CIVIL PROCEDURE I

Final Examination
Fall 1994

Mr. Czarnetzky

SAMPLE ANSWERS

In writing these sample answers, I have attempted to formulate the answers in the same time periods that you were given. Therefore, these are not the most "polished" answers that I could possibly write. On the other hand, these sample answers contain much more discussion and analysis than even the top papers from your class contained. Where appropriate in these answers, I have merely noted that further analysis applying the facts to the legal issues should be done. I only did this where it is obvious how the analysis should proceed.

In general I was pleased with the examinations. As you proceed in law school, you will become much more proficient in legal analysis and argument. Most students had a fair to good handle on the law that applied. The outstanding papers did a good job of legal analysis given the law.

The total available points for this examination was 1175. The questions were weighted as follows:

Question I -- 475 points
Question II -- 300 points
Question III-- 250 points
Question IV -- 100 points

The grade ranges were as follows:

A -- 600+ points
B+ -- 575-600 points
B -- 500-570 points
C+ -- 425-495 points
C -- 370-420 points
D+ -- 295-365 points
D -- Below 295 points

The top paper received 705 points.

Question I -- (1 and 1/4 hours)

On September 23, 1994, Jenny was gambling at the Mississippi Princess Casino, a land-based casino in Mhoon's Landing, Mississippi, approximately thirty miles south of the Tennessee border.

Gump, who was normally a janitor at the casino, was working as a waiter/host that night because several waiters and waitresses had called in sick. From time to time during the evening, Gump would pleasantly make the rounds of the casino floor asking whether the gamblers, including Jenny, would like something to eat or drink (at no charge, of course). After about six hours at the gaming tables and many drinks, Jenny asked Gump to bring her a hamburger and another gin and tonic. The kitchen was overwhelmed by food orders placed by a busload of conventioneers from Nashville, so Gump asked his supervisor if he could prepare Jenny's food. Gump's supervisor, who knew that Gump had no training as a cook, but who was anxious to get back to watching an Ole Miss football game on television, told Gump "Yeah, Yeah. Cook the darn hamburger and leave me alone for goodness sakes, Gump."

Jenny was a resident of Memphis, Tennessee. Later that evening as she turned onto her street in a fashionable neighborhood in Memphis, she began to feel ill. Her vision became blurred and she drove her expensive British sports car into a neighbor's house.

Gump maintained his home in Tunica, Mississippi, though he travelled to Memphis a few times a year to shop. Princess Gambling, Inc. is a Nevada corporation and has its executive offices in Reno, Nevada. The Mississippi Princess is Princess Gambling, Inc.'s only casino, and the company has no other businesses. Princess Gambling, Inc. advertises heavily in Memphis and approximately one-half of its customers are from Tennessee.

Jenny filed suit against Gump and Princess Gambling, Inc. in the United States District Court for the Western District of Tennessee which included the scene of Jenny's automobile accident. In compliance with the Tennessee long-arm statute, Jenny's lawyer served process on Princess Gambling, Inc. by having a process server personally deliver the summons and complaint to the company's President while he was poolside in Reno. Unable to find Gump outside of work, the process server hired by Jenny's lawyer got lucky and ran into Gump at a K-Mart in Memphis and served him there. Assume that the Tennessee long-arm statute provides that a Tennessee court may "exercise personal jurisdiction on any basis not inconsistent with the United States Constitution."

In her complaint, Jenny alleged negligence on the part of Gump for improperly preparing her food and negligence on the part of Princess Gambling, Inc. for the

actions of Gump's supervisor in allowing Gump to cook. Jenny alleged damages for personal injury and property damage of $100,000.

Gump's lawyer moved to dismiss Jenny's case for lack of personal jurisdiction and, in the alternative, for transfer of venue to the United States District Court for the District of Nevada.

Princess Gambling, Inc.'s lawyer moved to dismiss for lack of subject-matter jurisdiction, personal jurisdiction, and improper venue.

Jenny's lawyer opposed the motions filed by the defendants and moved for the imposition of attorney's fees under Rule 11 of the Federal Rules of Civil Procedure. Assume all of the above facts are true.

The district court judge granted the motions for lack of personal jurisdiction and denied all of the remaining motions. Are the district court's rulings correct? Why or why not?

ANSWER: I would approach this question by breaking it down into separate sections. As a preliminary matter, please note that the question asked you to state an opinion about the district court's rulings on the motions. You were not told anything about the basis for the court's rulings, so it is dangerous for you, in providing a critique of all of the motions to not thoroughly discuss all possible reasons for the court's holding. (The directions specifically told you to thoroughly discuss all reasonable possibilities -- it is dangerous not to do so). For the most part, this question actually turned out to be the "easiest" in the sense that everyone got at least some points on this question and those that did not later perform well on other parts of the exam were able to make up ground here.

