

CIVIL PROCEDURE
Mr. Martin
October 20, 2000

Crowe
at Hailey

MIDTERM EXAMINATION

This is an open book examination. You may use any materials which you have brought with you whether prepared by you or by others. The three questions will be given equal weight and you should spend equal amounts of time on each. The Federal Rules of Civil Procedure apply to all questions. Please write legibly and leave a margin on the left-hand side of the page. Use only your social security number to identify your blue book. If you use more than one blue book, identify each one ("No. 1 of 2," "No. 2 of 2," etc.), be sure that your social security number is on each one, and insert all others into the first one.

Your assignment for the class on Monday, October 23, is to re-read the book A Civil Action in the light of your newly-acquired knowledge of pleadings, discovery, Rule 11, summary judgment, directed verdict, JNOV and new trial. There are additional assignments in connection with A Civil Action on a separate handout which you should have before you leave tonight.

QUESTION ONE

THIS QUESTION ONE HAS SIX PARTS. PLEASE ANSWER EACH PART IN A SEPARATE, NUMBERED, PARAGRAPH. IN EACH OF YOUR SIX ANSWERS, CITE THE RELEVANT FEDERAL RULE

Prudence Juris was seriously injured when a section of the new apartment building in which she lived collapsed. She commenced an action in a federal district court against Owner, the owner of the building; Builder, its builder; and Steelco, the supplier of structural steel for the building. She claims to have suffered physical injury, property damage, and a nervous breakdown. Diversity is satisfied.

Prudence requested production from Builder of the following documents: (1) the signed statement which she, Prudence, gave to an investigator hired by Builder's lawyer; (2) the signed statement given by Neighbor, Prudence's neighbor in the building, to the investigator; and (3) Builder's lawyer's notes of an interview with Witless, an eyewitness to the building collapse, who has moved away and is now of parts unknown. Builder objected to each request. Proper motions to compel production are before the judge. How should the judge rule? Why?

(4) Owner gave notice that it intended to take the deposition of Dr. Destructo, a psychiatrist who treated Prudence after her nervous breakdown. Prudence moved, with proper certification, for a protective order to prevent the deposition from being taken. How should the judge rule on the motion? Why?

(5) Prudence submitted an interrogatory to Steelco demanding detailed information about all claims against it at any time during the previous twenty years. What motion might Steelco make seeking to forestall disclosure? (6) How should the judge rule in response?

QUESTION TWO

Victor Victim ("Victim") sustained serious and permanent injuries in an automobile accident allegedly caused by the negligence of the driver ("Driver") of an automobile owned by Humongous Corp. ("Humongous"), Driver's employer. Victim has filed suit against Humongous in federal court based on diversity of citizenship. Humongous is a Delaware corporation. Victim is a Massachusetts resident. Pursuant to F.R.Civ.P. Rule 26(a)(1)(D), Humongous disclosed an insurance policy protecting both it and its employees against automobile liability claims. More than ten days have passed since Humongous filed its answer. Today Humongous filed a motion under F.R.Civ.P. Rule 14(a) seeking to implead Driver. (This is done for two reasons: first, to enhance Driver's appetite for vigorous defense of the case and, second, in the hope of making it appear to the jury that Driver, not Humongous, is the real defendant). Driver is a resident of New Hampshire. How should the judge decide the motion? Why?

QUESTION THREE

New client Millie, a woman in her 60's or 70's who walks with a cane, comes to your office. She tells you that she was hit by a car while crossing the street at a marked crosswalk. She was badly injured which explains why she was so long in coming to see a lawyer. She has the defendant's name and car registration number. Liability seems clear, but you also realize that the statute of limitations expires today.

You agree to represent Millie, executing for this purpose a standard form representation agreement. You quickly draft and file a complaint.

The defendant responds by filing and serving upon you a motion for summary judgment accompanied by affidavits and documents (including a certified photocopy of the defendant's passport) which make it clear that the defendant was in Ethiopia when the accident occurred and that Millie has a long history of filing unfounded claims in the hope of collecting small nuisance settlements from insurance companies. Accompanying the motion for summary judgment is a motion for Rule 11 sanctions seeking attorneys' fees.

