

Civil Procedure Final Exam
Professor Sternlight
December 6, 2005
1:00 P.M. - 4:00 P.M.

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 access substantive information on a computer or from a live person.

Please check this exam for completeness at this time. It should be seven pages long. Please write your Exam number on this exam and make sure the Exam number also appears on any blue book or printed exam answer you turn in. Please also number the blue books if you use more than one.

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. In general you should not add or make up any facts. However, 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 in your printed exam 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 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 (30 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. You will also do yourself a disservice by writing extremely long “sentences” because questions these are each only worth three points each.

A. Plaintiff Priscilla alleges that her ex-boyfriend, Dan Dervish, engaged in the tort of intentional infliction of emotional distress by deflating the air in Priscilla’s car tires eight times in the course of three months. Priscilla filed a claim against Dervish in federal court and has testified in a deposition to her belief that Dervish was harassing her, as set out above. When asked how she knew Dervish was the culpable party Priscilla explained that her new boyfriend, Abe, had told her he saw Dan deflating the tires one time, and that Abe never lies. Moreover, explained Priscilla, she knew Dan was capable of such dastardly acts based on her experiences with him during the course of their three year relationship. Meanwhile, Dan testified in his deposition that he never deflated the air in Priscilla’s car tires. Dan submits a motion for summary judgment. Assuming that the deposition testimony outlined above is the only evidence submitted to the court in connection with the motion for summary judgment, Dan is entitled to win the motion for summary judgment.

B. The Due Process Clause of the U.S. Constitution is an important backbone of civil procedure. However, because plaintiffs bring lawsuits voluntarily, whereas defendants are brought into court involuntarily, it turns out that the Due Process Clause has only been useful to defendants, and not plaintiffs, in protecting their procedural rights.

C. Plaintiffs are always better off seeking injunctive relief, rather than compensatory damages, because whereas injunctive relief is final, the availability of compensatory damages depends upon the depth of defendant’s pockets.

D. A group of three UNLV law students are in a study group. It turns out they are all disgruntled with the Boyd law school. Andrew believes that his First Amendment rights under the U.S. Constitution were violated because, on November 1, 2005, the law school administration had security escort him off law school premises for wearing a sweatshirt proclaiming “President Bush II – Our Fearless Misleader”. As well, Andrew is also mad because he slipped on cigarette butts outside the front door of the law school door and broke his coccyx, on November 15, 2005. Barb is mad because she broke her ankle when she slipped on a wet floor in the ladies room at Boyd on November 15, 2005. Carl is mad because he was not selected as part of one of the winning teams in the Boyd Client Counseling Competition, on November 18, 2005. He claims he was not selected because he told an ornery client he would not represent someone who was

such an “assh#\$%”. Carl believes his First Amendment rights were violated. Andrew can bring both claims together, in federal court, assuming jurisdictional requirements have been met, but it would be improper for Barb or Carl to join their claims with Andrew’s.

E. Maybelline’s Muffins Inc. (MM) is a franchisor with franchisees located throughout the United States. MM sues one of its franchisees, Maybelline’s Muffins of Las Vegas (MMLV), for fraud, alleging that MMLV has failed to accurately report its financial information to MM, and that MMLV has also failed to make payments required by its contract with MM. MM knows that MMLV has lots of financial data stored on the computers of its accountant, Get Richer Inc. MM would like to obtain electronic discovery of financial documents stored on the Get Richer Inc. computers. However, because Get Richer Inc. is not a party to the litigation MM will not be able to get access to this information.

F. Plaintiff Priscilla sues Defendant Big Snow Inc. in federal court for injuries Plaintiff incurred at Defendant’s ski resort. Priscilla alleges Defendant negligently maintained its trails, thereby causing her serious back injuries. Defendant Big Snow, in its Answer, raises a defense that Priscilla assumed the risk of poor trail maintenance when she purchased her lift ticket to ski at Big Snow. Priscilla’s attorney believes the defense is unfounded and has filed a motion for partial summary judgment on the defense of assumption of the risk. In order for Plaintiff to prevail on her motion Plaintiff would only have to show that given the undisputed evidence, no reasonable jury could find Plaintiff assumed the risk of negligent trail maintenance, and Plaintiff would not have to present evidence to support her underlying claim of negligence to prevail on the motion for partial summary judgment.

G. Plaintiff Nancy Carpenter files a Complaint in federal court which is essentially identical to the Complaint set out in the Subrin et al casebook at p. 897. (Assume that plaintiffs have adequately plead the existence of federal jurisdiction). In response to this Complaint defendants Randall and Peter Dee file an Answer which, while properly captioned and meeting all the requirements of the relevant Local Rules, contains only a single-sentence Answer stating: “All allegations are denied in that Plaintiff’s Complaint is 100% bullshit.” Plaintiff’s best choice, in response, is to file a motion under Rule 11 arguing that Defendants should be sanctioned under Rule 11 for filing an Answer in bad faith.