Gump's Motion to Dismiss for Lack of Personal Jurisdiction

Federal courts may exercise personal jurisdiction over defendants to the extent that the state courts where the federal courts sit may exercise personal jurisdiction over the same defendant. Thus, to the extent that the state courts of Tennessee could exercise jurisdiction over Gump in this type of case, the United States District Court for the Western District of Tennessee can exercise personal jurisdiction over Gump as well.

The Tennessee long-arm statute, given in the problem, allows the state to exercise personal jurisdiction over out-of-state defendants "to the extent not inconsistent with the United States Constitution." Therefore, the Tennessee federal court can exercise personal jurisdiction over Gump if the exercise comports with Supreme Court caselaw regarding personal jurisdiction.

At this point, you should have immediately jumped to Burnham. In that case, the majority indicated that "tagging" an out-of-state defendant in the forum state by serving process on him is enough for the forum state to exercise personal jurisdiction over that defendant.

You should not have stopped there, however. Though the Justices all agreed on the decision, the Court was deeply divided on the proper reasoning for reaching the decision in Burnham. According to the approach of Justice Scalia, because presence in a state is historically and practically such a well-accepted means of asserting personal jurisdiction over a defendant, the practice is constitutional without more.

On the other hand, Justice Brennan et al. stressed that the Court had previously held that all assertions of personal jurisdiction must meet the test set forth in International Shoe, i.e., the "minimum contacts" test. Thus, it is arguable that Burnham left open the possibility of arguing around a "tagging" where there is no argument under International Shoe to support the exercise of personal jurisdiction. At this point, you should have analyzed briefly Gump's connections with Tennessee. A key point to emphasize here is not just that Gump rarely visited Tennessee (and when he did it had nothing to do with work), but rather whether or not it was forseeable for Gump that actions he took out of state in Tunica could have affects in Tennessee, which is precisely what happened here. I believe that viewed from this perspective, a Tennessee court could assert personal jurisdiction over Gump regardless of whether the Scalia or the Brennan view ultimately prevails (as one or the other surely will). The better the analysis on this point, the more points received.

In sum, I believe that the District Court was incorrect in granting Gump's motion to dismiss for lack of personal jurisdiction, regardless of the analysis used.

You could also have pointed out that, based on the foregoing, that Gump's motion on personal jurisdiction was well grounded in law or fact, or, at the very least, a good faith argument for the extension of the law based upon Burnham. Indeed, the fact that the district court initially granted the motion seems to bolster the idea that there is a good faith legal dispute here. (This will save you time later when discussing the Rule 11 motion).

Gump's Motion for Transfer of Venue to Nevada

This presents a rather straightforward venue analysis. A motion to transfer venue in this situation is governed by section 1404 of title 28 which provides that a federal district court may order a transfer of venue to a district court where the case could have been brought initially if it is in the interests of justice and/or if the transferee forum is more convenient for the witnesses, parties, etc. Therefore, the first inquiry must be whether or not the case against Gump could have originally been brought in Nevada.

The lawsuit against Gump is a diversity case, so section 1391(a) of title 28 mandates

where venue is appropriate: (i) where any defendant resides, if all the defendants reside in the same district; (ii) where a substantial part of the acts giving rise to the cause of action took place; or (iii) where the defendant is subject to personal jurisdiction if no other venue is appropriate.

No part of the acts giving rise to the case arose in Nevada, nor is Gump apparently subject to personal jurisdiction in Nevada, so neither (ii) nor (iii) applies in this case. On its face, it appears that (i) does not apply either. Gump, after all, resides in Mississippi. The corporate defendant, Princess Gambling resides in Nevada (its state of incorporation and the location of its headquarters), Mississippi (its principal place of business), and, perhaps, Tennessee. These possibilities are dictated by section 1391(c) which provides that for purposes of the venue statute, a corporation "resides" wherever it is subject to personal jurisdiction. However, the only state that both in which both Gump and Princess reside is Mississippi. Therefore, (i) does not seem to apply to Nevada.

An ingenious argument would be that because both Gump and Princess reside in Mississippi, venue is appropriate in Nevada under (i) because it is a district "where any defendant [Princess] resides." [Look at the statute and think about it]. No student pointed out this possibility. Even if this argument works for venue, it is not clear that the Nevada court would have personal jurisdiction over Gump such that section 1404 is met. Could Gump argue that because he would submit (indeed, he seems to desire) to a Nevada court's jurisdiction, that personal jurisdiction is not a problem for purposes of section 1404? I am not sure, but it is worth arguing.

If you did not see this "ingenious" argument, you should have immediately stated that the court was correct in denying Gump's motion based upon section 1391(a) alone. Indeed, unless you could construct the "ingenious" argument or something similar, isn't it fair to say that Gump's motion to transfer venue is not well grounded in law or fact, nor is it based on a good faith effort to extend the law? Remember this for the Rule 11 motion at the end.

