

Civil Procedure Final Exam (final version)
Professor Sternlight
December 13, 2003
9:00 A.M. - 12 :00 noon

Exam # _____

INSTRUCTIONS

This is an open book exam. You may consult any notes, commercial or personal outlines, hornbooks, etc. However, you may not share your materials with any other person during the exam. Nor may you resort to information stored on a computer.

Please check this exam for completeness at this time. It should be six pages long. Please write your Exam number on this exam and make sure the Exam number also appears on any blue book or typed materials you turn in. Please also number the blue books. If you are typing, number the pages.

Read (don't skim) each of the questions carefully before drafting your answers. Also, be sure to provide me with the reasoning underlying your answers. That is, tell me why you came to the conclusions you did. If you consider but ultimately reject certain options or arguments, please explain why. If you find a particular question is ambiguous, or if you believe that I have omitted essential information then explain any such ambiguity or problem and supply any additional information or assumptions you believe to be necessary to permit you to answer the question.

Put all of your answers in a blue book or your typed answer. I will not give credit for information written on the exam itself. Also, I ask that you write only on one side of the page. You may use abbreviations so long as they are obvious or you define them. I will look at outlines if you ask me to. However, it is difficult to thoroughly set forth reasoning in an outline.

Please use only your Exam number to identify yourself. Do not attempt to identify yourself by, for example, referring to personal characteristics or to remarks made in class. Also, please refrain from including any personal notes or holiday greetings in your exam.

You have three hours to complete the exam. I have indicated the point value for each question and you should allocate your time accordingly. Given my scoring system you will be sharply penalized for failing to thoroughly address any portion of the essay questions.

Question 1 True false questions (45 points total; 3 points each)

With respect to each of the following propositions, state whether the proposition is true or false. Then, explain in one or two sentences why you believe the proposition is either true

or false. You will receive no credit at all unless you provide an explanation for why the statement is true or false. You will also receive no credit unless you come to a conclusion as to whether the statement is true or false. Finally, I will not read any material in excess of two sentences.

A. Plaintiff filed a complaint against Defendant in federal court on January 1, 2002. On January 15, 2002 Defendant filed a pre-answer motion to dismiss the complaint for failure to name an indispensable party. Defendant filed no other pre-answer motions. Defendant cannot subsequently include a defense of lack of personal jurisdiction in her Answer.

B. If a state supreme court makes a ruling on an issue of federal law, the losing party may properly appeal that ruling to the federal district court in the relevant state.

C. Sally Spectator (citizen of Georgia) has brought a lawsuit in federal court against the MGM Mirage Hotel/Casino alleging that she suffered negligent infliction of emotional distress when she watched performer Roy (of Siegfried and Roy) be mauled by the tiger. The Mirage, in paragraph 36 of its answer, has plead that it is not liable because it could not have predicted the mauling. The Mirage has also sought to implead Roy, arguing that he was responsible for the incident because he failed to train the tiger properly and failed to handle the tiger properly on the day of the event. The impleader is not proper.

D. When parties consider alternatives to litigation they are better off choosing arbitration, than mediation, because whereas the results achieved in arbitration can be binding, those achieved in mediation are not binding.

E. The rules of our adversary system of justice provide that if a client instructs his/her attorney not to disclose certain items in discovery the attorney may not be sanctioned under FRCP 11 or FRCP 37 for refusing to produce those items.

F. Plaintiff Patsy sued Clod Company and Supervisor Sleaze in federal court for sex discrimination, arguing that she was fired for discriminatory reasons. Sleaze filed a counterclaim against Patsy accusing her of having slashed the tires of his car. Sleaze also seeks to bring Patsy's boyfriend Paul into the case, arguing that he participated in the tire slashing with Patsy. Assuming personal jurisdiction and subject matter jurisdiction exist with respect to all claims, Sleaze may bring Paul into the case.

G. Larry Lawstudent and Deborah Dentist were engaged to be married.. One day, the two participated in a vigorous game of table tennis, in the second floor hallway at the Boyd School of Law. Larry was trying to slam the ball when the paddle flew out of his hand and hit Susy Spectator in the head, causing serious injury. Susy has brought claims in federal court against Larry & Deborah (for negligence), and against the Boyd School of Law (for negligently setting up a table tennis table in an inappropriate venue). Susy has also brought a dental malpractice claim against Deborah in the same lawsuit. The alleged dental malpractice occurred when

Deborah filled a cavity for Susy six months prior to the table tennis incident. Assuming no problems with personal or subject matter jurisdiction, these claims are properly joined.

H. Lousy Lawyer represents Defendant. Lousy Lawyer files an answer on behalf of her client that erroneously admits several of Plaintiff's key allegations to be true when in fact Defendant has evidence to show that the allegations are false. At trial defendant will not be permitted to put on evidence to counter plaintiff's allegations on these points.

