

CIVIL PROCEDURE
Mr. Martin
October 19, 2001

Answer
attached

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 22, 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 IS IN TWO PARTS, PART "A" AND PART "B." PART "A" and PART "B" WILL BE WEIGHTED EQUALLY FOR GRADING PURPOSES.

Part A.

The science of tissue matching for human organ transplantation has yielded, as a side benefit, blood tests to determine human heredity which have revolutionized lawsuits by unmarried mothers seeking to establish the paternity of children born out of wedlock. (Such cases are called "paternity suits").

Charlene sued Mark claiming that Mark was the father of her child and demanding parental support for the child. Under the state's law, the defendant in a paternity suit is required to take a blood test as an aid to proving or disproving paternity. The test showed a 99.21% probability that Mark, as compared to a random untested man from a similar population, was the father of Charlene's daughter Maria. Charlene moved for summary judgment in her favor. With the motion, she filed an affidavit from the testing laboratory certifying that Mark's blood test had been conducted in accordance with its standard testing protocol and affirming that the test showed a 99.21% probability that Mark was the father of Maria.

In response, Mark filed an affidavit in which he denied that he had ever at any time had sexual intercourse with Charlene. Mark did not challenge the methodology or accuracy of the blood test itself.

How should the judge rule on Charlene's motion for summary judgment? Why?

Part B.

In Minnesota there is a statute providing that an alleged father is presumed to be the parent where the blood test results indicate that the likelihood of paternity is 99% or greater. Upon invocation of this presumption in court, the Minnesota law says, the evidentiary burden shifts to the alleged father to prove that he is not the parent of the child.

If this Minnesota law were in force, would your answer to Part A of this question be different? (ANSWER "YES" OR "NO"). Explain why or why not.

QUESTION TWO

Nick Bent claims that he slipped and fell in the rest room on defendant's gambling ship Royal Flush. Bent is represented by attorney Art Dodger. Dodger sent Bent to Dr. Chizzel to be examined.

Dodger wrote to Dr. Chizzel explaining that he (Dodger) was an experienced personal injury attorney who knew how to write a medical report that would have the maximum impact. Accompanying Dodger's letter was a draft of a medical report about Bent. At the top of Dodger's draft appeared these words:

PLEASE HAVE THIS REPORT RE-TYPED ON YOUR OWN STATIONERY.
THANK YOU.

Dr. Chizzel gave the document to his new secretary to be re-typed on his own letterhead. The secretary re-typed it exactly,

including the words "Please have this report re-typed on your own stationery. Thank you." Dr. Chizzel didn't read the report, but signed it. He sent it to attorney Dodger with his bill for \$500. Dodger didn't read the report, but he paid Dr. Chizzel's \$500 fee. Dodger mailed the report to Royal Flush's insurance company. The insurance company's claims representative didn't read the report, but the insurance company denied Bent's claim.

Dodger, on Bent's behalf, then started suit in federal district court. In his initial disclosure pursuant to F. R. Civ. P. Rule 26(a)(1)(A), Dodger identified Dr. Chizzel as a person having discoverable information about Bent's claim.

The insurance company has retained you to represent Royal Flush. Reading Dr. Chizzel's report in the insurance company's file, you notice the words, "Please have this report re-typed on your own stationery. Thank you."

Pursuant to F. R. Civ. P. Rule 30, you call for Dr. Chizzel's deposition. At the deposition you ask Dr. Chizzel if he had any contact with attorney Dodger in connection with the preparation of the medical report. Dodger objects and instructs the witness not to answer any questions about contacts between himself and Chizzel concerning the medical report on the grounds that such questions impermissibly ask for attorney work product information.

You follow up the deposition with a Request for Production of Documents under F. R. Civ. Rule 34 in which you ask for all correspondence and other documents that attorney Dodger furnished to Dr. Chizzel. Dodger objects, again on work-product grounds.

You bring before the court appropriate motions (1) to compel Dr. Chizzel to answer your deposition question and (2) to require Bent, through Dodger, to produce all documents previously furnished by Dodger to Dr. Chizzel. Dodger repeats his objections based on attorney work product. How should the judge rule? Why?

QUESTION THREE

In March of 2001 Pickwick borrowed \$2500 from the Warm Fuzzy Finance Co. ("Finance Co.") to be repaid in monthly installments of \$105. Pickwick executed a note and other documents on Finance Co.'s preprinted forms. Pickwick never paid anything. In September of 2001 Pickwick commenced a civil action in federal district court in Massachusetts under the federal Truth-in-Lending Act, 15 U.S.C. s. 1601, claiming that Finance Co.'s preprinted forms failed to make disclosures in connection with the loan which are required by that statute and by regulations which implement it.

