST FOR ADMISSIONS**

PLAINTIFF Your Name, pursuant to §R3120 New York Rules of Civil Procedure, requests defendant to admit the truth of the following statements of fact:

1. You were employed by plaintiff to deliver apples.
2. You were allowed to use plaintiff's apple delivery truck.
3. On 12 July 2011 you signed a document in the presence of plaintiff who also signed the document in your presence.
4. You received $4,400 from plaintiff on 12 July 2011.

RESPECTFULLY SUBMITTED this ___ day of _____ 2011.

_____
Your Name, Plaintiff

Request for Production - The request for production is similar to the request for admissions but, rather than asking the other party to admit, it asks the other party to produce documents and things. As with all discovery, requests must be reasonably calculated to lead to discovery of admissible evidence. The thing requested need not be admissible, but the request must be aimed at ultimately discovering admissible evidence. More on this in the Jurisdictionary® tutorial on evidence. A typical request for production follows:

- REQUEST FOR PRODUCTIONS EXAMPLE -

NEW YORK SUPREME COURT, DUTCHESS COUNTY

Your Name, Plaintiff, - a - DEFENDANT, Defendant	Magistrate _____ Case No. 12345 **REQUEST FOR PRODUCTIONS**

PLAINTIFF Your Name, pursuant to §R3120 New York Rules of Civil Procedure, requests defendant to produce for inspection and copying the original of the following documents and things the at offices of plaintiff or such other place as the parties may hereafter agree.

1. All corporate records of Apple Delivery Corporation.
2. All records of money or other consideration received by you for sale or delivery of Apple from 12 July 2011 to the present, including but not limited to invoices and bank statements.

RESPECTFULLY SUBMITTED this ___ day of _____ 2011.

_____
Your Name, Plaintiff

Interrogatories - The use of interrogatories can narrow issues of fact *before* taking depositions, giving you a decided advantage over those who take depositions before they know what to ask. Interrogatories are nothing more complicated than questions. When drafting interrogatories, be careful to ask your questions in such a way that only one answer (i.e., the answer you want) is possible.

- REQUEST FOR INTERROGATORIES' EXAMPLE -

NEW YORK SUPREME COURT, DUTCHESS COUNTY

Your Name, Plaintiff, - a - DEFENDANT, Defendant	Magistrate _____ Case No. 12345 **REQUEST FOR INTERROGATORIES**

PLAINTIFF Your Name, pursuant to §R3120 New York Rules of Civil Procedure, propounds the following interrogatories to defendant Danny Defendant. [Cite to the rule in your own jurisdiction.]

1. List the names, addresses, and telephone numbers (if known) of all customers to whom you sold or delivered apples from 12 July 2011 until the present, listing also the gross revenues received from each such customer.
2. List the names, addresses, and telephone numbers (if known) of all persons having any knowledge of your sales of apples from 12 July 2011 through the present.
3. List the names, addresses, and telephone numbers (if known) of all persons you intend to call as witnesses at trial in your defense.
4. List the names, addresses, and telephone numbers (if known) of all persons holding shares in Apple Delivery Corporation at any time from 12 July 2011 to present.

RESPECTFULLY SUBMITTED this ___ day of _____ 2004.

_____
Your Name, Plaintiff

CHECK LIST

1st **Gather together your evidence, organize and create a "Table of Contents".**

(a) Produce all your evidence, hold nothing back

(b) The evidence must prove your case, or you have no case

(c) This should be logically organized so that it can be easily thumbed through

2nd Perfect your complaint in the proper form

3rd Law of the case should be attached to your complaint

4th Perfect your Affidavit

TIPS FOR SUCCESS IN COURT:

1. Deserve the Judgment You Seek
2. Follow the Rules
3. Make Everyone Follow the Rules
    a. Rules of Civil Procedure
    b. Rules of Evidence
    c. General Legal Principles
    d. Common-Sense & Reason
4. Demand the Truth
    a. Require Sworn Testimony
    b. Verify Pleadings & Motions
5. Make an Effective Record
    a. Use Well-Paid Court Reporters
    b. Do Not Go Off-the-Record
6. Don't Allow Opponent Control
    a. Don't Allow Court Direction
7. Expect a Favorable Judgment
8. Demand Justice!

Every Complaint must state at least one Cause of Action. Every Cause of Action begins with a Breach of some sort:

1. Breach of Contract
2. Breach of Faithful Duty
3. Breach of Professional Duty
4. Breach of Public Duty
5. Breach of Law

- Actions must state all facts, caselaws, and statutes, and prove it in your Memorandum.

COURT MUST HAVE "JURISDICTION".

Action should set **(1)** subject matter jurisdiction and **(2)** personal jurisdiction or motion to dismiss wins.

PERSONAL JURISDICTION ARISES IF

(1) person resides in county, cause of action accrues in county, or property is located in county and

(2) person receives copy of complaint & summons or alternative service provided by rules. Facts alleged meet first requirement. Affidavit of process server meets second requirement. Jurisdiction thereby attaches to person.

Defendant must

(1) answer complaint,

(2) move to dismiss complaint,

(3) move for definite statement, or

(4) move to strike part or all of the complaint. If the defendant elects to answer the complaint he must do so within a set period (20 or 30 days in New York, dependent upon how served).

Defendant must respond to each numbered paragraph separately. He must admit, deny, or claim no knowledge. Perhaps the most important thing that can be said about litigation is that everything depends upon the record. The savvy litigant is scrupulous about making a record. That's why a properly worded complaint is so very important. Everything that happens thereafter is (or should be) in response to the allegations of the complaint. If the complaint fails to fully state the case, everything afterward will be riddled with loopholes.

The defendant has no options. He must do one of the four things listed above. This is the power of civil lawsuits. It all begins with a well-stated complaint. Form books are tools used by those who don't care much if they win or lose. They are tools to help you identify causes of action and essential form. Only by effectively stating your entire case can you hope to get a complete and prompt verdict.

If you are going to do discovery, start the discovery process with the complaint! And do a combined discovery.

CHAPTER 3

- Defendant's Counter Attack to your Action
- Defenses

DEFENDANT'S COUNTER ATTACK TO YOUR ACTION

MOTIONS TO DISMISS

- The complaint can be dismissed if the court lacks subject matter jurisdiction. Obviously, if the court has no jurisdiction over the subject matter of the case, it cannot enter judgment. The case must be dismissed.
- The complaint can be dismissed if the court lacks personal jurisdiction. If the act complained of was in Georgia where the defendant resides, and where the property is located, the case cannot be lawfully heard in a New York court.
- The complaint can be dismissed if it was filed in the wrong county or the wrong court.
- A complaint can be dismissed if it fails to state at least one cause of action. All counts failing to state a cause of action may be dismissed separately.
- A complaint can be dismissed if it fails to join an indispensable party. If a case cannot be resolved completely without joining a party not named by the complaint, the case can be dismissed.
- A complaint can be dismissed if the court is convinced the cause of justice will be frustrated.
- Any contempt for the court may result in dismissal.

MOTION FOR MORE DEFINITE STATEMENT

If the plaintiff's complaint is so poorly written that a reasonable person cannot be certain what it says, if it is vague, ambiguous, contains sentences with no subject or no verb, the court will require the plaintiff to re-state it or dismiss. It is surprising how often lawyers file papers that contain non-sentences or use language no reasonable person can understand. When this happens, a motion for more definite statement will invariably prevail. The same rule applies to answers or any other paper filed in the court. We have a right to know what the other side is saying and, if they cannot say it so reasonable people can understand them, the court will invariably require them to say it differently. Of course, if this continues and a party cannot state their position reasonably after several tries, the court may dismiss their case as impertinent.

A very large insurance company recently filed a complaint containing a string of words beginning with a capital letter and ending with a period but containing no verb whatsoever. Since it was impossible to know what the complaint was saying, the defendant moved for a more definite statement and prevailed, of course. The insurance company must now file a more definite statement of their complaint or be dismissed.

MOTIONS TO STRIKE

A complaint can be stricken if it or any part of it is untrue and was known to be untrue at the time it was filed. This is accomplished by a motion to strike sham, and evidence may be taken at the hearing. Only truth may be permitted in court. A successful motion to strike sham can result in dismissal or judgment in the moving party's favor, depending on the circumstances.

Any part of the complaint can be stricken if it is redundant. If parts of the complaint merely restate other parts, they may be stricken upon motion. Any part of the complaint can be stricken if it is immaterial. If the complaint alleges facts that have no rational relationship to the matter before the court, the immaterial part can be stricken.

Any part of the complaint can be stricken if it is impertinent. If part of the complaint shows insolence toward our legal system, it may be stricken. Any part of the complaint can be stricken if it is scandalous. If part of the complaint is so outrageous that a slanderous motive can be clearly seen, the court may strike that part or the entire complaint. Improper form may also result in striking.

Any contempt of court may result in a complaint being stricken, dismissed, or summarily judged in favor of the defendant. Our courts have this power

DEFENSES

Affirmative Defenses - The answer, by itself, denies a few of the allegations, but a denial, by itself, is not affirmative, It merely denies, it asserts nothing. Affirmative defenses allege facts that, if proven by a preponderance of admissible evidence, destroys the plaintiff's case. If defendant *proves* the essential facts alleged by any of his affirmative defenses, he wins.

- AFFIRMATIVE DEFENSE EXAMPLE -

NEW YORK SUPREME COURT, DUTCHESS COUNTY

Your Name, Plaintiff, - a - DEFENDANT, Defendant	Magistrate _____ Case No. 12345 **ANSWER AND AFFIRMATIVE DEFENSE**

DEFENDANT, Your Name, answers the complaint and states:

1. Denied.
2. Without knowledge.
3. Admitted.
4. Without knowledge.
5. Admitted for jurisdictional purposes only.
6. Admitted.
7. Admitted.
8. Denied.

AFFIRMATIVE DEFENSES

1. Failure of Consideration: Plaintiff did not pay defendant $3000 as alleged. Defendant has not received any money whatever from Plaintiff.
2. Estoppel: Plaintiff promised and agreed to provide insecticide to spray the strawberries but failed and refused to do so in spite of repeated demands by Defendant.
3. Lack of Subject Matter Jurisdiction: Plaintiff is not entitled to recover consequential damages from breach of a contract that does not contemplate such damages but is limited to the contract amount of $4,500, which is within the exclusive jurisdiction of the Small Claims Division of this Court. This Circuit Court lacks jurisdiction to hear cases where the amount in controversy is less than $15,000.

WHEREFORE, Your Name, Defendant, demands judgment against plaintiff, together with such other and further relief as the Court may deem reasonable and just under the circumstances.

_____
Your Name, defendant

VERIFICATION

Absolute Immunity - So long as acts of an officer or agent of government (e.g., a judge, senator, mayor, or county commissioner) are lawfully within the scope of their delegated authority, the affirmative defense of absolute immunity protects *absolutely* from lawsuits brought by disgruntled people disappointed with the "official acts" of those officers or agents. If an officer or agent acts beyond the scope of his delegated official authority, the immunity disappears. The officer or agent may then be sued as an individual – just like anyone else.

Accord and Satisfaction - An accord arises where two parties agree to settle some prior existing debt by the substitution of some performance different from the original obligation. If the first contract is replaced by a new agreement, the second contract voids the first. Accord and satisfaction erases the former obligation.

For a defendant to adequately plead the defense of accord and satisfaction, he must allege ultimate facts sufficient to establish the following elements:

1. Existence of a pre-existing dispute over an enforceable obligation.
2. Both parties intended to settle their dispute by entering into a substitute agreement.
3. Both parties acted in accordance with the substitute agreement, i.e., the debtor tendered and the creditor accepted the substitute performance agreed upon.

If all three factual elements of this defense are proven to exist, any claim raised by a plaintiff on the pre-existing agreement should be discharged by the court (after proof, of course), and the plaintiff's case should be dismissed on defendant's motion after hearing and presentation of evidence of the accord and satisfaction.

Act of God - This affirmative defense may be used against certain classes of claim if a natural disaster, extreme weather conditions, or other event beyond the control of mankind makes performance by the defendant impossible.

This defense works only if defendant acted reasonably in all other respects and was utterly prevented by the act of God will this defense lie.

Alibi - Many claims (i.e., causes of action on which the court can grant relief) require that the defendant be in the presence of the plaintiff at the time of the event giving rise to the cause of action, the event allegedly causing the plaintiff's injury. It should be clear that the defendant must be where the plaintiff is, or at least within reach of the proverbial "ten-foot pole" or some other means of actual *contact* in order for this cause of action to work.

The elements of this cause of action are:

1. Plaintiff suffered a harmful or offensive contact caused by defendant.
2. Defendant intended the contact and the resulting harm or offense or acted with reckless disregard for whether or not his acts would result in the contact complained of and the harm or offense caused thereby.
3. Defendant acted unlawfully or without authority or consent.
4. Plaintiff suffered damages as a direct result of the battery.

Assault - is another such cause of action requiring the defendant to be where the alleged offense occurs or, at least, to be within "reach" of the defendant.

The elements of assault are:

1. An intentional threat or offer to cause bodily injury by force, or force directed toward another, regardless of whether any injury is caused.
2. The threat was not lawful nor authorized by the plaintiff.
3. Circumstances surrounding the threat created a well-founded (i.e., reasonable) fear of imminent peril of bodily injury.
4. It was apparent to the plaintiff that defendant had immediate ability to cause the threatened injury if the defendant was not prevented.
5. Plaintiff suffered damages as a direct result.

Arbitration and Award - If disputed issues are subject to arbitration procedures, and if the dispute goes to arbitration, and if the arbiter or arbitration board makes an award to the prevailing party, then a lawsuit brought on the same disputed issues will be dismissed if the defendant files the affirmative defense of "arbitration and award". Once you've won in an official arbitration, you've won!

Proof of course, is substantiated by tender into the court record of admissible evidence of all three elements:

1. Dispute was lawfully subject to arbitration.
2. Dispute was duly submitted for arbitration.
3. An arbitration award was made in accordance with the rules of arbitration.

Assumption of Risk - Some activities are so inherently dangerous, that the courts will allow a defense against plaintiffs who voluntarily engage in such activities. Contact sports like soccer, football, karate and other martial arts disciplines, basketball, and any competition involving the risk of foreseeable injury is included in the ambit of this defense when injury results from the foreseeable risk and the injured person knew or should have known of the risk. If the risk is hidden or unknown, of course, then the defense does not apply.

Coercion - This is another name for the affirmative defense known as "duress". Please see the explanation for duress below under that alphabetical heading.

Comparative Negligence - In many cases, the plaintiff is at least partially responsible for his own damages. Where this is true, the plaintiff cannot recover that portion of damages caused by himself. He is said to be comparatively negligent. If both parties are equally at fault, the amount of plaintiff's recovery should be reduced by one-half.

Consent - This affirmative defense applies in many different types of cases, where a plaintiff attempts to sue for damages resulting from an act to which he knowingly and intelligently consented. Consent is an absolute defense against plaintiffs who knowingly and intelligently agree to any circumstance that later causes them injury for which they seek damages in a lawsuit.

In order for this defense to lie, plaintiff's consent must be
1. voluntary,
2. informed, and
3. identified to the specific risk rather than general.

Contributory Negligence - If a plaintiff negligently contributed to the event giving rise to plaintiff's claim, the defendant may have grounds for the defense of contributory negligence, which may eliminate his responsibility for plaintiff's damages.

Discharge in Bankruptcy - If a creditor files a lawsuit to collect a debt that's been discharged in bankruptcy, the defendant need only file this affirmative defense along with the ultimate facts needed to prove the defense, referencing an attached *certified* copy of the bankruptcy court's order discharging the debt. Case closed.

Duress - Duress is a defense to any lawsuit brought for damages resulting from an act of the defendant that he was forced into by threat or other coercion. In all cases physical force suffices, e.g., a gun to the head.

Economic Loss Rule - The economic loss rule is an affirmative defense to prevent plaintiffs from double-dipping … doubling their damages for the same loss.

Estoppel - In its most fundamental form, an estoppel defense arises where one party leads another to believe some set of facts, the second party reasonably relies on those facts, then the first party changes position and seeks to stand on a different set of facts. The courts say the first part is *estopped* to deny the initial facts, and the second party is justified in continuing to rely on the facts initially represented by the first party. Estoppel is related to the affirmative defense of *res judicata* (the thing has been ruled upon), wherein the parties are bound by a previous court decision as to certain facts that one of the parties wishes to re-litigate. The party wishing another bite at the apple, so to speak, is estopped. Similarly, the affirmative defense of laches stands on estoppel principles, since the plaintiff is estopped to delay bringing his case.

The defense of equitable estoppel stands to protect one who relies on some set of facts present or past that are communicated or demonstrated by acts or words of another who
(1) knows or ought to know the facts communicated or demonstrated are not true,
(2) intentionally or negligently causes another to reasonably rely on those facts, and
(3) subsequently seeks to assert a different set of facts that would cause an unjust result. Courts will not allow it if the doctrine of estoppel is raised

Equitable estoppel relates to facts present or past. Promissory estoppel relates to future facts and applies when one person tries to withdraw or alter a promise made to another who justifiably relied on the promise to his detriment. Even if there is no enforceable contract, our courts will enforce such promises to protect parties who *detrimentally rely* on the dishonesty of a crooked promissor who knew or should have known the promised facts were false. This doctrine is sometimes also called "detrimental reliance".

Failure of Consideration - This affirmative defense is useful in breach of contract cases where the plaintiff claims the defendant failed to uphold his end of the bargain, and the defendant

wishes to make clear that the plaintiff didn't do his part, either – such as failure to pay for services or failure to deliver goods or pay the price for same.

Failure to Demand - In some jurisdictions, however, plaintiffs are required to make a formal demand for performance (payment of money, performance of services, or delivery of goods) as a pre-requisite to filing a lawsuit on the contract.

Failure to Join an Indispensable Party - This defense may also be (and should be) raised by motion to dismiss prior to the filing of an answer. It is proper where someone who has an interest in the case such that a final decree cannot be made without either affecting the interest or leaving the case unresolved or contrary to the requirements of justice. In such cases, the indispensable party must be joined to the case. Not all "necessary parties" are indispensable.

Failure to Post Bond - Some jurisdictions require the posting of a bond to protect the foreseeable injury to a defendant in certain types of cases – most notably actions for injunctive relief – so, if no bond is posted, the defendant has this affirmative defense (which may also be presented by motion to dismiss for failure to post the required bond). The amount of bond is calculated in relation to the amount of money damages a wrongfully-issued injunction might cause the defendant. In many jurisdictions, if no bond is posted, the injunction cannot be lawfully enforced.

Failure to State Cause of Action - This defense may also be (and should be) raised by motion to dismiss prior to the filing of an answer. Every cause of action (or claim on which the court can grant relief) must be alleged by stating ultimate facts that support all essential elements of the cause of action. For example, in an action for breach of contract, the plaintiff must allege ultimate facts sufficient to assert three essential elements:

(1) existence of an enforceable contract,
(2) an act by the defendant in breach of the contract, and
(3) damages to the plaintiff that directly result from the breach.

Suppose, then, that a lawsuit is filed for breach of contract in which the plaintiff fails to allege *ultimate facts* that he suffered damages as a direct result of the breach. Merely stating that the defendant suffered "damages" is not enough. The plaintiff must allege the *"ultimate facts"* that support that essential element, such as stating that his strawberry fields were destroyed or that he lost business to a competitor, adding additional ultimate facts as necessary that explain how the loss was a direct result of the breach. Failure to allege all ultimate facts necessary to assert all essential elements exposes the plaintiff to a motion to dismiss for failure to state a cause of action and, if the court does not dismiss the plaintiff's case (usually allowing the plaintiff a reasonable time to amend his pleading to correct the defect), the defendant should file this affirmative defense to preserve the point in his favor.

Fraud - Fraud as an affirmative defense (and as a claim or cause of action) must be pled with *specificity*. It is not enough to merely allege the other party is guilty of fraud. One must spell out fraudulent details with *specificity* so the court knows what material misrepresentation was made that gives rise to the alleged fraud. In other words, the defensive pleading must be both complete and accurate. In order for fraud to support an affirmative defense, circumstances and material facts of the fraud must be pled with *specificity*, and all essential fact elements must be stated.

Futile Act - No court process can lawfully enforce the performance of a futile act. If requiring or prohibiting an action will have no reasonably foreseeable benefit, the court is without jurisdiction to lawfully enter an order. It's like trying to get one gear to turn another, when the two are not meshed with each other. No amount of twisting on one will ever transfer power to the other. Even if a court order compelled the turning of one gear, if the desired effect was to make the other gear turn, the courts' order would be an absolute waste of time.

Good Samaritan Defense - Some jurisdictions have enacted statutory protections that limit the liability of persons who render assistance, medical or otherwise, in "emergency" situations. These statutes do not remove liability for those who act without reasonable care, however those who render assistance gratuitously and do so with reasonable care are immune from lawsuits brought by persons who claim they were damaged as a result of the gratuitous rendering of assistance.

Illegality - It is a general rule that controls the trial courts in all jurisdictions that a contract arising from an illegal act (e.g., gambling) or one seeking to enforce performance of an illegal act (e.g., a mob hit) cannot be enforced in our courts.

Impossibility - A defendant may be excused from performing certain acts if prevented by some circumstance beyond his control. In such cases, he has this affirmative defense that arises primarily in contract cases where the defendant is sued for failure to perform a promise.

Improper Venue - This defense may also be (and should be) raised by motion to dismiss prior to the filing of an answer. Venue is often confused with jurisdiction. They are two separate things. Venue is *where* the court sits. Jurisdiction is *what* the court can hear. Improper venue defenses generally don't dispose of cases. They move them. Generally, venue may be controlled by statute. The purpose is to conserve judicial economy by not permitting cases to be brought in courts where delays and unnecessary expenses may result because the evidence, parties, or events giving rise to the claims are located elsewhere. To require the defendants travel long distance to present their case would unduly prejudice the defendants, delay the proceedings, and increase the cost to taxpayers by allowing litigation to take place inefficiently. Improper venue militates against the swift and efficient administration of justice. In most cases it also creates an unjust burden on the party most distant. In general, venue is proper in the county where the defendant resides (or, if a corporation, where it has or usually keeps an office for customary business), where the events giving rise to the claim (cause of action) accrued, or where property involved in the litigation is located.
A defendant sued in an improper venue should first move to have the case dismissed or transferred to a proper venue and, failing that, should preserve this issue by filing this affirmative defense with his answer.

Injury by Fellow Servant - Where an employee is injured by another employee of the same employer, this defense protects the employer from legal liability if the employer did not contribute in any way to the injury. Where the employer puts his employees in places where the work exposes the employees to hazards they cannot avoid by the use of reasonable care and at the same time perform their duties, then the employer has a duty to both warn the employees and provide sufficient safety measures to protect them from harm.

Insufficiency of Process - This defense may also be (and should be) raised by motion to dismiss prior to the filing of an answer. This defense does not arise when a party is *not* served with a

summons and complaint. That defense is called insufficiency of *service* of process. The defense of "insufficiency of process" arises when the summons is defective (e.g., unsigned) or when a copy of the complaint was not attached to the summons when served. There's a break in the chain. The process is insufficient … giving rise to this defense.

Insufficiency of Service of Process - This defense arises when *service* (and not the process itself) is defective or insufficient as a matter of law to put the defendant on notice that a lawsuit has been filed to which he is obligated to file a timely response. Suppose the plaintiff uses the mail to deliver the summons and a copy of his complaint when the rules require service of process by other means. The process is good, but the *service* is insufficient to give the court jurisdiction over the person of the defendant. Of course, once defendant makes an appearance this defect will soon be cured.

No Irreparable Harm - If a plaintiff sues for an injunction when the wrong plaintiff seeks to prevent by means of the injunction could be fully compensated by awarding money damages alone, the court should not issue the injunction. The affirmative defense of "no irreparable harm" should be filed with defendant's answer. An essential element for an injunction to issue is allegation and proof that money damages alone will not compensate the plaintiff. If the plaintiff has been beaten nearly within an inch of his life, an injunction cannot restore him to the condition he enjoyed before the beating. The best the court can do is award money damages from the defendant. Whenever a plaintiff seeks an injunction where an award of money would adequately and justly compensate him for the injury he claims should entitled him to an injunction, then (after proof) the court should deny issuance of the injunction. The decision as to whether an award of money alone is sufficient to protect the plaintiff is not based on whether the defendant has sufficient means to satisfy a money judgment. The decision rests squarely on whether money alone would (if money were available) prevent or cure the threatened injury plaintiff alleges. If a money amount cannot be calculated that would protect the plaintiff from the threatened injury, then entry of an injunction is proper.

Laches - Laches is an affirmative defense that rests on the concept that one who delays unreasonably in pursuing his remedy in court, especially where his voluntary delay prejudices the other party, should not be permitted to sue. The decision is based on elements, just as claims are.
In order for the defense of laches to be effective, defendant must prove each of the following elements:

(1) Some genuine basis for the plaintiff's lawsuit, i.e., conduct on the part of the defendant giving rise to the complaint (otherwise the defense is not necessary).
(2) Plaintiff had knowledge of defendant's conduct giving rise to the complaint for an unreasonable time before filing suit.
(3) Plaintiff had a reasonable opportunity to file suit sooner.
(4) Plaintiff unreasonably delayed filing suit.
(5) Defendant didn't know the plaintiff would sue.
(6) Injury or prejudice to defendant if relief is granted on the complaint.

The fundamental doctrine underlying the defense of laches is whether and to what extent the plaintiff's delay has lessened the defendant's ability to defend. For example, if a key witness has died during the interval, defendant may have a harder time proving he is not liable for the damages plaintiff seeks. In some cases, delay may actually preclude the court from arriving at a just result

because the span of time has made it too difficult to determine the truth of matters asserted by the respective parties.

Lack of Jurisdiction over Subject Matter - This defense may also be (and should be) raised by motion to dismiss prior to the filing of an answer. This defense may be raised at any time but, of course, should be raised as soon as it is known to the defendant. This may occur in many ways. If the court lacks subject matter jurisdiction, and the defendant raises and *proves* the elements of this defense, the judge's hands are tied.

Lack of Jurisdiction over the Person - This defense may also be (and should be) raised by motion to dismiss prior to the filing of an answer. In order for a court to have jurisdiction over a person, as opposed to in rem jurisdiction (i.e., jurisdiction over a subject matter) the person must be served with process,[46] i.e., a summons and copy of the complaint. However, service of process alone does not insure that the court has jurisdiction over the person. Without jurisdiction over the person, no order of the court can be effective to command such person to do anything whatever. The court has no power over a person unless it also has in personam jurisdiction (i.e., jurisdiction over the person). Georgia residents cannot be sued in Alabama's state courts, unless the Georgia resident cause the damages while within the state boundaries of Alabama. If the cause of action (claim) arose out of events that took place outside Alabama, then the Alabama state courts do not have in personam jurisdiction over the Georgia defendant … whether or not the Georgia defendant is served with a copy of the complaint and summons from the Alabama court. A motion to dismiss for lack of jurisdiction over the person should be filed and, if that motion is unsuccessful, this affirmative defense should be filed with the answer to preserve the issue.

License - The affirmative defense of license exists where, for example, the plaintiff sues for trespass or conversion or some other cause of action alleging the defendant unlawfully and without authority or permission entered upon or took exclusive possession or use of the plaintiff's property.

No Prior Course of Dealing - This is a defense to a lawsuit based on a cause of action for account stated. In order for a plaintiff to prevail on a claim (cause of action) for account stated, he must allege and prove there were prior dealings between the parties and a reasonably long history of periodic billing that the defendant timely and routinely paid over an extended course of time prior to the lawsuit. Since this is an element of the plaintiff's case, the affirmative defense of "No Prior Course of Dealing" is offered to show the essential element of this cause of action does not exist.
The most common way to defeat an action for account stated is to show that the debt claimed is *new*, i.e., that there was no prior course of dealing between the parties or, at best, only a very short period with very few transactions. Sending an invoice or other demand for payment of a debt that includes language such as, "Failure to dispute the amount of this debt will result in the legal conclusion that the debt is owed," may intimidate unwary people into paying the claimed debt. Such a demand, however, does not give rise to a cause of action for "account stated". A lawsuit on this cause of action may result in an unjust judgment if the defendant is unfamiliar with the law – in particular, the essential fact elements of the cause of action that the plaintiff must allege and prove by the greater weight of admissible evidence. Suing for account stated when essential elements are clearly absent, may expose the party bringing the action to a counterclaim for abuse of process if it can be shown that the plaintiff intended to intimidate the debtor and there was no prior course of dealing.

Payment - Payment of a debt is, of course, an absolute defense. To prevail, the defendant need only tender to the court admissible evidence to demonstrate that all funds payable under the terms of the debt, including interest (if applicable), have been fully paid and the debt otherwise fully satisfied.

Release - If a plaintiff brings his complaint alleging breach of some obligation, and the plaintiff (by word or deed) has released the defendant from that obligation, then the defendant should file this affirmative defense. Whatever the form of release, if the defendant can present clear and convincing evidence that the former obligation has, in fact, been canceled by some subsequent act of the person to whom the obligation is owed, then this defense is absolute.

Res Judicata - The meaning of this Latin phrase is simply that "the thing has already been adjudicated". The decision is already in the court's file. If a plaintiff brings suit involving issues that have already been resolved by a court of competent jurisdiction, the defendant should first file a motion to dismiss raising the issue of *res judicata* and, if possible, attaching certified copies of papers from the earlier case file to show that the issues have, in fact, been previously adjudged. If this motion fails and the court refuses to dismiss, then the defendant should preserve the issue by filing this affirmative defense with his answer.

Self-Defense - Any act or communication done in pure self-defense is an affirmative defense. Suppose you threaten to hit me with a beer bottle, and I wave an umbrella over my head shouting, "I'll crush your head with this umbrella." If you sue me for assault (my threat to do you bodily harm coupled with the present ability to carry out the threat), I have this affirmative defense: self defense.
Suppose you actually start beating me with that beer bottle, and I haul off with my umbrella and break your arm. If you sue me for your broken arm, I have this affirmative defense to defeat you.
Any communication or act done in defense of personal safety or private property is a lawful defense. If you are in the act of stealing potatoes from my garden, and I run toward you waving a shovel over my head, shouting, "Get out of my garden or I'll pound you with this spade," I have an affirmative defense to your cause of action against me for assault. If you continue stealing my potatoes and I break your arm with my shovel, your lawsuit against me will result in my filing this affirmative defense. I have a right to protect my property … provided I act reasonably. If it is possible to withdraw from threatening situations, the law requires you to do so, rather than causing unnecessary physical harm to others. In most jurisdictions you are not required to retreat.

Sham - If the plaintiff files a lawsuit alleging material facts the plaintiff knew were false at the time the lawsuit was filed, his complaint is subject to dismissal as a sham. This is one of those defenses that should be asserted by motion at the outset by a motion to strike sham.

A motion to strike a sham pleading must assert

(1) that a material allegation of the sham pleading is false, and
(2) that the pleader knew or should have known the allegation was false at the time the pleading was filed.

If the defendant can prove both elements, the court should strike the pleading (or, at least, the false part of the pleading). If the motion to strike sham fails and the defendant is required to file an answer, then this affirmative defense should be filed with the answer in order to preserve the issue and give the defendant something affirmative to prove on his own behalf.

Statute of Frauds - As with certain other defenses, this one should be first raised with a motion to dismiss. Then, if the motion to dismiss fails, the issue should be preserved by filing this affirmative defense and proceeding to prove the elements with admissible evidence. Statutes of frauds differ among jurisdictions, however fundamental commonalities exist. The most common use of the statute of frauds is to defeat an action for breach of contract where the contract is unenforceable pursuant to a local statute. The statute may not be called a "statute of frauds", however it will spell out certain circumstances where a plaintiff is barred from suing on contracts that fail to meet certain requirements.

Statute of Limitations - This defense should be first asserted by motion to dismiss. If the court does not dismiss, the defendant should file his answer with this affirmative defense (among others that may also apply), since a case brought beyond the deadline established by the statute of limitations is a case over which the court lacks subject matter jurisdiction … an issue that can be raised at any time *but must be properly preserved*.

Truth - If an allegedly defamatory statement is true, there can be no action, and plaintiff has the burden of proving falsity. The defendant does not have the burden to prove truth. This raises an important fact about arguments in general in that it is far harder to prove a falsehood than to prove a truth.

Unclean Hands - An injunction, being an equitable remedy, should not be granted when the party seeking it has not acted in good faith. The maxim in equity is, "He who comes to equity must come with clean hands." Thus, if a plaintiff has wrongfully defrauded the defendant when he seeks an injunction, the court should deny him … *if* the defendant pleads unclean hands as an affirmative defense and explains how the plaintiff has unclean hands. The court should not merely consider the allegations of the pleadings when asked to deny an injunction for unclean hands.

Other factors should be considered *and proved*:

(1) Nature of the interest to be protected.
(2) Relative adequacy of other available, less-restrictive remedies.
(3) Unreasonable delay of plaintiff to seek the remedy.
(4) Relative hardship likely to be caused to defendant.
(5) Possible prejudice to defendant of defending in underlying lawsuit.
(6) Related misconduct of plaintiff.
(7) Interests of third persons and of the public.
(8) Practicality of framing and enforcing the injunction.

Unconscionability - The defense of unconscionability is related to the cause of action for rescission. The gist is that if a party has become the unwitting victim of a contract procured by fraud, overreaching, or otherwise by unjust means, the court should not enforce that contract, even though the plaintiff is a victim of his own foolishness and lack of caution. To prevail with this defense, the defendant must show the court that the contract, in itself (i.e., aside from related factors) was outrageously unfair and that the proceedings leading up to the parties' entering into the contract were also outrageously unfair. The first requirement is called substantive unconscionability, wherein the terms of the contract itself are deemed to be unreasonably favorable to the plaintiff seeking to sue on the contract. The second requirement is called procedural unconscionability, wherein there was lack of any meaningful choice on the part of the defendant when he entered the contract. Perhaps he was

too feeble, or perhaps he lacked all understanding of technical aspects of the promises made to him. Either way, there was no meeting of the minds essential to the formation of an enforceable contract. Therein lies the gist of this defense. It has been said at common law that an unconscionable contract is one that "no man in his right mind would make on the one hand, and no fair and honest man would attempt to enforce on another."

Waiver - is an affirmative defense that arises when plaintiff has waived the right or privilege upon which he sues. The right or privilege waived must, of course, first exist, or there is nothing to be waived, so this is one of the elements. A second element is that the waiver must be knowing, i.e., the plaintiff cannot waive a right or privilege without knowing (or having constructive knowledge) of the fact. Finally, the plaintiff must have waived with actual intention to relinquish the right or privilege.

In order to successfully assert this defense, the defendant must allege (in his initial response to the complaint) that

(1) Plaintiff possessed a right or privilege upon which he has brought his lawsuit.
(2) Plaintiff waived the right or privilege by word or conduct.
(3) Plaintiff knew or should have known he waived the right or privilege.
(4) Plaintiff intended by his waiver to relinquish the right or privilege.

For the court to imply the waiver from the plaintiff's conduct, facts relied upon to demonstrate that the waiver occurred must be clear and convincing. Mere inferences are not enough … however probable they might be. In the absence of direct facts demonstrating waiver, the defendant must meet a heavy burden for the court to imply a waiver.

Pleading Affirmative Defenses - When pleading affirmative defenses, remember that merely reciting the names of the defenses (e.g., laches, license, or payment) is not nearly enough. As is the case when drafting a complaint, you need to allege each and every essential fact in support of each of your defenses, i.e., every fact you need to *prove* in order to prevail with each and every one of your defenses.

CHAPTER 4

READY FOR TRIAL

- Bill of Particulars and Note of Issue
- Notice of Issue, example
- Certificate of Readiness, example
- Judgment on the Pleadings
- Bill of Particulars, example
- Motion for Summary Judgment
- Default Judgment

BILL OF PARTICULARS & NOTE OF ISSUE

(Verified) Bill of Particulars. - A bill of particulars is a written statement giving details of a lawsuit filed in a General District Court. It's a more complete explanation of why the person filing the lawsuit, called the plaintiff, should get the money or property being requested.