H. Plaintiff files a Complaint in federal court on January 3, 2005. Defendant files its Answer on January 19, 2005, raising defenses that the Complaint fails to state a claim upon which relief can be granted and that the court lacks personal jurisdiction over the Defendant. The Defendant, in the same document, also files a Counterclaim against the Plaintiff. The Plaintiff files a Reply to the Counterclaim on February 15, 2005. Subsequently, on March 15, 2005, Defendant’s attorney learns from the Defendant for the first time that the Complaint was delivered to the Defendant exclusively by fax. As service by fax is not sufficient to meet the requirements of the Federal Rules (assume this to be true) Defendant should now file a motion to amend its Answer “as a matter of course” to add the defense of improper service of process.

I. Alfred sues Bartolomy in federal court alleging that Bartolomy breached his contract to provide a magician act for Alfred's club. Bartolomy seeks to bring a counterclaim against Alfred and also sue Candace, for a totally unrelated tort. Specifically Bartolomy alleges that Alfred and his friend Candace deliberately and maliciously trashed Bartolomy's fancy sportscar. Assuming that jurisdiction is proper, all of these claims can be brought together in federal court, although they likely would not be heard in the same trial.

J. Penelope fell into an unfilled unfenced swimming pool in her brother-in-law Dan's backyard. She suffered serious injuries to her back and right leg. She brought suit for negligence against Dan, in federal court. Dan notified his home owner's insurance carrier, Security Inc., of the suit, but the carrier responded that the insurance did not cover claims by family members. Dan filed an Answer denying negligence and also implead Security Inc. Security now files a motion to implead Penelope, arguing that the accident would not have happened had she not been drunk, at the time. Dan did not raise the issue of Penelope's alleged drunkenness in his Answer. The judge should grant Security's motion to implead Penelope, assuming no problems with timing or jurisdiction.

Question 2 (50 points total)

Kings County has been trying to build a new courthouse for many years, but unfortunately the project has been plagued with problems. In 1997 the County retained Arturo Artist to design the plan for the new courthouse. The County was very pleased with the plan, which called for a beautiful open design with lots of windows, and paid Mr. Artist in full for his work. In 1998 the County retained Bob Builder Inc. ("BBI") to be the general contractor for the project and to execute the design done by Arturo Artist. The contract between Kings County and BBI explained that as general contractor BBI would be primarily responsible for selecting and supervising the various subcontractors who would work on the project (electricians, plumbers, roofers, etc.). Kings County retained a veto right over certain key choices of subcontractors. According to the contract, BBI would be paid in stages, as work was completed. The contract also contained a dispute resolution clause requiring that to the extent any dispute were to arise between Kings County and BBI, regarding the construction of the courthouse, the parties would attempt to mediate a resolution prior to filing any claim in court.

Now, seven years later, the courthouse is still incomplete, and the only thing everyone can agree on is that the project has been a disaster from start to finish. Each participant is pointing the finger at others, regarding the problems that have occurred. For example, the County asserts BBI has been incompetent and run up excessive extra charges; BBI asserts that Arturo Artist's plan was unworkable from the outset, that several of the contractors have performed incompetently and/or committed fraud, and that the County has breached its contract with BBI by failing to make timely payments for the work BBI has completed; Arturo Artist claims he is being defamed; and the sub-contractors claim they have not been paid sufficiently or in a timely fashion for the work they have performed.

In addition, the project has been plagued by vandalism. Even to the extent that portions of the courthouse have been completed, some body or some bodies have been destroying completed work. For example, holes were drilled in the pipes in five of the restrooms, graffiti was written on some of the fancy wood paneling, and some of the subcontractors' trucks have had their tires slashed.

A. (9 points) Tired of waiting, and believing that negotiation is pointless, Kings County filed a claim for breach of contract against BBI in federal court on January 3, 2005. For the purpose of this sub-part, you represent BBI. You have not yet filed an Answer or any motions. Your client is furious that Kings County did not fulfill the mediation requirement of the contract prior to filing suit. Indeed, the Complaint makes no mention whatsoever of the contract's mediation requirement. What would be the best way to raise this issue and why?

B. (13 points) It is now April 1, 2005. BBI has filed its Answer. The judge has now ordered the dispute into mediation, in front of one of the federal magistrate judges. For the purpose of this sub-part you represent Kings County. Your client informs you it is not familiar with mediation. How will you explain to your client what it ought to expect from the mediation process? Your explanation to your client should address, among other things, who will likely attend the mediation, who will be expected to speak at the mediation, what the likely setting for the mediation will be, whether evidence will be given, whether the mediator can order a resolution to the dispute, whether information provided in a mediation is confidential, and whether the results of a mediation are binding. To the extent you don't have all these answers, how would you try to research these questions?

