

CIVIL PROCEDURE  
Mr. Martin  
October 20, 2006

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 23, is to re-read the book A Civil Action in the light of your newly-acquired knowledge of pleadings, joinder, discovery, Rule 11, and summary judgment. Study also the passages on directed verdict, JNOV and new trial. There are additional assignments in connection with A Civil Action on a separate handout which you should collect before you leave at the end of the examination.

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 THE EXAMINATION. LABEL ANY SCRAP BLUE BOOK "SCRAP."

## QUESTION ONE

Read Rules 12(b), 12(e), 12(g) and 12(h).

Marge Muffinmaker ("Marge") sues her employer, Bloody Stump Tool Co. of Bloody Stump, Minnesota ("Bloody Stump"), in federal court for sex discrimination. Marge alleges that she was denied promotion to a top-level management position because she is a woman.

You are a law clerk in the law firm that represents Bloody Stump. Promptly upon receipt of the complaint, the partner in charge of the case filed a Motion for a More Definite Statement under Rule 12(e). The judge allowed the motion. Marge responded, filing a timely amended complaint with sufficient additional detail to satisfy Rule 12(e), as the judge found.

### Part A.

The partner tells you that he wants to file an additional motion raising the defenses of (1) insufficiency of service of process, (2) lack of jurisdiction over the subject matter, and (3) failure to state a claim on which relief can be granted. The partner asks you which, if any, of these grounds can now be a basis for the new motion, and why.<sup>1</sup> What do you tell the partner?

### Part B.

The partner also asks you to advise what happens if the judge (rightly or wrongly) refuses to entertain any new motion to dismiss

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<sup>1</sup>. This is a question about procedure. Ignore the merits (i.e. the likelihood of success) of these defenses. If they seem to you unlikely to succeed on the merits, just assume that the partner knows something that you don't know.

at this stage of the litigation. Can Bloody Stump raise some or all of these challenges at a later time? If so, how? If not, why not?

## QUESTION TWO

The Massachusetts Medical Society is a voluntary association of physicians regulated by its own by-laws, rules and procedures. No Massachusetts physician is obliged to belong to the Massachusetts Medical Society (hereinafter "Society"), but most do; and the Society is widely respected as the voice of the medical profession in Massachusetts.

In 1978 the Society established its Impaired Physician Committee ("Committee") "to deal with matters relating to impaired or disabled physicians." Almost all of the impaired physicians who come to the attention of the Committee are addicted to, or abusers of, alcohol or drugs. The Committee's purpose is to urge these physicians into appropriate treatment programs so as to salvage their careers before their alcohol or drug problems become occasions for license revocation or other disciplinary action at the Board of Registration in Medicine. The Chairman and Executive Secretary of the Committee is Dr. Lazaretto, a psychiatrist with a specialty in addictions.

Dr. Cankerworm and Dr. Bugbite were both orthopedic surgeons at St. Simeon Stylites Hospital in southeastern Massachusetts. They were not friends. In 2003 Dr. Cankerworm wrote to the Committee charging that Dr. Bugbite's ability to practice medicine was impaired by the use of alcohol or drugs.

Dr. Cankerworm told the Chief of Staff of the hospital that the Committee was looking into Dr. Bugbite's lifestyle. The Chief of Staff began his own investigation. Some of the doctors stopped referring patients to Dr. Bugbite. Two years later the Chief of Staff notified Dr. Bugbite that the hospital was closing its investigation of him without taking any action.

Dr. Bugbite sued Dr. Cankerworm for libel (written false statement that impairs reputation). At the earliest possible time Dr. Bugbite's lawyers noticed (i.e. called for) the deposition of Dr. Lazaretto. Dr. Lazaretto was subpoenaed duces tecum pursuant to Rule 30(a)(1) and Rule 45. The subpoena required him to bring to the deposition all letters or other documents sent by Dr. Cankerworm to the Committee and all records of the Committee relating to its investigation of Dr. Bugbite.