Princess's Motion to Dismiss for Lack of Subject-Matter Jurisdiction

This motion required you to discuss and apply the rules regarding diversity jurisdiction. Jenny's causes of action against the defendants are not based on any type of federal claim or right, so in order for the federal court to have subject matter jurisdiction over the case, the requirements for a diversity jurisdiction must be met.

First, there must be complete diversity of citizenship between the plaintiff, on the one hand, and the defendants, on the other hand. Jenny, an individual, is a "citizen" (for diversity purposes) of her state of domicile. Domicile as defined as residence combined with an actual intent to remain in the state permanently. Though we have no information on Jenny's intent, it is fair to assume from the facts that Tennessee is her state of domicile. Thus, Jenny is a citizen of Tennessee.

Using the same test, it is clear that Gump is a citizen of Mississippi.

A corporation, for diversity purposes, is a citizen of its state of incorporation and the state where its principal place of business is located. Princess is, therefore, obviously a citizen of Nevada. Two different tests have been applied by courts to determine a corporation's "principal place of business" -- the "nerve center test" versus the "operations" test. (Sometimes apparently referred to (in some kind of hornbook, perhaps?) as the brain versus to muscle test) At this point you should discuss those two tests and how they apply to the facts of this case. The answer is that Princess has its principal place of business, for diversity purposes, of either Mississippi or Nevada. Note that the amount of business that Princess does in Tennessee and with her citizens does not enter into the diversity calculus. Thus, Princess is a citizen of either Mississippi or Nevada, and Gump is a citizen of Mississippi.

Therefore, the complete diversity requirement is met, regardless of how you come down on the issue of Princess's principal place of business. Note that the fact that both Gump and Princess might be considered residents of Mississippi does not destroy the "complete diversity" requirement.

Your inquiry should not end there, however. Remember that you must satisfy the amount in controversy requirement as well. Jenny's lawsuit must claim damages exceeding $50,000. Note that the facts tell you that Jenny has asked for $100,000 without telling you how much she had requested from each defendant individually. This is because Jenny probably asked for $100,000 against both defendants, jointly and severally. You should have recognized that this case is similar to the cases in the book where a plaintiff was attempting to hold both defendants jointly liable for the same damages. In such a case, the amount in controversy requirement is met if the alleged joint and several damages exceed the $50,000 requirement. Some students tried to split the damages between the defendants and got $50,000 each. This is wrong in this situation. I was willing to accept a reasonable argument that joint and several liability was inappropriate here, even though I think that position is wrong. I do not believe anybody made that argument.

In summary, because the requirements of complete diversity and the amount in controversy requirements were met, the court was correct to deny the motion to dismiss for lack of subject matter jurisdiction.

You could note your views on whether this motion was well grounded in fact or law, or based upon an argument for a good faith extension of the law. While I see very little argument regarding the citizenship of the parties, perhaps an argument based upon the amount in controversy would pass the bad faith standard.

In my opinion, this is the most interesting of the motions. You should have started by reciting or referring to or making the same preliminary remarks about long-arm statutes that is discussed above with regard to Gump's motion. Once we get to the U.S. Supreme Court decisions, I would begin by pointing out that the International Shoe line of cases applies, and cite the requirement that an out-of-state defendant have minimum contacts with a forum state such that an exercise of personal jurisdiction over that defendant does not offend traditional notions of fair play and substantial justice.

I would then point out that International Shoe has by now been interpreted in a number of close situations. Of the cases we read, World Wide Volkswagen comes to mind initially. That case established that the concept of "minimum contacts" requires more than the actions of an out of state defendant causing some kind of injury or effect in the forum state. Rather, a defendant must be found to have "purposely availed" itself of the benefits of the forum state in order to deem the defendant to have had "minimum contacts" with the forum. "Purposeful availment," in turn, means that the defendant has taken advantage of the privilege of conducting activities within the forum state such that the defendant invokes the benefits and protection of that state's laws.

This test provided you with an opportunity to really do some legal analysis. At a minimum, you should have mentioned the facts that clearly are cited in the problem: Princess draws most of its customers from Tennessee, many from Memphis, and Princess does a great deal of advertising in Tennessee. Moreover, because Princess is so intimately involved with Tennesseans and directs such attention to the state, you can bet that Princess would not hesitate to use Tennessee courts and laws as a normal part of doing business. For example, imagine that a gambler from Memphis ran up a large tab at the Princess casino. Does anyone doubt that Princess would avail itself of Tennessee laws and courts to collect the debt from the gambler?