I. Pat Partyboy brought a claim for negligence, against the Luxor Casino, in federal court. The suit alleges that Pat slipped and seriously injured himself due to the Luxor's failure to clean up a spilled drink in a timely fashion. The Luxor admits that the drink was spilled, but defends on the grounds that (a) Pat is the one who spilled the drink and (b) Pat would not have slipped had he not been drunk. Assuming no problems with jurisdiction, the best way for the Luxor to assert these defenses is by bringing a counterclaim against Partyboy.

J. In federal court it is up to the district court judge to determine, purely as a matter of discretion, whether a new party should be allowed to intervene in a lawsuit as either a plaintiff or a defendant.

K. Plaintiff, a Boyd law student, files a complaint against Defendant, a Boyd law professor, in federal court. Plaintiff alleges that by assigning the class to draft haiku poetry Defendant violated Plaintiff's right to Due Process under the U.S. Constitution. Defendant argues that Plaintiff's complaint, alleging violation of the Due Process Clause, is entirely frivolous and not based on a reasonable extension of existing law. After first complying with the 21 day "safe harbor" requirement Defendant files a motion for sanctions, pursuant to Fed. R. Civ. P. Rule 11, against Plaintiff's attorney. Assuming the court agrees with Defendant that the claim is frivolous the court may but need not order Plaintiff herself to pay monetary sanctions to the Defendant.

L. The federal Environmental Protection Agency ("EPA") has brought suit in federal court against golf course developer Green Grass Inc. ("GGI") alleging that GGI violated federal environmental laws by using excessive and illegal chemicals and pesticides in caring for some of its golf courses. To defend itself against these claims GGI hired attorney Mel Mouthpiece. Upon receipt of the complaint, Mouthpiece immediately scheduled interviews with numerous GGI employees and also reviewed numerous GGI documents. The EPA has now sent interrogatories and document requests to GGI demanding that GGI state what chemicals it has used on its golf courses in the last five years and produce documents regarding those chemicals. On behalf of GGI, Mouthpiece can properly object to these requests on the ground that they call for information protected by attorney client privilege and work product doctrine.

M. According to the FRCP, a Defendant should be sure to include in its Answer all relevant R. 12 "disfavored" defenses and R. 8(c) affirmative defenses. However, it is easier for a Defendant to cure omission of an affirmative defense than to cure omission of a disfavored defense.

N. Gladys Gladiator, a plaintiffs' class action attorney, brought a class action on January 1, 2002 on behalf of all then-current Boyd law students alleging that they were all being harmed by asbestos contained in the ceiling of the Boyd building. The suit does not seek monetary relief, but only demands that the court issue an injunction requiring the law school to clean up the asbestos. Some of the law students are not happy with the lawsuit. They are not confident that Gladys Gladiator is a good lawyer who will represent their interests well. Other law students oppose the class action because they fear it will cause their tuition to increase. The court may but need not permit all these law students to opt out of the lawsuit.

O. The advantage of informal discovery over formal discovery is that the former can be obtained from non-parties, but the latter can not.

Question 2 (42 points total, subdivided as indicated below)

As many of you may know, a substantial legal dispute is brewing in Summerlin over the proposed construction of a new Station Casino near Red Rock Canyon. For purposes of this exam, please accept the facts as stated here, even if you have reason to believe any of the stated facts are incorrect.

The Summerlin planned community is contained within the Las Vegas city limits. Currently it contains an estimated 250,000 people. The development is sponsored by the Howard Hughes Corporation ("HHC"), which is incorporated and has its principal place of business in Nevada. The HHC is a wholly-owned subsidiary of the Rouse Corporation, which is incorporated in and has its principal place of business in Columbia Maryland. Persons who bought houses in Summerlin were provided with documents by representatives of the HHC, and also by the individual builders who built their houses. Four individual builders were responsible for construction within the Summerlin development. The Summerlin Master Plan was approved by the Clark County Commission in 1996, and then revised by the Commission in 1999. From the outset potential homeowners were informed by HHC and individual builders that a neighborhood casino and regional malls were planned. In particular, as required by state law the potential homeowners were provided with disclosure forms noting that a hotel-casino was planned, and also noting that then-current zoning laws permitted a hotel-casino no higher than 100 feet with not more than 1,000 rooms. Thus, some home owners anticipated that the casino would resemble the Green Valley Ranch-style complex (not very tall or conspicuous). However, Station Casinos Inc. (a Nevada Corporation) has stated that it now hopes to build a larger facility, boasting 1,500 rooms, two 200-foot towers, and one 300-foot tower. Station Casinos Inc. has stated that it needs to build the large towers in order to have the casino be taller than the 250 foot office towers now proposed to be constructed by the Howard Hughes Corp. In order to build this larger structure Station Casinos Inc. will need to obtain a variance from the Clark County Commission. To date, the Commission has neither granted nor denied the request. Station Casinos Inc. is a gambling powerhouse that runs eleven neighborhood casinos, mostly in the Las Vegas area.