Uniform Rules 22 NYCRR Part 206 - § 206.12 Note of Issue and Certificate of Readiness

a. General. No action shall be deemed ready for trial unless there is first filed a note of issue accompanied by a certificate of readiness, with proof of service on all parties entitled to notice, in the form prescribed by this section. Filing of a note of issue and certificate of readiness shall not be required for prisoner pro se claims, for an application for court approval of the settlement of the claim of an infant, incompetent or conservatee, or for an application for court approval of a settlement pursuant to section 20-a of the Court of Claims Act. The note of issue shall include the claim number, the name of the judge to whom the action is assigned, and the name, office address and telephone number of each attorney or individual who has appeared. Within ten days after service, the original note of issue and certificate of readiness, with proof of service, shall be filed with the clerk.

b. Forms. The note of issue and certificate of readiness shall read substantially as follows:

NOTE OF ISSUE

For use of clerk
Calendar No. _____
Claim No. _____
New York State Court of Claims,_____ District
Notice for trial
Filed by attorney for _____
Date claim filed _____
Date claim served _____
Date issue joined _____
Nature of action
Tort: Highway or motor vehicle negligence _____
Medical malpractice _____
Other tort (specify) _____
Appropriation claim _____
Small claim pursuant to article 6 EDPL _____

Public construction contract claim _____
Other contract _____
Other type of action (specify) _____
_____
Amount demanded $_____
Other relief _____
Attorney(s) for Claimant(s)
Office and P.O. Address:
Phone No.
Attorney(s) for Defendant(s)
Office and P.O. Address:
Phone No.
Insurance carrier(s):
NOTE: Clerk will not accept this note of issue unless accompanied by a certificate of readiness.

CERTIFICATE OF READINESS FOR TRIAL

(Items 1-6 must be checked)
Complete Waived Not Required
1. All pleadings served and filed. ....
2. Bill of Particulars served and filed. ....
3. Physical examinations completed. ....
4. Medical reports filed and exchanged. ....
5. Expert reports filed and exchanged. ....
6. Discovery proceedings now known to be necessary completed. ....
7. There are no outstanding requests for discovery.
8. There has been a reasonable opportunity to complete the foregoing proceedings.
9. There has been compliance with any order issued pursuant to section 206.10 of this part.
10. The action is ready for trial.
Dated: _____
(Signature)_____
Attorney(s) for:_____
Office and P.O. address:_____

c. Pretrial Proceedings. Where a party is prevented from filing a note of issue and certificate of readiness because a pretrial proceeding has not been completed for any reason beyond the

control of the party, the court, upon motion supported by affidavit, may permit the party to file a note of issue upon such conditions as the court deems appropriate. Where unusual or unanticipated circumstances develop subsequent to the filing of a note of issue and certificate of readiness which require additional pretrial proceedings to prevent substantial prejudice, the court, upon motion supported by affidavit, may grant permission to conduct such necessary proceedings.

d. Striking Note of Issue. Within 20 days after service of a note of issue and certificate of readiness, any party to the action may move to strike the note of issue, upon affidavit showing in what respects the action is not ready for trial, and the court may strike the note of issue if it appears that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of this section in some material respect. After such period, no such motion shall be allowed except for good cause shown. At any time, the court on its own motion may strike a note of issue if it appears that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of this section in some material respect.
e. Restoration of Note of Issue. Motions to restore notes of issue struck pursuant to this section shall be supported by a proper and sufficient certificate of readiness and by an affidavit by a person having first-hand knowledge showing that there is merit to the action, satisfactorily showing the reasons for the acts or omissions which led to the note of issue being struck from the calendar, stating meritorious reasons for its restoration and showing that the action is presently ready for trial.
f. Change in Title of Action. In the event of a change in title of an action by reason of a substitution of any party, no new note of issue will be required. Notice of such substitution and change in title shall be filed with the clerk for transmittal to the assigned judge within ten days of the date of an order or stipulation effecting the party substitution or title change.
g. Unless for good cause shown, the trial of the action shall commence within fifteen (15) months of the filing of the note of issue.

At Issue Memorandum - A document that states that all parties to a case have been served, that the parties disagree (or are "at issue") over one or more points that need to be resolved at trial, and how much time the parties estimate will be required for trial. (note of issue and certificate of readiness, 2 forms)

NOTE OF ISSUE EXAMPLE

Calendar No. (if any) _____
Index No. 2751/2012

New York State Supreme Court, Dutchess County.

_____
Name of Justice Assigned

For use of clerk

[redacted]

Plaintiff/Petitioner

- against -

[redacted]

Defendant/Respondent

NOTICE FOR TRIAL

□ Trial by jury
- □ Of all issues
- □ On issues specified below
- □ Or attached hereto

□ Trial without jury
✓ Court of record

Filed by [redacted], plaintiff
Date summons served May 16, 2012
Date service completed May 21, 2012
Date issue joined June 20, 2012

NATURE OF ACTION OR PROCEEDING

□ Tort
- □ Motor Vehicle Negligence
- □ Medical Malpractice
- □ Other Tort

✓ Contract
□ Other _____

Amount demanded $112,600.00 Other Relief None

_____
_____

Plaintiff, [redacted], in pro per
Address [redacted], Hyde Park, NY. 12538
Phone (845) 229-[redacted] Fax (888) 891-[redacted]

Attorney for Defendant [redacted]
Address [redacted] Law offices, [redacted], Suite D; Fishkill, NY. 12524
Phone (845) 897-[redacted] Fax (845) 468-[redacted]

CERTIFICATE OF READINESS FOR TRIAL EXAMPLE

(Items 1-6 must be checked)

	Completed	Waived	Not Required
1. All pleadings served and filed.	✓	☐	☐
2. Bill of Particulars served and filed.	✓	☐	☐
3. Physical examinations completed.	✓	☐	☐
4. Medical reports filed and exchanged.	☐	☐	✓
5. Expert reports filed and exchanged.	☐	☐	✓
6. Discovery now known to be necessary completed.	✓	☐	☐

7. There are no outstanding requests for discovery.
8. There has been a reasonable opportunity to complete the foregoing proceedings.
9. There has been compliance with any order issued pursuant to section 206.10 of this part.
10. The action is ready for trial.

Dated: November 27, 2012

(Signature)_____

Plaintiff, John [redacted], in pro per
[redacted], Hyde Park, NY. 12538
(845) 229-[redacted] Fax (888) 891-[redacted]

New York State)
) ss:
Dutchess County)

NOTARY

New York State, Dutchess County on this _____ day of _____, 2012 before me _____, the subscriber, personally appeared [redacted] to me known to be the living man describe in and who executed the forgoing instrument and sworn before me that he executed the same as his free will act and deed.

_____
Notary

My commission expires: _____
(Notary Seal)

JUDGMENT ON PLEADINGS EXAMPLE

New York Supreme Court, Dutchess County

John [redacted], Plaintiff; - against - Idoni [redacted], Defendant.	INDEX NO. 2751-2012 MAGISTRATE:_____ **MEMORANDUM IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS**

COME NOW [redacted], plaintiff, pursuant to Common Law for a Motion for judgment on the pleadings, and moves this Honorable Court for entry of an Order of Judgment in plaintiffs favor, with regard to the breach of contract of the plaintiff's action, and states:

GENERAL SUMMARY JUDGMENT ARGUMENT

1) There are no material issues of fact that need to be determined in this cause.

2) The law of the case is such that no fact issues remain that can affect the outcome as a matter of law.

3) Where no issues of material fact alleged by the defendant in defense of this action nor in support of defendant's counter-complaint remain, judgment is proper to conserve valuable judicial energies and to spare litigants unnecessary costs and further delays.

4) Defendant has not demonstrated any genuine issue of material fact.

5) Well established New York law clearly favorable to the plaintiff controls this case.

6) Where the law of a case, as here, is so compellingly controlling that the material facts already established dictate a result that cannot be altered by making any finding of immaterial fact the court should grant judgment.

7) The material facts in this case have been sufficiently developed to enable the court to determine as a matter of law that based on statutory authority, common law, and controlling case law, no issue of material fact remains to preclude entry of judgment.

8) There are no justifiable issues of material fact or law to preclude entry of judgment.

GENERAL FACTUAL BACKGROUND

9) The elements for a breach of contract are;[4]

a. a contract,

i. Plaintiff produced the signed contract dated August 9th 2011 between the defendant and the plaintiff;

ii. On May 11, 2012, the same day that defendant breached the contract, defendant admitted in writing that he agreed to the terms of the contract;

[4] Civil Serv. Empls. Assn., Inc., Local 1000, AFSCME, AFL-CIO v Town of Riverhead, Supreme Court, Suffolk County, Docket Number: 44050/2008, Judge: Joseph Farneti

b. performance by plaintiff,
   i. Plaintiff dutifully performed, even when defendant failed to pay plaintiff on April 11, 2012 for more than a month, until defendant breached the contract, by terminating the contract without remedy;
   ii. Defendant, not once in eight months, expressed any dissatisfaction concerning plaintiff's performance by phone, letter, email, or in person;
   iii. On May 9, 2012 just two days before defendant breached the contract stated in writing that he was happy with defendants service;
c. defendants failure to perform,
   i. On May 11, 2012 defendant breached the contract by terminating it and not compensating plaintiff;
d. and damages;
   i. Plaintiff was damaged by defendants breach of the contract in the amount of $112,600.00:

10) Plaintiff has met the burden to prove a contract, performance by plaintiff, defendants failure to perform, and damages:

11) Defendant has not raised one material issue of fact.

12) Let the court take judicial notice of the maxim "*Truth is expressed in the form of an affidavit*"

13) Plaintiff has expressed his complaint and answers, in pro per, in the form of an affidavit.

14) Defendant has answered though his attorney, without answers, with plausible deniability.

15) On June 20, 2012 defendant claimed an incredible parade of twenty-three (23) affirmative defenses[5] with not one material fact to support just one.

16) On July 2, 2012 plaintiff demanded strict proof for each and every part of defendant's affirmative defenses[6], defendant acquiesced.

17) On June 20, 2012 accusations in support of defendant's charade of five (5) unsubstantiated counterclaims[7], claiming through the ceiling and bizarre damages, in defendant's pleadings, are without any material facts, and a revelation of want of the same.

18) On July 2, 2012 plaintiff denied defendants accusations in support of unsubstantiated counter claims[8], and demanded strict proof for each and every part of defendant's accusations in support of defendant's counterclaim, defendant acquiesced.

19) The essential elements of due process of law are notice and opportunity to defend; [Simon v. Craft 182, U.S. 427,436, 21 SUP. CT. 836, 45 L. ED 1165;]

LAW OF THE CASE

20) Plaintiffs verified answer, dated April 2, 2012, declared this action at law[9] a court of record[10] and asserted the law of the case[11], therefore this is the plaintiffs court[12] and this case is to proceed according to common law.

[5] **See** defendant's answer with counterclaim, dated June 20, 2012, lines 5-27
[6] **See** plaintiff's answer, dated July 20, 2012, line 1
[7] **See** defendant's answer with counterclaim, dated June 20, 2012, lines 28-88
[8] **See** plaintiff's answer, dated July 20, 2012, lines 2-17

21) "*The people of this State, as the successors of its former sovereign, are entitled to all the rights which formerly belonged to the King by his prerogative*." [**Lansing v. Smith, 4 Wend. 9 (N.Y.) (1829), 21 Am. Dec. 89 10C Const. Law Sec. 298; 18 C Em.Dom. Sec. 3, 228; 37 C Nav.Wat. Sec. 219; Nuls Sec. 167; 48 C Wharves Sec. 3, 7.**] "*A consequence of this prerogative is the legal ubiquity of the king. His majesty in the eye of the law is always present in all his courts, though he cannot personally distribute justice*". (**Fortesc.c.8. 2Inst.186**) "*His judges are the mirror by which the king's image is reflected*". [**1 Blackstone's Commentaries, 270**]

22) In a court of record, common law proceedings without a jury the "papers are the trial".

23) **Trial by the Record** [Black's Law 4th edition, 1891] - "*A form of trial resorted to where issue is taken upon a plea of nul tiel record, in which case the party asserting the existence of a record as pleaded is bound to produce it in court on a day assigned. If the record is forthcoming, the issue is tried by inspection and examination of it. If the record is not produced, judgment is given for his adversary*". **3 Bl.Comm. 330**.

24) Defendant acquiesced, raising no objection to a court of record in his pleadings.

25) Defendant has had ample time, and it was demanded of him, to produce material facts, and defendant has failed to do so.

26) There is no appeal from a court of record[13] "*... Decision of a court of record may not be appealed. It is binding on ALL other courts. However, no statutory or constitutional court (whether it be an appellate or supreme court) can second guess the judgment of a court of record. "The judgment of a court of record whose jurisdiction is final, is as conclusive on all the world as the judgment of this court would be. It is as conclusive on this court as it is on other courts. It puts an end to inquiry concerning the fact, by deciding it*."

---

[9] **AT LAW**. [Bouvier's Law, 1856 Edition] This phrase is used to point out that a thing is to be done according to the course of the common law; it is distinguished from a proceeding in equity.

[10] **A "COURT OF RECORD**" is a judicial tribunal having attributes and exercising functions independently of the person of the magistrate designated generally to hold it, and proceeding according to the course of common law, its acts and proceedings being enrolled for a perpetual memorial. Jones v. Jones, 188 Mo.App. 220, 175 S.W. 227, 229; Ex parte Gladhill, 8 Metc. Mass., 171, per Shaw, C.J. See, also, Ledwith v. Rosalsky, 244 N.Y. 406, 155 N.E. 688, 689.

*** New York State Constitution Article VI, 1b (2)** The court of appeals, the supreme court including the appellate divisions thereof, the court of claims, the county court, the surrogate`s court, the family court, the courts or court of civil and criminal jurisdiction of the city of New York, and such other courts as the legislature may determine shall be courts of record.

* **N.Y.JUD.LAW §753:** (A) A court of record has power to punish, by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced, in any of the following cases: (1) An attorney, counselor, clerk, sheriff, coroner, or other person, in any manner duly selected or appointed to perform a judicial or ministerial service, for a misbehavior in his office or trust, or for a willful neglect or violation of duty therein; or for disobedience to a lawful mandate of the court, or of a judge thereof, or of an officer authorized to perform the duties of such a judge. ... (7) An inferior magistrate, or a judge or other officer of an inferior court, for proceeding, contrary to law, in a cause or matter, which has been removed from his jurisdiction to the court inflicting the punishment; or for disobedience to a lawful order or other mandate of the latter court. (8) In any other case, where an attachment or any other proceeding to punish for a contempt, has been usually adopted and practiced in a court of record, to enforce a civil remedy of a party to an action or special proceeding in that court, or to protect the right of a party.

[11] See exhibit I, 14 pages

[12] **COURT** - [Black's Law Dictionary, 5th Edition] The person and suit of the sovereign; the place where the sovereign sojourns with his regal retinue, wherever that may be.

[13] **New York State Constitution Article VI** ... As of right, from a judgment or order of a COURT OF RECORD of original jurisdiction which finally determines an action or special proceeding where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States; and on any such appeal only the constitutional question shall be considered and determined by the court.

*** New York State Constitution Article VI, 1b (2)** The court of appeals, the supreme court including the appellate divisions thereof, the court of claims, the county court, the surrogate`s court, the family court, the courts or court of civil and criminal jurisdiction of the city of New York, and such other courts as the legislature may determine shall be courts of record.

[Ex parte Watkins, 3 Pet., at 202-203. [cited by SCHNECKLOTH v. BUSTAMONTE, 412 U.S. 218, 255 (1973)].

27) "*...As of right, from a judgment or order of a court of record of original jurisdiction which finally determines an action or special proceeding where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States; and on any such appeal only the constitutional question shall be considered and determined by the court.*" **New York State Constitution Article VI**

WHEREFORE the plaintiff moves this Honorable Court to enter an Order adjudging the defendant liable to the plaintiff in the amount of $112,600.00[14], together with such other and further relief as the Court may deem reasonable and just under the circumstances, and adjudging that the defendants five (5) counterclaims, namely (1) Breach of contract, (2) Unjust enrichment, (3) Money had and received, (4) Agent breaching fiduciary duty to principal, and (5) trespass vacated for failing to state and prove any viable cause of action.

I Certify that a good faith effort to communicate with opposing counsel with a view toward resolving the issue raised by the foregoing motion the parties are at an impasse.

VERIFICATION

I John [redacted], Affiant, being of lawful age, qualified and competent to testify to, and having firsthand knowledge of the foregoing facts, do hereby swear that the facts are true, correct, and not misleading:

_____

John [redacted], plaintiff

NOTARY

State of New York, County of Dutchess, on this _____ day of _____, 2012 before me _____, the subscriber, personally appeared John [redacted], to me known to be the living man describe in and who executed the forgoing instrument and sworn before me that he executed the same as his free will act and deed.

_____

Notary

My commission expires: _____

(Notary Seal)

---

[14] **SEE** plaintiffs bill of particulars, dated November 27, 2012 for a justification of the amount of damages.

BILL OF PARTICULARS EXAMPLE

New York Supreme Court, Dutchess County

[redacted],	Plaintiff;	CASE NO. 2751/2012 JUDGE:_____
- against -		
[redacted],	Defendant.	**Bill of Particulars**

Plaintiff, [redacted], responds to defendants demand for a verified bill of particulars, dated November 23, 2012:

1) On or about April 19, 2012 defendant requested a lowering of plaintiffs CM (Construction Manager) fee, I agreed to negotiate, see plaintiffs exhibits, volume II, §11 - e-mail pg 13 dates 4-19-12 through 5-20-12
   a) On 5-9-12 in the process of negotiations defendant stated, and I quote "*If I am not happy with your service and want to get out of it, I will simply write you a termination letter. At this point, this is not the case. I just returned Monday night and I still believe we can still work together*." see plaintiffs exhibits, volume II, §11 - e-mail pg 6 date 5-9-12
   b) During these negotiations by e-mail the defendant expected that plaintiff reduce the contracted agreed upon fee of 8%, which represents about $210,000.00, versus the $50,000.00 proposed by defendant, which was unacceptable.
   c) On 5-9-12 the defendant then got angry and stated, and I quote, "*I cannot afford to continue to pay you 8% fee for the portion of work you managed **as agreed**, since I am not satisfied with your performance* ..." see plaintiffs exhibits, volume II, §11 - e-mail pg 5 date 5-11-12
   d) Clearly between 4-19-12 through 5-20-12 the only issue being discussed, along with my continued progress reports, was not the plaintiffs performance but the cost agreed upon in the contract.
   e) With the one exception that first rose, conveniently, on 5-11-12, the first time in nine months that the defendant voiced a negative opinion of plaintiff's service, the same day defendant breached the contract, was concerning the finding of windows for $32,000 cheaper at Lowes, which the defendant was, past, clear on when discussing windows that he wanted Marvin windows and not Pella or Anderson windows.
   f) This was a high end project and more often than not the defendant choose the higher priced products.

2) When the contract was negotiated I informed the defendant that I would need payments during the first few months because there was a lot of planning and bidding that needed to be accomplished before work and/or materials would be ordered and/or completed, the defendant insisted that I get paid as he paid contractors and suppliers, I hesitantly agreed:
   a) Plaintiff worked for three months with the first payment on 11-4- 11, for $5,537.60.
   b) Plaintiff received a second check on 12-28-11, in the amount of $3,597.00.
   c) Plaintiff received a third check on 3-6-12, in the amount of $6,000.00.
   d) Plaintiff has been paid to date a total of $15,134.60.

e) Plaintiff on or about 4-11-12, after defendant told plaintiff that he had wired money to pay for windows, plaintiff requested a payment due in the amount of $15,393.64, see plaintiffs exhibits, volume I, §8, for convenience a copy titled "Schedule of values" is attached see plaintiff's exhibit C.
f) On or about 4-13-12 plaintiff met with defendant to give an update on progress, and requested payment again, defendant said he was working on it and he wanted plaintiff to consider reducing the agreed upon fee, plaintiff agreed that he would.
g) On or about 4-16-12 defendant left the country, without paying plaintiff.
h) On or about 4-19-12 defendant and plaintiff started negotiations.
i) On 4-25-12 plaintiff requested payment again, see plaintiffs exhibits, volume II, §11 - e-mail pg 8 dated 4-25-12
j) On 5-11-12 defendant breached the contract by terminating without cause and refusal to pay the $15,393.64 that was under requisition at the time, see plaintiffs exhibits, volume II, §11 - e-mail pg 3 dated 5-11-12

3) **Estimated home construction cost $2,400,000 +** theater see architectural plans plaintiffs exhibits, Volume 1, section §03 and take-offs §02.
   a) Basement (5120 SF) 4-car garage, movie theater, weight room, entertaining area, Jacuzzi, 1-bath room, wine cellar, and kitchen
   b) First floor (4918 SF) - 17 rooms, 4 bathrooms, 2 kitchens, main stairs, servant stairs.
   c) Second Floor (3789 SF) - 12 rooms, and 6 bathrooms
   d) Attic - (4918 SF)
      i) Totals: 31 rooms, plus 11 bathroom, 3 kitchens, movie theater, Jacuzzi, wine cellar, main stairs, servant stairs, 4 car garage: (53 rooms altogether) 13,827 SF living area @ $175/SF [a modest SF rate for a luxury home] = $2,419,725.

4) **Estimated site work cost $223,935 +** fish pond, import top soil, seeding, solar panels, generator, pool, pool house, and tennis court, see engineering plans, plaintiffs exhibits, Volume 1, §02 and take-offs §02.

a)	Clearing, removing stumps from site (3 acres)	$ 21,000.00 actual cost
b)	Site and home excavation, and erosion control	$ 36,675.00 actual cost
c)	Driveway (approx 800 LF) sub-base. blacktop, & seed	$ 83,320.00 low bid
d)	Drainage system	$ 10,300.00 low bid
e)	Sanitary system	$ 19,580.00 low bid
f)	Water system	$ 13,395.00 low bid
g)	Retaining walls	$ 39,675.00 low bid

   h) Items in bidding process - fish pond, import top soil, seeding, solar panels, generator, pool, tennis court, putting greens and nets:

5) Total estimated project cost $2,623,935.00+.
6) Estimated construction management cost at 8% for completed project = $209,900.00+

7) Most of the construction management work is pre construction work which includes:
   a) **Take-off** - calculating and detailing all of the components for construction this is called the take-off at the time of the breach of contract this was 100% completed.
   b) **Meetings** - with owner and contractors, defendant was out of the country majority of the time and when defendant returned meetings were set up, some of which defendant did not show up for, plaintiff and defendant met about 4 days per month.
   c) **Meetings**, phone conversations and email with architect, engineer, designers, contractors and suppliers.

d) **Work bid, negotiated and started**:
   i) Site work
   ii) Concrete
   iii) Water-proofing

e) **Work bided, negotiated and ready to start**:
   i) Masonry
   ii) Framing
   iii) Roofing
   iv) Copper
   v) Insulation
   vi) Plumbing
   vii) HVAC
   viii) Sheetrock
   ix) Paint
   x) Main stairs
   xi) Fire places
   xii) Windows and doors

f) **Bidding process completed** and collecting prices
   i) Electrical
   ii) Movie theater

g) **Finishing work** - waiting on defendant to answer questions on material requirements in order to bid, see plaintiffs exhibits, Volume 1, §08-schedules-charts-notes-etc.
   i) Cabinetry
   ii) Appliances
   iii) Fixtures
   iv) Flooring
   v) Marble
   vi) Finish carpentry

h) About 80% of the bidding and negotiations with contractors and suppliers was completed

8) **Estimating amount due the plaintiff by the hour**, plaintiff was engaged by defendant and working from Aug 9, 2011 to April 19, 2012 which was 9 months and 11 days or 37 weeks.
   a) Amount plaintiff billed defendant prior to breach was $30,528.24
   b) Amount plaintiff received from the defendant prior to the breach was $15,134.60
   c) Plaintiff time invested in defendants project was an average of 30 hours per week at 41 weeks = 1230 hours at, see plaintiffs exhibits Volume I and II (approx 650 pages w/progressive pictures) for proof of work.
   d) Amount paid by defendant to date - $15,134.00/1230 hours = $12.30/hour
   e) Amount billed defendant to date - $30,528.24/1230 hours = $24.82/hour

9) Amount due plaintiff if billed by the hour.
   a) Construction management cost $110.00/per hour x 1230 hours = $135,300.00 minus $15,134 paid by defendant = **Amount due the plaintiff $120,166.00**

10) **Amount due plaintiff by estimating contract cost and estimated work completed**;
   a) Total contract estimate above - $2,623,935.00+ @ 8% = $209,914.00 estimating 65% the construction management work was completed the total = $136,444.00 minus $15,134.00 paid by defendant = **Amount due the plaintiff $121,310.00**

11) The afore-calculations does not take damages into consideration, such as loss of contract opportunities during the nine months plaintiff was working on defendants project

12) Attached is a recap of the above calculations on a spread sheet for easier appreciation, see plaintiffs exhibit D.

I [redacted], Affiant, being of lawful age, qualified and competent to testify to, and having firsthand knowledge of the foregoing facts, do hereby swear that the facts are true, correct, and not misleading:

November 27, 2012

_____
[redacted], Plaintiff

NOTARY

State of New York, County of Dutchess, on this _____ day of _____, 2012 before me _____, the subscriber, personally appeared [redacted], to me known to be the living man describe in and who executed the forgoing instrument and sworn before me that he executed the same as his free will act and deed.

_____
Notary

My commission expires: _____
(Notary Seal)

MOTION FOR SUMMARY JUDGMENT

CPLR 3212

(a) Time; kind of action.

Any party may move for summary judgment in any action, after issue has been joined; provided however, that the court may set a date after which no such motion may be made, such date being no earlier than thirty days after the filing of the note of issue. If no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown.

(b) Supporting proof; grounds; relief to either party.

A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision (c) of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion.

(c) Immediate trial.

If it appears that the only triable issues of fact arising on a motion for summary judgment relate to the amount or extent of damages, or if the motion is based on any of the grounds enumerated in subdivision (a) or (b) of rule 3211, the court may, when appropriate for the expeditious disposition of the controversy, order an immediate trial of such issues of fact raised by the motion, before a referee, before the court, or before the court and a jury, whichever may be proper.

(e) Partial summary judgment; severance.

In a matrimonial action summary judgment may not be granted in favor of the non-moving party. In any other action summary judgment may be granted as to one or more causes of action, or part thereof, in favor of any one or more parties, to the extent warranted, on such terms as may be just. The court may also direct: 1. that the cause of action as to which summary judgment is granted shall be severed from any remaining cause of action; or 2. that the entry of the summary judgment shall be held in abeyance pending the determination of any remaining cause of action.

(f) Facts unavailable to opposing party.

Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.

(g) Limitation of issues of fact for trial.

If a motion for summary judgment is denied or is granted in part, the court, by examining the papers before it and, in the discretion of the court, by interrogating counsel, shall, if practicable, ascertain what facts are not in dispute or are incontrovertible. It shall thereupon make an order specifying such facts and they shall be deemed established for all purposes in the action. The court may make any order as may aid in the disposition of the action.

(h) Standards for summary judgment in certain cases involving public petition and participation.

A motion for summary judgment, in which the moving party has demonstrated that the action, claim, cross claim or counterclaim subject to the motion is an action involving public petition and participation, as defined in paragraph (a) of subdivision one of section seventy-six-a of the civil rights law, shall be granted unless the party responding to the motion demonstrates that the action, claim, cross claim or counterclaim has a substantial basis in fact and law or is supported by a substantial argument for an extension, modification or reversal of existing law. The court shall grant preference in the hearing of such motion.

(i) Standards for summary judgment in certain cases involving licensed architects, engineers, land surveyors or landscape architects.

A motion for summary judgment, in which the moving party has demonstrated that the action, claim, cross claim or counterclaim subject to the motion is an action in which a notice of claim must be served on a licensed architect, engineer, land surveyor or landscape architect pursuant to the provisions of subdivision one of section two hundred fourteen of this chapter, shall be granted unless the party responding to the motion demonstrates that a substantial basis in fact and in law exists to believe that the performance, conduct or omission complained of such licensed architect, engineer, land surveyor or landscape architect or such firm as set forth in the notice of claim was negligent and that such performance, conduct or omission was a proximate cause of personal injury, wrongful death or property damage complained of by the claimant or is supported by a substantial argument for an extension, modification or reversal of existing law. The court shall grant a preference in the hearing of such motion.

DEFAULT JUDGMENT

N.Y. CVP. LAW § 3215 : NY Code - Section 3215: Default judgment

(a) Default and entry. When a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed, the plaintiff may seek a default judgment against him. If the plaintiff's claim is for a sum certain or for a sum which can by computation be made certain, application may be made to the clerk within one year after the default. The clerk, upon submission of the requisite proof, shall enter judgment for the amount demanded in the complaint or stated in the notice served pursuant to subdivision (b) of rule 305, plus costs and interest. Upon entering a judgment against less than all defendants, the clerk shall also enter an order severing the action as to them. When a plaintiff has failed to proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed, the defendant may make application to the clerk within one year after the default and the clerk, upon submission of the requisite proof, shall enter judgment for costs. Where the case is not one in which the clerk can enter judgment, the plaintiff shall apply to the court for judgment.

(b) Procedure before court. The court, with or without a jury, may make an assessment or take an account or proof, or may direct a reference. When a reference is directed, the court may direct that the report be returned to it for further action or, except where otherwise prescribed by law, that judgment be entered by the clerk in accordance with the report without any further application. Except in a matrimonial action, no finding of fact in writing shall be necessary to the entry of a judgment on default. The judgment shall not exceed in amount or differ in type from that demanded in the complaint or stated in the notice served pursuant to subdivision (b) of rule 305.

(c) Default not entered within one year. If the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed. A motion by the defendant under this subdivision does not constitute an appearance in the action.

(d) Multiple defendants. Whenever a defendant has answered and one or more other defendants have failed to appear, plead, or proceed to trial of an action reached and called for trial, notwithstanding the provisions of subdivision (c) of this section, upon application to the court within one year after the default of any such defendant, the court may enter an ex parte order directing that proceedings for the entry of a judgment or the making of an

assessment, the taking of an account or proof, or the direction of a reference be conducted at the time of or following the trial or other disposition of the action against the defendant who has answered. Such order shall be served on the defaulting defendant in such manner as shall be directed by the court.

(e) Place of application to court. An application to the court under this section may be made, except where otherwise prescribed by rules of the chief administrator of the courts, by motion at any trial term in which the action is triable or at any special term in which a motion in the action could be made. Any reference shall be had in the county in which the action is triable, unless the court orders otherwise.

(f) Proof. On any application for judgment by default, the applicant shall file proof of service of the summons and the complaint, or a summons and notice served pursuant to subdivision (b) of rule 305 or subdivision (a) of rule 316 of this chapter, and proof of the facts constituting the claim, the default and the amount due by affidavit made by the party, or where the state of New York is the plaintiff, by affidavit made by an attorney from the office of the attorney general who has or obtains knowledge of such facts through review of state records or otherwise. Where a verified complaint has been served, it may be used as the affidavit of the facts constituting the claim and the amount due; in such case, an affidavit as to the default shall be made by the party or the party's attorney. When jurisdiction is based on an attachment of property, the affidavit must state that an order of attachment granted in the action has been levied on the property of the defendant, describe the property and state its value. Proof of mailing the notice required by subdivision (g) of this section, where applicable, shall also be filed.

(g) Notice. 1. Except as otherwise provided with respect to specific actions, whenever application is made to the court or to the clerk, any defendant who has appeared is entitled to at least five days' notice of the time and place of the application, and if more than one year has elapsed since the default any defendant who has not appeared is entitled to the same notice unless the court orders otherwise. The court may dispense with the requirement of notice when a defendant who has appeared has failed to proceed to trial of an action reached and called for trial.

2. Where an application for judgment must be made to the court, the defendant who has failed to appear may serve on the plaintiff at any time before the motion for judgment is heard a written demand for notice of any reference or assessment by a jury which may be granted on the motion. Such a demand does not constitute an appearance in the action. Thereupon at least five days' notice of the time and place of the reference or assessment by

a jury shall be given to the defendant by service on the person whose name is subscribed to the demand, in the manner prescribed for service of papers generally.

3. (i) When a default judgment based upon nonappearance is sought against a natural person in an action based upon nonpayment of a contractual obligation an affidavit shall be submitted that additional notice has been given by or on behalf of the plaintiff at least twenty days before the entry of such judgment, by mailing a copy of the summons by first-class mail to the defendant at his place of residence in an envelope bearing the legend "personal and confidential" and not indicating on the outside of the envelope that the communication is from an attorney or concerns an alleged debt. In the event such mailing is returned as undeliverable by the post office before the entry of a default judgment, or if the place of residence of the defendant is unknown, a copy of the summons shall then be mailed in the same manner to the defendant at the defendant's place of employment if known; if neither the place of residence nor the place of employment of the defendant is known, then the mailing shall be to the defendant at his last known residence.

(ii) The additional notice may be mailed simultaneously with or after service of the summons on the defendant. An affidavit of mailing pursuant to this paragraph shall be executed by the person mailing the notice and shall be filed with the judgment. Where there has been compliance with the requirements of this paragraph, failure of the defendant to receive the additional notice shall not preclude the entry of default judgment.

(iii) This requirement shall not apply to cases in the small claims part of any court, or to any summary proceeding to recover possession of real property, or to actions affecting title to real property, except residential mortgage foreclosure actions.

4. (i) When a default judgment based upon non-appearance is sought against a domestic or authorized foreign corporation which has been served pursuant to paragraph (b) of section three hundred six of the business corporation law, an affidavit shall be submitted that an additional service of the summons by first class mail has been made upon the defendant corporation at its last known address at least twenty days before the entry of judgment.

(ii) The additional service of the summons by mail may be made simultaneously with or after the service of the summons on the defendant corporation pursuant to paragraph (b) of section three hundred six of the business corporation law, and shall be accompanied by a notice to the corporation that service is being made or has been made pursuant to that provision. An affidavit of mailing pursuant to this paragraph shall be executed by the person mailing the summons and shall be filed with the judgment. Where there has been compliance

with the requirements of this paragraph, failure of the defendant corporation to receive the additional service of summons and notice provided for by this paragraph shall not preclude the entry of default judgment.

(iii) This requirement shall not apply to cases in the small claims part or commercial claims part of any court, or to any summary proceeding to recover possession of real property, or to actions affecting title to real property.

(h) Judgment for excess where counterclaim interposed. In an action upon a contract where the complaint demands judgment for a sum of money only, if the answer does not deny the plaintiff's claim but sets up a counterclaim demanding an amount less than the plaintiff's claim, the plaintiff upon filing with the clerk an admission of the counterclaim may take judgment for the excess as upon a default.

(i) Default judgment for failure to comply with stipulation of settlement.

1. Where, after commencement of an action, a stipulation of settlement is made, providing, in the event of failure to comply with the stipulation, for entry without further notice of a judgment in a specified amount with interest, if any, from a date certain, the clerk shall enter judgment on the stipulation and an affidavit as to the failure to comply with the terms thereof, together with a complaint or a concise statement of the facts on which the claim was based.

2. Where, after commencement of an action, a stipulation of settlement is made, providing, in the event of failure to comply with the stipulation, for entry without further notice of a judgment dismissing the action, the clerk shall enter judgment on the stipulation and an affidavit as to the failure to comply with the terms thereof, together with the pleadings or a concise statement of the facts on which the claim and the defense were based.

CHAPTER 5

PROCEDURES AND SUBSTANCE

- Motions in General
- Form
- Evidence
- Objections

Motions in General

Content of the Memorandum in Support – State or Federal - The memorandum in support should, of course, clearly reference the motion it is offered to support. This is done not merely by name (e.g., Plaintiff's Second Motion to Compel Better Answers to Interrogatories) but also by the service date of the motion as filed (e.g., "… bearing service date of 17 October 2005") so there is no possible mistake about what motion you are arguing for.

The memorandum should re-state your motion *concisely* and support the motion with citations to case law, statutes, court rules, administrative code, and/or constitutional references. Everything in the memorandum should support entry of the order you seek. Where language in the supporting citations applies *directly* to the facts, quote *directly* from the references. If a controlling case reads, "Upon motion of a party, the court must examine the document *in camera,* …" and you wish the court to examine some document *in camera*, then quote from the statute directly so the court has no wiggle room to deny your motion.