C. (19 points) The mediation did not lead to the resolution of the dispute. It is now May 2, 2005. The judge has issued a pretrial order stating that all discovery in the case shall be completed by December 30, 2005, that any expert reports shall be exchanged by February 1, 2006, and that trial shall be held on April 3, 2006. For the purposes of this sub-part, you represent BBI. Up until now you have not filed any claim against any party with respect to the events outlined above. What claims will you consider filing against whom, what are the pros and cons of filing such claims, what process would you need to follow in order to file such claims, and what is the likelihood that the court will permit you to file such claims?

D. (9 points) It is now August 1, 2005. The judge's pretrial order, set out above in sub-part C, is still in effect. For purposes of this subpart, assume that BBI was permitted to file a counterclaim against Kings County for breach of contract, but that no other parties have been named to the suit. For purposes of this subpart, you represent BBI. Kings County has just filed a motion to add a new cause of action to its complaint alleging that BBI breached a separate contract with Kings County to construct the County Jail. You oppose this motion. Draft a memorandum of opposition to Kings County's motion to amend its Complaint. (No need to worry about caption or fancy memorandum format).

Question 3 (20 points)

The bill, below, has been passed by the U.S. House of Representatives and has now been referred to the Senate Committee on the Judiciary. You are an attorney, on staff to the Committee. Your assignment is to draft a short memo (1) explaining the highlights of the bill and putting the bill in historical context; (2) providing the arguments that will be made in favor of and in opposition to the bill, and providing your opinion as to whether members should approve the bill, reject the bill, or amend the bill (and of course explaining your reasoning). You should draft this memo in a non-partisan fashion, and not concern yourself with any politics that may underlie the bill.

109th CONGRESS

1st Session

H. R. 420

IN THE SENATE OF THE UNITED STATES

October 31, 2005

Received; read twice and referred to the Committee on the Judiciary

AN ACT

To amend Rule 11 of the Federal Rules of Civil Procedure to improve attorney accountability, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. ATTORNEY ACCOUNTABILITY.

Rule 11(c) of the Federal Rules of Civil Procedure is amended--

(1) by amending the first sentence to read as follows: 'If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the attorney, law firm, or parties that have violated this subdivision or are responsible for the violation, an appropriate sanction, which may include an order to pay the other party or parties for the reasonable expenses incurred as a direct result of the filing of the pleading, motion, or other paper, that is the subject of the violation, including a reasonable attorney's fee.';

(2) in paragraph (1)(A)--

(A) by striking 'Rule 5' and all that follows through 'corrected.' and inserting 'Rule 5.'; and

(B) by striking 'the court may award' and inserting 'the court shall award'; and

(3) in paragraph (2), by striking 'shall be limited to what is sufficient' and all that follows through the end of the paragraph (including subparagraphs (A) and (B)) and

inserting `shall be sufficient to deter repetition of such conduct or comparable conduct by others similarly situated, and to compensate the parties that were injured by such conduct. The sanction may consist of an order to pay to the party or parties the amount of the reasonable expenses incurred as a direct result of the filing of the pleading, motion, or other paper that is the subject of the violation, including a reasonable attorney's fee.'

SEC. 2. THREE-STRIKES RULE FOR SUSPENDING ATTORNEYS WHO COMMIT MULTIPLE RULE 11 VIOLATIONS.

(a) Mandatory Suspension- Whenever a Federal district court determines that an attorney has violated Rule 11 of the Federal Rules of Civil Procedure, the court shall determine the number of times that the attorney has violated that rule in that Federal district court during that attorney's career. If the court determines that the number is 3 or more, the Federal district court--

(1) shall suspend that attorney from the practice of law in that Federal district court for 1 year; and

(2) may suspend that attorney from the practice of law in that Federal district court for any additional period that the court considers appropriate.

(b) Appeal; Stay- An attorney has the right to appeal a suspension under subsection (a). While such an appeal is pending, the suspension shall be stayed.

(c) Reinstatement- To be reinstated to the practice of law in a Federal district court after completion of a suspension under subsection (a), the attorney must first petition the court for reinstatement under such procedures and conditions as the court may prescribe.

SEC. 3. ENHANCED SANCTIONS FOR DOCUMENT DESTRUCTION IN PENDING FEDERAL COURT PROCEEDINGS.

Whoever willfully and intentionally influences, obstructs, or impedes, or attempts to influence, or obstruct, or impede, a pending Federal court proceeding through the willful and intentional destruction of documents sought pursuant to the rules of such Federal court proceeding and highly relevant to that proceeding--

(1) shall be punished with mandatory civil sanctions of a degree commensurate with the civil sanctions available under Rule 11 of the Federal Rules of Civil Procedure, in addition to any other civil sanctions that otherwise apply; and

(2) shall be held in contempt of court and, if an attorney, referred to one or more appropriate State bar associations for disciplinary proceedings.

Passed the House of Representatives October 27, 2005.