Many Summerlin home owners are upset by the proposed new construction. They feel that the proposed construction will block their views of the beautiful nearby Red Rock Park, and also diminish views from the Red Rock Park. They contend that the construction will therefore diminish their property values. Homes in the Summerlin area range in price from \$250,000 - 700,00.

A. (15 points) You are an attorney. You have been contacted by Emily Enviro, president of a newly-formed organization, Summerlin Homeowners Against Tall Towers (“SHATT”). Emily has informed you that her organization currently has fifty members, and that she expects membership to grow rapidly, as word gets out about the 300 foot hotel planned by Station Casinos. Emily has informed you that her goal, and that of her organization, is to prevent Station Casinos from building towers in excess of 100 feet. Emily realizes that a moderate-size casino is inevitable, but is looking for ways to prevent a monstrosity. She has asked you to help the group consider whether bringing or threatening litigation would be a good choice at this point, or whether there are any other options that might be explored. What would you respond to Emily? You have concluded that the only potentially viable lawsuit that might be brought by the homeowners would be a suit for fraud against Rouse or HHC or the individual builders. The suit likely would not be viable unless and until Station Casinos is given permission to build the larger towers. Assuming the permission is granted and litigation is commenced, you give such a suit 50/50 odds, at best. To the extent necessary, briefly describe any further factual or legal research you would need to do before advising Emily and the group. Don’t worry about personal jurisdiction or subject matter jurisdiction in drafting this response. Assume both would exist to the extent you wanted to bring a suit in federal court. In your answer to this subpart A don’t discuss matters that are covered in the other subparts of this question, below.

B. (15 points) You are the same attorney as above, but some time has now passed and events have now transpired. The Clark County Commission has granted the variance requested by Station Casinos, and permitted construction to go forward on the 1,500 room casino with two 200 feet towers and one 300 foot tower. You and your client, Emily Enviro, have agreed that it makes sense to commence litigation. But, you have not yet determined the best litigation approach. Discuss the pros and cons of each of the following approaches: a class action for fraud on behalf of the homeowners against either Rouse or the individual builders; a suit based on joinder of multiple plaintiffs’ claims against Rouse or the individual builders; or an individual claim on behalf of Emily against Rouse or the individual builders. Assume that any such actions would and could be brought in federal court (i.e. that there is no problem with securing subject matter or personal jurisdiction against Rouse or the individual builders).

C. (12 points) You are now to change roles. Plaintiffs’ counsel has brought a suit for fraud in federal court on behalf of ten home owners against the Rouse Corporation. You are the law clerk to the federal judge assigned to hear this case. Plaintiffs, the ten home owners, have brought suit against Rouse Corp. for fraud. Plaintiffs have served defendant with a request for production, under FRCP 34, demanding that defendant produce the following:

1. Any and all documents written, distributed, or held by Rouse that discuss or mention plans for building a casino as part of the Summerlin Master Plan
2. Any and all documents written, distributed or held by Rouse that instruct Rouse or developer sales persons on how to describe the potential development of a Station Casino to home purchasers.

Defendant has refused to respond to these queries, objecting on the ground that the requests “are vague, overly broad, and request information that is not relevant to the lawsuit.” Plaintiff has filed a motion to compel production of these responses.

Your judge has asked you to write a brief memorandum setting out (1) a discussion of the potential courses of action the judge might follow in ruling on this motion; (2) the standard(s) the judge should apply in ruling on this motion; and (3) your tentative recommendation on how the judge should handle this dispute (recognizing that further legal and factual information would be needed before you could make a final recommendation).

Question 3 (13 points)

“The concept of the adversarial process rests on the idea that truth and justice are best served when each side is represented by a gladiator, fighting hard to present that sides’s point of view. As an empirical matter, this premise is open to question for many reasons. One potential problem is that attorney gladiators may go overboard, in their attempt to represent their clients’ interests. Thus, the Federal Rules of Civil Procedure contain numerous provisions that are in essence geared to curb the excessive zeal of adversarial attorneys. Yet, such measures are band aids, at best. What is needed is a more complete restructuring of the adversarial premise of our system.”

Please state whether you agree or disagree with the author’s statement and why. Your discussion should identify the provisions of the FRCP to which the author likely refers. Your discussion should also address counter-arguments that might be made to the position that you take.

I have enjoyed teaching you and look forward to next semester. As soon as you finish all your exams, rest up and relax. Best wishes for happy, healthy holidays.