Content of the Response (Memorandum in Opposition) – State or Federal - The response memorandum should do two (2) things. First, of course, it should tell the court why the motion should *not* be entered by citing controlling authorities ignored by the movant, arguing how those authorities that were omitted by the movant are, in fact, the law that controls the outcome. Second, it should show the court how the movant's arguments are off-point. If the movant cites as legal basis for his motion references that do not apply to the facts of the case, *make that clear in your response!* Quote from the references cited by your opponent to show where the authority is misplaced.

You must, of course, read all the cases, statutes, and other authorities your opponent cites in his memorandum. Read beyond the headnotes, carefully analyzing every word of the official writings to determine whether or not they are controlling law. Finally, cite your own authorities, explaining why they apply (instead of those cited by your opponent) and finalize a strong argument why your authorities *require* the court to deny the motion.

Content of the Reply – State or Federal - Though the movant may not be obligated to file a reply memorandum, there may be times when the non-movant's response memorandum mis-quotes the law or mis-applies the law … in which case the movant is permitted to file a reply (which is to the response memorandum what the response is to the initial motion and memorandum in support.
The movant's reply opposes the non-movant's response – which, you'll remember, opposes the movant's initial motion.

The reply is not for re-arguing what's already argued in the movant's initial motion and memorandum. The reply should not go over old ground. The proper use of the reply is to oppose error or new argument raised for the first time in the non-movant's response. The reply cites and quotes controlling authority, persuading the court that the argument and authorities set forth by non-movant in his response memorandum are misleading or utterly false.

Motions in State Court - In federal court, the motion is filed by itself, simply stating what the party wishes the court to rule, while the argument and citations to case law and statutes are filed

separately in a memorandum in support of the motion In state court, the same two-step process *may* be used, but generally state court motions contain both a statement of what the movant wants and also the movant's legal and factual argument (supported by citations to controlling authorities) that tell the court why it should grant the motion. In other words, with most state court motions, the memorandum and motion are combined in one paper. If argument in favor of a state court motion is unusually complex, however, the movant *may* (at his option) file a memorandum in support (as in federal court) going into greater detail with arguments of law and statements of fact supporting his motion.

As a general rule, if a motion with argument requires more than four pages, make the motion simpler and amplify with a separate memorandum in support. Most motions in state court are presented at hearings prior to the court's ruling. If you don't set a state court motion for hearing[7] (brilliantly reasoned and skillfully written though it may be) the paperwork could lie dormant in the court's files for years before finally being stashed away on microfilm in some storage warehouse at the edge of town. Ultimately, it might be scanned as a digital image in some giant computer database in a faraway city … *never to be seen again.*

Most written motions in state court *require* a hearing … an opportunity for both sides to prepare and present legal and factual arguments in hopes of persuading the judge to rule one way or the other. Without a hearing, most state court motions will *never* be ruled upon (whether yours or the other fellow's). It isn't fair to allow the court to rule (with a few exceptions we'll examine later in this tutorial) without giving *both* sides an equal chance to prepare and present arguments and, in certain cases, to call witnesses and offer evidence.

This is where "due process" really kicks in! In fact, the very meaning of due process is nowhere more clear than when we're talking about notices and hearings. Every person has an equal right to be heard. Being heard, however, includes the right to receive reasonable notice in advance of the hearing, i.e., to know where and when the hearing will be held, to know the nature of the matter being reviewed, and to have time to prepare – including time to call witnesses, discover evidence, and research law (cases, statutes, rules, or constitutions) that could persuade the judge and control the outcome.

Anything less is not due process! Anything the court does *without* due process is not American! To get "due process" in *your* case and protect yourself from crooked lawyers and corrupt judges, you must *demand* it … and *make a record for appeal if you don't get it*. Filing motions in state court without setting them for hearing is *not* making your record for appeal. It's up to *you* to move your case. Strangely, however, many *pro se* people (and even a few experienced lawyers) fail to see the necessity of setting motions for hearing. It's as if they think the judge *reads* all the papers that get filed with the clerk. Nothing could be farther from the truth.

Motions in Federal Court - In federal court your motion does little more than tell the court what order you want the court to enter. You follow this with a memorandum in support of your motion. Your opponent then files a memorandum in opposition. You may then (at your option) file a reply memorandum rebutting the response memorandum that opposes your motion. In due course (when the federal judge or magistrate) gets around to it, your motion and the parties' respective memoranda will be read and ruled upon … without a hearing.

There are exceptions, of course. There are always exceptions. Check the local federal court rules to see what motions require a hearing and what motions permit a hearing upon petition by one or both of the parties. Typically, federal court motions are not unlike state court motions. They seek orders. The orders sought either (1) command someone to do something, (2) make findings of fact as legal conclusions from evidence presented, or (3) adjudge one party indebted or otherwise obligated to the other.

The memorandum in support contains the legal basis that justifies entry of the order sought together with a discussion of relevant facts and citations to legal authorities that should persuade the court to grant the motion. The non-moving party's response memorandum, sets out a different view of the law and facts, making opposing arguments designed to persuade the court to deny the motion. The movant may file a reply to the response (but is not obligated to do so). This is called "motion practice".

Frequently Used Motions

Motion for Extension of Time - This motion seeks an order giving movant a later deadline, e.g., extending the time to file a response to some discovery request[11], to obtain additional discovery, or to take some other action that is constrained by time limitations. The motion needs to show (1) a good faith effort was made to comply within the deadline, (2) that the extension will not unduly burden or prejudice the other side's case, and (3) that the interests of justice will be served by the extension. This motion should be filed as soon as the necessity for more time is known.

Motion to Exceed Page Limit - Many courts put a limit on the number of pages one can use with various documents (motions, memoranda, briefs, etc.). In unusually complex cases, this limit on pages may prevent a party from fully explaining a matter. In most cases the motion will be granted, unless the movant has previously abused an extended court privilege or otherwise acted beyond the scope of proper protocol and procedure.

Motion for Continuance - Judges don't like continuances and generally oppose them. Continuances juggle the court's calendar and delay efficient conclusion of cases. Good cause *must* be shown. The fact you wanted to take a family vacation during the week scheduled for a hearing or trial will probably be insufficient. A death in the family or some other genuine emergency that prevents you from attending will almost always be honored.

Motion to Seal - Sensitive papers must sometimes be filed with the court. The judge and the opposing party must see these papers to insure due process, however in some cases the party filing the papers has valid reasons for not wanting anyone else to see the papers. The motion to seal seeks an order directing the clerk to put such papers in a sealed file and deny access to anyone who doesn't have a court order authorizing inspection.

Motion to Amend - A motion to amend may be filed anytime a party wishes to alter what's been said in a document already filed. It might be a discovery response, a motion, or a memorandum. In most cases it is a pleading[12]. In the case of the initial pleading (the complaint) one may amend without leave of court (i.e., without a motion) so long as the other side has not yet filed an answer. In all other cases, if what's been said needs to be changed, one must file a motion to amend and obtain an order authorizing the amendment. A sample copy of a motion to amend is shown. If the defendant

fails to file a responsive pleading (or delaying motion) within the time permitted for such filings, the plaintiff may move for entry of the clerk's default. Defaults are usually set aside by a showing (1) the failure or delay was a result of excusable neglect and (2) there is a reasonable likelihood that the defaulted party can prevail in the case. The defaulted party cannot proceed until he files a motion and obtains an order setting aside the default.

Motion for Default Judgment - If the clerk enters a default against the defendant, or if any party violates the rules so abusively that default is warranted as a sanction to punish the offending party, one may move the court for entry of an order of default judgment … and the case is over.

- MOTION TO AMEND EXAMPLE -

NEW YORK SUPREME COURT, DUTCHESS COUNTY

Your Name, Plaintiff, - a - DEFENDANT, Defendant	Case No. 12345 **MOTION TO AMEND**

PLAINTIFF, Your Name, moves this Honorable Court to enter an Order allowing plaintiff to amend complaint to add Defendant 2 as defendant and to allege counts against defendant individually, stating in support:

1) As a result of discovery and the ongoing proceedings in this matter plaintiff has acquired knowledge of torts committed against it by Defendant 2 who should be added as a defendant in this action.
2) The torts committed by Defendant 2 arise out of fact circumstances common to this action.
3) A copy of the proposed amendment is attached.

WHEREFORE the plaintiff moves the Court to enter an Order allowing plaintiff to amend complaint by appending the pleading attached hereto.

I CERTIFY that a copy of the foregoing was provided to Dewey Cheatham, Esq., 38 Liar Lane, Somewhere, New York 99999 this 19th day of April 2005.

Motion to Dismiss - Motions to dismiss may be filed for various reasons. The order sought is one that dismisses part or all of the other side's case. The general rule is for dismissals to be set aside (upon motion by the dismissed party) if the error is cured within a reasonable time. The most common motion to dismiss is filed when the plaintiff fails to state a cause of action (or claim upon which the court can grant relief), however courts generally give plaintiffs additional time to amend complaints to cure this common defect. If one party has not taken affirmative action to move his case along and nothing is done within a certain period of time (varies by jurisdiction) one may move the court to dismiss for lack of prosecution.

Motion to Strike - A motion to strike seeks an order deleting parts or all of an opponent's paper on the grounds it is scandalous, impertinent, inflammatory, or absolutely false and known to be false

at the time of filing. An example is the motion to strike sham, filed when a movant's opponent files a paper containing false statements known to be false at the time of filing. If a plaintiff files a complaint, for example, containing false statements known to be false at the time of filing, the defendant may by this motion obtain an order dismissing the case in its entirety and *with prejudice* so it cannot be amended and filed again. Movant must, however, prove the falsehood and his opponent's knowledge of the falsehood.

Motion for Summary Judgment - If a case presents no issue of material fact (i.e., not one single issue that could affect the outcome) so there remains nothing further to be decided by the court, you can move the court to enter an order of summary judgment. To obtain such an order, however, you must show there is absolutely *nothing* about the facts that can be seen in any way other than favorable to you. If there are any issues of material (relevant) fact remaining in the record of the case, summary judgment motions should be denied. If summary judgment is granted while there are remaining issues of material fact, appeal is necessary. Appeal is not permitted if summary judgment is denied.

Motion for Reconsideration / Re-hearing - This is an often misunderstood motion. Although it is recommended when one loses a motion (because it gives the losing party another opportunity to make his record in a cogent writing filed with the clerk) it is seldom granted. Moreover, it does *not* toll the deadline for appeal. Don't make the common mistake of failing to file notice of appeal while waiting for the court to rule on your motion for reconsideration. The clock keeps ticking. Failure to file notice of appeal in the time allowed makes appeal impossible.

Motion to Compel Discovery - It's amazing how many *pro se* litigants fail to move the court to compel discovery after receiving from a hired-gun lawyer for the other side bogus responses to reasonable interrogatories, requests for production, or requests for admissions. Most lawyers refuse to file good faith discovery responses. Instead, you'll get, "Objection. Vague, ambiguous, seeks to inquire into the attorney-client privilege, outside the scope of discovery, not reasonably calculated to lead to discovery of admissible evidence," or something similar intended to throw you off. Don't put up with it! File a motion to compel, citing rules that grant your right to discovery. Explain why things you sought to discover are "reasonably calculated to lead to admissible evidence". If what you seek is reasonable, the court will command the other side to respond accordingly. If you don't file a motion you won't get your evidence, and you'll likely lose your case for lack of proof.

Motion for Protective Order - If discovery (including depositions) is likely to unduly burden or prejudice a party, that party may move for a protective order to either prevent the discovery altogether or require that discovery take place under controlled conditions. If controlled conditions will afford sufficient protection, the movant should state the conditions requested, instead of seeking to avoid the discovery altogether, since judges are disinclined to deny discovery completely except under the most egregious circumstances.

Motion to Determine Sufficiency - This motion is used to challenge an opponent's response to a request for admissions. The rules require no more than simple "Admitted" or "Denied" responses. *But, the rules are intolerant of objections or outright refusals to respond.* The penalty for trying to avoid either admitting or denying a fact set forth in the request is to have that fact deemed admitted by court order using a "Motion to Determine Sufficiency" of the responses. The penalty for lying in a response may be judgment for the requesting party, *if the lie was intentional and can be proven*. If a party objects, he must give detailed reasons for his objection. An objection by itself does not suffice.

Objections must be explained in detail. If a party fails to either admit or deny or otherwise fails to respond appropriately to a request for admissions, the requesting party may file a Motion to Determine Sufficiency. If the motion is granted, the court's order will deem the improper responses as admissions, in which case everything the other side refused to admit in a straightforward manner as required by the rules will be treated as true for all purposes in the case. A good thing for you!

- EXAMPLE -

NEW YORK SUPREME COURT, DUTCHESS COUNTY

Your Name, Plaintiff, - a - DEFENDANT, Defendant	Case No. 12345 **MOTION TO DETERMINE SUFFICIENCY**

PLAINTIFF, Your Name, pursuant to Rule _____ New York Rules of Civil Procedure, moves this Honorable Court to enter an Order determining insufficient a response of defendant to plaintiff's request for admissions and deeming same admitted for all purposes, stating in support:

1) This court is not a forum for cute tricks nor a stage for clever use of smoke and mirrors word magic to evade responding to lawful discovery requests.
2) Defendant's response to plaintiff's request for admissions is nothing short of a word game.
3) In his request for admissions #1, plaintiff sought to establish that a contract forming the basis for this lawsuit "contemplated" there would be a limit on defendant's ability to trade her stock.
4) Defendant evaded answering by claiming contracts cannot "contemplate" because (as defendant asserts with the transparent guile of a pre-schooler) contracts are "inanimate objects".
5) Use of "contemplates" in reference to contracts is well known and judicially approved.
6) The Florida Supreme Court and Fourth District Court of Appeals use this term routinely in written opinions describing what contracts "contemplate". Pandya v. Israel, 761 So.2d 454 (Fla. 4th DCA 2000); Petracca v. Petracca, 706 So.2d 904 (Fla. 4th DCA 1998); Baker v. Baker, 394 So.2d 465 (Fla. 4th DCA 1981); Potter v. Collin, 321 So.2d 128 (Fla. 4th DCA 1975); Belcher v. Belcher, 271 So.2d 7 (Fla. 1972); Bergman v. Bergman, 199 So. 920 (Fla. 1940); Bowers v. Dr. Phillips, 129 So. 850 (Fla. 1930).
7) Dirtbag's resort to word games is in contempt of this Court's lawful authority and should be sanctioned by entry of an Order deeming the requested admission admitted for all purposes.

WHEREFORE plaintiff Peter Plaintiff moves the Court to enter an Order deeming the request referenced herein admitted for all purposes.

Motion to Show Cause - If a party disobeys a court order or commits perjury (a *material* false statement that was known to be false when made) the proper procedure is a motion to show cause why that person should not be held in contempt. The motion will generally be heard, so the offending party has an opportunity to show either (1) he didn't do *or fail to do* what the movant alleges or (2) that he had good cause to do what he did *or didn't do.* If he cannot show good cause, an order may be entered requiring further performance.

Motion for Contempt - If a party fails to obey a show cause order, a motion for contempt should be made, seeking an order finding the offending party in contempt. In general, contempt orders give the offending party one further opportunity to cure. Failure to cure can result in a warrant being issued for the offending party's arrest.

Motion in Limine - Motions *in limine* are filed before trial to either limit the introduction of evidence or to insure that certain evidence will be allowed. These are a good idea whenever there's a chance the other side may pull a "fast one" and bring in something at the last moment that the jury shouldn't see, or if you're pretty sure the other side will try to prevent you from presenting critical evidence you need to get in.

- EXAMPLE -

NEW YORK SUPREME COURT, DUTCHESS COUNTY

Your Name, Plaintiff, - a - DEFENDANT, Defendant	Case No. 12345 **MOTION IN LIMINE**

PLAINTIFF, Your Name, moves this Honorable Court to enter an Order preventing the defendants from presenting at trial argument or evidence in support of the "clean hands" defense and states:

1. The clean hands defense cannot be used as a defense to intentional torts.
2. All allegations of plaintiff's complaint are based on defendants' intentional torts.
3. The clean hands defense is appropriate only in cases where plaintiff seeks equitable relief.
4. The ancient maxim is, "He who comes to equity must come with clean hands."
5. Plaintiff seeks only money damages caused by defendants' intentional torts.
6. Plaintiff does not seek equitable relief of any kind.
7. Therefore, the clean hands doctrine is inapplicable as a defense, and no evidence or argument should be permitted in support of same at trial.

WHEREFORE plaintiff moves the Court to enter an Order preventing defendants from presenting at trial evidence or argument in support of their alleged "clean hands" defense.

Motion to Invoke the Rule - During trials, hearings, and depositions it is generally improper for witnesses to be present if their testimony is not being taken. "The Rule" sequesters witnesses who are not being questioned at the time, so their independent testimony can be obtained when their turn comes. If the court does not invoke the rule on its own, you can move the court to enter an order invoking it.

Motion to Set Aside / Vacate - If an order was granted under circumstances contrary to the fair administration of justice (fraud, false statement, mistake, lack of proper notice, etc.) you can file a motion to have that order set aside *or vacated.* To prevail, of course, you must prove the fraud, false statement, mistake, etc. These are just a few of the commonly encountered motions you will run into as you fight your battles in court. There are as many different potential motions as your imagination can create, but these are a few that courts are used to seeing on a daily basis – motions you can file without raising judicial eyebrows.

Scheduling Hearings - Before you can send out a notice of hearing you must schedule time with the court. You have to make a date with the judge. In federal court this may depend on local rules you should consult before attempting to schedule a hearing. In state court the process is not much easier.

• Call the JA.
• Explain what the motion is and how much time you believe you'll need, allowing time for the other fellow also.
• Ask the JA for three (3) dates/times on the judge'sbe heard.
•*Carefully* write down these three (3) dates/times.
• Tell the JA you'll call back promptly to pick one of the three (3) available times. • *Immediately* call all opposing parties and (again being courteous) see if any of the three (3) possible times will work for the other side. If they cannot (or will not) agree to any of the three times, call the JA again to get another three, then rep with a call to the other side, etc. • Once the other side agrees to a date/time, call the JA back acknowledging the date/time you and the other side agreed upon.

When I fax such CMA letters to the other side, I always keep a copy and staple to the copy a printed fax log showing the date and time, along with the other lawyer's fax number, when the fax was sent.

Noticing Hearings - Just as everyone is entitled to an opportunity to be heard, so too are they entitled to receive *reasonable* advance notice of when and where a hearing is to take place. This is given by a paper we call, not surprisingly, the Notice of Hearing. A proper Notice of Hearing must accomplish eight things:

1. Identify the court.
2. Identify the case.
3. Identify the parties.
4. Identify the motion to be heard.
5. Identify the time and place where the motion will be heard.
6. Identify the judge who will hear the motion.
7. Identify the length of time set aside for the hearing.
8. Provide reasonable advance notice to all parties, the Clerk, and the judge.

NOTICE EXAMPLE

NEW YORK SUPREME COURT, DUTCHESS COUNTY

	)	Magistrate _____
Your Name,	)	
Plaintiff,	)	Case No. 12345
- a -	)	
	)	**NOTICE OF HEARING**
DEFENDANT,	)	
Defendant	)	
_____)		

NOTICE is given that the defendant's Motion for More Definite Statement (copy attached) will be called up to be heard at the New York State Supreme Court, Dutchess County, 123 Justice Boulevard, Anytown, New York at 9:15 on the 30th day of February 2006.

TIME RESERVED is 30 minutes.

GOVERN YOURSELVES ACCORDINGLY.

_____
Your Name Defendant

NOTARY

State of New York, County of Dutchess on this _____ day of the _____ month of 2013 before me _____, the subscriber, personally appeared **[Your Name]** to me known to be the living man/woman describe in and who executed the forgoing instrument and sworn before me that he executed the same as his free will act and deed.

_____
Notary

My commission expires: _____
(Notary Seal)

FORM

FORM LAYOUT - 12 Font Times New Roman or Arial, double spaced, margins 1" right, left, top and bottom. Your complaint, answer to the answer, and memorandums in support should be verified. There is a maxim that states "Truth is expressed in the form of an affidavit.

Always pay the Sheriff or a professional process server (about $45) to serve the summons, complaint and other attachments, and make sure you have a certificate of service for all other papers that you serve the defendant.

Call 800-344-5009 and ask for the "Rules of Court" *in paperback* for your state, and they will send you the rules that control both your state and federal courts … including sample forms.

Every form can be placed in one of the following six (6) categories:

1. **PLEADINGS**
   - **a.** Action at Law [always supported by a memorandum and affidavits(s)]
   - **b.** Answers
   - **c.** Answer the answer
   - **d.** Affirmative Defenses
   - **e.** Counter-Claims
   - **f.** Cross-Claims
   - **g.** Third-Party Claims
2. **MOTIONS**
   - **a.** Motion to Dismiss the Complaint
   - **b.** Motion to Strike the Complaint
   - **c.** Motion for a More Definite Statement of the Complaint
   - **d.** Motions in Limine
   - **e.** etc...
3. **MEMORANDA (PLURAL FOR MEMORANDUM)**

   The most often used form is the motion, usually supported by a memorandum (that may be included in simple motions or drafted as a separate document to support complex motions, so the court can easily see what the motion is asking for and refer to a separate document to see your argument with case law and statutory citations explaining why the judge should grant your motion).
4. **NOTICES**

   Notices simply tell the other side and the court what you plan to do, e.g., notice that the case is ready for trial, notice of hearing, notice of taking deposition, etc.
5. **DISCOVERY REQUESTS** [discovery requests fall into four (4) general categories] there is no discovery in common law, everything you need to say along with your evidence should be said in the pleadings. Or you can use discovery to get information and evidence from the defendant.
   - **a.** Requests for Admissions
   - **b.** Requests for Production
   - **c.** Interrogatories
   - **d.** Subpoenas
6. **ORDERS**

- EXAMPLE -

NEW YORK SUPREME COURT, DUTCHESS COUNTY

Your Name, Plaintiff,	)	Case No. 12345
- a -	)	
	)	**SUMMONS**
DEFENDANT, Defendant	)	

YOU ARE HEREBY SUMMONED and required to answer this endorsed action in the New York Supreme Court Supreme Court, County of Dutchess; located at 80 Market Street, Poughkeepsie, NY 12601; and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

The basis of venue: Breach of Contract, see attached verified complaint and affidavit.

You are hereby summoned to answer the complaint in this

Dated: This _____ day of _____, 2013.

_____
Your Name, Plaintiff
Address
Phone and Fax

COMPLAINT - Three necessary ingredients:

1. Short and plain statement of grounds for the court's jurisdiction,
2. Short and plain statement of facts on which right to relief is based, and
3. Demand for relief.

- EXAMPLE -

NEW YORK SUPREME COURT, DUTCHESS COUNTY

Your Name, Plaintiff, - a - DEFENDANT, Defendant	Magistrate _____ Case No. 12345 **ACTION AT LAW** w/AFFIDAVIT, attached

Plaintiff, **Your Name**, one of the people of New York, in this court of record, sues defendant [**Defendant's Name]**, hereinafter defendant for money damages, arising from a Breach of Contract by the defendant, stating in support:

JURISDICTIONAL ALLEGATIONS

1. Defendant resides in Dutchess County.
2. Plaintiff resides in Dutchess County.
3. The contract was for the construction of a home in Dutchess County at [redacted], Poughkeepsie, NY.
4. The events given rise to this lawsuit occurred in Dutchess County.
5. The amount in controversy is $112,600.
6. This court has jurisdiction.

GENERAL ALLEGATIONS OF FACTS

7. The Defendant and the Plaintiff signed a document with the title "Agreement between Owner and Construction Manager" dated August 9, 2011, **see Exhibit A** (2 pgs, attached)
8. Whereby plaintiff agreed to perform Construction Management to construct a home.
9. The estimated construction cost of defendants home was about $1,650,000 plus, **see Exhibit B** (4 pgs, attached)
10. Defendant agreed to pay plaintiff to perform Construction Management to construct a home at 8% the project cost.
11. Upon information and belief the defendant was pleased with the quality of work.
12. Defendant failed to pay plaintiff as per agreement.
13. Defendant refused to pay plaintiff as per agreement.
14. A copy of the written contract is appended as **Exhibit "A"** (4 pgs).

BREACH OF CONTRACT

15. Plaintiff restates the foregoing paragraphs 1-12.
16. The parties entered into a written contract **see Exhibit A** (4 pgs, attached).
17. Defendant breached the contract, by failing and refusing to pay.
18. Plaintiff performed valuable services for defendant under conditions that would cause a reasonable person to anticipate that defendant would pay the fair market value of such services.
19. Plaintiff has performed all duties required by the contract.
20. Plaintiff made reasonable demand for payment after performing the valuable services.
21. Plaintiff suffered money damages as a direct and proximate result.
22. The required elements for breach of contract stated and met herein are:

    ... plaintiff must establish each of the following four elements: (1) existence of a valid contract; (2) plaintiff's performance of the contract; (3) defendant's material breach of the contract; and (4) damages **(Noise In The Attic Productions, Inc. v London Records, 10 AD3d 303 [1st Dept 2004] [referencing NY PJI 4:1-elements of breach of contract]; and Furia v Furia, 116 AD2d 694 [2d Dept 1986]); Sun Gold Corp. v. Stillman, 2010 NY Slip Op 31896 (N.Y. Sup. Ct., 2010)**

Wherefore the Plaintiff prays this Honorable Court will enter an Order adjudging the defendant liable to plaintiff in the amount of $112,600. together with such other and further relief as the Court may deem reasonable and just under the circumstances.

VERIFICATION

Your Name, being duly sworn says that he has written the foregoing and knows the contents thereof, and is familiar with the facts and circumstances therein, and that all of the allegations in those documents are true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to the matters deponent believes them to be true.

_____
Your Name, plaintiff

NOTARY

State of New York, County of Dutchess on this _____ day of the _____ month of 2012 before me _____, the subscriber, personally appeared **[Your Name]** to me known to be the living man/woman describe in and who executed the forgoing instrument and sworn before me that he executed the same as his free will act and deed.

_____
Notary

My commission expires: _____
(Notary Seal)

ANSWER - An answer is nothing more complicated than a defendant's formal response to the initial pleading, e.g., complaint, counter-claim, cross-claim, or third-party complaint. If you're a defendant you'll try to avoid filing an answer. Examples of motions to dismiss, strike, and require a more definite statement of the complaint are given in a later chapter. If you're unsuccessful with this "flurry of motions" to dismiss, strike, or require a more definite statement, you'll be required to file an answer. The answer must respond to each numbered paragraph of the initial pleading by one of the following three statements: (1) Admitted (2) Denied (3) Without knowledge.

- SIMPLE ANSWER EXAMPLE -

NEW YORK SUPREME COURT, DUTCHESS COUNTY

Your Name, Plaintiff, - a - DEFENDANT, Defendant	Magistrate _____ Case No. 12345 **ANSWER**

DEFENDANT, Your Name, answers the complaint of Peter Plaintiff and, in response to each numbered paragraph thereof, states:

1. Denied.
2. Admitted.
3. Without knowledge.
4. Denied.
5. Denied.
6. Denied.

VERIFICATION

Your Name, being duly sworn says that he has written the foregoing and knows the contents thereof, and is familiar with the facts and circumstances therein, and that all of the allegations in those documents are true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to the matters deponent believes them to be true.

_____
Your Name, in pro per

NOTARY

State of New York, County of Dutchess on this _____ day of the _____ month of 2012 before me _____, the subscriber, personally appeared **[Your Name]** to me known to be the living man/woman describe in and who executed the forgoing instrument and sworn before me that he executed the same as his free will act and deed.

_____
Notary

My commission expires: _____
(Notary Seal)

Once an answer with a counter-claim is filed, the plaintiff must then respond to the counter-claim in the same way the defendant responded to the initial complaint. He must respond to it with a formal Answer.

- ANSWER COUNTER CLAIM EXAMPLE -

NEW YORK SUPREME COURT, DUTCHESS COUNTY

Your Name, Plaintiff, - a - DEFENDANT, Defendant	Magistrate _____ Case No. 12345 **ANSWER AND COUNTER CLAIM**

DEFENDANT, Your Name, answers the complaint of Peter Plaintiff responding to each numbered paragraph thereof and counterclaiming as follows:

1. Denied.
2. Admitted.
3. Without knowledge.

COUNTER-CLAIM

4. On or about 13 May 2008, Plaintiff verbally contracted to pay Defendant $4,500 as an initial deposit toward the agreed full contract price of $6,000 for apple deliveries.
5. Defendant made multiple apple deliveries for Plaintiff thereafter.
6. Plaintiff failed and refused to pay Defendant for any grapefruit deliveries, breaching the parties' contract.
7. Defendant suffered substantial money damages as a direct result.

WHEREFORE Counter Plaintiff demands judgment for money damages against Peter Plaintiff, together with such other and further relief as the Court may deem reasonable and just under the circumstances.

RESPECTFULLY SUBMITTED

_____
Your Name, Defendant and Counter-Plaintiff

VERIFICATION

Your Name, being duly sworn says that he has written the foregoing and knows the contents thereof, and is familiar with the facts and circumstances therein, and that all of the allegations in those documents are true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to the matters deponent believes them to be true.

_____
Your Name, in pro per

NOTARY

State of New York, County of Dutchess on this _____ day of the _____ month of 2012 before me _____, the subscriber, personally appeared **[Your Name]** to me known to be the living man/woman describe in and who executed the forgoing instrument and sworn before me that he executed the same as his free will act and deed.

_____
Notary

My commission expires: _____
(Notary Seal)

The cross-claim is like a counter-claim, but the responding defendant asserts a claim against one or more co-defendants instead of the plaintiff. Therefore, in a case brought by Plaintiff against Defendant *and* Carl Co-Defendant, the answer and cross-claim might look like the following … if Plaintiff sues two or more people, as in the next example.

- COUNTER CLAIM EXAMPLE -

NEW YORK SUPREME COURT, DUTCHESS COUNTY

Your Name, Plaintiff, - a - DEFENDANT, Defendant	)	Magistrate _____ Case No. 12345 **ANSWER AND CROSS CLAIM**

DEFENDANT answers the complaint of Plaintiff responding to each numbered paragraph thereof, stating:

1. Denied.
2. Admitted.
3. Without knowledge.
4. Denied.
5. Denied.

CROSS-CLAIM

DEFENDANT Danny Defendant sues Carl Co-Defendant and states,

6. Admitted.
7. On or about 13 May 2004, Defendant and Co-defendant agreed to work together to deliver grapefruit for Plaintiff.
8. Defendant and Co-defendant agreed to share the labor responsibilities equally.
9. Defendant and Co-defendant agreed to share their costs equally.
10. Defendant and Co-defendant agreed to share Plaintiff's payments equally.
11. Plaintiff contracted to pay Defendant and Co-Defendant $3,000 as an initial deposit toward agreed full contract price of $5,000 for grapefruit delivery to be performed by both Defendant and Co-Defendant working together.
12. Plaintiff paid Co-defendant the $3,000 initial deposit.
13. Defendant made multiple grapefruit deliveries for Plaintiff thereafter.
14. Co-defendant failed and refused to make any grapefruit deliveries, breaching the contract between Defendant and Co-defendant.
15. Co-defendant failed and refused to tender any part of the $3,000 initial deposit to Defendant, breaching the contract between Defendant and Co-defendant.
16. Defendant suffered substantial money damages as a direct result.

WHEREFORE Danny Defendant demands judgment for money damages against Carl Co-Defendant together with such other and further relief as the Court may deem reasonable and just under the circumstances.

RESPECTFULLY SUBMITTED

_____
Your Name, Defendant and Cross-Plaintiff

~ ADD VERIFICATION ~

Third-Party Complaint - The third-party complaint is similar, but requires a change in the caption to add the name of the third-party defendant, whom the defendant claims is ultimately responsible for the plaintiff's losses and, if defendant loses the lawsuit brought by plaintiff, asserting that the third-party defendant owes the defendant whatever his losses might be. In the following example, Plaintiff sued Defendant. When Defendant files his answer, he brings in a third-party, whom Defendant says is responsible for whatever Defendant may be required to pay Plaintiff.

- 3RD PARTY COMPLAINT EXAMPLE -

NEW YORK SUPREME COURT, DUTCHESS COUNTY

Your Name, Plaintiff, - a - DEFENDANT, Defendant - a - DEFENDANT, Third Party Defendant	Magistrate _____ Case No. 12345 **ANSWER AND THIRD PARTY COMPLAINT**

DEFENDANT answers the complaint of Peter Plaintiff responding to each numbered paragraph thereof,

1. Denied.
2. Admitted.
3. Without knowledge.
4. Denied.

THIRD-PARTY COMPLAINT

DEFENDANT sues Third-Party and states,

5. On or about 13 May 2004, Theo Third-Party agreed to work for Defendant to deliver grapefruit for Plaintiff.
6. Defendant paid third-party defendant $1,500 to deliver grapefruit for Plaintiff.
7. Third-party defendant failed and refused to deliver any grapefruit for Plaintiff, breaching his contract with Defendant.
8. As a result of the breach of third-party defendant, Defendant has been required to file an answer in this lawsuit and defend against the claims of money damages brought against Defendant by Plaintiff.
9. Third-party defendant is liable to Defendant for all damages suffered by Defendant in this lawsuit.
10. Third-party defendant is further liable to Defendant for return of the $1,500 taken by him without consideration of any kind.

WHEREFORE Defendant demands judgment for money damages against Theo Third-Party together with such other and further relief as the Court may deem reasonable and just under the circumstances.

RESPECTFULLY SUBMITTED

_____
Your Name, Defendant and Third-Party Plaintiff

~ ADD VERIFICATION ~

MOTION

Motions by far are the most-used forms. There may be dozens or even hundreds filed in a single lawsuit, depending on complexity of issues and number of parties. Motions vary from simple 1-page forms to complex arguments over facts and law requiring 100's of pages and attached exhibits. The purpose of a motion is to *move* the court, i.e., to require the court to *do* something (whether the court does what you want or not). The result of every motion is that the court must move. Motions require the court to make a decision, either granting your motion or denying it. A court cannot remain as it was and ignore your motion. You have moved it, and it must move … either in the direction you want it to go or against your wishes but, either way, all motions *move* the court. Therefore, you must be precise in telling a court what you want with your motion.

Motions *move* the court. They're not disrespectful. They are efficient. They tell the court

- what you want the judge to do,
- why you're entitled as a matter of law,
- what citations to statute or case law justify the court's action, and
- to *move!*

Motion to Dismiss - A common motion you'll encounter in nearly every lawsuit is the motion to dismiss the complaint. There are several grounds for a motion to dismiss, including:

- failure to state a cause of action
- lack of subject matter jurisdiction (i.e., the court has no authority over the matter)
- lack of personal jurisdiction (i.e., the court has no authority over defendant)
- failure of service of process (i.e., summons never properly served on defendant)

Tell the court what order you want the judge to enter, why you're entitled to the order as a matter of law, what citations to statute or case law justify the court's order, and to *move!* Every motion follows essentially the same form.

- MOTION TO DISMISS EXAMPLE -

NEW YORK SUPREME COURT, DUTCHESS COUNTY

Your Name, Plaintiff, - a - DEFENDANT, Defendant	Magistrate _____ Case No. 12345 **MOTION TO DISMISS FOR FAILURE TO STATE A CAUSE OF ACTION**

DEFENDANT, Your Name, moves this Honorable Court to enter an Order dismissing Plaintiff's complaint for failure to state a cause of action and states:

1. The complaint alleges a cause of action for breach of contract.
2. Plaintiff failed to allege ultimate facts to establish Plaintiff suffered any damages.
3. Allegation of damages is necessary element of cause of action for breach of contract. J.J. Gumberg Co. v. Janis Services, Inc., 847 So.2d 1048 (Fla. 4th DCA 2003).
4. The complaint should be dismissed for failure to state a cause of action.

WHEREFORE, Your Name, moves this Court to enter an Order dismissing the complaint and granting such other and further relief as the Court may deem reasonable and just under the circumstances.