What are you going to do? Formulate a strategy. How do you respond to the motion for summary judgment? How do you respond to the motion for sanctions? What pleadings, motions, other papers will you prepare in order to carry out your strategy?

END OF EXAMINATION

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November 8, 2000

Ans to attached
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MIDTERM EXAMINATION: GOOD ANSWERS

The following are examples of good (not perfect) student answers to the examination questions one and three. They are commended to you because (1) they answer the question; (2) they are expressed in acceptable English (improved in places by the instructor's light editing); and (3) they avoid the common first-year student's mistake of reciting abstractly correct principles of law without explaining how these principles apply to the facts of the question.

QUESTION ONE

(Student SSN ██████████)

1) The issue is whether Prudence is entitled to the signed statement which she gave to an investigator hired by Builder's lawyer. Under discovery, Rule 26, any material relevant to the parties may be discovered, as long as it is not privileged (see Rule 26(b)(1)). First, you would analyze whether this material is subject to Rule 26(a)(1)-Initial Disclosure Provision. Then, you would determine whether the material is relevant. If yes, then you would look at admissibility. As long as the information is not privileged or protected under attorney work-product- Rule 26(b)(3) and not related to experts, it should be allowed to be discoverable by Prudence, and this is how the judge should rule. The party may obtain a copy of his statement per Rule 26(b)(3).

2) With regard to the signed statement given by the neighbor, Prudence can only obtain the statement if she can overcome the qualified work-product immunity. She would have to show, according to Rule 26(b)(3), that she could not obtain the same information with undue hardship. The judge should rule against the request as the information can be obtained without difficulty.

3) Under Rule 26(b)(3), the Builder's lawyer could argue that the notes taken by him in the interview with Witless, an eyewitness, are subject to the trial preparation immunity (Rule 26(b)(3)). This would be what is known as a qualified immunity. However, as this eyewitness has "disappeared to parts unknown," Prudence could make a case for her need for the materials because she can't obtain them any other way. As a sidenote, under automatic disclosure (Rule 26(a)(1)), parties must disclose the names of witnesses without a request from the other side. Due to the fact that this witness is not available, under Rule 26(b)(3), the judge may rule in favor of Prudence.

4) This would fall under the category of privileged information. If this privilege has not been waived, then the information would not be discoverable under Rule 26(b)(1). Therefore, the judge should rule against this motion. Only if a Rule 35 motion for a physical exam had been granted and the Rule 35(b) that allows discovery of the medical record had been complied with, would the other party obtain information concerning the nervous breakdown. However, the breakdown suffered is claimed to be a result of the accident, something relevant to the subject matter of the case.

5) Steelco might make an objection under Rule 33(d) to shift the burden to Prudence to give her the opportunity to see their records and get the answers by doing her own research.

6) The judge should rule against this motion because Steelco would be much more familiar with their own records. This would be similar to the case in the casebook with the flammable pajamas.

QUESTION THREE

(Student SSN 034-52-5370)

The Motion for summary judgment would be responded to by stating that facts may be in dispute. Obtain an affidavit from Millie stating how the events occurred and the date and time. Specifically, you could make a motion to amend plaintiff's complaint under Rule 15(a) as the pleading may be defective. It may have been a different driver in the defendant's vehicle on the date of the incident.

I would also obtain copies of medical (emergency room) reports, and any police incident reports to attempt to ascertain the correct date, time, and names of parties which were involved. Witness names may also be listed in the police report and I would attempt to contact and interview each witness. If necessary, I would also amend the complaint.

I would object to the motion for sanctions based on Rule 11(C)(1)(A) as 21 days had not elapsed and the claim may be amended or withdrawn. As for Millie's previous claims, I would attempt to obtain a protective order citing in the motion that any previous claims made by Millie are not relevant under Rule 26.