

CIVIL PROCEDURE
Mr. Martin
October 21, 2005

Social security no. _____

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 25, is to read the United States Constitution, which is printed in your softbound book.

Because at least one student must take this examination on a deferred basis, you must fill in your social security number in the space above and turn in this white examination paper when you leave. This is a temporary measure for examination security only, and the examination paper will be returned to you.

ALL BLUE BOOKS MUST BE RETURNED AT THE CLOSE OF TYHER EXAMINATION. LABEL ANY SCRAP BLUE BOOK "SCRAP."

QUESTION ONE

You represent Mary Beth, who seeks damages arising out of an automobile accident in which she was injured and her boyfriend was killed. Suit has been filed in a federal court based on diversity of citizenship. Mary Beth's complaint includes claims for medical expenses, permanent disability, and emotional injury.

As part of your pre-filing investigation you sent Mary Beth to be examined by a psychiatrist whose written report to you says that Mary Beth is suffering from "post-traumatic stress disorder" but also says that "the patient appears greatly to exaggerate the disabling effect of her injuries."

After the filing of the complaint, Mary Beth was examined by an orthopedic surgeon engaged by the defendant for the purpose. You agreed to this examination without requiring the defendant to obtain a court order under Rule 35.

1. You would like to see the orthopedic surgeon's report. Are you entitled to see it? Why or why not?

2. Is the defendant entitled to see your psychiatrist's report? Why or why not?

QUESTION TWO

Vinda Lou Chutney, author of the cowboy ballad "I Love my Horse, of Course," sued her ex-boyfriend of long ago, Furbish Lousewort, for copyright infringement. Furbish is a country and

western singer who regularly performs "I Love my Horse, of Course" before live audiences. He has also recorded the song. (Performing or recording a copyrighted song without permission of the copyright holder is copyright infringement).

Vinda Lou, represented by competent counsel, adequately alleged in her complaint that she was the author of "I Love my Horse, of Course" and copyrighted the song at the time she wrote it in 1987. The 1987 copyright has not expired.

Furbish answered the complaint pro se. He admitted performing and recording the song, denied the claim of copyright infringement and, as an affirmative defense, alleged that Vinda Lou gave the copyright to him years ago when they were dating.

Vinda Lou's lawyer next served Requests for Admissions under F.R.Civ.P. Rule 36 on Furbish. One of the facts that Furbish was asked to admit or deny was the following: "There is not, and never has been, any written document evidencing transfer of ownership of the copyright in 'I Love my Horse, of Course' from the plaintiff, Vinda Lou Chutney, to the Defendant, Furbish Lousewort." The Requests for Admissions were sent to Furbish at his address by both certified and regular mail. The certified mail was returned by the post office marked "Refused." Neither the plaintiff, nor her lawyer, nor the court, ever received a response from Furbish to the Request for Admissions.

Several months after serving the Request for Admissions, Vinda Lou's lawyer moved for summary judgment in Vinda Lou's favor on the claim of copyright infringement. In support of this motion Vinda

Lou's lawyer pointed out in a memorandum of law that the federal copyright law unambiguously requires any transfer of ownership of a copyright to be evidenced by a written document; otherwise any purported transfer of ownership is void and of no effect (17 U.S.C. 204[a]). Vinda Lou's lawyer also supported his motion for summary judgment with an affidavit which repeated the facts about the Request for Admissions that are set out in the paragraph above.

In response to the Motion for Summary Judgment, Furbish (still pro se) filed an Opposition to the Motion accompanied by his own affidavit which repeated his claim, this time under oath, that Vinda Lou gave him the copyright. Furbish also stated in his affidavit that he never received the Request for Admissions.

Upon receipt of Furbish's affidavit, Vinda Lou's lawyer wrote a letter to Furbish. The letter stated that Vinda Lou intended to seek sanctions under F.R.Civ.P. Rule 11 from Furbish on account of Furbish's assertion of an obviously frivolous defense. Furbish did not respond to this letter nor withdraw his opposition and its accompanying affidavit. More than twenty-one days passed. Vinda Lou's lawyer then filed his motion for sanctions with the court.

1. How should the judge decide Vinda Lou's motion for summary judgment? Why?
2. How should the judge decide Vinda Lou's motion for sanctions? Why?

QUESTION THREE

Pony Tail League ("PTL") is an organization that seeks gender equity in public school sports programs in the state of West Dakota.

PTL sues the West Dakota Coaches' Club ("Coaches"), which fixes regulations for all high schools in West Dakota that participate in interscholastic athletics. Suit is brought in federal court under Title IX of the federal Education Amendments of 1972 ("Title IX") and the Equal Protection Clause of the Fourteenth Amendment. PTL seeks injunctive relief to abolish Coaches's rules that prohibit girls from competing in football, wrestling, water polo and ice hockey. As an alternative remedy, PTL seeks a court order requiring schools which exclude girls from football, wrestling, water polo and ice hockey to establish separate programs in these sports for girls.

PTL's suit is brought by PTL and seven parents as next friends of their respective daughters, alleging that the each of the daughters wishes to participate in one or more of the named sports but is prohibited from doing so by Coaches's rules. The complaint says it is brought under F.R.Civ.P. Rule 23(b)(2) as a class action on behalf of all female secondary school students in the state of West Dakota who have been adversely affected by Coaches's rules. PTL is represented by Penny Farthing, a member of the U. S. Olympic women's track and field team in 2000, who recently was admitted to the bar after graduating from West Dakota School of Law.

At an early time, as commanded by F.R.Civ.P. Rule 23(c), the district court holds a hearing on PTL's Motion for Class Certification in order to decide if the case should be certified as class action.

Seeking class certification, PTL's President Fred Fumble testifies that PTL has about 300 members, most of whom are parents of girl athletes. Under cross examination, he admits that about 50% of the parents want girls to be eligible to compete on all teams now restricted to boys. The other 50% of the parents want separate, equal, programs established for girls in all sports.

Opposing class certification, Coaches present the results of a survey which shows that fewer than 1000 out of 300,000 female students in West Dakota high schools wish to participate in football, wrestling, water polo and ice hockey. The survey also discloses that, out of the 300,000 female students surveyed, only about 10% want gender-integrated teams. Ten per cent want separate but equal programs for boys and girls. Eighty per cent don't see any need to change existing arrangements.

Penny Farthing objects to Coaches's survey saying that it is irrelevant because, if Coaches's practices are illegal under Title IX, it doesn't matter what girl athletes (or their parents) think about those practices.

Buzz Bomber, wrestling coach at Millard Filmore High School in West Dakota, testifies as an expert on interscholastic sports. He points out that money to establish separate girls' programs will have to be found somewhere and will lead in most schools to

curtailing one or more boys' sports. As for gender-integrated teams, Coach Bomber goes on, "Speaking for myself, I don't think my wrestlers will be able to maintain their concentration if they have to wrestle against females. And I would hate to see any of my boys beaten by girls. It would be bad for their self-esteem."

How should the district court judge rule on the Motion for Class Certification? Why?