August 10, 2012

_____
Your Name, Plaintiff

Motion to Strike - A motion to strike may be made where any pleading or paper contains redundant, scandalous, or impertinent matter. (As always, check local rules for details.) This is not a motion to dismiss. The purpose of the motion may be to merely remove some improper reference in the objectionable paper. Or, if the paper is so replete with improper remarks that merely removing a few sentences here and there will not repair the error, the motion may seek an order striking the entire paper!

- MOTION TO STRIKE EXAMPLE -

NEW YORK SUPREME COURT, DUTCHESS COUNTY

	)	Magistrate _____
Your Name,	)	
Plaintiff,	)	Case No. 12345
- a -	)	
	)	**MOTION TO STRIKE FOR SCANDALOUS AND IMPERTINENT REFERENCE**
DEFENDANT,	)	
Defendant	)	
_____	)	

DEFENDANT, Your Name, moves this Honorable Court to enter an Order striking portions of Plaintiff's complaint as scandalous and impertinent, stating in support therefor as follows:

1. The 42nd paragraph of the complaint alleges, "Defendant is a flake."
2. The statement should be stricken pursuant to Rule _____ New York Rules of Civil Procedure, because it is "wholly irrelevant and can have no bearing on the equities and no influence on the decision," Rice-Lamar v. City of Fort Lauderdale, 853 So.2d 1125 (Fla. 4th DCA 2003).

WHEREFORE, Your Name, moves this Court to enter an Order striking from the record of this cause the 42nd paragraph of the complaint and granting such other and further relief as the Court may deem reasonable and just under the circumstances.

August 10, 2012

_____
Your Name, Plaintiff

- MOTION FOR MORE DEFINITE STATEMENT EXAMPLE -

NEW YORK SUPREME COURT, DUTCHESS COUNTY

Your Name, Plaintiff, - a - DEFENDANT, Defendant	)	Magistrate _____ Case No. 12345 **MOTION FOR MORE DEFINITE STATEMENT**

DEFENDANT, Your Name, moves this Honorable Court to enter an Order requiring Plaintiff to file a more definite statement of the complaint, stating in support therefor as follows:

1. The 32nd paragraph of the complaint reads, "Defendant 10 truckloads of grapefruit."
2. The 32nd paragraph of the complaint contains no verb.
3. Therefore, the complaint is so vague and ambiguous that the Defendant cannot reasonably be required to frame a responsive pleading.
4. The Defendant should be ordered, pursuant to Rule _____ New York Rules of Civil Procedure, to state the complaint more definitely.
5. Or, in the alternative, the complaint should be dismissed in its entirety.

WHEREFORE, Your Name, moves this Court to enter an Order requiring the Plaintiff to state the complaint more definitely or, if Plaintiff fails or refuses to do so, dismissing the complaint with prejudice and granting such other and further relief as the Court may deem reasonable and just under the circumstances.

August 10, 2012

_____
Your Name, Plaintiff

[NOTE: Dismissal with prejudice means the case cannot be filed again.]

Memorandum

No two memoranda are the same, however all memoranda follow a similar form. The purpose of a memorandum is to prove argument in support of a motion or other paper filed with the court. The memorandum

- sets forth the issue in controversy,
- provides citations to statutes and case law that control the court, and
- explains how the statutes and case law should be interpreted to resolve the issue

The structure is flexible. The arguments of a memorandum can generally be laid out in whatever order you choose. However, for most purposes, following a fixed format will tend to make your arguments more effective. The following example will give you an idea how to begin. Note the citations to case law and statute that give the judge confidence to enter the order you're seeking.

- MEMORANDUM EXAMPLE -

NEW YORK SUPREME COURT, DUTCHESS COUNTY

Your Name, Plaintiff, - a - DEFENDANT, Defendant	Magistrate _____ Case No. 12345 **MEMORANDUM IN RESPONSE TO SUMMARY JUDGMENT MOTION**

PLAINTIFF, Your Name, files this memorandum in response to defendant Danny Defendant's motion for summary judgment, stating:

ISSUE

1) The issue for the court is whether a jury could conclude from evidence adduced that Defendant formed Apple Delivery Corporation (hereinafter ADC) to tortiously interfere with plaintiff's business relationships by using Plaintiff's trade secrets.
2) If a jury could reach this conclusion, Defendant's summary judgment motion should be denied.

ARGUMENT

3) The foregoing issue has not been adjudicated.
4) No evidence has yet been presented on the record to contradict Plaintiff's allegations in regard to the foregoing issue.
5) Plaintiff has not completed discovery.
6) Plaintiff has at this moment a motion before the Court for *in camera* inspection of ADC's customer records, which inspection has been postponed by the Court.
7) Plaintiff has noticed Defendant's accountant for deposition.
8) Summary judgment is not proper where discovery has not yet been closed.
9) "Summary judgment should not be granted until the facts have been sufficiently developed to enable the court to be reasonably certain that there is no genuine issue of material fact. Epstein v. Guidance Corporation, Inc., 736 So.2d 137 (Fla. 4th DCA 1999) citing Singer v. Star, 510 So.2d 637,639 (Fla. 4th DCA 1987).
10) "It is reversible error to grant summary judgment where depositions are still pending." Fleet Finance & Mortgage, Inc. v. Carey, 707 So.2d 949 (Fla. 4th DCA 1998).
11) Plaintiff's customer information, compiled through the industry of Plaintiff, was not just a random compilation of information commonly available to the public, and thus the information (much more than a mere customer list) constitutes a trade secret. Kavanaugh v. Stump, 592 So.2d 1231 (Fla. 1st DCA 1992).

12) Plaintiff's client information was not available to Defendant through any other means, e.g., telephone books, etc., but was a result of "considerable effort, knowledge, time, and expense on the part of the plaintiff". Unistar Corporation v. Child, 415 So.2d 733 (Fla. 3rd DCA 1982).
13) Plaintiff has a right to have this Court judicially determine whether plaintiff's client information is a trade secret, and summary judgment is not proper until that judicial determination has been made.
14) Since plaintiff has clearly alleged intentional interference with an existing business relationship coupled with plaintiff's legal rights and damage, it has stated a *prima facie* case, and the burden has shifted to Defendant to establish that interference was justified. Wackenhut Corporation v. Maimone, 389 So.2d 656 (Fla. 4th DCA 1980).
15) Mere "customer lists" can constitute trade secrets if they were "not mere compilations of information commonly available to public". Kavanaugh v. Stump, 592 So.2d 1231.

16) Where pleadings and affidavits create material issues of fact on question of whether "customer lists" (certainly a less critical asset than customer information records that form the basis for this action) are of such nature and character that they can properly be treated as confidential information, summary judgment is improper. Inland Rubber Corporation v. Helman, 237 So.2d 291 (Fla. 2nd DCA 1970).

WHEREFORE Plaintiff prays the Court will enter an Order denying Defendant's motion for summary judgment and granting such further relief as the Court may deem reasonable under the circumstances.

August 10, 2012

_____
Your Name, Plaintiff

NOTICE

Notices are perhaps the simplest of forms. They serve only one purpose. They give notice to the court and all parties that something is going to happen, or has happened, or is happening at the time of filing the notice. An example of something that has happened is a notice that a party has died. An example of something that is happening at the time of filing the notice is a notice of filing an affidavit. Notices should include *all* information necessary for the parties receiving notice (and the court, of course) to know precisely what's being notice. In the following example of a notice of hearing, the notice provides all the information someone needs to know about a hearing that's been scheduled.

- NOTICE EXAMPLE -

NEW YORK SUPREME COURT, DUTCHESS COUNTY

Your Name, Plaintiff, - a - DEFENDANT, Defendant	Magistrate _____ Case No. 12345 **NOTICE OF HEARING**

PLAINTIFF, Your Name, hereby gives notice he will call up to be heard before the Hon. _____ in Courtroom _____ at the Dutchess County Courthouse, 10 Justice Avenue, Anywhere, New York at 10:00 a.m. on the 31st day of February 2004 this Motion for a More Definite Statement.

TIME RESERVED is 15 minutes.
GOVERN YOURSELVES ACCORDINGLY.

August 10, 2012

_____
Your Name, Plaintiff

- NOTICE EXAMPLE -

NEW YORK SUPREME COURT, DUTCHESS COUNTY

Your Name, Plaintiff, - a - DEFENDANT, Defendant	Magistrate _____ Case No. 12345 **NOTICE OF TAKING DEPOSITION**

YOU ARE HEREBY NOTIFIED that the undersigned will take the deposition of _____ at the offices of Esquire Deposition Services, 515 North Flagler Drive, Poughkeepsie, New York 12601 (800-330-6952) at 9:30 a.m. on September 28, 2012.

This deposition is for discovery and for use at hearings and at trial.

TIME RESERVED is six (6) hours.

GOVERN YOURSELVES ACCORDINGLY.

August 10, 2012

_____
Your Name, Plaintiff

SUBPOENA

As non-lawyers, *pro se* litigants must apply to the Clerk of Court to issue subpoenas. Check court rules for a form. The purpose of a subpoena is to command a non-party to appear in court or to appear for deposition or to produce documents. Since the non-party is not under the power of the court by summons (which gives the court jurisdiction over defendants served with the summons) nor under the power of the court because they submitted to jurisdiction by filing a lawsuit (which the plaintiff did, thereby giving the court jurisdiction over him) it is necessary to obtain court power over the non-party by way of subpoena. Subpoenas are used to get telephone records, banking records, copies of documents, or simply to require a non-party to appear as a witness at trial or at a hearing or to appear before a court reporter to be deposed. Duces Tecum means "bring the thing with you.

- SUBPOENA EXAMPLE -

NEW YORK SUPREME COURT, DUTCHESS COUNTY

Your Name,	)	Magistrate _____
Plaintiff,	)	Case No. 12345
- a -	)	
	)	**SUBPONEA**
DEFENDANT,	)	**DUCES TECUM**
Defendant	)	

NEW YORK STATE:
To: Custodian of Records
BellSouth Telecommunications, Inc.
1960 West Exchange Place, Suite 165
Somewhere, New York 11111

YOU ARE COMMANDED to appear before the Hon. _____, Judge of the Court, at the Dutchess County Courthouse in Anywhere, New York at 10:00 o'clock a.m. on the 31st day of August 2004 to testify in this action and to have with you at that time and place the following:

All records of phone calls to or from phone number 555-555-5555 at any time from 1 January 2003 through 31 August 2003.

IF YOU FAIL TO APPEAR YOU MAY BE IN CONTEMPT OF COURT.

You are subpoenaed to appear by the following party and, unless excused from this subpoena by the party or the court, you shall respond to this subpoena as directed.

DATED this ___ day of _____ 2004. CATHERINE CLERK As Clerk of the Court

by _____
Deputy Clerk

August 10, 2012

_____
Your Name, Plaintiff

ORDER

- ORDER EXAMPLE -

NEW YORK SUPREME COURT, DUTCHESS COUNTY

	)	Magistrate _____
Your Name,	)	
Plaintiff,	)	Case No. 12345
- a -	)	
	)	**ORDER**
DEFENDANT,	)	
Defendant	)	
	)	

THIS CAUSE having come before the Court upon the motion of defendant for an Order requiring the plaintiff to file a more definite statement of the complaint, and the Court having heard argument of the parties and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED that

1. The defendant's motion is granted.
2. The Court finds the complaint is so vague and ambiguous that defendant cannot reasonably be required to frame a responsive pleading.
3. Plaintiff is hereby directed to file a more definite statement of the complaint within 10 days from entry hereof and to serve a copy of same on defendant who shall have 20 days thereafter to answer the re-stated complaint.

DONE AND ORDERED this ___ day of _____ 2004.

_____
Hon. _____

EVIDENCE

There are rules pertaining to hearsay, for example, and rules pertaining to relevance, privilege, and witness credibility.

CLASSIFICATION OF EVIDENCE RULES FOLLOWS:

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

ADMISSIBILITY

- Relevance – ability to prove or disprove an issue material to outcome of the case
- Credibility – reliability of witness or tangible evidence
- Privilege – protection afforded certain kinds of evidence (e.g., attorney-client)
- Prejudice – tendency to confuse, mislead, or waste time

Only admissible evidence should be considered by the court.

Rulings on Evidence

Objections - You must object in a timely manner. You cannot allow a witness to keep on talking and object when it comes your turn to question the witness. You must object right then and there! On the spot! Without unnecessary delay! Merely saying, "Objection!" isn't enough, either (unless the basis or ground for your objection is clearly apparent from the context, and you should never assume that it is). When you object to evidence being admitted, state your reasons. Cite the rule, if you know it. Otherwise, explain the ground for your objection clearly. You cannot appeal a trial court's decision based on the judge's exclusion or admission of evidence if you don't timely object *and state proper grounds for your objection*. That's why understanding the rules of evidence is so critically important.

Judicial Notice - The act by which a court, in conducting a trial, or framing its decision, will, of its own motion, and without the production of evidence, recognize the existence and truth of certain facts, having a bearing on the controversy at bar, which, from their nature, are not properly the subject of testimony, or which are universally regarded as established by common notoriety, e. g., the laws of the state, international law, historical events, the constitution and course of nature, main geographical features, etc. North Hempstead v. Gregory, 53 App.Div. 350, 65 N.Y.S. 867; State v. Main, 69 Conn. 123, 37 A. 80, 36 L.R. A. 623, 61 Am.St.Rep. 30. The cognizance of certain facts which judges and jurors may properly take and act upon without proof, because they already know them. United States v. Hammers, D. C.Fla., 241 F. 542, 543.

The true conception of what is "judicially known" is that of something which is not, or rather need not be, unless the tribunal wishes it, the subject of either evidence or argument. Chiulla de Luca v. Board of Park Com'rs of City of Hartford, 94 Conn. 7, 107 A. 611, 612. The limits of "judicial notice" cannot be prescribed with exactness, but notoriety is, generally speaking, the ultimate test of facts sought to be brought within the realm of judicial notice; in general, it covers matters so notorious that a production of evidence would be unnecessary, matters which the judicial function supposes the judge to be acquainted with actually or theoretically, and matters not strictly included under either of such heads. Gottstein v. Lister, 88 Wash. 462, 153 P. 595, 602, Ann.Cas.1917D, 1008.

Presumptions - A presumption is a fact that is established by operation of law, unlike the inference that results from the unrestrained human imagination. Presumptions are the product of courts and legislatures that decide certain facts can be determined from other facts *as a matter of law*.

Inference - An inference, like a presumption, is an assumed fact. However, unlike a presumption, an inference arises not from the application of law but from common-sense reasoning (or, as too often happens, not-so-common-sense guessing or wild conjecturing).

Relevance - Relevant evidence is evidence that tends to prove or disprove a material fact.

Prejudice May Exclude Relevant Evidence
Character Evidence
Character of Party
Character of a Victim
Character of a Witness
Prior Bad Acts
Proving Character
Habit and Routine

Privileges - Privilege is the right not to testify or the right to prevent another from testifying or introducing evidence protected by the privilege. Special care must be made to avoid waiving these privileges. In some cases, if one is foolish enough to communicate to others any part of an otherwise privileged matter, he may be deemed by the court to have waived his privilege with regard to facts that would otherwise have been protected.

Fifth Amendment
Lawyer-Client
Psychotherapist-Patient Privilege
Husband-Wife Privilege
Priest-Penitent Privilege
Accountant-Client Privilege

Witnesses and Competency

Impeachment
Inconsistent Prior Statements
Character
Religion
Defect of Capacity
Substantial Contrary Evidence

Opinions and Expert Testimony - There are two types of opinions permitted in court: lay and expert.

Lay Opinions and Inferences - A major distinction between lay and expert testimony is that lay testimony is *always* derived from the witness' personal observation and experience with the underlying facts, while expert testimony may arise from hypothetical facts presented to experts who have no first-hand knowledge of the underlying facts but possess special skills, education, or training that equips them to form admissible opinions with regard to such facts. Unless a lay witness has personally perceived the underlying facts, the witness is not permitted to offer an opinion.

Expert Opinions and Inferences - Expert witnesses are witnesses who have no first-hand knowledge of the facts. They know only what they've been told prior to trial or what they are told at trial in the form of hypothetical facts, from which they form their opinion testimony. They don't have first-hand knowledge of the facts. They are permitted to offer opinions of fact only. They are not permitted to offer an opinion as to which party should win the case. They are given certain facts to consider and asked to provide other opinions of fact.

Hearsay - Is never permissible with two exceptions
Statement Against Interest
Excited Utterance

Authentication - Authentication is the process of determining the credibility of documents and things. Authentication is a condition precedent to admission of tangible evidence. All tangible evidence should be authenticated before it is presented to the court. If a party wishes to offer tangible evidence that might prejudice or mislead the jury, and authentication of that evidence has been challenged by the other side, the evidence should be presented with the jury removed from the courtroom so the court can rule as a matter of law whether the documents and things are authentic, reliable, and relevant to at least one issue of material fact.

Authentication of Documents - Authentication of documents is necessary in almost all lawsuits. Letters, checks or other negotiable instruments, contracts, deeds, official documents, and other papers cannot come in simply by being offered by a party wishing them to be considered by the court. First, the document must be authenticated. Video and audio tapes, photos, computer diskettes, and similar recordings of data or other information are treated as "documents" for authentication. It is the authenticity of information contained in a document that concerns courts, rather than the document itself.

Self-Authenticating Documents - Copies of court papers certified by the clerk of court, i.e., bearing the clerk's seal and signature are self-authenticating. They come in over the other side's objection, unless the other side alleges the seal and signature are forged or that the document is a counterfeit. This almost never happens, of course. Court papers under seal are admitted in all cases, if the information contained therein is relevant to material issues of fact. Similarly, a document purporting to be that of the United States or any state, district, commonwealth, territory, or insular possession thereof comes in if under seal. In general, any official government document under seal or bearing the signature of an officer authorized to attest to its authenticity will be admitted in spite of objections. The only exceptions are objections for fraud or counterfeit, as mentioned above. Where many people get into trouble is showing up for trial with copies of official court or other government papers that do not bear an original seal or original signature of an authorized officer attesting to the document's authenticity. Unless the seal or signature is original, a copy is not self-authenticating. A witness must authenticate it, i.e., some-one who has authority to attest to its authenticity.

Self-authenticating documents that do not need a seal or other certification include:

- ! Books, pamphlets, or other publications purporting to be issued by a government
- Printed materials purporting to be newspapers, magazines, or other periodicals

- Tags, labels, and signs affixed in business to show ownership, origin, or control

Non-Self-Authenticating Documents - Other documents are generally not self-authenticating and require the testimony of a credible witness as to chain of custody, proof of signature, and similar matters. Though a document may not be self-authenticating, it may still be admitted if authenticated by the testimony of a credible witness, i.e., one who has first-hand knowledge as to the nature of the document and its authenticity. Remember, any document can be challenged for fraud, seal or no seal, and witnesses called to authenticate documents can be impeached if you have evidence to prove their testimony is not credible.

Authentication of Things - The authentication of things almost always requires live testimony by witnesses who have first-hand knowledge of the item's authenticity and authority to authenticate. If there is some peculiarity about a thing offered in evidence, like a dent or a scratch relevant to some material issue in the case, the person testifying to its authenticity may be required to prove knowledge of the item's chain of custody, i.e., that the witness has been in constant possession or exclusive control of the object since the date when the dent or scratch was alleged to be made. Obviously, if a witness testifies, "Yes, that's my motorcycle," and the opposing party is attempting to prove the scratch on its front fender has something to do with his injuries, the witness must testify that nobody but himself has had access to the bike since the injury-causing accident and that he himself did not scratch the fender. Authentication of things, of course, is entirely dependent on credibility of the witness testifying to its authenticity.

Requirement for Originals - In general, originals are required. Certainly this is true of things. It is also true of writings, photographs, or recordings offered to prove the authenticity of their contents. Copies are never admitted unless they can be authenticated. Many lose a valuable litigation advantage by accepting copies in response to requests for production, subpoenas, and depositions *duces tecum*.

Applicability

Motion in Limine - At any time prior to trial and in some cases during trial, any party may file a motion *in limine* (pronounced lim´-i-nee) to exclude evidence the other party is trying to offer. The term means "at the threshold", at the very beginning, preliminarily, and applies to the motion's being brought before trial to preliminarily prevent introduction of evidence that is irrelevant or otherwise inadmissible. Motions *in limine* to prevent offers of adverse evidence is a very smart thing to do.

Testimony by Attorneys - As a rule, attorneys representing their clients in court are *not permitted to testify as to facts about which they have no personal, first-hand knowledge* … and, if they do so, they should be disqualified as counsel for their client and placed under oath! The only exceptions are (1) in opening statements at the beginning of trial when the lawyer may say to the jury, "Ladies and gentlemen, the evidence you are about to hear will show …" or (2) in closing statements at the end of trial when the lawyer may say to the jury, "Ladies and gentlemen, you have heard evidence that showed …" It is improper for lawyers to testify, yet it happens all the time. Don't let lawyers testify in *your* case! If a lawyer begins to tell the court material facts (instead of saying what the evidence will show or has shown already) jump to your feet and object. Move the court to put the lawyer under oath and to disqualify the lawyer as counsel. No one is competent to testify to facts about which he has no first-hand knowledge.

Dealing with Perjury - Perjury is a crime. In some states it is still a felony punishable by imprisonment.

Direct and Cross-Examination - Cross-examination is an extremely powerful tool for getting at the truth. Being able to tell a witness a fact and make him admit it (as may be done during the discovery phase with requests for admissions.

When Direct and When Cross? - In general (though there are exceptions in local rules that vary from state-to-state) you may not cross-examine (i.e., ask leading questions of) your own witnesses, i.e., the witnesses you call. You may cross-examine the opposing party and witnesses he calls, but you may not cross-examine your own. When examining your own witnesses, you must use direct questioning to elicit testimony you want the court to hear. Witnesses called to the stand by the other side can be cross-examined by you once the other side completes his direct examination. Don't let the other side cross-examine his own witnesses! Object at once, stating the grounds for your objection. Make your record! Do not allow it! One exception is where a witness you call turns "hostile" or begins to lie. If you can convince the judge to declare your witness hostile, he will be treated as if called by the other side or even as if he were an opposing party, in which case you may impeach your own witness and cross-examine him to get at the truth.

You can always cross-examine opposing parties. The reason you aren't permitted to cross-examine your own witness is because the process of cross-examination gives the examiner an opportunity to state facts and ask the witness to corroborate "the examiner's own testimony". What we want from witnesses on direct examination (i.e., when being examined by the party who called the witness) is not mere "yes" or "no" as the examiner tells the story he wants the court to hear but what the witness can say *from his own personal knowledge*. By requiring examiners to ask direct questions instead of leading the witnesses they call, the testimony is limited to what the witnesses know first-hand, not what the examiner wants the witnesses to know and tells the witnesses to say by using leading questions.

When you call your own witness, you cannot lead. You must use direct questions to get the testimony you want the court to hear. When the other side finishes direct examination of his own witness, however, you can attack the other side's testimony with cross-examination. In general, however, cross-examination of the other side's witness is not permitted to inquire into matters not raised by the other side's direct examination. If the other side didn't ask questions about company billing procedures, for example, you cannot inquire into those procedures for the first time on cross-examination. Unless direct examination "opens the door" to a particular matter, you cannot inquire into that matter when it comes time for your cross. An obvious exception to this rule is when examining an opposing party whom you may always ask leading questions. Another obvious exception is when impeaching a hostile witness, which may be done with leading questions.

How to Examine a Witness on Direct - Direct examination is probably one of the most difficult tasks of trial lawyers. It is beautiful to hear when properly done … a nightmare when done poorly. Keeping in mind that the examiner may not lead his witness or in any way suggest to his witness what the answer might be to the question asked, you can see how difficult it is to get a witness to say what you wish the witness to say. For example, you may wish your witness to tell the court he's known the opposing party nearly 40 years, done business with the opposing party for 10 of those years, and of his own personal knowledge can testify the opposing party issued bad checks to him not fewer than 20 times during those 10 years and 5 times in the last year alone. If you begin, "Mr. Witness, isn't it a fact Mr. Party gave you 20 bad checks in the last 10 years and that 5 of those bad checks were in the last year alone?" you won't get past the words "isn't it a fact" before being interrupted. The other side will jump up to object, "Leading!" And, the court will surely wither you with an immediate, "Sustained!" The other side won't say, "Objection, your Honor. That question was leading and is not permitted." It won't be necessary. He will say simply, "Leading!" His objection will be sustained … while you will be required to start over.

Try getting a family member or friend to "testify" to some fact you know the friend or family member knows by using direct questions alone, i.e., without "leading". You'll find it very difficult, and the practice will serve you well when it comes time for trial. Have another friend or family member sit as judge and another as opposing counsel to object when you ask leading questions. Pick some event like last year's county fair or a visit to the amusement park, something your "witness" is sure to remember. Write on a piece of paper the fact you want your witness to testify to and put the paper in your pocket. Then, start asking direct questions until you get the answer you want. Go ahead. Give it a try. You'll find it's none too easy, yet the practice will be extremely valuable later on, when you must examine your witnesses with direct questions only, i.e., without leading. You cannot lead your own witnesses! A good way to learn direct examination is to practice with friends or family judging and objecting when you lead of wander from relevance. Then it will be easier in court, during real cases involving real issues … with real stakes on the line.

How to Examine a Witness on Cross - This is probably the most fun a human being can have in court. Cross-examination is a delight when properly managed, focused on getting relevant evidence, and directed toward a witness who's trying to evade the truth. Well-done it will get the truth every time and uncover lies with very little difficulty. Done poorly, however, it can backfire, so learn the simple principles taught here and practice them on friends and family members before you go to court. Be ready for the real thing when the time for court arrives. The most important thing when cross-examining a witness is to remain calm, cool, and collected. The goal is to get the truth, not to rattle the witness.

Circumstantial Evidence - Circumstantial evidence is an invention. Circumstantial evidence reaches beyond the boundaries of known truth into the realm of conjecture, imagination, and hunches. To be admissible in court, circumstantial evidence must be derived from direct evidence. It must be directly derived from direct evidence. It cannot be derived from other circumstantial evidence, inferences on inferences, or opinions founded on intuition. Inferences that circumstantial evidence makes must be reasonable, or the evidence is excluded for lack of credibility. Circumstantial evidence derived from inferences built on other inferences is always excluded by reasonable courts by the rule against pyramiding inferences. Direct facts are not disputed by reasonable persons. Direct facts may be explained by saying what indirect facts are – facts inferred or surmised from other facts.
A direct fact requires no inference.
A direct fact is not surmised nor does it arise from intuition or spiritual powers.
A direct fact is not a guess or hunch!
A direct fact is a fact reasonable persons would believe without relying on a hunch.
Pure speculation founded solely on conjecture or inference should not be given the same weight as facts that are clearly evident. Direct facts are clearly evident. Direct facts are, therefore, good evidence if they are relevant to the issues in your case. Circumstantial evidence is evidence that does not in itself exist. It is only a fiction of conjecture offered to prove a disputed issue by drawing an inference from direct facts. The quality of the inference relied upon to create circumstantial evidence determines the probative value of the circumstantial evidence.

OBJECTIONS

The rules are the rules of the court, and when someone breaks them - judge, lawyer, or litigant - we make an objection on the record and move the court to rule on our objection.
And, if the court does not rule on our objection, we move the court to rule on our objection ... sustained or overruled, one way or the other, silence isn't good enough.
If we don't object, we cannot later complain to an appellate court that we lost our case because the judge did not enforce the rules. If the judge does not rule on your objections, it is as if you never objected. We work diligently to make our record for appeal, because by doing so we significantly reduce the likelihood that we'll be required to appeal!
While most objections result from violations of the rules of evidence or rules of procedure, objections should also be made whenever a judge or opposing party violates any of our American principles of justice:

- provisions of the Constitution of the United States,
- provisions of the constitution of the state in which the court is sitting,
- statutory legislation enacted by Congress or your state's legislature,
- appellate court decisions that control the lower court proceedings,
- the rules of procedure,
- the rules of evidence, or
- just plain common-sense and decency.

As you can see from the foregoing, the opportunities for objections are limitless. The appellate court will review these errors only if you object to them at the time they are made (or as soon thereafter as possible) so your objections and the judge's errors are preserved in the official record for review. Leave no stone unturned. Leave no error un-objected.

When litigants prepare for appeal at every phase of their lawsuit, judges are much less likely to rule against them ... simply because judges don't like to be appealed/ If we don't make timely objections and get a ruling on our objections, we lose our right to complain to an appellate court that the judge allowed a rule to be broken ... so we lose two ways! We lose firstly because by failing to object we let the judge know we cannot win on appeal, so he knows he can rule any way he wishes without fear of being reversed. Secondly, we lose because the appellate courts will not consider your objection if it is raised for the first time on appeal. Objections must be made in the lower court, or the right to object is forever lost. Judges make mistakes. Lawyers on the other side will try to get away with as much as possible to win for their clients, and you must use your objections to force the judge to stop opposing counsel from breaking the rules.

When a lawsuit is over - if harmful errors were made - and you objected properly to those errors and did so in a timely manner - the final score may be revisited by a panel of appellate justices who will review the judge's errors and, if they agree with what you say in your appellate brief, may reverse the lower court's ruling or send the case back for another round of play.

Winning lawsuits is nothing more or less than a process of preparing for appeal. Good lawyers (i.e., lawyers who consistently win lawsuits) know this. Winning is simply a process of presenting your case by (1) pleadings, (2) proof, and (3) procedure protected by the process of making a record of every error made by the judge. It will make no difference that you had the law and facts on your side. It will make no difference if your Constitutional rights are violated. It will make no difference if you are denied due process. If an appealable record is not made and the judge has some corrupt motive to rule against you in spite of the facts and law you present, you cannot win on appeal. That may sound harsh, but that's the way it is! No objections? No appeal!

Objections need to be contemporaneous, but they also need to be ruled upon. If the judge refuses to rule on your objection, move the court to rule. Say, "Your Honor is moved to rule on the objection before proceeding further." If the judge refuses to rule you should, of course, object also to the refusal to rule. Say, "Plaintiff objects to the court's refusal to rule on plaintiff's objection!"

"**Hearsay**"- An out-of-court statement offered to prove the truth of what was said out-of-court by someone who is not available to be cross-examined.

"**Competence**". no first-hand knowledge, lacks competence to testify.

"**Calls for speculation**" - Witnesses should never be allowed to testify to what someone else was thinking or feeling.

Spouse can't be compelled to testify as to matters discussed between the two of them in confidence

Objection. Leading, "Isn't it a fact you were standing on the corner of Main and Elm at 2:30 the day of the accident?" You generally cannot ask your own witness leading questions. You must ask your own witness direct questions - what we call direct examination.

Objections generally fall into one of four (4) classes.

(1) Evidence Rule Violations
(2) Procedural Rule Violations
(3) General Law Violations
(4) Polity and Precedence

Evidence Rule Violations - Any violation of general law is objectionable error, Polity and Precedence Violations, the objections in this classification are based on common sense and decency.

Asked & Answered - Don't let a lawyer keep asking repetitive questions that emphasize a fact contrary to what's best for your case. Enough is enough!
Badgering takes the form of an unnecessary verbal attack on the witness.

Best Evidence Rule - objection when the other side in your case offers a copy instead of the original of a document, recording, or photograph, a copy is not an equivalent of the original. The purpose of your objection is to call into question the authenticity of any copy offered by the other side. This, in turn, creates an opportunity to cross-examine persons who allegedly had possession of the original as well as those who now offer the court a copy instead of the original and those who supposedly controlled the chain of custody in between. This is your right. Insist upon it. The U.S. Supreme Court said, "The elementary wisdom of the best evidence rule rests on the fact that the [original] document is a more reliable, complete, and accurate source of information as to its contents and meaning." Gordon v. United States, 344 U.S. 414 (1953).

Competence - Competence objections are based on a hard-and-fast evidence rule that requires everyone testifying to a fact to have first-hand knowledge of the fact - i.e., up close and personal! Moreover, the individual testifying must have sufficient mental faculties to be relied upon as competent. Otherwise, the testimony is objectionable.

Lack of first-hand knowledge = Lack of competence to testify

Counsel Testifying - The worst form of abuse of the competence rule occurs when lawyers testify to get facts into evidence, instead of asking questions of witnesses (who are competent to testify) to get the
I facts into evidence properly! It happens all the time! If a lawyer insists on offering testimony and the court allows it over your objection and will not disqualify the lawyer, move the court to order the lawyer to take the oath and submit to your cross-examination.

Facts Not in Evidence Not infrequently you'll catch a lawyer "reminding" the court of facts that have never been properly introduced into evidence", no documents, no witness testimony, nothing but the lawyer's sneaky word work! This will happen at hearings, at depositions, at trial, and in written memoranda, motions, and other papers submitted to the court. You must stop it with a timely objection!

Objection. Facts not in evidence - There are no facts in evidence to support this statement.

Outside the Pleadings - the only issues properly before the court at any time during a lawsuit are those issues properly raised by the pleadings. Once the pleadings are closed, however, those issues are sealed and remain unchangeable through the remainder of the lawsuit. The pleadings tell us what the case is about. They should have been clearly stated in plaintiffs Complaint, defendant's Answer and Affirmative Defenses, and plaintiff's Reply to defendant's Affirmative Defenses. Those are the pleadings. Nothing else is.

Prejudice - An example might be a gruesome photograph of horrendous injuries suffered by a young child involved in an automobile accident. Hospital bills and testimony of physical therapists as to the degree of impairment the child will suffer are admissible evidence of the child's damages, without

bloody photographs of mangled limbs that could serve only to influence the court to award greater money damages than the circumstances may truly warrant. "Isn't it a fact that the plaintiff owes you money?" Or, "How often in the past ten years has the plaintiff failed to pay your wages on time?" Or, worse yet, "Is it true that the plaintiff cheats at golf?" Don't let this sort of thing slip past you. If the testimony is prejudicial, if it tends to influence emotion more than reason, if it has the unwanted effect of encouraging the court to rule against you in spite of the facts and the law, object.

Qualifications - If a lay witness is invited to offer an expert "opinion" about a particular matter, object on the ground that the witness is not qualified to offer expert opinions. Lay witnesses are not experts by definition. Expert witnesses, on the other hand, must first be qualified by court approval. Then and only then can their opinion can be offered. Lay witness opinions are permitted as to matters based on personal knowledge and observation of the lay witness where, according to the United States Supreme Court, they are "rationally based on perception and helpful to a determination of a fact in issue." Lloyd v. American Airlines, 537 U.S. 974 (2002). Thus, a lay witness may be qualified by showing that he or she has personally perceived what they are called upon to testify, and what they can offer will be "helpful to a determination of a fact in issue".

If opposing counsel offers an "expert witness", object before questioning begins. Move the court for an order allowing you an opportunity to examine the witness outside the hearing of the jury to determine if the witness is qualified to testify as an expert. If the court finds the witness is qualified to testify as an expert, object and renew your objection at the close of your opponent's presentation to preserve your objection (unless it's clear the witness does have the requisite qualifications to testify as to the questions asked, in which case your objections will probably be to no avail).

If opposing counsel begins questioning an expert witness about matters outside his or her qualifications, object ... and, if the judge overrules you, renew your objection at the close of your opponent's questioning and again at the close of his presentation. 40 Just a fancy word that means to examine by questioning.

The only testimony a lay witness should be permitted to give (unless you want the testimony to come in anyway) is what the lay witness learned through his or her five senses, i.e., what the witness: • saw, • heard, • felt, • smelled, or • tasted. If a lay witness is called upon to testify as to matters beyond the reach of these five sensations personally, and none of the other objections (hearsay, competence, etc.)

Relevance - Unless a fact fits in some way with the issues in a case, like a bolt fits the nut it was designed for, it is said to lack relevance. If it doesn't fit it has no place in your lawsuit. If it doesn't fit, it can only damage your case. Any fact that's not relevant to the issues in controversy is objectionable.

Speculation - When your opponent asks a witness, "What was the doctor thinking?" or, "Was the victim happy?"