The Society and Dr. Lazaretto applied to the Court for a protective order. The affidavit accompanying this application recited the information in the first and second paragraphs above. The affidavit went on to say that, in order to encourage referrals, the Committee had adopted a policy of strict confidentiality. "Written referrals to the Committee and information developed by the Committee in the course of its work are kept confidential and are not exhibited to or provided to third persons." The committee "believes that only by assuring the confidentiality of information provided to it and maintaining the anonymity of persons cooperating with the Committee can it promote the trust and reliance which is essential to the Committee's work." Accordingly, the Society and

Dr. Lazaretto asked that "the subpoena be quashed and that the deposition not be had."

In support of their application, the Society and Dr. Lazaretto pointed the Court to Massachusetts General Laws c. 231, s. 85N, which provides as follows:

No member of a professional society or of a duly appointed committee thereof, or a duly appointed member of a committee of a medical staff of a licensed hospital or a health maintenance organization licensed under the provisions of chapter one hundred and seventy-six G shall be liable in a suit for damages as a result of his acts, omissions or proceedings undertaken or performed within the scope of his duties as such committee member, provided that he acts in good faith and in the reasonable belief that based on all the facts the action or inaction on his part was warranted. . . .

How should the judge rule on the motion for a protective order? Why?

### QUESTION THREE

Newlyweds Hope and Dope bought a fixer-upper house in Tewksbury, MA. Because they were short on funds they agreed to allow their bedroom to be redecorated for a new TV reality show, "Room to Change," in which interior designers and sellers of furniture get to display their talents and wares. In exchange for allowing their bedroom to be used as the set for the program, Hope and Dope got the improvements free.

The room was redone in Victorian style with the show's trademark, a big ceiling fan, installed. Unfortunately, two weeks after the TV people left, the 50-pound fan came crashing down onto the bed in the middle of the night. The fan broke Dope's leg, and its whirling blades disfigured Hope's pretty face.

Hope and Dope sued the company that produces the show, Room to Change, Inc. ("RTC"), alleging negligence in the installation of the ceiling fan. RTC denied their claims and alleged that the fan fell because of hidden flaws in the ceiling. RTC also relied on a contract that Hope and Dope signed absolving RTC of liability for any damages caused by the redecoration.

#### Part A.

Promptly after being sued, RTC took Hope's deposition. RTC's lawyer asked her, "What makes you think that it was the show's fault that the ceiling fan fell?" Hope answered, "Well, I don't know but it certainly wasn't my fault." Immediately after the deposition RTC filed a motion for summary judgment. The motion states that the plaintiffs have no evidence to support the necessary elements of breach of duty and causation. RTC points to Hope's deposition testimony in support of its motion.

What should Hope and Dope do in response to RTC's motion for summary judgment?

#### Part B.

Assume that the motion for summary judgment is denied with leave to refile. RTC files a second motion for summary judgment, this one based on the release. Under Massachusetts law, however, such releases are not valid when they purport to release a party from its own negligence. Hope and Dope respond to the motion, briefing this legal issue, but they do not come forward with any evidence in opposition to summary judgment.

How should the judge decide the renewed motion? Why?

Part C.

Assume that the renewed motion for summary judgment is denied with leave to refile. About a year later, RTC again renews its motion for summary judgment, this time supported by an affidavit from an expert structural engineer who opines that the fan was correctly designed and correctly installed. He further opines that the ceiling was weakened by invisible wood rot that caused the fan to fall. Hope and Dope do not respond to this motion. How should the judge decide this again-renewed motion for summary judgment? Why?

Part D.

Assume that, instead of not responding as in Part C, Hope and Dope respond with an affidavit from their own expert and with their own motion for summary judgment (called a "cross-motion"). The plaintiffs' expert states that he has examined the wood of the ceiling and there is no wood rot. He further notes that, if there were wood rot, any competent carpenter would have seen it and so would have been negligent in proceeding with the plan to install a ceiling fan. The plaintiffs' expert opines that the fan was, negligently, attached only to the sheetrock rather than to a ceiling joist and that this inadequate anchoring caused it to fall.

How should the judge decide the cross-motions? Why? Be sure to address each party's motion for summary judgment.

END OF EXAMINATION

CIVIL PROCEDURE  
Mr. Martin  
November 3, 2006

MIDTERM EXAMINATION  
COMPLETE ANSWERS

QUESTION I.

