

DO NOT TURN THE PAGE UNTIL INSTRUCTED TO DO SO

INSTRUCTIONS

1. You may have with you your casebook Cound, Friedenthal, Miller & Sexton, Civil Procedure, the 1996 Civil Procedure Supplement, your notes, any class handouts, and any outlines which you have prepared. You may not have commercial outlines or other sources. If you have any such items, please stack them in the front of the room.

2. Answer all questions and all subparts of each question. After each question, I have written a recommended time allotment. You may deviate from this allotment. However, the recommended time reflects the approximate weight accorded to the question. The total recommended time allotment is just 2 hours and 40 minutes, but you have a full 3 hours to work on the exam.

3. I also recommend that you devote approximately one-third of your time on each essay question to thinking about and/or outlining your answer. This will help assure clarity, organization, and completeness, all of which will count in your favor. Rambling discussions of irrelevant material may count against you and certainly will not help your score. Turn in only your final answer, not any notes or outlines made in thinking about a question.

4. Write legibly. You may wish to print. While I will make every effort to read your writing, if I cannot understand what you are saying you will not get credit. I suggest that you skip every other line in the answer book.

5. This exam consists of 7 pages, including this page. Please be certain that you have the entire exam before starting.

6. Unless otherwise specified, assume for each question that the current Federal Rules of Civil Procedure are in effect.

7. BE SURE TO PLACE YOUR EXAM ID NUMBER ON ALL BLUEBOOKS, AND TO NUMBER AND TURN IN ALL BLUEBOOKS WHICH YOU USE.

THIS EXAM IS GIVEN PURSUANT TO THE LAW SCHOOL HONOR CODE

QUESTION 1. (Approximately 45 minutes)

Back in the early 1960s, a Columbus musician named Gordy Berry started a small record company, which, in honor of his home city, he named Cowtown Records. Over the next decade, the company prospered, as hit groups such as the Four Supremes, the Seductions, and Foggy Robertson and the Mirrored Cubes spread "the Cowtown Sound" across the country. In the early 1970s, Berry moved the company headquarters to Los Angeles, California. Mr. Berry has lived in California since 1972.

In 1996, Mr. Berry sued the Gotham Daily News and its entertainment writer, George Flash, in California, alleging that Berry was defamed by a column written by Flash and published in the Gotham Daily News earlier this year.

The Gotham Daily News is based and published in New York City. More than 99% of its daily circulation of approximately 750,000 copies occurs within 300 miles of the New York City metropolitan area. It neither employs nor contracts with distributors in California, and does not solicit subscriptions in California. Nevertheless, it does circulate 13 copies of its daily paper and 18 copies of its Sunday edition (.0017% of its total circulation) to subscribers in California. Although the Daily News primarily reports on events occurring in Gotham City, many features and columns deal with subject matter of national interest, such as entertainment industry news. The Daily News sometimes sends reporters to California to gather news.

Flash, the story's author, lives in New York and wrote the story there. Before publishing the article, Flash authorized his assistant, Jimmy Olson, to telephone Berry in California to get his response, which Olson did. Olson also gathered information for the story, by telephone, from two California sources. The events reported in the story did not take place in California, nor does the article mention California. Both Flash and the Daily News were aware that Berry lives in California.

The defendants were served pursuant to the California longarm statute, which extends to the fullest limits allowed by the United States Constitution. Flash and the Daily News have moved to dismiss under F.R.C.P. 12(b)(2), for lack of personal jurisdiction. How should the court rule on their motion., and why?

QUESTION 2. (Approximately 30 minutes)

After graduating from a state supported law school and (barely) passing the bar, John set up shop as a solo practitioner handling general litigation. Things went well for a few weeks, until John agreed to take on the Brown case.

Ms. Brown told John about being fired from her job, and on the basis of her story, John filed a complaint in the Franklin County Court of Common Pleas, naming Brown's former employer as the defendant, and alleging breach of contract, wrongful discharge, national origin discrimination, and sexual harassment. Brown and her former employer are both citizens of Ohio. The national origin discrimination and sexual harassment claims were made under Title VII of the federal civil rights laws.

The employer filed a timely petition to remove the case to federal court. John sought to oppose removal. He filed a brief in the federal district court pointing out that the plaintiff and defendant were citizens of the same state, that some of the claims were based solely on state law, and that removal was therefore improper. The Court denied John's motion.

The Defendant answered the complaint, denying most of the material allegations. It also made a counterclaim, alleging that some months after her discharge, Brown, in a fit of rage, had driven her car into the window of the defendant's shop, causing substantial property damage. John told his client about this development, but said that as the Federal Rules permitted counterclaims, he couldn't do anything about it other than deny some of the material allegations.

The case eventually went to trial, and it was a disaster for John. The jury found for the defendant on all of Brown's claims, and also found for the defendant on its counterclaim.

Then, a few weeks after the trial, John received a summons and complaint naming him as the defendant in a legal malpractice suit brought by Ms. Brown. John has come to you seeking advice. John wants to know if any of the things he did, described above, were wrong, and whether there was anything that he did not do that he might have done.

What, if anything, did John do wrong, or fail to do that he might have done, and explain why. If there is other information you need, indicate what it is and why you need it.