CHAPTER 6

COMMON LAW

- Jurisdiction
- Writ of Mandamus
- Habeas Corpus
- Court of Record
- Law of the Case
- Maxims

JURISDICTION

1. COMPETENCE - A court must have subject matter jurisdiction (competence) to hear the type of controversy bought before it. Subject matter jurisdiction cannot be waived. A court of general original subject matter jurisdiction is a trial court with the power to hear any type of action. In New York, this is the supreme court of the State of New York. The supreme court can hear all cases except for those bought against the state of New York. There is a supreme court of New York in each of the 62 New York counties. Each of the 62 has jurisdiction, regardless of the county in which the event occurred. The supreme court has subject matter jurisdiction to hear any case, even if the parties do not reside in New York, and even if the claim has no connection to New York. Thus if A (who resides in New Jersey) serves B (who resides in New Jersey) with process, regarding an event that took place in New Jersey, the NY supreme court would still have **subject** matter jurisdiction on the case. However, the supreme court does not automatically have **personal** jurisdiction over such parties. There are various ways a court can have personal jurisdiction, these will be discussed later.The courts have discretion whether to dismiss the case upon a motion of the defendant on the grounds of **forum non conveniens** - this means lack of nexus.

EXCEPTIONS TO SUPREME COURT'S GENERAL JURISDICTION

1) Cases where federal law confers exclusive jurisdiction to federal courts. Such as bankruptcy, patents and copyright cases.
2) Claims for money damages in tort or contract against the State of New York. Such claims are bought in the New York Court of Claims. The State of New York is the only defendant that can be sued in the New York Court of Claims. If an action is against both New York and anyone else, the actions would have to be split into two as only the State of New York can be sued in the New York Court of Claims. Suing an employee of the state does not constitute suing the state. Even if a county of New York is being sued, you still would not bring the action in the New York Court of Claims. Only when the State of New York itself is sued, is the case heard at the New York Court of Claims.

EXCLUSIVE SUBJECT MATTER JURISDICTION OF THE SUPREME COURT OF NEW YORK

The supreme court of New York has exclusive jurisdiction over

(i) Matrimonial actions (e.g. divorce, annulment);
(ii) CPLR Article 78 proceedings (e.g. judicial review of administrative action);
(iii) Declaratory judgment actions. This is where the court rules on the rights and obligations of disputing parties who wish to find out on whose side, the law stands.
(iv) The highest appeal court in New York is the New York Court of Appeal. The intermediate appeal court is the appellate division.

2. STATUTE OF LIMITATIONS (*note: there is no statute of limitations in common, but because lawyers do not know common law you can use statute of limitations to have a case against you dismissed*)

A. General concepts

Statute of limitations is an **affirmative defense** The statute of limitations begins to run the day after the injury or event occurs. In personal injury and property damage cases, the statute of limitations begins to accrue from the date of the original impact. For breach of contract cases, it starts from the time of the breach, and does not start when the plaintiff discovers the damage, injury or breach. If a child is injured *in utero*, the child has no action unless it is born alive. However unlike usual personal injury cases, here, the accrual starts not at point of damage, but from when the child is born. To satisfy the statute of limitations, the action must be commenced by the last day that is within the statute of limitations period. In the supreme and county courts, this means that the process must be filed by the last day of this period. In any other court this means that the defendant must be served with process by the last day. Personal injury claims and property damages have a three year statute of limitations in New York. Where the last day falls on a weekend or public holiday, the time is extended until the end of the next business day.

B. Medical malpractice

For **medical malpractice** injuries involving dentists, doctors and hospitals, the statute of limitations is two and a half years from the date of the malpractice. If the plaintiff is suing the employer for their negligence in hiring the doctor that made the mistake, this would be an ordinary negligence claim and thus will have the usual negligence statute of limitations - i.e., three years. Exceptions to medical malpractice two and a half year statute of limitations rule

i. **Continuous treatment** - Where a physician is negligent in his/her treatment of a condition, if the treater continues to treat the plaintiff for the same condition, the statute of limitations starts on the day after the treatment ends.
ii. **Foreign object rule** - where a doctor leaves a foreign object in a patient, the plaintiff has two and a half years from date of the event or one year from when the patient discovered, or should have discovered the foreign object, whichever is the longer period. Note that foreign objects do not include chemical substances or prosthetic devices or fixation devices (such as a steel pin in the knees.)

C. Other professional malpractice

A victim of other types of professional malpractice has **three years** from the date of the termination of services in which the malpractice occurred. For an **architect** this period normally starts at the **completion** of the building, for an attorney from delivery of the completed work. If a plaintiff is in essence claiming professional malpractice, it does not matter what he writes on the complaint (e.g. breach of contract for negligent performance of contract, to try and take advantage of the six year statute of limitations for breach of contract,) he will only have the period associated with the statute of limitations for the professional misconduct involved. Non-parties to the original contract are not bound by the statute of limitations associated with the professional malpractice. Thus, if a building collapses causing injuries, the injured parties can utilize the usual three year statute of limitations period for personal injuries against the architect. Where an architect or engineer is being sued for personal injuries caused by their work, if the suit comes more than ten years after the completion of the building, the following procedural rules apply.

(i) Plaintiff must serve a notice of claim on the architect or engineer at least 90 days before suit.
(ii) Plaintiff may obtain discovery from potential defendant during the 90 day waiting period.

(iii) After suit is commenced, defendant may move to dismiss and the burden will be on the plaintiff to make an immediate evidentiary showing that there is a substantial basis to believe that the defendant's negligence was the proximate cause of the injuries.

D. PRODUCTS LIABILITY

In New York, products liability claims can be based on one or more of the following tortuous claims.

Negligence - the statute of limitations runs out three years from the date of injury.

Strict products liability - the statute of limitations runs out three years from the date of injury.

Breach of warranty - the statute of limitations runs out four years from date of sale. In a products liability case, the defendant can normally sue the manufacturer, retailer and any middlemen involved. Each defendant is liable for four years after he sold it on. For example, if the manufacturer sold it to the distributor in 1990 and the distributor sold it to the wholesaler in 1991, who then sold it to a department store in 1992, each defendant will be liable for four after they sold it on.

Often manufacturers will indemnify sellers of their products. Thus, if the department store gets sued, the store can claim indemnification or a contribution from the manufacturer. The statute of limitations for indemnification or contribution claims is six years from the date that the store actually paid out the judgment against it. Where a products case involves exposure to a toxic substance, the statute of limitations starts from when the injury is discovered or should have been discovered. For example, in 1990, a doctor injects the plaintiff with a vaccine that causes a cancer. The cancer is discovered in 1995. In a negligence case or strict products case against the makers of the vaccine, the statute of limitations runs out three years from discovery, i.e., 1998. If the plaintiff tried to sue the doctor for medical malpractice, the usual two and a half years statute of limitations period would apply, as this case does not come under one of the two malpractice exceptions to the two and a half year rule.

E. TOLLS AND EXTENSIONS

Toll due to defendant's absence If the defendant is not in New York when the cause of action starts to accrue, the statute of limitations period does not begin to run until the defendant comes to New York. If the defendant is in New York when the statute of limitations period starts but leaves and stays away for at least four months continuously, then the period of absence is tolled, unless, despite defendant's being out of town, the New York courts still had personal jurisdiction over him and the plaintiff was able to serve him out of state. Plaintiff's infancy or insanity Although an insane or infant plaintiff could sue through a competent adult representative, they still get the benefit of a toll during their infancy or insanity. Thus, the statute of limitations does not begin to run until the infancy or insanity ends. If the original statute of limitations period was three years or more, the plaintiff gets a three year statute of limitations period which begins once the disability is over. If the original statute of limitations period was less than three years, the plaintiff gets that same original period once the disability ends. **Exception** In two cases, the statute of limitations is not tolled indefinitely until the disability ends.

i. In an infancy toll, a medical malpractice claim must be commenced no later then ten years after the statute of limitations period would normally start even if the plaintiff is still in infancy when this ten year period ends. The infant plaintiff's remedy would be to get adult representation.
ii. A statute of limitation that is tolled due to insanity becomes time-barred ten years from accrual, no matter what the cause of the claim - no matter if the plaintiff is still insane.

TOLLS FOR DEATH

Survival claim - these are any claims that the plaintiff could have made himself whilst still alive. It is not limited to torts, it can include breach of contract and it includes pain and suffering.

Wrongful death - this cause of action is a tort claim for pecuniary damages made by the decedent's (dead person's) heirs. It is limited to a claim for lost earnings of the decedent. Both types of claim are made by the executor (where the decedent left a will) or the administrator (where he died without a will).Each claim has its own statute of limitations rule.

Wrongful death - the statute of limitations runs out two years from date of death. (Even if the death was caused by negligence, [which normally has a three year statute of limitations]). But claimant must also show that the plaintiff's underlying personal injury claim would have been timely if filed at time of death.

Survival claim - if the plaintiff's underlying claim would have been timely if filed at time of death, the claimant will have the remainder of the time that would be left if the plaintiff were alive. Or one year from the death of the plaintiff - whichever is longer.

Where a **defendant** or potential defendant dies during the accrual period, the plaintiff always receives an additional eighteen months to sue the estate. Six months from dismissal grace period

General rule
If a New York action is timely commenced, but is thereafter dismissed before trial, and at the time of dismissal, the statute of limitations has either expired or has less than six months remaining, the plaintiff gets six months from date of dismissal, to re-file the same action and serve process on the same defendant.

Exceptions
There are four types of prior dismissal which do not affect a six month re-filing period.
i. Dismissal on the merits.
ii. Voluntary dismissal by plaintiff.
iii. Failure to prosecute by plaintiff.
iv. Dismissal for lack of personal jurisdiction.

Examples of dismissal for lack of personal jurisdiction are; dismissal for defect in the form of summons, dismissal for out of state service, where no long arm statute applies.

F. Borrowing statute

Where a cause of action occurs out of New York, a difficulty arises if the statute of limitations period is different in New York and the state in which the action arose. The courts wanted to prevent out of state plaintiffs suing in New York to take advantage of longer statute of limitations. Thus, we have the "borrowing statute." The borrowing statute provides as follows:

Out of state cause of action - Where plaintiff is non-resident of New York New York will apply the statute of limitations of the state where the cause of action arose, if it is shorter than New York's statute of limitations. If the state where the cause of action arose has a longer statute of limitations than New York, then New York will apply New York's statute of limitations. Out of state cause of action where plaintiff is resident of New York The New York statute of limitations will apply.

3. Personal JURISDICTION

In addition to subject matter jurisdiction, three additional jurisdiction elements must be satisfied in order for court to render a valid judgment. Failure of one of these three elements will mean a failure of personal jurisdiction.

i. Proper commencement of the action.
ii. Proper service of process on defendant.
iii. Proper basis of jurisdiction over the person or property involved in the action.

(i) Proper commencement of the action - A duly commenced action means the action was correctly and properly commenced. Timing In the lower civil courts (i.e. NYC civil court, all other city courts, district courts of Nassau and Suffolk Counties, and the Justice courts) an action is commenced by serving the defendant with process. In the Supreme courts and County court an action is commenced by filing process with the court clerk. The filing must be accompanied by payment of a fee for the purchase of index number. This is then followed by service of process in the defendants. The process must be served on defendant within 120 days (approximately four months) of filing with the court. The court, at its discretion, may increase this time to serve on defendant. If the defendant is not timely served, he may make a motion to dismiss for untimely service. It is at the court's discretion whether to grant such a motion.

(ii) Proper service of process on defendant

WHAT IS "PROCESS"?

There must be a summons and a complaint. The summons advises the defendant that the plaintiff is suing him in a particular court. The complaint is the plaintiff's pleading. It specifies the transaction or the event that is the subject of the complaint. It must also spell out the basic causes of action (i.e., the legal grounds to sue).

Sometimes the summons is accompanied by a notice instead of a complaint. The notice consists of:

i. A brief statement of nature of action,
ii. The nature of relief sought,

iii. The amount of damages the plaintiff is seeking (except for medical malpractice cases which must not specify amount of damages.) If the plaintiff serves a summons without an accompanying complaint or notice, it causes a defect in the personal jurisdiction of the court and the case is subject to dismissal.

Days on which process can be served

A **duly** served action means the action was correctly and properly served. The process can be served by any person 18 years or older that is not a party to the action (the plaintiff's attorney is not considered a party to the action nor is his spouse - only the plaintiff himself is a party to the action). Process may be served on any day of the week except Sunday, or Sabbath if the defendant is a Sabbath observer and the plaintiff is aware of this. However if the plaintiff served a Sabbath observer on Sabbath because he was unaware of this, the service is valid. Service on holidays is valid.

Method of delivery

We will see soon that only certain methods of delivery are acceptable and if these methods are not adhered to, the service is defective even though the defendant might receive the process and thus have notice of it.

(a) Personal delivery

Service by personal delivery is complete upon process server's tender of summons directly to the defendant (defendants response time starts upon completed delivery). If the process is given to someone other than the defendant, the service has not been complete even if that person than hands the summons to the defendant.

(b) "Leave and mail"

In order for service to someone other than the defendant to be valid, it must be

i. Delivered to someone of suitable age and discretion.
ii. At the defendants dwelling place or place of business
iii. **Plus** a copy must be **mailed** to the defendant at the defendant's dwellingplace or place of business within **20** days of the delivery. This method is called the **"leave and mail"** method. **Service is complete 10 days after proof of service is filed**. Proof of service is an affidavit by the process server describing the details of the service. Failure to file a proof of service is not a jurisdictional defect but rather will delay the start of the defendant's response time.

If there are two defendants, each is required to receive a copy of the summons. If the leave and mail method is used, each must be left their own copy and a copy must be mailed to both of them.

(c) Affix and mail

In order for the affix and mail method to be used

i. The process server must affix the process to the door of defendants dwelling place or place of business.

ii. Plus a copy must be mailed to the defendant at the defendant's dwelling place or place of business within 20 days of the delivery.
iii. The process server must first exercise **due diligence** in attempting to use either the personal delivery or leave and mail method Due diligence is more then just showing up once - several attempts must be made at different times of day (usually three attempts will suffice). Service is complete 10 days after proof of service is filed.

(d) Expedient service
If the plaintiff exercises due diligence but has not been able to carry out one of the above methods (usually because he has been unable to trace the defendants current whereabouts) he may make an *ex-parte* motion to the court, for an order allowing an improvised method of delivery that is reasonable under the circumstances - perhaps service on a child or publishing in a newspaper etc. Remember - the plaintiff cannot use expedient service without a court order.

(e) Designated agent
A plaintiff may serve process on the designated agent. Often contracts will designate an agent (such as the defendant's attorney) as authorized to receive any complaints that may arise over the contract.

(f) Infants and the mentally incapacitated
Where the defendant is an infant, the infants name goes on the summons and complaint but the delivery goes to an eligible adult. An eligible adult is normally the parent or guardian. Where the infant is 14 or older, the process must be served on both the infant and the eligible adult. Any of the above methods may be used. Where the defendant is mentally incapacitated and the courts have appointed a legal guardian, the complaint must be served on both the legal guardian and the defendant. If no guardian has been appointed by the courts, then only the defendant is served. Mail service cannot be used for defendants that are infants or mentally incapacitated (see below)

(g) Service outside of New York
Assuming there is a basis for out of state service, the usual methods are employed for service **even if they are not valid** under that state's law. Anyone authorized by New York, or the out-of-state's law, or any attorney licensed in that state, may serve process.

(h) Corporations
Where a corporation is the defendant, two methods of service are acceptable -
personal delivery and service on the secretary of state.
Personal delivery can be made to:
i. Any officer of the corporation.
ii. Any director.
iii. A designated agent.
iv. Managing agent.

Delivery cannot be made to the secretary. Leave and mail is not valid to a corporation.

Neither is affix and mail.

If there is a basis of jurisdiction over the corporation, service can be made by personal delivery to any of the above, wherever they are in the US.

Service on secretary of state
For a domestic corporation (i.e., incorporated in New York), or a foreign corporation that is licensed to do business in New York, two copies should be delivered to the secretary of state. The secretary of state who is a designated agent of all New York businesses will mail a copy to the corporation. For an unlicensed foreign corporation, a copy should be mailed to the secretary of state (who is an implied agent for the corporation) and another copy should be sent by certified mail to the corporation.

(i) Service by first class mail plus acknowledgement.
If the plaintiff is very far away from the defendant, he may want to utilize a service which uses just mail. He may only do so by

i. Mailing the process by first class mail to the defendant.
ii. Enclosing an acknowledgement form.
iii. A return prepaid addressed envelope.
iv. The defendant must agree to be served in this way by signing the form and returning it within thirty days of receipt.

Service will be completed once the defendant posts the acknowledgement form. If the defendant does not return the acknowledgement form, or does so more than thirty days after receipt, the service was invalid and the plaintiff must serve the defendant again.

A return of the acknowledgement form does not mean that the defendant has agreed that the court has jurisdiction over him. **Service by mail can be used regardless of whether the defendant is in or out of state.** Mail service cannot be used for defendants that are infant or mentally incapacitated.

NOTICE OF PETITION FOR WRIT OF MANDAMUS EXAMPLE

NEW YORK STATE SUPREME COURT
APPELLATE DIVISION - THIRD JUDICIAL DEPARTMENT

----------X

In the Matter of the Application of John Vidurek, Gerard Aprea, Anthony Futia Jr., Anthony Maresco, Carl Scheuering, Paul Black, David Paul, Donna Fields, Emanuele Marinaro, Christopher Ciraulo, Cristopher Rodriguez, Jeffrey Monheit, Robert Smith; all in pro per

Petitioners

For a judgment pursuant to Article 78 of the CPLR

Notice of Petition For a Writ of Mandamus

- against -

NEW YORK SUPREME COURT, ALBANY COUNTY; JOSEPH S TERESI

Respondents

----------X

PLEASE TAKE NOTICE that the annexed Verified Petition of the people stated in the above caption and the exhibits thereto, and the Memorandum in support of Petition, the undersigned will move the New York Supreme Court, Appellate Division, Third Department at its Courthouse in the Justice Building, in Albany, New York on the 8th day of October, 2012, at 1 pm or as soon thereafter as counsel can be heard, pursuant to Article 78 of' the CPLR, for a final judgment requiring respondent to obey the Sovereign Court of Record (superior court) in and relating to New York State Supreme Court, Albany County Index No. 4224-12.

PLEASE TAKE FURTHER NOTICE, that pursuant CPLR 7804 (c) an answer and supporting affidavits, if any, shall be served at least five (5) days before the return date.

PLEASE TAKE FURTHER NOTICE, that pursuant to 22 N.Y.C.R.R. §800.2, this motion will be submitted on the papers and personal appearance in opposition to the motion is neither required nor permitted.

Dated: September 12, 2012 Yours, etc.

_____
John Vidurek, plaintiff

_____
Gerard Aprea, plaintiff

Case # _____

When in a court of Record you come to an impasse with the Judge you can areal to the appellate court for a "Writ of Mandamus" which is an order from a higher court commanding the trial court to obey the "Court of Record".

PETITION FOR WRIT OF MANDAMUS EXAMPLE

NEW YORK STATE SUPREME COURT
APPELLATE DIVISION - THIRD JUDICIAL DEPARTMENT

John Vidurek, Gerard Aprea, Anthony Futia Jr., Anthony Maresco, Carl Scheuering, Paul Black, David Paul, Donna Fields, Emanuele Marinaro, Christopher Ciraulo, Cristopher Rodriguez, Jeffrey Monheit, Robert Smith; Petitioners; - vs - New York Supreme Court, Albany County; Joseph S Teresi Respondent	NY SUPREME COURT COUNTY OF ALBANY INDEX NO: 4224-12 **PETITION FOR A Writ of Mandamus**

On and for the Record, we, the petitioners John Vidurek, Gerard Aprea, Anthony Futia Jr., Anthony Maresco, Carl Scheuering, Paul Black, David Paul, Donna Fields, Emanuele Marinaro, Christopher Ciraulo, Cristopher Rodriguez, Jeffrey Monheit, Robert Smith; accept the oaths of all the offices of this court.

SUMMARY

The purpose of this petition is for an issue of a writ of Mandamus[15] directed to the New York Supreme Court, County of Albany (hereinafter inferior court) and the Honorable Joseph Teresi (hereinafter inferior magistrate), acting contrary to the law of the case[16] of petitioners Court of Record (hereinafter superior court). To obtain an order, commanding the inferior court, inferior magistrate, and inferior court officers obedience to the lawful orders and mandates of the superior court. Whereas the petitioners pursuant to N.Y.JUD.LAW §753[17] when filing their Action at Law

[15] MANDAMUS. [Black's Law 4th edition, 1891] Lat. We command, this is the name of a writ which issues from a court of superior jurisdiction directed to an inferior court commanding the performance of a particular act therein specified thereby restoring the complainant to rights or privileges of which he has been illegally deprived. Lahiff v. St. Joseph, etc., Soc., 76 Conn. 648, 57 A. 692, 65 L.R.A. 92, 100 Am.St.Rep. 1012.

[16] See attachment A - Law of the case.

[17] N.Y.JUD.LAW §753: (A) A court of record has power to punish, by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced, in any of the following cases:
1. An attorney, counselor, clerk, sheriff, coroner, or other person, in any manner duly selected or appointed to perform a judicial or ministerial service, for a misbehavior in his office or trust, or for a willful neglect or violation of duty therein; or for disobedience to a lawful mandate of the court, or of a judge thereof, or of an officer authorized to perform the duties of such a judge.
2. A party to the action or special proceeding, for putting in fictitious bail or a fictitious surety, or for any deceit or abuse of a mandate or proceeding of the court.

opened a Court of Record thereby removing jurisdiction from the inferior court and inferior magistrate.

The following is organized into three sections:

I. Jurisdiction
II, Justice
III. Findings of fact

I. JURISDICTION

It is the design of our systems of jurisprudence that courts have no jurisdiction until a party comes forth and declares a cause needing resolution. The particular jurisdiction depends upon how the cause is declared by the plaintiff. Jurisdiction may be administrative, at law, in equity, or in any of many other formats. In this case the jurisdiction is at law[18] in a court of record under the sovereign authority of the people (plaintiffs).

In order for a court to prove jurisdiction it must show where the people gave them the authority, the government through legislation cannot give itself authority. So the people decreed in the preamble the US Constitution which provides for two jurisdictions one under common law and the other is jurisdiction under admiralty or military tribunal venue from article 1, section 8, clause 17. The People[19] of the United States under our United States Constitution provided for the common law venue and by the authority of our New York State Constitution ARTICLE VI, Section 1; §3 (b) (2)[20] where the people of New York expressly authorized a court of Record.

This is further expressed by the US Supreme Court where we read: "The decisions of a superior court may only be challenged in a court of appeal. The decisions of an inferior court are subject to collateral attack. In other words, in a superior court one may sue an inferior court directly, rather than resort to appeal to an appellate court. Decision of a court of record may not be appealed. It is

3. A party to the action or special proceeding, an attorney, counselor, or other person, for the non-payment of a sum of money, ordered or adjudged by the court to be paid, in a case where by law execution cannot be awarded for the collection of such sum except as otherwise specifically provided by the civil practice law and rules; or for any other disobedience to a lawful mandate of the court.
4. A person, for assuming to be an attorney or counselor, or other officer of the court, and acting as such without authority; for rescuing any property or person in the custody of an officer, by virtue of a mandate of the court; for unlawfully detaining, or fraudulently and willfully preventing, or disabling from attending or testifying, a witness, or a party to the action or special proceeding, while going to, remaining at, or returning from, the sitting where it is noticed for trial or hearing; and for any other unlawful interference with the proceedings therein.
5. A person subpoenaed as a witness, for refusing or neglecting to obey the subpoena, or to attend, or to be sworn, or to answer as a witness.
6. A person duly notified to attend as a juror, at a term of the court, for improperly conversing with a party to an action or special proceeding, to be tried at that term, or with any other person, in relation to the merits of that action or special proceeding; or for receiving a communication from any person, in relation to the merits of such an action or special proceeding, without immediately disclosing the same to the court; or a person who attends and acts or attempts to act as a juror in the place and stead of a person who has been duly notified to attend.
7. An inferior magistrate, or a judge or other officer of an inferior court, for proceeding, contrary to law, in a cause or matter, which has been removed from his jurisdiction to the court inflicting the punishment; or for disobedience to a lawful order or other mandate of the latter court.
8. In any other case, where an attachment or any other proceeding to punish for a contempt, has been usually adopted and practiced in a court of record, to enforce a civil remedy of a party to an action or special proceeding in that court, or to protect the right of a party.
(B) A court not of record has such power to punish for a civil contempt as is specifically granted to it by statute.

[18] AT LAW. This phrase is used to point out that a thing is to be done according to the course of the common law; it is distinguished from a proceeding in equity.

[19] *[Preamble] WE THE PEOPLEof the State of New York, grateful to Almighty God for our Freedom, in order to secure its blessings, DO ESTABLISH THIS CONSTITUTION.

[20] ARTICLE VI, Section 1; §3 (b) (2) As of right, from a judgment or order of a court of record of original jurisdiction which finally determines an action or special proceeding where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States; and on any such appeal only the constitutional question shall be considered and determined by the court.

binding on ALL other courts. However, no statutory or constitutional court (whether it be an appellate or supreme court) can second guess the judgment of a court of record. "The judgment of a court of record whose jurisdiction is final, is as conclusive on all the world as the judgment of this court would be. It is as conclusive on this court as it is on other courts. It puts an end to inquiry concerning the fact, by deciding it".[21]

Therefore a Court of Record, with a history of almost a 1000 years, under common law that goes back to Adam[22] is established and ordained[23] by the People in both constitutions, New York Code and case law.

To be a court of record a court must have four characteristics, and may have a fifth, they are:

A) A judicial tribunal having attributes and exercising functions independently of the person of the magistrate designated generally to hold it[24].

B) Proceeding according to the course of common law[25].

C) Its acts and judicial proceedings are enrolled, or recorded, for a perpetual memory and testimony[26].

D) Has power to fine or imprison for contempt[27].

E) Generally possesses a seal[28].

It is essential to understand what are a sovereign, a magistrate, a court, and a court of record. A court is "The person and suit of the sovereign[29]."

Who is the sovereign? It is the people either in plural[30] or in singular capacity.[31] In plural capacity, in this case, it is the plaintiffs, the people as contemplated in the preambles of the Constitution for New York, and the 1789 Constitution for the United States of America.

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[21] [Ex parte Watkins, 3 Pet., at 202-203. [cited by SCHNECKLOTH v. BUSTAMONTE, 412 U.S. 218, 255 (1973)].

[22] Rom 2:14-15 For when the Gentiles, which have not the law, do by nature the things contained in the law, these, having not the law, are a law unto themselves: Which show the work of the law written in their hearts, their conscience also bearing witness, and their thoughts the mean while accusing or else excusing one another;)

[23] ORDAIN. To institute or establish; to make an ordinance; to enact a constitution or law. State v. Dallas City, 72 Or. 337, 143 P. 1127, 1131, Ann. Cas.1916B, 855.

[24] [Jones v. Jones, 188 Mo.App. 220, 175 S.W. 227, 229; Ex parte Gladhill, 8 Metc. Mass., 171, per Shaw, C.J. See, also, Ledwith v. Rosalsky, 244 N.Y. 406, 155 N.E. 688, 689][Black's Law Dictionary, 4th Ed., 425, 426]

[25] Jones v. Jones, 188 Mo.App. 220, 175 S.W. 227, 229; Ex parte Gladhill, 8 Metc. Mass., 171, per Shaw, C.J. See, also, Ledwith v. Rosalsky, 244 N.Y. 406, 155 N.E. 688, 689][Black's Law Dictionary, 4th Ed., 425, 426

[26] 3 Bl. Comm. 24; 3 Steph. Comm. 383; The Thomas Fletcher, C.C.Ga., 24 F. 481; Ex parte Thistleton, 52 Cal 225; Erwin v. U.S., D.C.Ga., 37 F. 488, 2 L.R.A. 229; Heininger v. Davis, 96 Ohio St. 205, 117 N.E. 229, 231

[27] 3 Bl. Comm. 24; 3 Steph. Comm. 383; The Thomas Fletcher, C.C.Ga., 24 F. 481; Ex parte Thistleton, 52 Cal 225; Erwin v. U.S., D.C.Ga., 37 F. 488, 2 L.R.A. 229; Heininger v. Davis, 96 Ohio St. 205, 117 N.E. 229, 231.][Black's Law Dictionary, 4th Ed., 425, 426

[28] [3 Bl. Comm. 24; 3 Steph. Comm. 383; The Thomas Fletcher, C.C.Ga., 24 F. 481; Ex parte Thistleton, 52 Cal 225; Erwin v. U.S., D.C.Ga., 37 F. 488, 2 L.R.A. 229; Heininger v. Davis, 96 Ohio St. 205, 117 N.E. 229, 231.][Black's Law Dictionary, 4th Ed., 425, 426]

[29] COURT - [Black's Law Dictionary, 4th Ed., 425, 426] "The person and suit of the sovereign."
COURT - [Black's Law Dictionary, 5th Edition] The person and suit of the sovereign; the place where the sovereign sojourns with his regal retinue, wherever that may be.
COURT - An agency of the sovereign created by it directly or indirectly under its authority, consisting of one or more officers, established and maintained for the purpose of hearing and determining issues of law and fact regarding legal rights and alleged violations thereof, and of applying the sanctions of the law, authorized to exercise its powers in the course of law at times and places previously determined by lawful authority. [Isbill v. Stovall, Tex.Civ.App., 92 S.W.2d 1067, 1070; Black's Law Dictionary, 4th Edition, page 425]

[30] PEOPLE, n. [L. populus.] The body of persons who compose a community, town, city or nation. We say, the people of a town; the people of London or Paris; the English people. In this sense, the word is not used in the plural, but it comprehends all classes of inhabitants, considered as a collective body,… Webster's 1828 Dictionary

[31].PEOPLE …considered as ... any portion of the inhabitants of a city or country. The word "people" may be either plural or singular in its meaning. Webster's 1828 Dictionary. The plural of "person" is "persons," not "people."

New York, the State of New York, and the United States of America have no general sovereignty. Theirs is a clipped sovereignty. Whatever sovereignty they have is limited to their respective constitutionally defined spheres of control. The general sovereignty is reserved to the people without diminishment.[32] Lest that be forgotten, "The people of this state do not yield their sovereignty to the agencies which serve them." Further, when the State of California did attempt to diminish one's rights, it was determined that the state cannot diminish rights of the people.[33]

It is by the prerogative of the sovereign[34] whether and how a court is authorized to proceed. In this case, the chosen form of the court is that of a court of record.

A qualifying feature of a court of record is that the tribunal is independent of the magistrate appointed to conduct the proceedings.[35]

The magistrate is a person appointed or elected to perform ministerial service in a court of record[36]. His service is ministerial because all judicial functions in a court of record are reserved to the tribunal, and, by definition of a court of record, that tribunal must be independent of the magistrate. The non-judicial functions are "ministerial" because they are absolute, certain and imperative, involving merely execution of specific duties arising from fixed and designated facts.
The magistrate is a person appointed or elected to perform ministerial service in a court of record because all judicial functions in a court of record are reserved to the tribunal which must be independent of the magistrate[37].

In a Court of Record the judicial tribunal is independently of magistrate designated to hold it[38] and proceeds according to the course of common law and whose jurisdiction is final[39] and conclusive on all the world, there is no appeal except as a right from a judgment[40] on a constitutional

[32] "...at the Revolution, the sovereignty devolved on the people; and they are truly the sovereigns of the country, but they are sovereigns without subjects...with none to govern but themselves" CHISHOLM v. GEORGIA (US) 2 Dall 419, 454, 1 L Ed 440, 455 @DALL 1793 pp471-472

[33] Hurtado v. People of the State of California, 110 U.S. 516

[34] The people of this State, as the successors of its former sovereign, are entitled to all the rights which formerly belonged to the King by his prerogative. [Lansing v. Smith, 4 Wend. 9 (N.Y.) (1829), 21 Am.Dec. 89 10C Const. Law Sec. 298; 18 C Em.Dom. Sec. 3, 228; 37 C Nav.Wat. Sec. 219; Nuls Sec. 167; 48 C Wharves Sec. 3, 7.]

[35] Court of Record: A judicial tribunal having attributes and exercising functions independently of the person of the magistrate designated generally to hold it [Jones v. Jones, 188 Mo.App. 220, 175 S.W. 227, 229; Ex parte Gladhill, 8 Metc. Mass., 171, per Shaw, C.J. See, also, Ledwith v. Rosalsky, 244 N.Y. 406, 155 N.E. 688, 689][Black's Law Dictionary, 4th Ed., 425, 426]

[36] Long v. Seabrook, 260 S.C. 562, 197 S.E.2d 659, 662; Black's Law Dictionary, Fifth Edition, p 899

[37] A judicial tribunal having attributes and exercising functions independently of the person of the magistrate designated generally to hold it [Jones v. Jones, 188 Mo.App. 220, 175 S.W. 227, 229; Ex parte Gladhill, 8 Metc. Mass., 171, per Shaw, C.J. See, also, Ledwith v. Rosalsky, 244 N.Y. 406, 155 N.E. 688, 689][Black's Law Dictionary, 4th Ed., 425, 426]

[38] "A Court of Record is a judicial tribunal having attributes and exercising functions independently of the person of the magistrate designated generally to hold it, and proceeding according to the course of common law, its acts and proceedings being enrolled for a perpetual memorial". [**Jones v. Jones, 188 Mo.App. 220, 175 S.W. 227, 229; Ex parte Gladhill, 8 Metc. Mass., 171, per Shaw, C.J. See, also, Ledwith v. Rosalsky, 244 N.Y. 406, 155 N.E. 688, 689**].

[39] "The judgment of a court of record whose jurisdiction is final, is as conclusive on all the world as the judgment of this court would be. It is as conclusive on this court as it is on other courts. It puts an end to inquiry concerning the fact, by deciding it;" [**Ex parte Watkins, 3 Pet., at 202-203. [412 U.S. 218, 255]; SCHNECKLOTH v. BUSTAMONTE, 412 U.S. 218 (1973) 412 U.S. 218**]

[40] "As of right, from a judgment or order of a court of record of original jurisdiction which finally determines an action or special proceeding where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States; and on any such appeal only the constitutional question shall be considered and determined by the court". [**New York State Constitution Article VI §3.b (2)**]

question. Common law is not civil law[41], it is the system of jurisprudence administered by the purely secular tribunals.

II. JUSTICE

In the preamble of our US Constitution We the people formed the United States to establish justice (hereinafter virtue)[42], this is the foundation of our union. It is the solemn duty of our justices[43] to uphold and exercise that virtue. We the People pledge allegiance only as long as we remain "one nation under God with liberty and justice for all".

Deny as they may, God is clearly the source of virtue[44] and being that source defines it[45], TRUTH, and our trial courts ordained by the people, are expected to apply it. But they are not functioning as "Courts of Virtue", as advertised. If judges[46] are not just, they are no doubt unjust, if they are not virtuous they are no doubt ungodly. They choke in the presence of virtue and therefore its source. They are too invested in the status-quo that allures its victims with status to administer

[41] COMMON LAW. As distinguished from the Ro-man law, the modern civil law, the canon law, and other systems, the common law is that body of law and juristic theory which was, originated, developed, and formulated and is adr. tinistered in England, and has obtained among nost of the states and peoples of Anglo-Saxon stock. [Lux v. Haggin, 69 Cal. 255, 10 P. 674]. As distinguished from law created by the en-actment of legislatures, the common law compris-es the body of those principles and rules of action, relating to the government and security of per-sons and property, which derive their authority solely from usages and customs of immemorial antiquity, or from the judgments and decrees of the courts recognizing, affirming, and enforcing such usages and customs; and, in this sense, par-ticularly the ancient unwritten law of England. [1 Kent, Comm. 492. Western Union Tel. Co. v. Call Pub. Co., 21 S.Ct. 561, 181 U.S. 92, 45 L.Ed. 765; Barry v. Port Jervis, 72 N.Y.S. 104, 64 App. Div. 268; U. S. v. Miller, D.C.Wash., 236 F. 798, 800.] As distinguished from equity law, it is a body of rules and principles, written or unwritten, which are of fixed and immutable authority, and which must be applied to controversies rigorously and in their entirety, and cannot be modified to suit the peculiarities of a specific case, or colored by any judicial discretion, and which rests con-fessedly upon custom or statute, as distinguished from any claim to ethical superiority. [Klever v. Seawall, C.C.A.Ohio, 65 F. 395, 12 C.C.A. 661]. As distinguished from ecclesiastical law, it is the system of jurisprudence administered by the purely secular tribunals. As concerns its force and authority in the Unit-ed States, the phrase designates that portion of the common law of England (including such acts of parliament as were applicable) which had been adopted and was in force here at the time of the Revolution. This, so far as it has not since been expressly abrogated, is recognized as an organic part of the jurisprudence of most of the United States. Industrial Acceptance Corporation v. Webb, Mo.App., 287 S.W. 657, 660.

