

CIVIL PROCEDURE

Mr. Martin

October 17, 2008

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 20, is pp. 521-545 and 563-578 in the casebook, including the Beacon Theatres and Teamsters Local 391 cases.

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(g) and 12(h). Then answer the questions that follow the fact pattern. Each question should be answered with the one word, "Yes" or "No," followed by a citation to the pertinent section (and, if applicable, subsection) of Rule 12. You may attach explanations to your answers if you wish, but full credit will be given for a correct answer containing only the word "Yes" or the word "No" followed by the correct citation. Example: "YES – Rule 12(h)(1)(A)."

This is a test only of your rule-reading ability. All of the information necessary to answer these questions is found in Rules 12(b), 12(g) and 12(h).

Hope and Dope, an impoverished elderly couple, sued their financially successful son Chester in a federal district court. Their complaint alleged (in Count I) violation of the Fifth Commandment ("Honor thy father and thy mother"), and (in Count II) breach of an oral agreement by Chester to support his parents in their old age.

Chester responded by filing a motion to dismiss the complaint for failure to state a claim on which relief can be granted (i.e. a motion under Rule 12[b] [(6)]). The judge agreed that the Fifth Commandment is not part of the common law of the jurisdiction and accordingly dismissed Count I of the complaint. However, the judge ruled that Count II of the complaint, if proven, stated a claim on which Hope and Dope could recover. Accordingly, the judge denied Chester's motion to dismiss Count II.

1. Can Chester now move to dismiss the complaint for improper venue? Assume that venue (i.e. the territorial location of the court in which the action has been filed) is improper.

2. Can Chester now move to dismiss the complaint for failure to join an indispensable party? Assume the existence of an indispensable party.

3. Can Chester now move under Rule 12(e) for a more definite statement?
4. Can Chester include the defense of insufficiency of service of process in his answer?
5. Can Chester include the defense of failure to join an indispensable party in his answer? (Again, assume the existence of an indispensable party).

Assume for the purposes of questions 6 through 8 below that, instead of moving to dismiss the complaint, Chester answered in a timely manner denying all material allegations of the complaint.

6. Can Chester later move to dismiss the complaint for improper venue?
7. Can Chester later move to dismiss the complaint for failure to state a claim on which relief can be granted?
8. Can Chester later, by motion, seek to dismiss the case for lack of the Court's jurisdiction over the subject matter?

## QUESTION TWO

Philander S. Podsnap is a lawyer in Foulhaven, Massachusetts. Once upon a time he represented Ms. Betty Bombast in securing a divorce from her husband Bart. Ten years later, on July 17, 2004, Betty slipped and fell to the floor in a Circle Pin convenience store in Foulhaven. She claims that she suffered a serious back injury as a result of this fall. On May 11, 2006, she was admitted to Foulhaven Hospital for removal of a spinal disk.

A few days after her fall, Betty called Podsnap's office seeking legal advice. A secretary in Podsnap's office returned the call and advised Betty to write a letter to the store stating that she had fallen in the store and received an injury. The secretary also arranged a medical examination for Betty with the store's insurance

company. Finally, the secretary instructed Betty to write a letter to Podsnap requesting legal assistance.

Following that instruction, Betty personally delivered a letter to Podsnap's secretary. The letter described her fall and ended with a question: "Would you kindly advise me legally?" Podsnap's secretary misfiled this letter in Betty's divorce file. It did not come to Podsnap's attention until 2008, after the statute of limitations had run on Betty's claim.

From the date she delivered the letter in July, 2004, until the expiration of the statute of limitations in July, 2007, Betty did not visit Podsnap's office nor speak with him. In the interim she called Podsnap's office a number of times. Each time she was told that her call would be returned, but Podsnap never returned any of her calls. In August, 2007, Betty did manage to speak by telephone to an intern in Podsnap's office. The intern told Betty that he could not find the file in her case.

In February, 2008, Betty filed a complaint alleging that she had engaged Podsnap to represent her concerning her fall at the store, and that Podsnap was guilty of malpractice in allowing the statute of limitations to run on her claim. In his answer, Podsnap denied that he was ever engaged to represent Betty in connection with her fall.

Last Wednesday, October 14, 2008, Podsnap's lawyer (furnished by his malpractice insurance carrier) filed a motion for summary judgment pursuant to Rule 56 seeking judgment on the grounds that, as a matter of law, no attorney-client relationship existed between Podsnap and Betty before the statute of limitations ran. The foregoing facts (and no others) are adequately to be found in the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits of the parties.

It is a general rule that a lawyer's liability for malpractice is limited to some duty owed to a client. Where there is no attorney-client relationship there is no breach or dereliction of duty and therefore no liability.

Part A (fifty per cent of this question)

How should Betty, by her lawyer, respond to Podsnap's motion for summary judgment? Explain.

Part B (fifty per cent of this question)

How should the judge decide Podsnap's motion for summary judgment? Explain.

### QUESTION THREE

Maximilien Ripoff was the manager of a branch of the Wastewater County Farm & Home Bank (hereinafter "Farmbank") in Drainsboro, West Dakota. Ripoff embezzled \$500,000 from his employer by forging the signatures of depositors on savings account withdrawal forms and directing employees of his branch to issue and sign checks drawn to the order of Intergalactic Bank (hereinafter "IG Bank") in Omnipolis, West Dakota, where Ripoff maintained a personal account. Ripoff deposited these checks into his personal account at IG Bank and later withdrew the entire amount and disappeared.

Two days after the embezzlement was discovered, the Board of Directors of Farmbank met and appointed three of their number as a special audit committee to conduct an in-house investigation of the circumstances. The Board of Directors also voted to engage the national accounting firm of Humble and Fumble to determine whether Farmbank's system of internal controls had failed in the matter of Ripoff's

embezzlement. The special audit committee promptly returned to the Board of Directors a seven-page document entitled “Suggestions for Improvement of our System of Internal Controls” (hereinafter “Suggestions”). Equally promptly, Humble and Fumble submitted to the Board of Directors a fifteen-page report entitled “Report to Management” containing Humble and Fumble’s findings.

Farmbank turned the matter over to its lawyers who, several months later, brought suit against IG Bank for negligence and conversion in the matter of Ripoff’s deposits and withdrawal. In its initial disclosure Farmbank did not disclose the documents entitled Suggestions and Report to Management. IG Bank answered, denying its negligence and asserting the affirmative defense of comparative negligence, thus: “The negligence of the plaintiff Farmbank equaled or exceeded any negligence of the defendant IG Bank, which negligence on the part of IG Bank is expressly denied.”

IG Banks’s lawyers filed and served a Request for Production of Documents seeking all reports of any investigations conducted by Farmbank into the embezzlement. In response, Farmbank identified the Suggestions document and the Report to Management document, but claimed multiple privileges not to disclose them. Farmbank claimed that the documents were protected from disclosure (1) by attorney-client privilege, (2) because they were attorney work product, and (3) by the rule of evidence against admitting, as evidence of negligence, evidence of remedial measures taken in the aftermath of an accident or other liability-creating event.

IG Bank filed and served a motion, properly certified as to unsuccessful attempts to secure production informally, to compel production of the Suggestions Document and the Report to Management. That motion is now before the judge. How should she rule? Why?