QUESTION 3. (Approximately 60 minutes)

Gaspar Williams was a journalist for the Scientific Christian News and AAA Network Radio. He made his living primarily in radio and print media, but occasionally sold his photographic work. In 1984 he began reporting on events in Central America. During the next 7 years, he took over 5000 slides, depicting active war zones, political leaders, and scenes from daily life. In 1992, he agreed to supply 300 of his original slides to the Center for Human Caring, to use in an educational videotape on Central America (the video tape eventually used 110 of them). The Center agreed to return the original slides, but after completing the project, it could not find them.

Williams sued in United States District Court in New York, invoking diversity jurisdiction under 28 USC 1332, and alleging breach of contract, conversion, and negligence. The Center admitted liability for the lost slides, and the issue of damages was tried to a jury.

At trial, Williams' expert witness testified that the expected fees from a unique commercial photograph over the course of its copyright were approximately \$1500, but admitted that most photographs, even by professionals, do not qualify as "unique." Williams also testified that he hoped to publish a book of his Central American photos, though he had no book contract. The Center's expert witness testified that, giving Williams every benefit of a doubt, no more than 50 of the 300 slides were unique. The Center also established through expert testimony that non-unique slides could expect to earn a maximum of \$100 over their lifetimes. It was also established that Williams' total earnings from photography between 1984 and the trial in 1996 were just \$12,000. The Center argued that a maximum reasonable compensation was \$100,000. After trial, however, the jury awarded Williams \$450,000 -- according to the jury foreman, "\$1500 for each of the 300 missing slides."

Under the Seventh Amendment to the U.S. Constitution, which governs proceedings in federal court, "no fact tried to a Jury shall be otherwise re-examined in any Court of the United States, other than according to the rules of common law." A determination of damages is normally considered a fact issue. Nevertheless, under case law, federal trial judges have long been deemed to have the authority to order a new trial when damages awarded by a jury "shock the conscience," or are "indisputably egregious."

In 1986, the New York state legislature passed Section 5501 of the Civil Practice Act, which instructs trial judges to order a new trial whenever a jury's award of damages "deviates materially from what would be reasonable compensation." Before passing this law, the legislature considered specific dollar caps on jury awards (for example, a maximum of \$250,000 punitive damages, or \$400,000 special damages), but decided that a more flexible standard, allowing case by case determination by judges, would be better. In signing the law, the Governor stated, "this will assure greater stability in the tort

system and greater fairness for similarly situated defendants throughout the state."

The Center for Human Caring has filed a timely motion for a new trial, arguing that in determining whether or not the jury verdict was excessive, the Court should apply New York law and order a new trial if the jury award "deviates materially from what would be reasonable compensation." Williams admits that had the New York legislature placed specific dollar caps on damages, it would be a substantive issue and state law would apply. However, he argues that Civil Practice Act Section 5501 is a procedural rule governing standards for new trials, so that federal practice should apply. Therefore, Williams argues that the Court should apply the federal standard in determining whether damages are excessive, ordering a new trial only if the verdict "shocks the conscience" or is "indisputably egregious."

You are a clerk to the federal judge who heard the case. After examining jury verdicts in similar cases, and reviewing the facts of this case, the judge tells you that she believes that the jury's award deviates materially from what other juries are awarding in similar cases, and from what would be reasonable. However, she is not sure that she would call the verdict "shocking" or "indisputably egregious."

The judge has asked you for a memo discussing whether the state or federal standard should apply in deciding the Center's motion for a new trial. WRITE THE MEMO.

QUESTION 4. (Approximately 25 minutes)

Answer all of the following 5 questions with a short answer and a brief (one or two sentence) explanation.

EXAMPLE

Q. Pat, a citizen of Kentucky, wants to sue David, a citizen of Ohio, for assault, alleging \$12,000 damages; and for an unrelated breach of contract claim with damages of \$40,000. May Pat sue in federal court?

A. Yes, because the parties have diverse citizenship, and a single plaintiff may aggregate claims against a single defendant in order to meet the \$50,000.01 minimum damages needed for diversity jurisdiction. (28 USC Sec. 1332).

QUESTIONS

A. Barbie, a passenger on a Speedy Bus Company bus, was injured when the bus collided with a truck. Barbie sued Speedy, but Speedy won, proving that it was not negligent. Ken, riding on the same bus as Barbie, then sued Speedy for his injuries. May Speedy assert collateral estoppel against Ken on the issue of negligence?

B. Explain why, under the current federal rules, defendants in federal court can be properly sued without ever being served process.

C. Explain why a federal court does not have subject matter jurisdiction over all civil cases which involve an important federal question.

D. Give an example of a situation in which a hearing would not be required before a taking of property.

E. Robert sued his former employer, the Giant Corporation, and his boss there, Mr. Bigg, for employment discrimination arising out of Robert's dismissal. Robert brought suit in the federal court for the District of Connecticut. Mr. Bigg lives in Connecticut. The Giant Corporation is both incorporated and has its principle place of business in New York. Robert was employed and fixed in New York, but the Giant Corporation admits that it is subject to general personal jurisdiction in Connecticut. If the Giant Corporation contests whether or not venue is proper in the District of Connecticut, what will be the result?

END OF EXAM
HAVE A JOYOUS BREAK