[42] JUSTICE. [**Bouvier's Law, 1856 Edition**] The constant and perpetual disposition to render every man his due. Just. Inst. B. 1, tit. 1. Toulli er defines it to be the conformity of our actions and our will to the law. Dr. Civ. Fr. tit. prel. n. (5) In the most extensive sense of the word, it differs little from virtue, for it includes within itself the whole circle of virtues. Yet the common distinction between them is that that which considered positively and in itself, is called virtue, when considered relatively and with respect to others, has the name of justice. But justice being in itself a part of virtue, is confined to things simply good or evil, and consists in a man'staking such a proportion of them as he ought.

[43] JUSTICES. [Bouvier's Law, 1856 Edition] Judges. Officers appointed by a competent authority to administer justice. They are so called, because, in ancient times the Latin word for judge was justicia. This term is in common parlance used to designate justices of the peace.

[44] And the whole multitude sought to touch him: for there went virtue out of him, and healed them all. [Luke 6:19]; ...through the knowledge of God, and of Jesus our Lord, According as his divine power hath given unto us ...virtue: [2 Pet 1:2-3]; ...let your requests be made known unto God. And the peace of God, which passeth all understanding, shall keep your hearts and minds through Christ Jesus. Phil [4:6-7]

[45] Phil 4:8 Finally, brethren, whatsoever things are true, whatsoever things are honest, whatsoever things are just, whatsoever things are pure, whatsoever things are lovely, whatsoever things are of good report; if there be any virtue, and if there be any praise, think on these things.

[46] JUDGE. [Bouvier's Law, 1856 Edition] An officer so named in his commission, who presides in some court; a public officer, ap-pointed to preside and to administer the law in a court of justice; the chief member of a court, and charged with the control of proceedings and the decision of questions of law or discretion. Todd v. U. S., 15 S.Ct. 889, 158 U.S. 278, 39 L.Ed. 982; Foot v. Stiles, 57 N.Y. 405; State v. Le Blond, 108 Ohio St. 126, 140 N.E. 510, 512. A public of-ficer who, by virtue of his office, is clothed with judicial authority. State ex rel. Mayer v. City of Cincinnati, 60 Ohio App. 119, 19 N.E.2d 902. Pre-siding officer of court. State v. Horn, 336 Mo. 524, 79 S.W.2d 1044, 1045. Any officer authorized to function as or for judge in doing specified acts. In re Roberts' Estate, 49 Cal.App.2d 71, 120 P.2d 933, 937.

repugnant statutes disguised as law changing the peoples courts into Nisi Prius[47] courts of injustice. This is not what We the People ordained, that we should be ruled over in these courts of vipers. It is obligatory upon me to make note at this point that there are still men of integrity at trial court level, although they are few and far between.

It is for this cause that it is high time that the people resurrect the well established, well hidden, right to rule in the peoples Courts of Record under the sovereign authority of the people, the consequence of the peoples failure to act will be the loss of Liberty's Light! And the consequence of justices of the kings bench[48] failure to see, despotism!

III. FINDINGS OF FACT

The inferior court became subject to the Court of Record when the plaintiffs, under their authority as people, declared it to be so[49], [50].

On July 26, 2012, the plaintiffs filed an action at law, the opening sentence decreed, "This is a court of record", there was no objection to the court being a court of record. Nowhere in the record is there any objection from magistrate or defendants regarding this court being a court of record.
In the same document dated July 26, 2012, the plaintiffs identified themselves as people of New York as contemplated in the preambles of the constitutions, this court is a court of record, and all parties were properly so apprised.

On August 13, 2012 the superior court on its own motion filed a writ of error to restore the orderly decorum of the court and to correct defective impromptu process and usurpation of legislative and court powers taken by the magistrate without leave of court, for assuming the mantel of a tribunal and stating numerous times that he was going to rendered rulings and adherence to statutes, and not law, and then proceeded independently openly showing contempt for the superior court.
On September 4, 2012 the superior court on its own motion found the magistrate in contempt of court for again assuming the mantel of a tribunal, and writing orders.

On September 5, 2012 the inferior court threatened the sovereigns of the superior court with sanctions should we respond.

The magistrate of this Court of Record has usurped the independent powers of the tribunal[51] by making discretionary judgments which are reserved to and should have been made by the tribunal independently of the person of the magistrate designated generally to hold it[52]. The magistrate

[47] NISI PRIUS. (Bouvier's Law, 1856 Edition) Where courts bearing this name exist in the United States, they are instituted by statutory provision.
[48] JUSTICE, n. [Black's Law 4th edition, 1891] In common law. The title given in England to the judges of the king's bench and the common pleas, and in America to the judges of the supreme court of the United States and of the appellate courts of many of the states.
[49] Opening statement in plaintiffs Action at Law - "Plaintiffs who are People of New York and in this court of record sue the New York State Board of Elections (NYSBOE)..."
[50] AT LAW. [Bouvier's Law, 1856 Edition] This phrase is used to point out that a thing is to be done according to the course of the common law; it is distinguished from a proceeding in equity.
[51] TRIBUNAL. [Black's Law Dictionary, 4th Ed., 425, 426] The seat of a judge; the place where he administers justice. The whole body of judges who compose a jurisdiction; a judicial court; the jurisdiction which the judges exercise. See Foster v. Worcester, 16 Pick. (Mass.) 81.
[52] One characteristic of a court of record: A judicial tribunal having attributes and exercising functions independently of the person of the magistrate designated generally to hold it [Jones v. Jones, 188 Mo.App. 220, 175 S.W. 227, 229; Ex parte

unduly chose to personally bypass all procedure, without proper hearing or notice to any of the affected parties and rule on the case thereby exceeding the jurisdiction of a magistrate who only possesses ministerial authority separate from the authority of an independent tribunal of a court of record.

WHEREFORE, Petitioners, pray that this court issue a peremptory writ of mandate requiring the respondents and all officers of the court and/or persons[53] to obey the order of the Constitutional Court.

We declare under penalty of perjury that the foregoing facts are true and correct, and that this was executed in the county of Greene, New York

_____
John Vidurek, plaintiff

_____
Gerard Aprea, plaintiff

NOTARY

State of New York, County of Greene on this _____ day of the _____ month of 2012 before me _____, the subscribers, personally appeared John Vidurek and Gerard Aprea, to me known to be the people[54] describe in and who executed the forgoing instrument and sworn before me that he executed the same as his free will act and deed.

_____
Notary

My commission expires: _____
(Notary Seal)

Gladhill, 8 Metc. Mass., 171, per Shaw, C.J. See, also, Ledwith v. Rosalsky, 244 N.Y. 406, 155 N.E. 688, 689][Black's Law Dictionary, 4th Ed., 425, 426]

[53] N.Y.JUD.LAW §753: An inferior magistrate, or a judge or other officer of an inferior court, attorney, counselor, clerk, sheriff, coroner, a party to the action, or other person, in any manner duly selected or appointed to perform a judicial or ministerial service, in his office or trust.

[54] The people of this State, as the successors of its former sovereign, are entitled to all the rights which formerly belonged to the King by his prerogative. [Lansing v. Smith, 4 Wend. 9 (N.Y.) (1829), 21 Am. Dec. 89 10C Const. Law Sec. 298; 18 C Em.Dom. Sec. 3, 228; 37 C Nav.Wat. Sec. 219; Nuls Sec. 167; 48 C Wharves Sec. 3, 7.]

When in criminal court and there is no response with a proper decision on the challenge of jurisdiction, you can petition your court (court of record) for a "Writ of Habeas Corpus" and thereby open a court of record and take control of the court (*all legislated courts in NY are courts of record*). This petition is followed by a show cause from the court of record and then a judgment, usually a default and a memorandum of decision.

PETITION FOR WRIT OF HABEAS CORPUS EXAMPLE

State of New York, Greene County
Local Criminal Court, Town of Cairo

Ryan [redacted] Petitioner; - vs - STATE OF NEW YORK Leland Miller Terry J. Wilhelm Ronald Coons Respondents.	CASE NO.2012-303 MAGISTRATE:_____ **PETITION FOR A WRIT OF HABEAS CORPUS BY A PEOPLE IN STATE CONSTRUCTIVE CUSTODY**

COMES NOW Ryan [redacted], one of the People, hereinafter petitioner, and petitions the above-entitled court of record for a writ of habeas corpus to inquire into the charge of a Misdemeanor of Criminal Possession of a Weapon of the 4th degree of said petitioner, not in the capacity of a citizen of the United States nor a citizen of the state of New York, and who is not subject to the jurisdiction of the following Custodians:

STATE OF NEW YORK (a legal fiction)
Attorney General, Albany office, The Capitol Albany, NY. 12224-0341
HONORABLE LELAND MILLER (a town court judge), 512 Main Street, Caito, NY. 12413
DISTRICT ATTORNEY; Terry J. Wilhelm - District Attorney, 411 Main Street, 3rd Floor, Catskill, NY 12414,
DEPUTY RONALD COONS (a peace officer), 80 Bridge Street, Catskill, New York

LAW OF THIS CASE

The accompanying Attachment "A" is incorporated by reference as though fully stated herein.

PETITIONER MAY PROSECUTE A WRIT OF HABEAS CORPUS TO INQUIRE INTO THE CAUSE OF THE CHARGE.

1. Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf. [**28 USC Sec. 2242**]
2. Availability of writ. Writ of habeas corpus is available to allow presentation of questions of law that cannot otherwise be reviewed, or that are so important as to render ordinary procedure inadequate and justify extraordinary remedy. [**State ex rel. Orsborn v. Fogliani, 82 Nev. 300, 417 P.2d 148 (1966), cited, Director, Dep't of Prisons v. Arndt, 98 Nev. 84, at 85.640 P.2d 1318 (1982), Snow v. State, 105 Nev. 521, at 523, 779 P.2d 96 (1989), Boatwright v. Director, Dep't of Prisons, 109 Nev. 318, at 321, 849 P.2d 274 (1993)**]
3. This habeas corpus is prosecuted because the charging of the People was without due process. The respondent's court acted as a nisi prius court, except that the jurisdiction was fraudulently acquired without petitioner volunteering or knowingly agreeing to the proceeding.
4. The nisi prius court is in fact a nis prius court falsa because respondent has taken unlawful dominion of petitioner so as to deprive him of his court. petitioner should be immediately released so that he may return to the jurisdiction of his own court.
5. petitioner is subject to unlawful constructive custody. petitioner is thus petitioning for a writ of habeas corpus.

BECAUSE NO JURISDICTIONAL BASIS FOR CUSTODY HAS BEEN PROFFERED OR STATED A WRIT OF HABEAS CORPUS SHOULD ISSUE.

6. Broad Meaning of Jurisdiction on Habeas Corpus. For purposes of the writ of habeas corpus, as for purposes of prohibition or certiorari, the term "jurisdiction" is not limited to its fundamental meaning, and in such proceedings judicial acts may be restrained or annulled if they are determined to be in excess of the court's powers as defined by constitutional provision, statute, or rules developed by courts (In re Zerbe (1964) 60 Cal2d 666, 667-668, 36 CalRptr 286, 388 P2d 192).
7. The liberty of the People is restrained by the CUSTODIANS:
   A. petitioner is in constructive custody by color of the authority of the Local Criminal Court, Town of Cairo and/or the CUSTODIANS, and is committed for trial before some court thereof; [**26 USC 2241(c)(1)**]
   B. petitioner is in constructive custody in violation of Section 265.01 Subdivision 1 of the Penal Code of the State of New York, a statute.
8. Although the true cause of custody of petitioner is unknown, petitioner on information believes that the claim or authority is under color of law in violation of the Constitutions for the STATE OF NEW YORK and the UNITED STATES OF AMERICA. The true basis for jurisdiction by the CUSTODIANS has never been proffered or stated. petitioner, as one of the People, has never knowingly or voluntarily agreed to such jurisdiction. petitioner has disputed and disputes any factual allegation that he has so agreed.
9. The jurisdictional facts leading up to the custody are unknown to the People. The jurisdictional facts by which the CUSTODIANS presume to continue to deprive the People of his court are unknown to the People.
10. The People, on information and belief, allege that the CUSTODIANS are funded in whole or in part by New York State. Thus motivated, they are acting, under color of law as contractual agents of their principal, the New York State.

11. The CUSTODIANS do not state and the proceedings do not show any lawful authority or jurisdictional facts enabling the CUSTODIANS to lawfully take dominion over a People of the United States. Lacking such jurisdiction, their actions can only be under color of law, violating due process, in order to execute their own private agendas, whatever they may be. Therefore a writ of habeas corpus should issue.

A WRIT OF HABEAS CORPUS IS A PROPER REMEDY

BECAUSE BURDEN IS UPON RESPONDENTS TO REBUT PRESUMPTION

12. Plaintiff is under the custody of a court **NOT** of record. The proceeding came about as a result of prosecutorial vindictiveness. The following facts support the claim of the prosecutorial vindictiveness:
13. On or about May 30, 2012 a false, unsworn, report was filed with an encouraging New York State Family Supreme Court.
14. On or about June 5,2012, Primary Reporting Officer Deputy Ronald Coons falsely reported, in a Green County Sheriff's Office, an Incident Report that petitioner committed a misdemeanor of criminal possession of a weapon in the fourth degree while executing an unconstitutional search warrant, seizing all weapons, with no sworn affidavit and Judges signature, since then the court order to cease the weapons was rescinded, and the said weapons (people property) have not been returned.
15. On or about June 14, 2012 petitioner was unconstitutionally arraigned in an attempt to defraud the people into the jurisdiction of a statutory court. petitioner offered the court a written answer to the complaint in a court of record, but the court denied petitioner 's common law right to a court of record.
16. On execution of the moot warrant the Justice Court contrary to ***Sherer v. Cullen*** cited below, the court *not* of record effectively sanctioned petitioner for exercising a well established right to challenge jurisdiction.
17. "There can be no sanction or penalty imposed upon one because of this exercise of constitutional rights." [**Sherer v. Cullen, 481 F 946.**]
18. The CUSTODIANS do not state and the proceedings do not show any lawful authority or jurisdictional facts enabling the CUSTODIANS to lawfully take dominion over a People of the United States. Lacking such jurisdiction, their actions can only be under color of law, violating due process, in order to execute their own private agendas, whatever they may be.
19. If, in their returns, the CUSTODIANS fail to prove jurisdiction, custody of petitioner should be released back to the jurisdiction of his own court. And the court should so order.

A PERSON COMMITTED IN A

CIVIL COMMITMENT PROCEEDING MAY SECURE RELEASE WHERE THERE WAS NOT STRICT COMPLIANCE WITH ALL OF THE STATUTORY REQUIREMENTS

20. "Henceforth the writ which is called praecipe shall not be served on any one for any holding so as to cause a free man to lose his court." [**Magna Carta, Article 34**]

21. "No person shall be...deprived of life, liberty, or property, without due process of law." [**U.S. Constitution, Amendment V**]
22. In this matter petitioner is a People of the United States. As such, without due process the respondents have caused petitioner to lose his court.
23. "No officer can acquire jurisdiction by deciding he has it. The officer, whether judicial or ministerial, decides at his own peril." [**Middleton v. Low (1866), 30 C. 596, citing Prosser v. Secor (1849), 5 Barb.(N.Y) 607, 608**]
24. Rhetorically, the question could be asked, "Is it an act of treason when a public official takes unlawful dominion over the sovereign People of the United States? Could such state officials be prosecuted under **18 USC 242** which makes it a federal crime to deprive or conspire to deprive, under color of law, any person of his rights.
25. In this case, strict compliance with the procedure was not followed. A necessary element is that petitioner must voluntarily and knowingly agree to any proceeding outside of the penumbra of a court of record. Petitioner neither volunteered nor knowingly agreed to what must necessarily be a strict nisi prius procedure. The element of due process is missing. Therefore a writ of habeas corpus should issue.

THE STATE MAY NOT DIMINISH
THE SOVEREIGN RIGHTS OF PETITIONER

26. It is the design of our systems of jurisprudence that courts have no jurisdiction until a party comes forth and declares a cause needing resolution. The particular jurisdiction depends upon how the cause is declared by the moving party. Jurisdiction may be administrative, at law, in equity, or in any of many other formats. In this habeas corpus proceeding the jurisdiction is at law in a court of record under the sovereign authority of one of the people.
27. It is essential to understand what are a sovereign, a magistrate, a court, and a court of record.
28. A court is "The person and suit of the sovereign."[NOTE-1] Who is the sovereign? It is the people either in plural[NOTE-2] or in singular capacity.[NOTE-3] In singular capacity, it is petitioner, one of the people as contemplated in the preambles of the Constitution for the STATE OF NEW YORK, and the 1789 Constitution for the United States of America. In singular capacity, it is also Ryan.
29. The STATE OF NEW YORK, and the United States of America have no general sovereignty. Theirs is a clipped sovereignty. Whatever sovereignty they have is limited to their respective constitutionally defined spheres of control. The general sovereignty is reserved to the people without diminishment.[NOTE-4] Lest that be forgotten, the analogous California Government Code twice admonishes the public servants that, "The people of this state do not yield their sovereignty to the agencies which serve them."[NOTE-5] Further, when the State of California did attempt to diminish one's rights, it was affirmed that the state cannot diminish rights of the people.[NOTE-6] Further, Amendments IX and X of the Constitution for the United States of America admonishes the federal government of its clipped sovereignty subservient to the full sovereignty reserved without diminishment to the People.[NOTE-10]
30. It is by the prerogative of the sovereign[NOTE-7] whether and how a court is authorized to proceed. In this case, the chosen form of this court is that of a court of record.
31. A qualifying feature of a court of record is that the tribunal is independent of the magistrate appointed to conduct the proceedings.[NOTE-8]
32. The magistrate is a person appointed or elected to perform ministerial service in a court of record.[NOTE-9] His service is ministerial because all judicial functions in a court of record are reserved to the tribunal, and, by definition of a court of record, that tribunal must be independent of the magistrate. The non-judicial functions are assigned by the court of record and are

"ministerial" because they are absolute, certain and imperative, involving merely execution of specific duties arising from fixed and designated facts.

33. Because the state has no jurisdiction over petitioner, and because the magistrate has no tribunal function, and because petitioner has not voluntarily and knowingly granted any jurisdiction to the state, it follows that the state has no jurisdiction over petitioner. Therefore, the state must cease its taking into involuntary custody the person of petitioner, one of the People. As a matter of right, petitioner should be immediately released back to the jurisdiction of his own court.

NOTES

NOTE-1 Black's Law Dictionary, 4th Ed., 425, 426

NOTE-2 PEOPLE, n. [L. populus.] The body of persons who compose a community, town, city or nation. We say, the people of a town; the people of London or Paris; the English people. In this sense, the word is not used in the plural, but it comprehends all classes of inhabitants, considered as a collective body… Webster's 1828 Dictionary

NOTE-3 PEOPLE…considered as....any portion of the inhabitants of a city or country. Ibid.

NOTE-4 "...at the Revolution, the sovereignty devolved on the people; and they are truly the sovereigns of the country, but they are sovereigns without subjects...with none to govern but themselves" CHISHOLM v. GEORGIA (US) 2 Dall 419, 454, 1 L Ed 440, 455 @DALL 1793 pp471-472

The people of this State, as the successors of its former sovereign, are entitled to all the rights which formerly belonged to the King by his prerogative. Through the medium of their Legislature they may exercise all the powers which previous to the Revolution could have been exercised either by the King alone, or by him in conjunction with his Parliament;…" Lansing v. Smith, 4 Wendell 9 (N.Y.) (1829), 21 American Decision 89; 10C Const. Law Sec. 298; 18 C Em.Dom. Sec. 3, 228; 37 C Nav.Wat. Sec. 219; Nuls Sec. 1`67; 48 C Wharves Sec. 3, 7.

NOTE-5 California Government Code, Sections 11120 and 54950

NOTE-6 The state cannot diminish rights of the people. Hurtado v. People of the State of California, 110 US 516

NOTE-7 "...at the Revolution, the sovereignty devolved on the people; and they are truly the sovereigns of the country, but they are sovereigns without subjects...with none to govern but themselves..... [CHISHOLM v. GEORGIA (US) 2 Dall 419, 454, 1 L Ed 440, 455 @DALL (1793) pp471-472.]

The people of this State, as the successors of its former sovereign, are entitled to all the rights which formerly belonged to the King by his prerogative. [Lansing v. Smith, 4 Wend. 9 (N.Y.) (1829), 21 Am.Dec. 89 10C Const. Law Sec. 298; 18 C Em.Dom. Sec. 3, 228; 37 C Nav.Wat. Sec. 219; Nuls Sec. 167; 48 C Wharves Sec. 3, 7.]

NOTE-8 Court of Record: A judicial tribunal having attributes and exercising functions independently of the person of the magistrate designated generally to hold it [Jones v. Jones, 188 Mo.App. 220, 175 S.W. 227, 229; Ex parte Gladhill, 8 Metc. Mass., 171, per Shaw, C.J. See, also, Ledwith v. Rosalsky, 244 N.Y. 406, 155 N.E. 688, 689][Black's Law Dictionary, 4th Ed., 425, 426]

NOTE-9 Long v. Seabrook, 260 S.C. 562, 197 S.E.2d 659, 662; Black's Law Dictionary, Fifth Edition, p 899

NOTE-10 Constitution for the United States of America:

> Amendment IX. The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Article X. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

34. Further, I request that the proceedings in the STATE OF NEWYORK, GREENE COUNTY JUSTICE COURT, TOWN OF CARIO Case No. 2012-303; be ordered stayed pending resolution of the jurisdictional challenge in the above-entitled court of record.

35. I am Ryan. I have personal knowledge of the above-stated facts and am competent to testify as to the truth of these facts if called as a witness. I declare under penalty of perjury that the forgoing is true and correct, and that this declaration was executed in Cairo, New York, on June 21, 2012.

_____

Ryan [redacted], Petitioner

VERIFICATION

BEFORE ME personally appeared Ryan [redacted] who, being by me first duly sworn and identified in accordance with New York law, deposes and says:

1. My name is Ryan [redacted], petitioner herein.
2. I have written and understood this affidavit filed herein, and each fact alleged therein is true and correct of my own personal knowledge.

FURTHER THE AFFIANT SAYETH NAUGHT.

_____

Ryan [redacted], Petitioner

SIGNATURE VERIFICATION FOR WITNESS PURPOSES ONLY

Use of notary is for cognizance in foreign venue only and not meant to convey jurisdiction.

Subscribed before me, _____ , a Notary Public, on this _____ day of the Eleventh month of the Year of our Lord two thousand eleven and two hundred thirty-fifth Year of our Independence.

_____

Notary

My commission expires:
(Seal)

WRIT OF HABEAS CORPUS ORDER TO SHOW CAUSE EXAMPLE

State of New York, Greene County
Local Criminal Court, Town of Cairo

Ryan	Petitioner;	CASE NO.2012-303 MAGISTRATE: _____ DATE: JULY 2, 2012
- v -		
STATE OF NEW YORK Leland Miller Terry J. Wilhelm Ronald Coons	Respondents.	**WRIT OF HABEAS CORPUS** **ORDER TO SHOW CAUSE** **IN RE RYAN D FELTZ** **[28 USC 2243]**

TO LELAND MILLER, PLEASE TAKE NOTICE THAT on July 2, 2012, a **PETITION FOR WRIT OF HABEAS CORPUS** is filed in the above-entitled court.

IT APPEARING THAT THE APPLICANT IS ENTITLED THERETO, LELAND MILLER IS DIRECTED, in accordance with Title 28, USC, Sec. 2243,to forthwith release Ryan from jurisdiction. If Ryan is not forthwith released from jurisdiction, then within three (3) calendar days after service of this writ **LELAND MILLER** shall make a return certifying the true cause of jurisdiction, and shall show cause why the writ should not be granted. On application to the court, for good cause additional time not exceeding twenty days may be allowed for the return.

LELAND MILLER must state in his return, plainly and unequivocally:

1. Proof of jurisdiction;

2. If the party is in custody by virtue of any writ, warrant, or other written authority, a copy thereof must be annexed to the return, and the original produced and exhibited to the Court or Judge on the hearing of such return;

3. If the person(s) upon whom the writ is served had the party in his power or custody, or under his restraint, at any time prior or subsequent to the date of the writ of habeas corpus, but has transferred such custody or restraint to another, the return must state particularly to whom, at what time and place, for what cause, and by what authority such transfer took place;

4. The return must be signed by the person making the same, and, except when such person is a sworn public officer, and makes such return in his official capacity, it must be verified by his oath.

The applicant or the person in custody may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

At the hearing the court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

THE COURT

_____

Ryan, Attornatus Privatus

(SEAL)

WRIT OF HABEAS CORPUS DEFAULT JUDGMENT EXAMPLE

State of New York, Greene County
Local Criminal Court, Town of Cairo

Ryan	Petitioner;	CASE NO.2012-303 MAGISTRATE _____
- v -		**DEFAULT JUDGMENT CORAM IPSO REGE**
STATE OF NEW YORK Leland Miller Terry J. Wilhelm Ronald Coons	Respondents.	FRCP Rule 55; Rule 58(2) 28 USC 2243

DEFAULT JUDGMENT

The Respondents against whom a judgment for affirmative relief is sought have failed to plead or otherwise defend as provided by these rules, and that fact is made to appear by affidavit, NOW THEREFOR, THIS COURT OF RECORD issues this default judgment coram ipso rege to dispose of the matter as law and justice require, to wit:

IT IS ORDERED AND ADJUDGED that the respondents, namely STATE OF NEW YORK, TOWN OF CAIRO, LELAND MILLER, TERRY J. WILHELM and RONALD COONS shall *abate at law* all proceedings in and relating to Town of Cairo Criminal Court Case No. 2012-303 and the personal property (weapons seized by sheriff) of Ryan shall be returned and carry permit to be reinstated immediately. No damages, costs, or attorneys' fees are awarded.

WITNESS: the SEAL of the COURT this 12th day of July 2012.

THE COURT
By
_____
Attornatus Privatus

SEAL

WRIT OF HABEAS CORPUS MEMORANDUM OF DECISION EXAMPLE

State of New York, Greene County Local Criminal Court, Town of Cairo

Ryan Petitioner; - v - STATE OF NEW YORK Leland Miller Terry J. Wilhelm Ronald Coons Respondents.	CASE NO.2012-303 MAGISTRATE: _____ **MEMORANDUM OF DECISION** Findings of fact; Conclusions of law; FRCP Rule 52(a) 28 USC 2243

COMES NOW THE ABOVE-ENTITLED COURT OF RECORD, TO review the record, summarily determine the facts, and dispose of the matter as law and justice require.[55]

CONTENTS

SUMMARY

Oliver Wendell Holmes once wrote, "I long have said there is no such thing as a hard case. I am frightened weekly, but always when you walk up to the lion and lay hold, the hide comes off and the same old donkey of a question of law is underneath.[56]

Duty falls upon this court of record to lay hold of the lion, unhide the underlying question of law, and dispose of the matter as law and justice require.[57]

On July 2, 2012, Ryan, a People of the United States[58], filed in the above-entitled court of record a

[55] 28 USC 2243
[56] 1 *Holmes-Pottock Letters* 156
[57] 28 USC 2243
[58] *Petition*, Page 1, Line 19; *Writ of Error* (#11), Findings of Fact, Page 6, Lines 10-11 Lines 21-22

PETITION FOR WRIT OF HABEAS CORPUS BY A PEOPLE IN STATE **CONSTRUCTIVE CUSTODY (#1)**.[59] The petition invites[60] this court's inquiry into the following:

A. The cause of the restraint,[61]
B. The jurisdictional basis of the restraint,[62]
C. Reasonable apprehension of restraint of liberty,[63]
D. Strict compliance with statutory requirements,[64] and
E. Diminishment of rights.[65]

The Petition presented issues of both fact and law. It did not appear from the application that the applicant was not entitled thereto;[66] therefore this court ordered[67] the respondents to show cause why the writ should not be granted.[68] Explicit return instructions were included as part of the *Order to Show Cause*[69] to enable the respondents to fulfill the order.

All respondents were duly[70] served with the Petition and Order to Show Cause. The record shows that no respondent made any return, no respondent requested more time to answer, and no respondent provided any objection to the proceedings.[71]

ANALYSIS

JURISDICTION OF THIS COURT

It is the duty of any court to determine whether it has jurisdiction even though that question is not raised, in order for the exercise of jurisdiction to constitute a binding decision that the court has jurisdiction.[72]

We fulfill that duty by examining the sovereign power creating the court.

But, first, what is a court? It is the person and suit of the sovereign; the place where the sovereign sojourns with his regal retinue, wherever that may be.[73]

Further, a court is an agency of the sovereign created by it directly or indirectly under its authority, consisting of one or more officers, established and maintained for the purpose of hearing and determining issues of law and fact regarding legal rights and alleged violations thereof, and of applying the sanctions of the law, authorized to exercise its powers in the course of law at times

[59] *Proof of Service* filed July 3, 2012.
[60] *Petition*, Page 1
[61] *Petition*, Page 3
[62] *Petition*, Page 5
[63] *Petition*, Page 17
[64] *Petition*, Page 18
[65] *Petition*, Page 20
[66] *Writ of Habeas Corpus*, Page 1, Line 21
[67] *Writ of Habeas Corpus, Order to Show Cause* received by clerk July 5, 2012. *Proof of Service* filed July 12, 2012.
[68] 28 USC 2243
[69] *Writ of Habeas Corpus, Order to Show Cause.*
[70] Duly: According to law in both form and substance. Black's Law Dictionary, Sixth Edition
[71] *Petition* filed July 2, 2012; *Order To Show Cause* issued July 2, 2012; *Proof of Service* filed July 12, 2012; no return filed by any respondent; no request for additional time filed by any respondent; no objection filed by any respondent; *Notice of De Facto Default* filed July 12, 2012.
[72] State ex rel. Missouri Gravel Co. v. Missouri Workmen's Compensation Commission, 113 S.W.2d 1034, 234 Mo.App. 232
[73] *Black's Law Dictionary*, 5th Edition, page 318

and places previously determined by lawful authority.[74]

The source of the authority is acknowledged by the Preamble in the Constitution for the United States of America.[75] The People of the United States, acting in sovereign capacity, "ordain[76] and establish[77] this Constitution for the United States of America". The Constitution contains nothing that would diminish the sovereign[78] power of the People, and no state may presume to do so.[79]

Further, the United States of America (and each member state) is a Republic,[80] which means that the People may act either directly or through their representatives.[81] Here the sovereign People is acting directly.

Beyond ordaining and establishing the Constitution, what are the powers of the People? The People retain all powers to self-determine and exercise rights;[82] the essence of the People's sovereignty distills to this: The decree of the sovereign makes law.[83]

Some have argued that the People have relinquished sovereignty through various contractual devices in which rights were not expressly reserved. However, that does not hold. The People retain all rights of sovereignty at all times.[84]

The exercise of sovereignty by the People is further clarified when one considers that the Constitutional government agencies have no genuine sovereign power of their own, but must rely upon such authority as is granted by the People.[85]

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[74] Isbill v. Stovall, Tex.Civ.App., 92 S.W.2d 1067, 1070; Black's Law Dictionary, 4th Edition, page 425

[75] We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

[76] Ordain: to enact a constitution or law. *Black's Law Dictionary*, Sixth Edition

[77] Establish: ...to create, ratify, or confirm... *Black's Law Dictionary*, Sixth Edition

[78] ...at the Revolution, the sovereignty devolved on the people; and they are truly the sovereigns of the country, but they are sovereigns without subjects...with none to govern but themselves.... CHISHOLM v. GEORGIA (US) 2 Dall 419, 454, 1 L Ed 440, 455, 2 DALL (1793) pp471-472

[79] Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them. Miranda v. Arizona, 384 US 436, 491

The state cannot diminish rights of the people. Hertado v. California, 100 US 516

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people. Constitution for the United States of America, Amendment IX

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. Constitution for the United States of America, Amendment X

[80] "The United States shall guarantee to every State in this Union a Republican Form of Government..." *Constitution for the United States*, Article IV, Section 4.

[81] Government: Republican government: One in which the powers of sovereignty are vested in the people and are exercised by the people, either directly, or through representatives chosen by the people, to whom those powers are specially delegated. In re Duncan, 139 U.S. 449, 11 S.Ct. 573, 35 L.Ed. 219; Minor v. Happersett, 88 U.S. (21 Wall.) 162, 22 L.Ed. 627." *Black's Law Dictionary*, Sixth Edition

[82] The people of this State, as the successors of its former sovereign, are entitled to all the rights which formerly belonged to the King by his prerogative. Lansing v. Smith, 4 Wend. 9 (N.Y.) (1829), 21 Am.Dec. 89 10C Const. Law Sec. 298; 18 C Em.Dom. Sec. 3, 228; 37 C Nav.Wat. Sec. 219; Nuls Sec. 167; 48 C Wharves Sec. 3, 7.

[83] The very meaning of "sovereignty" is that the decree of the sovereign makes law. American Banana Co. v. United Fruit Co., 29 S.Ct. 511, 513, 213 U.S. 347, 53 L.Ed. 826, 19 Ann.Cas. 1047.

[84] RESERVATION OF SOVEREIGNTY: "[15] (b) ...The Tribe's role as commercial partner with petitioners should not be confused with its role as sovereign. It is one thing to find that the Tribe has agreed to sell the right to use the land and take valuable minerals from it, and quite another to find that the Tribe has abandoned its sovereign powers simply because it has not expressly reserved them through a contract. To presume that a sovereign forever waives the right to exercise one of its powers unless it expressly reserves the right to exercise that power in a commercial agreement turns the concept of sovereignty on its head. MERRION ET AL., DBA MERRION & BAYLESS, ET AL. v. JICARILLA APACHE TRIBE ET AL. 1982.SCT.394 http://www.versuslaw.com, 455 U.S. 130, 102 S. Ct. 894, 71 L. Ed. 2d 21, 50 U.S.L.W. 4169 pp. 144-148

In the Petition Ryan identifies himself as "a People[86] of the United States."[87] As such he decrees the law[88] for this court,[89] and, ultimately, for this court as a court of record.[90]

This, then, is the sovereign power by which this court is created.

The Constitution for the United States of America mandates that, "The judicial Power[91] shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;..."[92]

This is a case in law, i.e., proceeding according to the common law in a court of record. This case arises under the Constitution and the Laws of the United States. It follows that "the judicial power" of [the People of] the United States "shall extend" to this case.

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[85] The words "sovereign state" are cabalistic words, not understood by the disciple of liberty, who has been instructed in our constitutional schools. It is our appropriate phrase when applied to an absolute despotism. The idea of sovereign power in the government of a republic is incompatible with the existence and foundation of civil liberty and the rights of property. Gaines v. Buford, 31 Ky. (1 Dana) 481, 501.

[86] PEOPLE…considered as...any portion of the inhabitants of a city or country. *Webster's 1828 Dictionary*. The word "people" may be either plural or singular in its meaning. The plural of "person" is "persons," not "people."