The partner made a big mistake when he fired off that Rule 12(e) motion without reading Rule 12. You have to tell the partner that he can't make a second Rule 12 pre-answer motion because Rule 12(g) requires that all Rule 12 pre-answer motions be consolidated.

Furthermore, you have to tell the partner that he has inadvertently waived the defense of insufficiency of service of process because of Rule 12(g) in conjunction with Rule 12(h)(1).

However, all is not lost. Rule 12(h)(2) says that the defense of failure to state a claim on which relief can be granted hasn't been waived but can be brought up later: in the answer, in a motion for judgment on the pleadings, or at trial on the merits. Now that Marge's amended complaint has been allowed, Bloody Stump is going to have to file an answer. You tell the partner that the defense of failure to state a claim on which relief can be granted must be asserted as an affirmative defense in the answer (Rule 12[b], first sentence) if it is to be available for use in a motion for judgment on the pleadings or at trial.

Finally, because of Rule 12(h)(3), the defense of lack of subject matter jurisdiction hasn't been waived and can be raised by "suggestion" of a party at any time. You tell the partner that you don't know what a "suggestion" is, nor whether a "suggestion" has to be asserted as an affirmative defense in the answer, but that there is every good reason to so assert it.

QUESTION II.

The information sought by Dr. Bugbite is unquestionably relevant to his libel suit. Therefore it is discoverable unless it is privileged.

Dr. Lazaretto and the Committee rely on G. L. c. 231, s. 85N. However, their reliance is misplaced. That statute creates a limited immunity from civil liability for Dr. Lazaretto and the Committee. It does not create an evidentiary privilege.

Reliance on Rule 26(b)(3) is also misplaced because Rule 26(b)(3) only protects the trial preparation material of a party, and Dr. Lazaretto and the Committee aren't parties.

Nor are Dr. Lazaretto and the Committee protected by any physician-patient privilege, because no relationship of physician and patient ever existed. No other privilege applies.

Rule 26(e) says that the purpose of a protective order is to protect a person from "annoyance, embarrassment, oppression, or undue burden or expense." None of these words is applicable to Dr. Lazaretto or to the Committee. The same can be said of similar language in Rule 45 (c).

In the end, Dr. Lazaretto and the Society are asking the Court to create a new privilege for medical peer review. For this there are reasons both pro and con. On the one hand, the truth-seeking purpose of civil litigation is impaired by privileges which keep from the trier of fact information (often, as here, the very best information). On the other hand, Dr. Lazaretto and the Society are undoubtedly correct to assert that confidentiality is important to the Committee's work in medical peer review which is an activity that benefits society as a whole.

### QUESTION III.

Part A. Hope and Dope should file counter-affidavits based on their pre-filing investigation to show that there will be evidence to the effect that negligence on RTC's part caused the fan to fall. (Hope and Dope and their lawyer did a pre-filing investigation, didn't they?).

Alternatively, Hope and Dope should file their own affidavit under Rule 56(f) explaining why they aren't yet able to produce counter-affidavits and ask the Court to refuse RTC's motion, or to order a continuance, so as to permit time for discovery.

Part B. RTC's motion raises only an issue of law. Hope and Dope adequately responded to the issue of law. Assuming that Hope and Dope's position on Massachusetts law is correct, as the question tells you it is, then RTC is not entitled to summary judgment as a matter of law and the judge should deny RTC's motion.

Because RTC did not assert any evidence in its motion for summary judgment, there is no burden on Hope and Dope to come up with any counter-evidence.

Part C. However, in this Part C RTC does assert evidence in the form of its expert's opinion that it (RTC) was free from negligence. This is an issue on which Hope and Dope will have the burden of production and proof at trial. Accordingly, on the motion for summary judgment the burden now shifts to Hope and Dope to produce information reducible to evidence that rebuts RTC's expert. This Hope and Dope have not done. Therefore summary judgment should be granted to RTC.

Part D. The judge should deny both motions. It is clear, from both motions, that a genuine issue of material fact is in dispute and therefore a trial will be required.