The statute provides that a creditor who fails to make the required disclosures shall be liable to the debtor in an amount equal to twice the amount of the finance charge in connection with the transaction and in addition shall be liable for the debtor's attorneys' fees.

Finance Co. counterclaimed for the unpaid amount of the note plus the finance charge pursuant to an acceleration clause in the note which provided that if the debtor were in default Finance Co. could, at its option, declare all installments immediately to be due and owing.

Pickwick filed a motion to dismiss the counterclaim for want of a jurisdictional basis since both Pickwick and Finance Co. are citizens of Massachusetts.

How should the judge rule on Pickwick's motion to dismiss the counterclaim? Why?

END OF EXAMINATION

CIVIL PROCEDURE
Mr. Martin
November 21, 2001

answer to
affidavit question

MIDTERM EXAMINATION
COMPLETE ANSWERS

QUESTION ONE

A motion for summary judgment under Rule 56 defeats the non-movant's right (here Mark's right) to a jury trial of contested issues of fact. Therefore summary judgment ought not to be granted if there are such contested issues. One way of putting the question is this: would Mark's case survive Charlene's motion for a directed verdict if the case were to go to trial? It would, because the jury would be entitled to disbelieve the lab test results and credit Mark's denial instead.

Part A.

Moving for summary judgment, Charlene must assert that there is no dispute about material facts on an issue (here paternity) on which she will have the burden of proof at trial. Once she does this, then the burden shifts to Mark to defeat the motion for summary judgment by showing that there will be admissible evidence of specific facts that are in dispute. See the Celotex case, casebook p. 414. Here, Mark's affidavit is sufficient to put into dispute the question whether the parties ever had sexual relations, and summary judgment should be denied. The affidavit raises a credibility question and Mark is entitled to put credibility questions in front of a jury.

Part B.

The Minnesota statute changes the burden of proof at trial but doesn't affect the motion for summary judgment. Even if the burden of proof at trial will be on Mark, his affidavit still shows that there will be material facts in dispute when the case is tried. For summary judgment purposes, the truth of his affidavit must be assumed. Whether or not the jury will believe it is another matter that cannot be determined on a motion for summary judgment. The motion therefore should be denied.

QUESTION TWO

It is not clear if Dr. Chizzel will be an expert witness at trial. Whether or not he will be a trial witness, however, he has information that the insurance company is entitled to discover if it is relevant and not privileged. Information about how Dr. Chizzel came to write his report is undoubtedly relevant and will be potentially of great value in cross-examining him at trial should he be presented as a witness. As to privileges, there is no

attorney-client privilege because nothing that is being sought was a communication between Dodger and Bent.

It is objected that the requested information constitutes attorney work product that is protected under Rule 26(b)(3) and 26(b)(4) and the doctrine of Hickman v. Taylor, casebook p. 360. Note that the limitation on discovery in Rule 26(b)(3) extends to material prepared by a party's "consultant," which Dr. Chizzel is. This objection has some merit. Inquiry into what Dodger said to Dr. Chizzel is very likely to disclose Dodger's mental impressions and legal theories as is forbidden by Rule 26(b)(3). On the other hand, Dr. Chizzel's report has already been furnished to the insurance company and isn't protected.

Even if Dr. Chizzel's information is protected as part of the attorney's work product, the insurance company may still be able to get documents that formed the basis of the report by showing "substantial need" of this information and "undue hardship" in securing it from any other source. Here, of course, there is no source other than Dr. Chizzel himself.

Note that, if Dr. Chizzel is later identified as an expert who will testify at trial, the insurance company will be entitled to disclosure of all materials furnished to him by Dodger that form a foundation for his expert opinion. See Rule 26(a)(2)(B).

QUESTION THREE

Pickwick's claim is based on a federal statute. Therefore there is federal-question jurisdiction in the district court. However, the counterclaim is not federal. The district court will have jurisdiction to entertain the counterclaim only if it is compulsory under Rule 13. See Wigglesworth v. Teamsters, casebook p. 199.

A counterclaim is compulsory if it arise out of the same transaction or occurrence as the plaintiff's original claim. There are several ways to determine this "same transaction or occurrence" test. Is the evidence the same in both claim and counterclaim? Yes, the note form that Pickwick complains of is also the evidence of his debt. Are the issues of fact and law the same? No, but they overlap. Is there a logical relation between the claim and the counterclaim? Yes, because claim and counterclaim both involve debtor-creditor issues. Would Finance Co. be able to assert the counterclaim elsewhere? No, not if it is compulsory.

Finally, the policy of the federal rules is to encourage joinder of claims and to discourage piecemeal litigation. For this reason, any doubt should be resolved in favor of finding the counterclaim compulsory. Therefore the district court should hold that it has jurisdiction over the counterclaim and should deny Pickwick's motion to dismiss the counterclaim.