[87] *Petition*, Page 1

[88] *Petition*, Page 2; Petition Attachment "I", Page 1, Line 1

[89] *Petition* Attachment "I", Page 4: COURT. The person and suit of the sovereign; the place where the sovereign sojourns with his regal retinue, wherever that may be. *Black's Law Dictionary*, 5th Edition, page 318.
An agency of the sovereign created by it directly or indirectly under its authority, consisting of one or more officers, established and maintained for the purpose of hearing and determining issues of law and fact regarding legal rights and alleged violations thereof, and of applying the sanctions of the law, authorized to exercise its powers in the course of law at times and places previously determined by lawful authority. Isbill v. Stovall, Tex.Civ.App., 92 S.W.2d 1067, 1070; *Black's Law Dictionary*, 4th Edition, page 425

[90] Petition Attachment "I", Page 3-4: COURT OF RECORD. To be a court of record a court must have four characteristics, and may have a fifth:

A. A judicial tribunal having attributes and exercising functions independently of the person of the magistrate designated generally to hold it. Jones v. Jones, 188 Mo.App. 220, 175 S.W. 227, 229; Ex parte Gladhill, 8 Metc. Mass., 171, per Shaw, C.J. See, also, Ledwith v. Rosalsky, 244 N.Y. 406, 155 N.E. 688, 689; *Black's Law Dictionary*, 4th Ed., 425, 426

B. Proceeding according to the course of common law Jones v. Jones, 188 Mo.App. 220, 175 S.W. 227, 229; Ex parte Gladhill, 8 Metc. Mass., 171, per Shaw, C.J. See, also, Ledwith v. Rosalsky, 244 N.Y. 406, 155 N.E. 688, 689, *Black's Law Dictionary*, 4th Ed., 425, 426

C. Its acts and judicial proceedings are enrolled, or recorded, for a perpetual memory and testimony. 3 Bl. Comm. 24; 3 Steph. Comm. 383; The Thomas Fletcher, C.C.Ga., 24 F. 481; Ex parte Thistleton, 52 Cal 225; Erwin v. U.S., D.C.Ga., 37 F. 488, 2 L.R.A. 229; Heininger v. Davis, 96 Ohio St. 205, 117 N.E. 229, 231

D. Has power to fine or imprison for contempt. 3 Bl. Comm. 24; 3 Steph. Comm. 383; The Thomas Fletcher, C.C.Ga., 24 F. 481; Ex parte Thistleton, 52 Cal 225; Erwin v. U.S., D.C.Ga., 37 F. 488, 2 L.R.A. 229; Heininger v. Davis, 96 Ohio St. 205, 117 N.E. 229, 231; *Black's Law Dictionary*, 4th Ed., 425, 426

E. Generally possesses a seal. 3 Bl. Comm. 24; 3 Steph. Comm. 383; The Thomas Fletcher, C.C.Ga., 24 F. 481; Ex parte Thistleton, 52 Cal 225; Erwin v. U.S., D.C.Ga., 37 F. 488, 2 L.R.A. 229; Heininger v. Davis, 96 Ohio St. 205, 117 N.E. 229, 231; *Black's Law Dictionary*, 4th Ed., 425, 426

[91] Judicial Power is the power to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before court for decision. Power that adjudicates upon and protects the rights and interests of persons or property, and to that end declares, construes and applies the law. *Black's Law Dictionary*, Sixth Edition

[92] *Constitution for the United States of America*, Article III, Sect. 2, Clause 1.

EXHAUSTION OF

ADMINISTRATIVE PROCEDURE

Ordinarily, exhaustion of state administrative procedures is a requirement before a court of another jurisdiction will review the proceedings of the state courts. This is founded upon the principle of comity.

The courts of the United States and the courts of the various states are independent of each other.[93] Federal courts have no supervisory powers over state judicial proceedings,[94] state court system,[95] or trial judges.[96] Thus, federal courts have no general power to correct errors of law that may occur from time to time in the course of state proceedings.[97]

However, the two courts are not foreign to each other; they form one system of jurisprudence, which constitutes the law of the land and should be considered as courts of the same country, having jurisdiction partly different and partly concurrent,[98] and as a matter of comity one of such courts will not ordinarily determine a controversy of which another of such courts has previously obtained jurisdiction. In cases of apparent conflict between state and federal jurisdiction, the federal courts are the exclusive judges over their jurisdiction in the matter.[99]

But federal intervention is only proper to correct errors of constitutional dimension,[100] which occurs when a state court arbitrarily or discriminatorily applies state law.[101]

The rule of comity does not go to the extent of relieving federal courts from the duty of proceeding promptly to enforce rights asserted under the federal Constitution,[102] and all considerations of comity must give way to the duty of a federal court to accord a citizen of the United States his right to invoke the court's powers and process in the defense or enforcement of his rights.[103]

In Friske v. Collins[104], the Court's view was that exhaustion was not a "rigid and inflexible" rule, but could be deviated from in "special circumstances." In addition to the class of "special circumstances" developed in the early history of the exhaustion rule, exhaustion was not required where procedural obstacles make theoretically available processes unavailable, where the

[93] Claflin v. Houseman, N.Y., 3 Otto 130, 93 U.S. 130, 23 L.Ed. 833
[94] Smith v. Phillips, 102 S.Ct. 940, 455 U.S. 209, 71 L.Ed.2d 78, on remand 552 F.Supp. 653, affirmed 717 F.2d 44, certiorari denied 104 S.Ct. 1287, 465 U.S. 1027, 79 L.Ed.2d 689, Ker v. State of California, Cal., 83 S.Ct. 1623, 374 U.S. 23, 10 L.Ed.2d 726, 24 O.O.2d 201, Burrus V. Young, C.A.7 (Wis.), 808 F.2d 578, Lacy v. Gabriel, C.A.Mass., 732 F.2d 7, certiorari denied 105 S.Ct. 195, 469 U.S. 861, 83 L.Ed.2d 128, Smiths v. McMullen, C.A.Fla., 673 F.2d 1185, certiorari denied 103 S.Ct. 740, 459 U.S. 1110, 74 L.Ed.2d 961
[95] U.S. ex rel. Gentry v. Circuit Court of Cook County, Municipal Division, First Municipal Dist., C.A.Ill., 586 F.2d 1142
[96] Harris v. Rivera, N.Y., 102S. Ct. 460, 454 U.S. 339, 70 L.Ed.2d 530
[97] Buckley Towers Condominium, Inc. v. Buchwald, C.A.Fla., 595 F.2d 253
[98] Claflin v. Houseman, N.Y., 3 Otto 130, 93 U.S. 130, 23 L.Ed. 833
[99] Craig v. Logemann, 412 N.W.2d 857, 226 Neb. 587, appeal dismissed 108 S.Ct. 1002, 484 U.S. 1053, 98 L.Ed.2d 969
[100] Burrus V. Young, C.A.7 (Wis.), 808 F.2d 578, Lacy v. Gabriel, C.A.Mass., 732 F.2d 7, certiorari denied 105 S.Ct. 195, 469 U.S. 861, 83 L.Ed.2d 128, Smiths v. McMullen, C.A.Fla., 673 F.2d 1185, certiorari denied 103 S.Ct. 740, 459 U.S. 1110, 74 L.Ed.2d 961
Inconsistent verdicts: Court of Appeals erred when it directed state trial judge to provide explanation of apparent inconsistency in his acquittal of codefendant and his conviction of defendant without first determining whether inexplicably inconsistent verdicts would be unconstitutional. Harris v. Rivera, N.Y., 102 S.Ct. 460, 454 U.S. 339, 70 L.Ed.2d 530
[101] Jentges v. Milwaukee County Circuit Court, C.A.Wis., 733 F.2d 1238
[102] Everglades Drainage Dist. v. Florida Ranch & Dairy Corp., C.C.A.Fla., 74 F.2d 914, rehearing denied 75 F.2d 1013
[103] Carpenter Steel Co. v. Metropolitan-Edison Co., D.C.Pa., 268 F. 980
[104] 342 US 519 (1952)

available state procedure does not offer swift vindication of the petitioner's rights, and where vindication of the federal right requires immediate action.[105]

Exhaustion today is a rule rooted in the relationship between the national and state judicial systems. The rule is consistent with the writ's extraordinary character, but it must be balanced by another characteristic of the writ, to wit: its object of providing "a swift and imperative remedy in all cases of illegal restraint upon personal liberty."[106] That is, it "is not [a rule] defining power but one which relates to the appropriate exercise of power."[107]

The Court noted that where resort to state remedies has failed to afford a full and fair adjudication of the federal contentions raised, either because the state affords no remedy or because in the particular case the remedy afforded by state laws proves in practice unavailable or seriously inadequate, a federal court should entertain a petition for habeas corpus; otherwise a petitioner would be remediless. In such a case the applicant should proceed in the federal district court before resorting to the Supreme Court by petition for habeas corpus.[108]

The Nevada Revised Statutes provide as follows:

> *NRS 34.430 Return and answer: Service and filing; contents; signature and verification.*
>
> *1. Except as otherwise provided in subsection 1 of NRS 34.745, the respondent shall serve upon the petitioner and file with the court a return and an answer that must respond to the allegations of the petition within 45 days or a longer period fixed by the judge or justice.*

28 USC 2243 provides as follows:

> Sec. 2243. Issuance of writ; return; hearing; decision.
>
> A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.
>
> The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The state standard, 45 days, when compared to the federal standard, 3 days, does not offer swift vindication of the petitioner's rights where vindication of the federal right requires immediate action. This is particularly so when one considers that the petitioner is suffering an ongoing loss of liberty, and will lose his liberty because of arbitrary exercise of state power. The state has been duly served, and the state has not made, and apparently cares not to make, a return. This question

[105] Amsterdam, "Federal Removal and Habeas Corpus Jurisdiction," 113 U. Pa. L. Rev. 793, 893-94; Developments, "Federal Habeas Corpus," 83 Harv. L. Rev. 1038, 1097-107. Cf. Markuson v. Boucher, 175 u.s. 189 (1899) WITH Roberts v. LaVallee, 389 U.S. 40 (1967)

[106] Price v. Johnson, 334 U.S. 266, 283 (1947)

[107] Bowen v. Johnston, 306. U.S. 19, 27 (1939). See Brennan, "Some Aspects of Federalism," 39 N.Y.U.L.Rev. 945, 957-58; Brennan, "Federal Habeas Corpus and State Prisoners," 7 Utah L. Rev. 423, 426

[108] Ex parte Hawk, 321 U.S. 114, 118; See also Ex parte Abernathy, 320 U.S. 219 (1943); White v. Ragen, 324 U.S. 760 (1945); Wood v. Niersteimer, 328 U.S. 211 (1946)

of timeliness constitutes a special circumstance justifying deviation from the exhaustion rule. Exhaustion is not required where procedural obstacles make theoretically available processes unavailable, where the available state procedure does not offer swift vindication of the petitioner's rights, and where vindication of the federal right requires immediate action.[109]

COMITY

Comity is one court giving full faith and credit to the judicial proceedings of another court provided that such proceedings do not violate its own rules. Though comity is not mandated, it is encouraged by Article IV, Section 1 of the U.S. Constitution.[110]

However, comity does not mean that one court involuntarily gives up its jurisdiction to another court. Comity does not mean that one court must respect the improprieties of another court. Comity does not mean that one court must submit to the whim of another court. Further, comity cannot enter the equation when the question before the courts concerns which of the two courts has jurisdiction regarding the vindication of the rights of the petitioner. The protection of the petitioner's rights from encroachment by the state is the innate responsibility of the federal courts.

Habeas corpus has been called "The Great Writ of Liberty." Historically, that is a side issue. In the early days habeas corpus was not connected with the idea of liberty. It was a useful device in the struggle for control between common law and equity courts. By the middle of the fifteenth century, the issue of habeas corpus, together with privilege, was a well established way to remove a cause from an inferior court where the defendant could show some special connection with one of the central courts which entitled him to have his case tried there.[111] In the early seventeenth century The Five Knights' Case[112] involved the clash between the Stuart claims of prerogative and the common law, and was, in the words of one of the judges, "the greatest cause that I ever knew in this court".[113] Over the centuries the writ became a viable bulwark between the powers of government and the rights of the people in both England and the United States.

In the United States habeas corpus exists in two forms: common law and statutory. The petitioner has chosen habeas corpus at common law in a court of record. The Constitution for the United States of America acknowledges the Peoples' right to the common law of England as it was in 1789. What is that common law? It does not consist of absolute, fixed and inflexible rules, but broad and comprehensive principles based on justice, reason, and common sense....[114]

The common law is also the Magna Carta[115] as authorized by the Confirmatio Cartarum, if the accused so demands.[116]

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[109] Amsterdam, "Federal Removal and Habeas Corpus Jurisdiction," 113 U. Pa. L. Rev. 793, 893-94; Developments, "Federal Habeas Corpus," 83 Harv. L. Rev. 1038, 1097-107. Cf. Markuson v. Boucher, 175 u.s. 189 (1899) WITH Roberts v. LaVallee, 389 U.S. 40 (1967)

[110] Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial proceedings of every other State. And the Congress may, by general Laws, prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof. Constitution for the United States of America, Art. IV, Sect. 1.

[111] See, e.g., De Vine (1456) O. Bridg. 288; Fizherbert, Abridg., sub tit. 'Corpus Cum Causa'.

[112] Darnel's Case, 3 St. Tr. 1)

[113] Ibid., at 31 per Doderidge J

[114] Miller v. Monsen, 37 N.W.2d 543, 547, 228 Minn. 400

[115] June 15, 1215, King John I

[116] November 5, 1297, King Edward I

The Confirmatio Cartarum succinctly says, "...our justices, sheriffs, mayors, and other ministers, which under us have the laws of our land to guide, shall allow the said charters pleaded before them in judgment in all their points, that is to wit, the Great Charter as the common law and the Charter of the forest, for the wealth of our realm."[117] In other words, the King's men must allow the Magna Carta to be pleaded as the common law if the accused so wishes it.

Magna Carta says, "Henceforth the writ which is called Praecipe shall not be served on any one for any holding so as to cause a free man to lose his court."[118] In this case, the free man's court is the court of record of William Jones, as above entitled.

The Constitution for the United States of America, Article III, Section 2-1, says, "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States..." The judicial power is thusly extended to this habeas corpus case at law in the above-entitled court of record.

The above-entitled court of record, invoking the extension of the judicial power of the United States, and upon a case in law is proceeding according to the common law as sanctioned by the Constitution, and considering the matter that has arisen under the Constitution and laws of the United States.

As stated above, the rule of comity does not go to the extent of relieving federal courts from the duty of proceeding promptly to enforce rights asserted under the federal Constitution,[119] and all considerations of comity must give way to the duty of a federal court to accord a citizen of the United States his right to invoke the court's powers and process in the defense or enforcement of his rights.[120]

This court accepts the duty obligation to proceed promptly to enforce rights asserted under the federal Constitution. Thus, this court has the subject matter jurisdiction to examine and act upon the Petition for habeas corpus.

Further, the parties were duly served personally with a copy of the Petition and the *Writ of Habeas Corpus, Order to Show Cause*, thus this court has in personam jurisdiction.[121]

PETITION

Both Title 28 of the United States Code[122] and the Nevada Revised Statutes[123] acknowledge that it is not the responsibility of the petitioner to know by what claim or authority the state acts, but that the petitioner may inquire as to the cause of the restraint.

[117] Confirmatio Cartarum, Article I, clause 3
[118] Magna Carta, Article 34
[119] Everglades Drainage Dist. V. Florida Ranch & Dairy Corp., C.C.A.Fla., 74 F.2d 914, rehearing denied 75 F.2d 1013
[120] Carpenter Steel Co. v. Metropolitan-Edison Co., D.C.Pa., 268 F. 980
[121] Proof of Service, filed July 12, 2012
[122] 28 USC 2242 states in part: Application for a writ of habeas corpus....shall allege the facts concerning the applicant's commitment or detention, the name of the person who has custody over him and by virtue of what claim or authority, if known.
[123] Every person unlawfully committed, detained, confined or restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus to inquire into the cause of such imprisonment or restraint. Nevada Revised Statutes 34.360

Petitioner has requested an inquiry into the cause of restraint, but none of the respondents has returned any statement of cause of the restraint. Therefore, this court may presume that there is neither legal nor lawful cause of restraint.

Petitioner has isolated five points upon which he bases his petition:

A. The lack of cause of the restraint,[124]
B. The lack of jurisdictional basis of the restraint,[125]
C. Prosecutorial vindictiveness,[126]
D. Reasonable apprehension of restraint of liberty,[127]
E. Strict compliance with statutory requirements,[128] and
F. Diminishment of rights.[129]

Because the respondents have made no return, this court must rule solely upon the evidence before it, as provided by the petitioner. Seneca wrote, ""He who decides a case with the other side unheard, though he decide justly, is himself unjust."[130] Mindful of the wisdom of Seneca, we proceed.

This court has taken judicial notice of the Federal Rules of Civil Procedure, Title 28, United States Code, insofar as it is not repugnant to the common law. FRCP Rule 55 regarding default[131] is applied here.[132]

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[124] *Petition*, Page 3
[125] *Petition*, Page 3
[126] *Petition*, Page 4
[127] *Petition*, Page 5
[128] *Petition*, Page 6
[129] *Petition*, Page 7
[130] Seneca's *Medea*.

[131] *Federal Rules of Civil Procedure, Rule 55. Default.*

(a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default.

(b) Judgment. Judgment by default may be entered as follows:

(1) By the Clerk. When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if the defendant has been defaulted for failure to appear and is not an infant or incompetent person.

(2) By the Court. In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, the party (or, if appearing by representative, the party's representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

The record shows that the *Petition* was filed, a *Writ of Habeas Corpus, Order to Show Cause* issued, the *Petition* and *Writ* were duly served upon the respondents, no return was filed, and a notice of default was filed. Further, the record shows that in a later state proceeding the state court and the judge of the state court were cognizant of the *Petition* and *Writ,*[133] so no claim may be made that the state court was unaware of this court's proceedings, nor may the respondents claim they were unaware of the consequences for failure to make a return on the order to show cause.

Simply stated, the parties against whom a judgment for affirmative relief is sought have failed to plead or otherwise defend as provided by these rules and that fact has been made to appear by affidavit[134] in accordance with FRCP Rule 55(a).

FINDINGS OF FACT

THEREFORE, BASED UPON THE RECORD BEFORE THIS COURT,

THE COURT FINDS that Ryan is one of the People as contemplated in the Preamble in the Constitution for the United States of America.

THE COURT FINDS that the above-entitled court is a **COURT OF RECORD**.

THE COURT FINDS that all respondents were duly served and court personnel were apprised of the petitioner's claims and the writ. All respondents had full notice and fair opportunity to argue their cause, and did not so do.

THE COURT FINDS that the respondents have not presented any legal or lawful cause of the restraint of Ryan.

THE COURT FINDS that the respondents have not presented any jurisdictional basis for the restraint of Ryan Feltz. The court of the Respondents did not fulfill the duty to determine whether it has jurisdiction even though that question is not raised, in order for the exercise of jurisdiction to constitute a binding decision that the court has jurisdiction.[135]

THE COURT FINDS that the respondents have not presented any evidence to prove the absence of prosecutorial vindictiveness by the respondents against Ryan.

THE COURT FINDS THAT Ryan has a reasonable apprehension of future restraint of liberty arising from the same facts.

THE COURT FINDS THAT strict compliance with statutory requirements were not met by the respondents.

THE COURT FINDS THAT Ryan has suffered an unlawful and illegal diminishment of rights.

(c) Setting Aside Default. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

[132] Courts of record have an inherent power, independently of statutes, to make rules for the transaction of business; 1 Pet. 604, 3 Serg. & R. Penn. 253; 8 id. 336, 2 Mo. 98

[133] Notice of De Facto Default and Non-Opposition to Habeas Corpus; Affidavit (Supplemental).

[134] *Notice of de Facto Default and Non-Opposition to Habeas Corpus*, Filed Mar 5, 2003, 12:52pm

[135] State ex rel. Missouri Gravel Co. v. Missouri Workmen's Compensation Commission, 113 S.W.2d 1034, 234 Mo.App. 232

CONCLUSIONS OF LAW

FURTHER, THE COURT CONCLUDES THAT this, the above entitled court, has the sovereign authority to proceed as a court of record with jurisdiction to act in the instant case and subject matter.

FURTHER, THE COURT CONCLUDES THAT because all respondents were duly served and court personnel were apprised of the petitioner's *Petition* and *Writ*, and because all respondents had full notice and fair opportunity to argue their cause and did not so do, and because none of the aforementioned persons made a return, objection, or motion, the above-entitled court has acquired in personam jurisdiction of each of the respondents.

FURTHER, THE COURT CONCLUDES THAT because the respondents have not presented any legal or lawful cause of, or any jurisdictional basis for the restraint of Ryan, the respondents do not have any legal or lawful cause against or jurisdiction over Ryan.

FURTHER, THE COURT CONCLUDES THAT strict compliance with statutory requirements were not met by the respondents, Ryan was denied due process, there is a reasonable probability that he will be denied due process, and there is a reasonable probability that Ryan will be subjected to future restraint of liberty arising from the same facts.

FURTHER, THE COURT CONCLUDES THAT because Ryan has suffered an unlawful and illegal diminishment of rights Ryan will be subjected to further unlawful and illegal diminishment of rights.

CONCLUSION SUMMARY

The respondents, namely **STATE OF NEW YORK, Leland Miller, Terry J. Wilhelm, and Ronald Coons** by their default (their failure to return the writ of habeas corpus), have failed to prove their jurisdiction; therefore they each and all of them shall *abate at law* all proceedings in and relating to State of New York, Greene County Local Criminal Court, Town of Cairo CASE NO.2012-303

None of the Respondents is an infant or incompetent. None of the Respondents has appeared in the proceedings.

Default judgment to be entered by this court in accordance with Federal Rules of Civil Procedure, Rule 55(b)(2). No damages are awarded; no costs are awarded; no attorneys' fees are awarded.

WITNESS: the SEAL of the COURT this 12th day of July, 2012.

THE COURT
By

SEAL

Attornatus Privatus

COURT OF RECORD

If you are the defendant you must become the plaintiff and then open a court of record. You can do this by challenging jurisdiction, if it is a civil case you can counter sue.

- Now that you have a fundamental understanding of court procedure, learn to proceed under Common Law go to - **http://newyorkcommitteemen.org/common/common/law.html** and learn how to open a Court of Record and control the court.

JUSTICE COURT TOWN OF HORRORSVILLE, NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK
Plaintiff
against
Your Name
Defendant

CASE NO: 123456

Magistrate _____

MOTION TO QUASH

DEFENDANT, Your Name, one of the people[136] of New York, , hereinafter the victim, in this court of record[137] moves this Honorable Court to quash for lack of authority[138] of personam jurisdiction[139]. The accompanying "law of the case", attached 16 pages, is incorporated by reference as though fully stated herein;

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[136] PEOPLE. People are supreme, not the state. [**Waring vs. the Mayor of Savanah, 60 Georgiaat 93**]; The state cannot diminish rights of the people. [**Hertado v. California, 100 US 516**]; Preamble to the US and NY Constitutions - We the people ... do ordain and establish this Constitution...; ...at the Revolution, the sovereignty devolved on the people; and they are truly the sovereigns of the country, but they are sovereigns without subjects...with none to govern but themselves... [**CHISHOLM v. GEORGIA (US) 2 Dall 419, 454, 1 L Ed 440, 455, 2 DALL (1793) pp471-472**]: The people of this State, as the successors of its former sovereign, are entitled to all the rights which formerly belonged to the King by his prerogative. [**Lansing v. Smith, 4 Wend. 9 (N.Y.) (1829), 21 Am. Dec. 89 10C Const. Law Sec. 298; 18 C Em.Dom. Sec. 3, 228; 37 C Nav.Wat. Sec. 219; Nuls Sec. 167; 48 C Wharves Sec. 3, 7.**]

* CONSTITUTION FOR THE UNITED STATES OF AMERICA: We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

* STATE OF NEW YORK CONSTITUTION: We, the People of the State of New York, grateful to Almighty God for our freedom, in order to secure and perpetuate its blessings, do establish this Constitution.

Both constitutions (and the constitution of any real republic) the operative word is "establish." The People existed in their own individual sovereignty before the constitution was enabled. When the People "establish" a constitution, there is nothing in the word "establish" that signifies that they have yielded any of their sovereignty to the agency they have created. To interpret otherwise would convert the republic into a democracy (Republic vs. Democracy;).

[137] Article VI. b. The court of appeals, the supreme court including the appellate divisions thereof, the court of claims, the county court, the surrogate's court, the family court, the courts or court of civil and criminal jurisdiction of the city of New York, and such other courts as the legislature may determine shall be courts of record.

[138] AUTHORITY. [Black's Law 4th edition, 1891] Permission. [**People v. Howard, 31 Cal.App. 358, 160 P. 697, 701]. Control over, juris-diction. [State v. Home Brewing Co. of Indian-apolis, 182 Ind. 75, 105 N.E. 909, 916**].

[139] JURISDICTION. [Bouvier's Law, 1856 Edition] A power constitutionally conferred upon a judge or magistrate, to take cognizance of, and decide causes according to law, and to carry his sentence into execution. [**6 Pet. 591; 9John. 239**].

1. "*Court must prove on the record, all jurisdiction facts related to the jurisdiction asserted*." **[Lantanav. Hopper, 102 F2d 188; Chicagov. New York, 37 F Supp 150]**.

2. "*However late this objection has been made, or may be made in any case, in an inferior or appellate court of the United States, it must be considered and decided, before any court can move one further step in the cause; as any movement is necessarily the exercise of jurisdiction*." [**Rhode Island v. Massachussetts, 37 U.S. 657, 718, 9L.Ed. 1233 (1838)**].

3. Service of an appearance ticket[140] does not confer personal jurisdiction upon a criminal court.

4. *Only Congress* **[NOT a town board crafting zoning *ordinances or a judge enforcing the same*]** *can make an act a crime, affix punishment to it, and declare court that shall have jurisdiction*." **[U.S. v. Beckford, 966 F.Supp. 1415 (1997)**]

5. "*Once challenged, jurisdiction cannot be 'assumed', it must be proved to exist*." **[Stuck v. Medical Examiners, 94 Ca2d 751.211 P2s 389]** "*Jurisdiction, once challenged, cannot be assumed and must be decided*." **[Maine v. Thiboutot, 100 S. Ct. 250]** "*No sanction can be imposed absent proof of jurisdiction*" **[Stanard v. Olesen, 74 S. Ct.768]** "*The law requires proof of jurisdiction to appear on the record of the administrative agency and all administrative proceedings*" [**Hagans v. Lavine, 415 U.S. 528] Other cases also such as McNutt v. G.M., 56 S. Ct. 789,80 L. Ed. 1135, Griffin v. Mathews, 310 Supp. 341, 423 F. 2d 272, Basso v. U.P.L., 495 F 2d. 906, Thomson v. Gaskiel, 62 S. Ct. 673, 83 L. Ed. 111, and Albrecht v U.S., 273 U.S. 1**,] also all confirm, that, when challenged, jurisdiction must be documented, shown, and proven, to lawfully exist before a cause may lawfully proceed in the courts.

6. "*Where the court is without jurisdiction, it has no authority to do anything other than to dismiss the case*." [**Fontenot v. State, 932 S.w.2d 185 "Judicial action without jurisdiction is void."-Id (1996)**]

7. "*When a judge knows that he lacks jurisdiction, or acts in the face of clearly valid statutes expressly depriving him of jurisdiction, judicial immunity is lost*." [**Rankin v. Howard, (1980) 633 F.2d 844, cert. den. Zeller v. Rankin, 101 S.Ct. 2020, 451 U.S. 939, 68 L.Ed 2d 326**]

8. "*A judge must be acting within his jurisdiction as to subject matter and person, to be entitled to immunity from civil action for his acts*." [**Davis v. Burris, 51 Ariz. 220, 75 P.2d 689 (1938)**]

9. "*When a judicial officer acts entirely without jurisdiction or without compliance with jurisdiction requisites he may be held civilly liable for abuse of process even though his act involved a decision made in good faith, that he had jurisdiction*." [**Little v. U.S. Fidelity & Guaranty Co., 217 Miss. 576, 64 So. 2d 697**]

10. "*No judicial process, whatever form it may assume, can have any lawful authority outside of the limits of the jurisdiction of the court or judge by whom it is issued; and an attempt to enforce it beyond these boundaries is nothing less than lawless violence*." [**Ableman v. Booth, 21 Howard 506 (1859)**]

11. "*We (judges) have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution*." [**Cohen v. Virginia, (1821), 6 Wheat. 264 and U.S. v. Will, 449 U.S. 200**]

12. The record states this is a criminal action, the US Constitution under Article 1 Section 8 Clause 17 grants court's Jurisdiction under Common Law[141] or Admiralty or Military tribunal venue.

13. Common law is preserved under the Supreme Courts as defined in our US and State Constitutions.

14. Legislators are authorized under the Constitution, ordained by the people, to write statutes and codes, enforced as law, to control bureaucrats, municipalities, government agencies, elected officials, interstate commerce, but not people, who's rights are unalienable[142], not legislated.

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[140] "Appearance ticket is not accusatory instrument and its filing does not confer jurisdiction over defendant." [**People v. Gabbay, 670 N.Y.S.2d 962, 175 Misc.2d 421 678 N.Y.S.2d 26,92 N.Y.2d 879, 700 N.E.2d 564 (1997)**]
* "Service of an appearance ticket on an accused does not confer personal or subject matter jurisdiction upon a criminal court." [**People v. Giusti, 673 N.Y.S.2d 824, 176 Misc.2d 377 (1998)**]

[141] "Trial court acts without jurisdiction when it acts without inherent or common law authority, ..." [**State v. Rodriguez, 725 A.2d 635, 125 Md.App 428, cert den 731 A.2d 971,354 Md. 573 (1999)**]

15. "*Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts And the law is the definition and limitation of power." ... "For, the very idea that man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself*." [Yick Wo v. Hopkins, 118 US 356, 370 Quotiens dubia interpretatio libertatis est, secundum libertatem respondendum erit]

16. Statutes simply are not law[143].

17. This court has no authority to rule and judge over "we the people" without their consent[144].

18. Let the record show this court can only be an Admiralty Court[145], acting under color of law[146], alleging jurisdiction over a people under commerce laws.

19. The victim, one of the people, has never consented to being judged by an admiralty court.

20. Therefore the victim demands this court dismiss for lack of constitutional or congressional proof of jurisdiction, and no sworn affidavit by an injured party.

WHEREFORE victim moves this Court to enter an Order discharging this case for lack of personam jurisdiction. Furthermore victim demands, that should this court rule itself to have jurisdiction, then as per, "Lantanav. Hopper, 102 F2d 188; Chicagov. New York, 37 F Supp 150", this court is to prove on the record, all jurisdiction facts related to the jurisdiction asserted, and the name of jurisdiction claimed, until such demand is met this court can proceed no further.

Dated _____ _____

Your Name, in pro per

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[142] UNALIENABLE [Bouvier's Law, 1856 Edition] Inalienable; incapable of being aliened, that is, sold and transferred; The state of a thing or right which cannot be sold; Things which are not in commerce, as public roads, are in their nature unalienable. Some things are unalienable, in consequence of particular provisions in the law forbidding their sale or transfer, as pensions granted by the government. The natural rights of life and liberty are unalienable.

[143] The common law is the real law, the Supreme Law of the land, the code, rules, regulations, policy and statutes are "not the law", [Self v. Rhay, 61 Wn (2d) 261]

[144] Consent of the governed - Declaration of Independence - We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.--That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed

[145] ADMIRALTY. A court which has a very extensive jurisdiction of maritime causes, civil and criminal, controversies arising out of acts done upon or relating to the sea, and questions of prize. It is properly the successor of the consular courts, which were emphatically the courts of merchants and sea-going persons, established in the principal maritime cities on the revival of commerce after the fall of the Western Empire, to supply the want of tribunals that might decide causes arising out of maritime commerce. Also, the system of jurisprudence relating to and growing out of the jurisdiction and practice of the admiralty courts.

[146] COLOR OF LAW. [Black's Law 4th edition, 1891] -- The appearance or semblance, without the substance, of legal right. [State v. Brechler, 185 Wis. 599, 202 N.W. 144, 148] Misuse of power, possessed by virtue of state law and made possible only because wrongdoer is clothed with authority of state, is action taken under "color of state law." (Atkins v. Lanning, 415 F. Supp. 186, 188)

New York State Supreme Court, Dutchess County

Your Name

Plaintiff

-against-

Defendant

Index # 123456

Magistrate _____

Law of the Case

Defendant

JUDICIAL COGNIZANCE[147]

THE LAW OF THE CASE IS DECREED AS FOLLOWS:

I IMMUNITY:

Any judge who does not comply with his oath to the Constitution of the United States wars against that Constitution and engages in acts in violation of the supreme law of the land. The judge is engaged in acts of treason. [**Cooper v. Aaron, 358 U.S. 1, 78 S. Ct. 1401 (1958)**]

There is a general rule that a ministerial officer who acts wrongfully, although in good faith, is nevertheless liable in a civil action and cannot claim the immunity of the sovereign. [**Cooper v. O'Conner, 99 F.2d 133**]

A judge must be acting within his jurisdiction as to subject matter and person, to be entitled to immunity from civil action for his acts. [**Davis v. Burris, 51 Ariz. 220, 75 P.2d 689 (1938)**]

"The courts are not bound by an officer's interpretation of the law under which he presumes to act." [**Hoffsomer v. Hayes, 92 Okla 32, 227 F. 417**]

"Where there is no jurisdiction, there can be no discretion, for discretion is incident to jurisdiction." [**Piper v. Pearson, 2 Gray 120, cited in Bradley v. Fisher, 13 Wall. 335, 20 L.Ed. 646 (1872)**]

"No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it." ... "It is the only supreme power in our system of government, and every man who, by accepting office participates in its functions, is only the more strongly bound to

[147] [Black's Law Dictionary, 5th Edition, page 760.] Judicial notice, or knowledge upon which a judge is bound to act without having it proved in evidence.

submit to that supremacy, and to observe the limitations which it imposes on the exercise of the authority which it gives." [**U.S. v. Lee, 106 U.S. 196, 220 1 S. Ct. 240, 261, 27 L. Ed 171 (1882)**]

II SOVEREIGNTY:

It is the public policy of this state that public agencies exist to aid in the conduct of the people's business.... The people of this state do not yield their sovereignty to the agencies which serve them. ...at the Revolution, the sovereignty devolved on the people; and they are truly the sovereigns of the country, but they are sovereigns without subjects...with none to govern but themselves..... [**CHISHOLM v. GEORGIA (US) 2 Dall 419, 454, 1 L Ed 440, 455 @DALL (1793) pp471-472.**]

The very meaning of 'sovereignty' is that the decree of the sovereign makes law. [**American Banana Co. v. United Fruit Co., 29 S.Ct. 511, 513, 213 U.S. 347, 53 L.Ed. 826, 19 Ann.Cas. 1047**.]

The people of this State, as the successors of its former sovereign, are entitled to all the rights which formerly belonged to the King by his prerogative. [**Lansing v. Smith, 4 Wend. 9 (N.Y.) (1829), 21 Am. Dec. 89 10C Const. Law Sec. 298; 18 C Em.Dom. Sec. 3, 228; 37 C Nav.Wat. Sec. 219; Nuls Sec. 167; 48 C Wharves Sec. 3, 7.**]

A consequence of this prerogative is the legal ubiquity of the king. His majesty in the eye of the law is always present in all his courts, though he cannot personally distribute justice. (**Fortesc.c.8. 2Inst.186**) His judges are the mirror by which the king's image is reflected. [**1 Blackstone's Commentaries, 270, Chapter 7, Section 379**.]

SOVEREIGNTY OF THE PEOPLE - The concept of sovereignty stands on its own. The sources shown below may help you to see that it is a respected and valid concept.

The people of this State, as the successors of its former sovereign, are entitled to all the rights which formerly belonged to the King by his prerogative.... [**Lansing v. Smith, 21 D. 89., 4 Wendel 9 (1829) (New York)**] "D." = Decennial Digest. Lansing v. Smith, 4 Wend. 9 (N.Y.) (1829), 21 Am.Dec. 89, 10C Const. Law Sec. 298; 18 C Em.Dom. Sec. 3, 228; 37 C Nav.Wat. Sec. 219; Nuls Sec. 1`67; 48 C Wharves Sec. 3, 7. NOTE: Am.Dec.=American Decision, Wend. = Wendell (N.Y.)

SOVEREIGNTY [Black's Law Dictionary, Fourth Edition] - The power to do everything in a state without accountability,--to make laws, to execute and to apply them, to impose and collect taxes and levy contributions, to make war or peace, to form treaties of alliance or of commerce with foreign nations, and the like. [**Story, Const. Sec 207**]

Sovereignty in government is that public authority which directs or orders what is to be done by each member associated in relation to the end of the association. It is the supreme power by which any citizen is governed and is the person or body of persons in teh state to whom there is politically no superior. The necessary existence of the state and that right and power which necessarily follow is "sovereignty." By "sovereignty in its largest sense is meant supreme, absolute, uncontrollable power, the absolute right to govern. The word which by itself comes nearest to being the definition of

"sovereignty" is will or volition as applied to political affairs. [**City of Bisbee v. Cochise County, 52 Ariz. 1, 78 P.2d 982, 986].**

"The very meaning of 'sovereignty' is that the decree of the sovereign makes law." American [**Banana Co. v. United Fruit Co., 29 S.Ct. 511, 513, 213 U.S. 347, 53 L.Ed. 826, 19 Ann.Cas. 1047]**.

"'Sovereignty' means that the decree of sovereign makes law, and foreign courts cannot condemn influences persuading sovereign to make the decree." [**Moscow Fire Ins. Co. of Moscow, Russia v. Bank of New York & Trust Co., 294 N.Y.S. 648, 662, 161 Misc. 903]**.

RESERVATION OF SOVEREIGNTY: "[15] (b) Even if the Tribe's power to tax were derived solely from its power to exclude non-Indians from the reservation, the Tribe has the authority to impose the severance tax. Non-Indians who lawfully enter tribal lands remain subject to a tribe's power to exclude them, which power includes the lesser power to tax or place other conditions on the non-Indian's conduct or continued presence on the reservation. The Tribe's role as commercial partner with petitioners should not be confused with its role as sovereign. *It is one thing to find that the Tribe has agreed to sell the right to use the land and take valuable minerals from it, and quite another to find that the Tribe has abandoned its sovereign powers simply because it has not expressly reserved them through a contract. To presume that a sovereign forever waives the right to exercise one of its powers unless it expressly reserves the right to exercise that power in a commercial agreement turns the concept of sovereignty on its head***.** (emphasis added) **[MERRION ET AL., DBA MERRION & BAYLESS, ET AL. v. JICARILLA APACHE TRIBE ET AL. 1982.SCT.394 , 455 U.S. 130, 102 S. Ct. 894, 71 L. Ed. 2d 21, 50 U.S.L.W. 4169 pp. 144-148]**.

III RIGHTS:

The assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice. [**Davis v. Wechsler, 263 US 22, 24.**]

Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them. [**Miranda v. Arizona, 384 US 436, 491.**]

There can be no sanction or penalty imposed upon one because of this exercise of constitutional rights. [**Sherer v. Cullen, 481 F 946.**]

The state cannot diminish rights of the people. [**Hurtado v. People of the State of California, 110 U.S. 516**]

Republican government. One in which the powers of sovereignty are vested in the people and are exercised by the people, either directly, or through representatives chosen by the people, to whom those powers are specially delegated. [**In re Duncan, 139 U.S. 449, 11 S.Ct. 573, 35 L.Ed. 219; Minor v. Happersett, 88 U.S. (21 Wall.) 162, 22 L.Ed. 627." Black's Law Dictionary, Fifth Edition, p. 626.**]

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or

Laws of any State to the Contrary notwithstanding. [**Constitution for the United States of America, Article VI, Clause 2.**]

CONSPIRACY AGAINST RIGHTS: If two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured - They shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill, they shall be fined under this title or imprisoned for any term of years or for life, or both, or may be sentenced to death. [**18, USC 241**]

DEPRIVATION OF RIGHTS UNDER COLOR OF LAW: Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death. [**18, USC 242**]

CIVIL ACTION FOR DEPRIVATION OF RIGHTS: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. [**42 USC 1983**]

ACTION FOR NEGLECT TO PREVENT: Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful

neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefore, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued. [**42 USC 1986**]

IV LAW:

AT LAW. [Bouvier's Law, 1856 Edition] This phrase is used to point out that a thing is to be done according to the course of the common law; it is distinguished from a proceeding in equity.

The common law is the real law, the Supreme Law of the land, the code, rules, regulations, policy and statutes are "not the law", [**Self v. Rhay, 61 Wn (2d) 261**]

"All laws, rules and practices which are repugnant to the Constitution are null and void" [**Marbury v. Madison, 5th US (2 Cranch) 137, 180**]

The very meaning of 'sovereignty' is that the decree of the sovereign makes law. [**American Banana Co. v. United Fruit Co., 29 S.Ct. 511, 513, 213 U.S. 347, 53 L.Ed. 826, 19 Ann.Cas. 1047**]

A consequence of this prerogative is the legal ubiquity of the king. His majesty in the eye of the law is always present in all his courts, though he cannot personally distribute justice. (**Fortesc.c.8. 2Inst.186**) His judges are the mirror by which the king's image is reflected. [**1 Blackstone's Commentaries, 270, Chapter 7, Section 379**]

"Sovereignty itself is, of course, not subject to law, for it is the author and source of law;" [**Yick Wo v. Hopkins, 118 US 356, 370 (Undersigned is Sovereign and no court has challenged that status/standing)**]

V COURT

COURT - The person and suit of the sovereign; the place where the sovereign sojourns with his regal retinue, wherever that may be. [**Black's Law Dictionary, 5th Edition, page 318.**]

COURT - An agency of the sovereign created by it directly or indirectly under its authority, consisting of one or more officers, established and maintained for the purpose of hearing and determining issues of law and fact regarding legal rights and alleged violations thereof, and of applying the sanctions of the law, authorized to exercise its powers in the course of law at times and places previously determined by lawful authority. [**Isbill v. Stovall, Tex.Civ.App., 92 S.W.2d 1067, 1070; Black's Law Dictionary, 4th Edition, page 425**]

VI COURTS OF RECORD

COURTS OF RECORD AND COURTS NOT OF RECORD - The former being those whose acts and judicial proceedings are enrolled, or recorded, for a perpetual memory and testimony, and which have power to fine or imprison for contempt. Error lies to their judgments, and they generally possess a seal. Courts not of record are those of inferior dignity, which have no power to fine or imprison, and in which the proceedings are not enrolled or recorded. [**3 Bl. Comm. 24; 3 Steph. Comm. 383; The Thomas Fletcher, C.C.Ga., 24 F. 481; Ex parte Thistleton, 52 Cal 225; Erwin v. U.S., D.C.Ga., 37 F. 488, 2 L.R.A. 229; Heininger v. Davis, 96 Ohio St. 205, 117 N.E. 229, 231]**.

"A COURTS OF RECORD" is a judicial tribunal having attributes and exercising functions independently of the person of the magistrate designated generally to hold it, and proceeding according to the course of common law, its acts and proceedings being enrolled for a perpetual memorial. [**Jones v. Jones, 188 Mo.App. 220, 175 S.W. 227, 229; Ex parte Gladhill, 8 Metc. Mass., 171, per Shaw, C.J. See, also, Ledwith v. Rosalsky, 244 N.Y. 406, 155 N.E. 688, 689]**.

NEW YORK STATE CONSTITUTION ARTICLE VI ... As of right, from a judgment or order of a Court of Record of original jurisdiction which finally determines an action or special proceeding where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States; and on any such appeal only the constitutional question shall be considered and determined by the court.

To be a court of record a court must have four characteristics, and may have a fifth, they are:

A) A judicial tribunal having attributes and exercising functions independently of the person of the magistrate designated generally to hold it [**Jones v. Jones, 188 Mo.App. 220, 175 S.W. 227, 229; Ex parte Gladhill, 8 Metc. Mass., 171, per Shaw, C.J. See, also, Ledwith v. Rosalsky, 244 N.Y. 406, 155 N.E. 688, 689][Black's Law Dictionary, 4th Ed., 425, 426**]

B) Proceeding according to the course of common law [**Jones v. Jones, 188 Mo.App. 220, 175 S.W. 227, 229; Ex parte Gladhill, 8 Metc. Mass., 171, per Shaw, C.J. See, also, Ledwith v. Rosalsky, 244 N.Y. 406, 155 N.E. 688, 689][Black's Law Dictionary, 4th Ed., 425, 426**]

C) Its acts and judicial proceedings are enrolled, or recorded, for a perpetual memory and testimony. [**3 Bl. Comm. 24; 3 Steph. Comm. 383; The Thomas Fletcher, C.C.Ga., 24 F. 481; Ex parte Thistleton, 52 Cal 225; Erwin v. U.S., D.C.Ga., 37 F. 488, 2 L.R.A. 229; Heininger v. Davis, 96 Ohio St. 205, 117 N.E. 229, 231**]

D) Has power to fine or imprison for contempt. [**3 Bl. Comm. 24; 3 Steph. Comm. 383; The Thomas Fletcher, C.C.Ga., 24 F. 481; Ex parte Thistleton, 52 Cal 225; Erwin v. U.S., D.C.Ga., 37 F. 488, 2 L.R.A. 229; Heininger v. Davis, 96 Ohio St. 205, 117 N.E. 229, 231.][Black's Law Dictionary, 4th Ed., 425, 426**]

E) Generally possesses a seal. [**3 Bl. Comm. 24; 3 Steph. Comm. 383; The Thomas Fletcher, C.C.Ga., 24 F. 481; Ex parte Thistleton, 52 Cal 225; Erwin v. U.S., D.C.Ga., 37 F. 488, 2 L.R.A. 229; Heininger v. Davis, 96 Ohio St. 205, 117 N.E. 229, 231.][Black's Law Dictionary, 4th Ed., 425, 426**]

The decisions of a superior court may only be challenged in a court of appeal. The decisions of an inferior court are subject to collateral attack. In other words, in a superior court one may sue an inferior court directly, rather than resort to appeal to an appellate court. Decision of a court of record may not be appealed. It is binding on ALL other courts. However, no statutory or constitutional court (whether it be an appellate or supreme court) can second guess the judgment of a court of record. "*The judgment of a court of record whose jurisdiction is final, is as conclusive on all the world as the judgment of this court would be. It is as conclusive on this court as it is on other courts. It puts an end to inquiry concerning the fact, by deciding it*." [**Ex parte Watkins, 3 Pet., at 202-203. [cited by SCHNECKLOTH v. BUSTAMONTE, 412 U.S. 218, 255 (1973)]**].

A COURT OF RECORD IS A "SUPERIOR COURT." A COURT NOT OF RECORD IS AN "INFERIOR COURT." "Inferior courts" are those whose jurisdiction is limited and special and whose proceedings are not according to the course of the common law. Criminal courts proceed according to statutory law. Jurisdiction and procedure is defined by statute. Likewise, civil courts and admiralty courts proceed according to statutory law. Any court proceeding according to statutory law is not a court of record (which only proceeds according to common law); it is an inferior court.

"The only inherent difference ordinarily recognized between superior and inferior courts is that there is a presumption in favor of the validity of the judgments of the former, none in favor of those of the latter, and that a superior court may be shown not to have had power to render a particular judgment by reference to its record. Note, however, that a 'superior court' is the name of a particular court. But when a court acts by virtue of a special statute conferring jurisdiction in a certain class of cases, it is a court of inferior or limited jurisdiction for the time being, no matter what its ordinary status may be.

COURT OF RECORD - Conclusion, from the definitions above, that a court of record is a court which must meet the following criteria:

1) Generally has a seal
2) Power to fine or imprison for contempt
3) Keeps a record of the proceedings
4) Proceeding according to the common law (not statutes or codes)
5) The tribunal is independent of the magistrate (judge)

The court of appeals, the supreme court including the appellate divisions thereof, the court of claims, the county court, the surrogate`s court, the family court, the courts or court of civil and criminal jurisdiction of the city of New York, and such other courts as the legislature may determine shall be courts of record. [**New York State Constitution Article VI, 1b (2)b**]

NOTE that a judge is a magistrate and is not the tribunal. The tribunal is either the sovereign himself, or a fully empowered jury (not paid by the government)

N.Y.JUD.LAW §753: NY Code Section 753: (A) A court of record has power to punish, by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced, in any of the following cases:

1. An attorney, counselor, clerk, sheriff, coroner, or other person, in any manner duly selected or appointed to perform a judicial or ministerial service, for a misbehavior in his office or trust, or for a willful neglect or violation of duty therein; or for disobedience to a lawful mandate of the court, or of a judge thereof, or of an officer authorized to perform the duties of such a judge.

2. A party to the action or special proceeding, for putting in fictitious bail or a fictitious surety, or for any deceit or abuse of a mandate or proceeding of the court.

3. A party to the action or special proceeding, an attorney, counselor, or other person, for the non-payment of a sum of money, ordered or adjudged by the court to be paid, in a case where by law execution cannot be awarded for the collection of such sum except as otherwise specifically provided by the civil practice law and rules; or for any other disobedience to a lawful mandate of the court.

4. A person, for assuming to be an attorney or counselor, or other officer of the court, and acting as such without authority; for rescuing any property or person in the custody of an officer, by virtue of a mandate of the court; for unlawfully detaining, or fraudulently and willfully preventing, or disabling from attending or testifying, a witness, or a party to the action or special proceeding, while going to, remaining at, or returning from, the sitting where it is noticed for trial or hearing; and for any other unlawful interference with the proceedings therein.

5. A person subpoenaed as a witness, for refusing or neglecting to obey the subpoena, or to attend, or to be sworn, or to answer as a witness.

6. A person duly notified to attend as a juror, at a term of the court, for improperly conversing with a party to an action or special proceeding, to be tried at that term, or with any other person, in relation to the merits of that action or special proceeding; or for receiving a communication from any person, in relation to the merits of such an action or special proceeding, without immediately disclosing the same to the court; or a person who attends and acts or attempts to act as a juror in the place and stead of a person who has been duly notified to attend.

7. An inferior magistrate, or a judge or other officer of an inferior court, for proceeding, contrary to law, in a cause or matter, which has been removed from his jurisdiction to the court inflicting the punishment; or for disobedience to a lawful order or other mandate of the latter court.

8. In any other case, where an attachment or any other proceeding to punish for a contempt, has been usually adopted and practiced in a court of record, to enforce a civil remedy of a party to an action or special proceeding in that court, or to protect the right of a party.

When the contempt is not committed in the immediate view and presence of the court, or of the judge at chambers, an affidavit shall be presented to the court or judge of the facts constituting the contempt, or a statement of the facts by the referees or arbitrators, or other judicial officers...

VII MAGISTRATE

MAGISTRATE **-** A person holding official power in a government; as: a The official of highest rank in a government (chief, or first, magistrate). b An official of a class having summary, often criminal, jurisdiction. [**Merriam-Webster Dictionary]**

MAGISTRATE **-** an official entrusted with administration of the laws [**Black's Law Dictionary, 4th Ed., 1103].**

MAGISTRATE - Person clothed with power as a public civil officer. [**State ex rel. Miller v. McLeod, 142 Fla. 254, 194 So. 628, 630].**

MAGISTRATE - A public officer belonging to the civil organization of the state, and invested with powers and functions which may be either judicial, legislative, or executive. But the term is commonly used in a narrower sense, designating, in England, a person entrusted with the commission of the peace, and, in America, one of the class of inferior judicial officers, such as justices of the peace and police justices. [**Martin v. State, 32 Ark. 124; Ex parte White, 15 Nev. 146, 37 Am. Rep. 466; State v. Allen, 83 Fla. 655, 92 So. 155, 156; Merritt v. Merritt, 193 Iowa 899, 188 N.W. 32, 34]**.

The word "magistrate" does not necessarily imply an officer exercising any judicial functions, and might very well be held to embrace notaries and commissioners of deeds. [**Schultz v. Merchants' Ins. Co., 57 Mo. 336].**

Judges are magistrates [**N.Y. CRC. LAW § 30 : NY Code - Section 30:**]

Judges as Magistrates **New York Family Court - Part 5 - § 151**

SECTION 146 OF THE NEW YORK CODE OF CRIMINAL PROCEDURE defines a magistrate as an officer having power to issue a warrant for the arrest of a person charged with a crime. This broad definition embraces the judges of the Supreme Court, the County Courts and General Sessions of the County of New York, as well as a number of local courts of limited jurisdiction authorized by law to act in criminal matters.

...our justices, sheriffs, mayors, and other ministers, which under us have the laws of our land to guide, shall allow the said charters pleaded before them in judgment in all their points, that is to wit, the Great Charter as the common law.... [**Confirmatio Cartarum, November 5, 1297, Sources of Our Liberties Edited by Richard L. Perry, American Bar Foundation**]

Henceforth the writ which is called Praecipe shall not be served on any one for any holding so as to cause a free man to lose his court. [**Magna Carta, Article 34**].

VIII SUIT

SUIT [Black's Law Dictionary, 4th Ed.,] - The witnesses or followers of the plaintiff. [**3 Bl. Comm. 295. See Secta;].**

SUIT [Black's Law Dictionary, 4th Ed.,] - A generic term, of comprehensive signification, and applies to any proceeding by one person or persons against another or others in a court of justice in which the plaintiff pursues, in such court, the remedy which the law affords him for the redress of an injury or the enforcement of a right, whether at law or in equity. **Kohl v. U.S., 91 U.S. 375, 23 L.Ed. 449; Weston v. Charleston, 2 Pet. 464, 7 L.Ed. 481; Syracuse Plaster Co. v. Agostini Bros. Bldg. Corporation, 169 Misc. 564 7 N.Y.S.2d 897.**

IX TRIBUNAL

TRIBUNAL [Black's Law Dictionary, 4th Ed.,] **-** The seat of a judge; the place where he administers justice. The whole body of judges who compose a jurisdiction; a judicial court; the jurisdiction which the judges exercise. **Foster v. Worcester, 16 Pick. (Mass.) 81.**

TRIBUNE [Webster's New Practical Dictionary, 707 (1953) G. & C. Merriam Co., Springfield, Mass.] - **1**. In ancient Rome, a magistrate whose special function was to protect the interests of plebeian citizens from the patricians. **2**. Any defender of the people.

X RECORD

A ***"minute order"*** issued by a judge is not part of the record.

RECORD **-** The proceedings of the courts of common law are records. But every minute made by a clerk of a court for his own future guidance in making up his record is not a record. **4 Wash. C.C. 698. See 10 Penn. St. 157; 2 Pick. Mass. 448; 4 N. II. 450; 6 id. 567; 5 Ohio St. 545; 3 Wend. N.Y. 267; 2 Vt. 573; 6 id. 580; 5 Day, Conn. 363; 3 T. B. Monr. Ky. 63.**

"The Common-Law Record consists of the Process, the Pleadings, the Verdict and the Judgment. After Judgment, such Errors were Reviewable by Writ of Error. Errors which occurred at the Trial were not part of the Common-Law Record, and could be Reviewed by a Motion for a New Trial, after Verdict and before Judgment; by Statute, such Errors could be Reviewed after judgment by incorporating them into the Record by means of a Bill of Exceptions. It was therefore essential to keep clearly in mind the distinction between Matter of Record and Matter of Exception.

"UNDER the ancient practice, the Proceedings in a litigated case were Entered upon the Parchment Roll, and when this was completed, the end product became known as the Common-Law Record. It consisted of Four Parts, the Process, which included the Original Writ and the Return of the Sheriff, by which the Court acquired Jurisdiction over the defendant; the Pleadings, presented by the Parties in the prescribed

order to develop an Issue of Law or of Fact, and which included the Declaration and all subsequent Pleadings, together with the Demurrers, if any; the Verdict; and the Judgment. These Four Elements formed the Common-Law Record, but it should be observed that at the point where the Retrospective Motions come into play, the Record has not been developed beyond the Stage of Entering the Verdict upon the Roll. At this point it should also be recalled that between the time when the Pleadings Terminated in an Issue, which Joinder in Issue was duly Recorded on the Parchment Roll, and the time when an Entry of the Verdict was made, nothing was Recorded on the Parchment Roll. The reason for this was that between the Joinder of Issue and the Rendition of the Verdict, the Trial takes place, and what occurs during this Trial does not Appear upon the Face of the Common-Law Record. Thus, Offers and Rejection of Evidence, the Court's Instruction of the Jury, or its Refusal to Instruct as requested by Counsel, or any Misconduct Connected with the Trial, such as Prejudicial Remarks on the Part of the Court, and the like—that is—any Error that occurs at the Trial—cannot be corrected by resort to the Common-Law Record because not Apparent Upon its Face. Such Errors were preserved only in the notes made by the Presiding Judge, or in his memory, and were reviewable, after Verdict and before Final Judgment, by a Motion for New Trial made before the Court En Banc at Westminster, within four days after the Commencement of the Next Term following the Rendition of the Verdict. As each of the Judges of the Court had Motions of a similar character coming up for decision from the Trials over which they had presided, the natural inclination of each Judge was to support the Rulings of his brother Jurists, and thus Overrule the Motion for a New Trial. Furthermore, Errors that occurred at the Trial were not Reviewable after Judgment on Writ of Error, because Not Apparent on any one of the Four Parts of the Common-Law Record. **To remedy this Defect, Parliament enacted Chapter 31 of the Statute of Westminster II in 1285,6 which provided for Review of such Errors through the use of what came to be known as a Bill of Exceptions.**

"Thus, it appears that in four out of five Retrospective Motions, the Court is permitted to consider only Defects Apparent Upon the Face of Part of the Common-Law Record—the Process, the Pleadings, and the Verdict—and Errors Occurring at the Trial were regarded as extraneous and not to be considered in rendering Judgment upon the Motions. Matters extraneous to or outside of the Record could be tested after Verdict and before Judgment only by a Motion for a New Trial. A distinction is made between Matter of Record and Matter of Exception, Matter of Record referring to those Errors Apparent upon the Face of the Common-Law Record and hence Reviewable after Final Judgment upon a Writ of Error, and Matter of Exception referring to those Errors which Occurred at the Trial, and were Not Apparent on the Face of the Common-Law Record, hence Reviewable after Final Judgment only by incorporating such Errors into the Record by means of a **Bill of Exceptions, as authorized by Chapter 31 of the Statute of Westminster II in 1285." Koffler: Common Law Pleading 567-568**

Proceedings in courts of chancery are said not to be, strictly speaking, records; but they are so considered. **Gresley, Ev. 101. And see 8 Mart. La. N. S. 303; 1 Rawle, Penn. 381; 8 Yorg. Tenn. 142; 1 Pet. C. C. 352**.

XI MINUTE

MINUTE [Bouvier's Law Dictionary, 14th Ed.] In practice. A memorandum of what takes place in court, made by authority of the court. From these minutes the record is afterwards made up.

Toulier says they are so called because the writing in which they were originally was small; that the word is derived from the Latin *minuta (scriptura)*, in opposition to copies which were delivered to the parties, and which were always written in a larger hand. **8 Toullier, n. 413**.

Minutes are not considered as any part of the record. [**1 Ohio, 268. See 23 Pick. Mass. 184.; Bouvier's Law Dictionary, 14th Ed. (1870)]**

MINUTE BOOK [Bouvier's Law Dictionary, 14th Ed. (1870)] A book kept by the clerk or prothonotary of a court, in which minutes of its proceedings are entered.

XII STATE

STATE [Black's Law Dictionary, Fourth Edition] - A People permanently occupying a fixed territory bound together by common-law habits and custom into one body politic exercising, through the medium of an organized government, independent sovereignty and control over all persons and things within its boundaries, capable of making war and peace and of entering into international relations with other communities of the globe. [**United States v. Kusche, D.C.Cal., 56 F.Supp. 201, 207, 208**]**.** The organization of social life which exercises sovereign power in behalf of the people. [**Delany v. Moraitis, C.C.A.Md., 136 F.2d 129, 130**]**.**

XIII CONSTITUTIONAL PREAMBLES

CONSTITUTION FOR THE UNITED STATES OF AMERICA: **We the People** of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, **do ordain and establish** this Constitution for the United States of America.

STATE OF NEW YORK CONSTITUTION: **We, the People** of the State of New York, grateful to Almighty God for our freedom, in order to secure and perpetuate its blessings, **do establish** this Constitution.

Both constitutions (and the constitution of any real republic) the operative word is "establish." The People existed in their own individual sovereignty before the constitution was enabled. When the People "establish" a constitution, there is nothing in the word "establish" that signifies that they have yielded any of their sovereignty to the agency they have created. To interpret otherwise would convert the republic into a democracy (**Republic vs. Democracy**).

To deprive the People of their sovereignty it is first necessary to get the People to agree to submit to the authority of the entity they have created. That is done by getting them to claim they are citizens of that entity (**see Const. for the U.S.A., XIV Amendment, for the definition of a citizen of the United States.**)

14 C.J.S. 426, 430 - The particular meaning of the word "citizen" is frequently dependent on the context in which it is found [25], and the word must always be taken in the sense which best harmonizes with the subject matter in which it is used [26].

One may be considered a citizen for some purposes and not a citizen for other purposes, as, for instance, for commercial purposes, and not for political purposes[27]. So, a person may be a citizen in the sense that as such he is entitled to the protection of his life, liberty, and property, even though he is not vested with the suffrage or other political rights[28].

[25] Cal.--Prowd v. Gore, 2 Dist. 207 P. 490. 57 C.A. 458.; La.--Lepenser v Griffin, 83 So. 839, 146 La. 584; N.Y.--Union Hotel Co. v. Hersee, 79 N.Y. 454
[27] U.S.--The Friendschaft, N.C., 16 U.S. 14, 3 Wheat. 14, 4 L.Ed. 322; --Murray v. The Charming Betsy, 6 U.S. 64, 2 Cranch 64, 2 L.Ed. 208; Md.--Risewick v. Davis, 19 Md. 82 Mass.--Judd v. Lawrence, 1 Cush 531; R.I.--Greeough v. Tiverton Police Com'rs, 74 A 785, 30 R.I. 212
[28] Mass.--Dillaway v. Burton, 153 N.E. 13, 256 Mass. 568

XIV STATE SOVEREIGNTY -VS- POPULAR SOVEREIGNTY

A general discussion of two types of sovereignty, and the relative positions of each.

As independent sovereignty, it is State's province and duty to forbid interference by another state or foreign power with status of its own citizens. [**Roberts v Roberts (1947) 81 CA2d 871, 185 P2d 381. Black's Law Dictionary, 4th Ed., p 1300]**

A county is a person in a legal sense, [**Lancaster Co. v. Trimble, 34 Neb. 752, 52 N.W. 711; but a sovereign is not; In re Fox, 52 N.Y. 535, 11 Am.Rep. 751; U.S. v. Fox 94 U.S. 315, 24 L.Ed. 192 .... Black's Law Dictionary, 4th Ed., p 1300]**

A person is such, not because he is human, but because rights and duties are ascribed to him. The person is the legal subject or substance of which the rights and duties are attributes. An individual human being considered as having such attributes is what lawyers call a "natural person." [**Pollock, First Book of Jurispr. 110. Gray, Nature and Sources of Law, ch. II. Black's Law Dictionary, 4th Edition, p 1300]**

The terms "citizen" and "citizenship" are distinguishable from "resident" or "inhabitant." [**Jeffcott v. Donovan, C.C.A.Ariz., 135 F.2d 213, 214; and from "domicile," Wheeler v. Burgess, 263 Ky. 693, 93 S.W.2d 351, 354; First Carolinas Joint Stock Land Bank of Columbia v. New York Title & Mortgage Co., D.C.S.C., 59 F.2d 35j0, 351]**. The words "citizen" and citizenship," however, usually include the idea of domicile, Delaware, [**L.&W.R.Co. v. Petrowsky, C.C.A.N.Y., 250 F. 554, 557]**; citizen inhabitant and resident often synonymous, [**Jonesboro Trust Co. v. Nutt, 118 Ark. 368, 176 S.W. 322, 324; Edgewater Realty Co. v. Tennessee Coal, Iron & Railroad Co., D.C.Md., 49 F.Supp. 807, 809]**; and citizenship and domicile are often synonymous. [**Messick v. Southern Pa. Bus Co., D.C.Pa., 59 F.Supp. 799, 800. Black's Law Dictionary, 4th Ed., p 310]**

Domicile and citizen are synonymous in federal courts, [**Earley v. Hershey Transit Co., D.C. Pa., 55 F.Supp. 981, 982]**; inhabitant, resident and citizen are synonymous, [**Standard Stoker Co. v. Lower, D.C.Md., 46 F.2d 678, 683. Black's Law Dictionary, 4th Ed., p 311]**

The Constitution emanated from the people and was not the act of sovereign and independent States. [**1 McCulloch v. Maryland, 4 Wheat. 316 [1819]. See also Chisholm v. Georgia, 2 Dall. 419, 470 [1793]; Penhallow v. Doane, 3 Dall. 54, 93 [1795]; Martin v. Hunter, 1 Wheat. 304, 324 [1816]; Barron v. Baltimore, 7 Pet. 247 [1833]**.

The preamble contemplates the body of electors composing the states, the terms "people" and "citizens" being synonymous. Negroes, whether free or slaves, were not included in the term "people of the United States at that time. [**Scott v. Sandford, 19 How 393, 404 [1857]]**.

The words "sovereign state" are cabalistic words, not understood by the disciple of liberty, who has been instructed in our constitutional schools. It is our appropriate phrase when applied to an absolute despotism. The idea of sovereign power in the government of a republic is incompatible with the existence and foundation of civil liberty and the rights of property. [**Gaines v. Buford, 31 Ky. (1 Dana) 481, 501]**.

XV GOVERNMENT

REPUBLICAN GOVERNMENT. One in which the powers of sovereignty are vested in the people and are exercised by the people, either directly, or through representatives chosen by the people, to whom those powers are specially delegated. [**In re Duncan, 139 U.S. 449, 11 S.Ct. 573, 35 L.Ed. 219; Minor v. Happersett, 88 U.S. (21 Wall.) 162, 22 L.Ed. 627. Black's Law Dictionary, Fifth Edition, p. 626]**

DEMOCRACY GOVERNMENT. That form of government in which the sovereign power resides in and is exercised by the whole body of free citizens directly or indirectly through a system of representation, as distinguished from a monarchy, aristocracy, or oligarchy. [**Black's Law Dictionary, 5th Edition, p. 388; Bond v. U.S. SCOTUS]** recognizes personal sovereignty, June 16, 2011

MAXIMS

- The Light of Liberty's Lamp -

Maxims are brief statements of self-evident truth that control our courts, our legislatures, and every consideration of mankind that seeks what's fair and best for all. Courts that do not honor or consider these maxims are not just. Indeed, whether and to what extent these common law maxims are honored by public leaders is how we test the way they administer the law to govern us. Our courts were established to enforce these principles of common law, the word Justice is synonymous with virtue, and virtue is a biblical principle that derived from Jesus Christ alone. Maxims are the law that never changes. These statements set essential limits on truth and are essential to the fair and efficient administration of justice according to the common law of mankind. No right-thinking person can disagree with a maxim. Every court is bound by the common law rules of equity established by the never-changing maxims. Maxims test those who judge and put an absolute limit on those who rule.

- "A thing similar is not exactly the same."
- "Liberty is a great privilege (from God), so the obligations and responsibilities that go with liberty are also great".
- The safety of society cannot be judged but by the safety of every individual. If anyone, however insignificant he or she may seem, is being unfairly wounded by our laws, then those laws are wrong and should be repealed at once.

Primary Principals of Common Law

- Liberty to all but preference to none
- The safety of the people is the supreme law
- The safety of the people cannot be judged but by the safety of every individual Legitimacy of Government
- Unjust is State power where the law is either uncertain or unknown
- The State should be subject to the law, for the law creates the State
- The judge who decides a case without hearing both parties, though his decision be just, is himself unjust.
- Courts are for the people to command the power of the State

The Burden

- The burden of proof lies on him who asserts the fact, not on him who denies it, because from the very nature of things a negative cannot be proof.

Testimony and Evidence

- No one should be believed in court except upon his oath
- Courts should not believe water runs upward of its own accord nor that impossibilities exist.
- The certainty of a thing arises only from making the thing certain in court

Civic Duty of Citizens

- Each should use his own powers and property so as not to unjustly injure others

Private Property

- There is nothing more sacred, more inviolate, than the house of every citizen
- Every home is a castle; though the winds of heaven blow through it, officers of the
- State cannot enter.
- Title is the right to enjoy possession of that which is our own

Civil Rights

- No one should be required to betray himself, i.e., no one should be made to testify against himself.
- Everyone should be presumed innocent until his guilt is established beyond a reasonable doubt.
- No one should be twice harassed for the same offense

Administration of Justice

- He who slices the pie should be last to take a piece

Judicial Reasoning

- Words should be considered only as commonly understood and not with a meaning others construe to their own purpose
- Words should be interpreted most strongly against him who uses them

Crime and Punishment

- He who acts in pure defense of his own life or limb is justified
- Crimes are more effectually prevented by the certainty than by the severity of punishment.
- Perjured witnesses should be punished for perjury and for the crimes they falsely accuse against others

CHAPTER 7

CHAPTER 7 - ATTACHED FILE [*The following files are attached to this e-book*]

- Affidavit Service and Form
- Case Examples
  - Court of Record Cases
  - Notice and Demands
- Case law
- Common Law
- Court Forms-Fees-Rules-Statutes-Etc
  - Federal
  - State
  - Forms
- Credit-Bank-Allodial-Pasport
- Dictionaries
  - Bouvier's Law, 1856 Edition
  - Black's Law 4th edition, 1891
  - Webster's 1828 Dictionary
- Foot notes-quotes
- Judicial writing
- Law of the Case
- Links
- Notice and Demand
- Punitive damages
- **http://newyorkcommitteemen.org**
- Common Law Lectures and Interviews (MP3's) - **http://newyorkcommitteemen.org/common/common/law.html**

CONCLUSION

Hear, ye children, the instruction of a father, and attend to know understanding. For I give you good doctrine, forsake ye not my law. For I was my father's son, tender and only beloved in the sight of my mother. He taught me also, and said unto me, Let thine heart retain my words: keep my commandments, and live. Get wisdom, get understanding: forget it not; neither decline from the words of my mouth. Forsake her not, and she shall preserve thee: love her, and she shall keep thee. Wisdom is the principal thing; therefore get wisdom: and with all thy getting get understanding. Exalt her, and she shall promote thee: she shall bring thee to honour, when thou dost embrace her. She shall give to thine head an ornament of grace: a crown of glory shall she deliver to thee. Hear, O my son, and receive my sayings; and the years of thy life shall be many. **Prov 4:1-10**

Justice and judgment are the habitation of thy throne: mercy and truth shall go before thy face. Blessed is the people that know the joyful sound: they shall walk, O LORD, in the light of thy countenance. In thy name shall they rejoice all the day: and in thy righteousness shall they be exalted. For thou art the glory of their strength: and in thy favour our horn shall be exalted. For the LORD is our defence; and the Holy One of Israel is our king. **Psa 89:14-18**

The proverbs of Solomon the son of David, king of Israel; To know wisdom and instruction; to perceive the words of understanding; To receive the instruction of wisdom, justice, and judgment, and equity; To give subtlety to the simple, to the young man knowledge and discretion. A wise man will hear, and will increase learning; and a man of understanding shall attain unto wise counsels: To understand a proverb, and the interpretation; the words of the wise, and their dark sayings. The fear of the LORD is the beginning of knowledge: but fools despise wisdom and instruction. My son, hear the instruction of thy father, and forsake not the law of thy mother: For they shall be an ornament of grace unto thy head, and chains about thy neck. My son, if sinners entice thee, consent thou not. If they say, Come with us, let us lay wait for blood, let us lurk privily for the innocent without cause: Let us swallow them up alive as the grave; and whole, as those that go down into the pit: We shall find all precious substance, we shall fill our houses with spoil: Cast in thy lot among us; let us all have one purse: My son, walk not thou in the way with them; refrain thy foot from their path: For their feet run to evil, and make haste to shed blood. Surely in vain the net is spread in the sight of any bird. And they lay wait for their own blood; they lurk privily for their own lives. So are the ways of every one that is greedy of gain; which taketh away the life of the owners thereof. Wisdom crieth without; she uttereth her voice in the streets: She crieth in the chief place of concourse, in the openings of the gates: in the city she uttereth her words, saying, How long, ye simple ones, will ye love simplicity? and the scorners delight in their scorning, and fools hate knowledge? Turn you at my reproof: behold, I will pour out my spirit unto you, I will make known my words unto you. **Prov 1:2-23**

Finally, brethren, whatsoever things are true, whatsoever things are honest, whatsoever things are just, whatsoever things are pure, whatsoever things are lovely, whatsoever things are of good report; if there be any virtue, and if there be any praise, think on these things. **Phil 4:8**