Another way of viewing the purposeful availment test is to ask whether or not it was foreseeable for Princess to be haled into court in Tennessee in connection with Princess's business dealings with Tennessee. In this sense, you should have drawn the analogy to stream of commerce cases such as Asahi. Granted, Princess is manufacturing a product and purposefully selling it in Tennessee. But, looked at in terms of foreseeability, I contend that it is doing exactly that. Princess is in the business of providing services -- gambling, food, parking, coat check, free drinks, etc. It is certainly forseeable (given the facts) that some action that Princess takes in Mississippi might lead to harm in Tennessee, especially given the way in which Princess directs its specific attention to Tennessee. (This same argument cuts against a similar contention by Gump too).

Thus, I believe that Princess indeed meets the test of "minimum contacts" with Tennessee under International Shoe and its progeny. However, before answering the personal jurisdiction question, we must be certain that asserting jurisdiction over this defendant does not offend traditional notions of fair play. The Supreme Court itself seems to be split on whether or not this requirement is in addition to the "minimum contacts" test, or

not offend traditional notions of fair play. The Supreme Court itself seems to be split on whether or not this requirement is in addition to the "minimum contacts" test, or is separate from it in the sense that if it does not offend traditional notions of fair play, but there are no minimum contacts, a court can assert personal jurisdiction over the defendant anyway. This problem does not arise for me because I believe there are minimum contacts between Princess and Tennessee.

In analyzing "traditional notions of fair play," the Supreme Court has been willing to examine a variety of interests, including: (i) the plaintiff's interest in a remedy (ii) Tennessee's interest in providing a remedy to one of its residents for her injuries which occurred in Tennessee; (iii) Mississippi's similar interest in providing remedies for harms caused in Mississippi (I gave credit for any additional points that make sense in this case). You should have analyzed these various interests. I believe the ultimate conclusion should obviously be that traditional notions of fair play are not offended in this situation, given the facts.

Finally, you might note that this motion should not have been granted by the district judge though it is arguably a close case. Thus, no Rule 11 problems are raised by this motion.

Princess's Motion to Dismiss for Lack of Venue

By this point, you have probably cited the venue statute at least once. (Because this is a motion to dismiss rather than a motion to transfer, only the venue statute is at issue). You should repeat that this problem involves section 1391(a). (Many students combined discussions of this motion and the other venue motion. This was fine and I unravelled the two where necessary. However, it was probably a better approach to discuss each venue problem separately) You should have focused on subsections (a)(2) and (a)(3).

First, as previously discussed, Gump is not a resident of Tennessee for purposes of section 1391(a)(1), so "all of the defendants" do not reside in the same state as required by that subsection. You must therefore argue that a substantial portion of the events which gave rise to the cause of action occurred. You should have discussed the fact that while the hamburger was served in Mississippi, it caused a car accident as well as personal and property damages in Tennessee. Certainly this arguably meets the test under section 1391(a)(2).

You should also have discussed the fallback provision in section 1391(a)(3) just in case the court did not agree with your argument under (a)(2). Subsection (a)(3) provides that venue is property in a district where the defendants are subject to personal jurisdiction at the time the action is commenced if the other two subsections of 1391 do not apply. Assuming, arguendo, that the other subsections do not apply, it is pretty clear that (a)(3) will. First, we have already decided that Gump is subject to personal jurisdiction in the Western District of Tennessee (you should have referred me to that discussion). Similarly, Princess is subject to

personal jurisdiction in Tennessee. At this point you should have taken the time to build upon the previous discussion of personal jurisdiction over Princess by narrowing the scope of the court's power over Princess from Tennessee to the Western District of Tennessee. (Note that 1391(a)(3) speaks in terms of a defendant being subject to personal jurisdiction in a district, not a state). To do this, you should have incorporated the previous discussion concerning Tennessee and then mentioned Princess's specific interactions with Memphis/Western District. I find this argument persuasive, but I was willing to accept either side given a good analysis.

In sum, I believe the court was correct to deny Princess's motion to dismiss for lack of venue based upon either sections 1391(A)(2) or (A)(3), though I believe that there is a good faith dispute here that Princess's lawyer could legitimately raise.

Jenny's Rule 11 Motion

The vast majority of students were willing to go easy on the attorneys in this case which is probably not a bad "gut reaction." However, for those of you who did not construct the "ingenious argument" in support of Gump's motion to transfer to Nevada, I believe you should have mentioned the filing of that motion as a likely candidate for Rule 11 sanctions. The standard for imposition of Rule 11 is that sanctions may imposed, in the court's discretion, if the legal contentions found in papers filed with the court are not "warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." F.R.C.P. 11(b)&(c).

You should then have analyzed whether or not Gump's transfer motion fit the above description. I believe that it probably does not, meaning it appears to be sanctionable to me. Having said that, it is correct, as many of you pointed out, that judges are reluctant to impose this type of sanction if any colorable argument is raised. I was looking for the discussion here, not necessarily the answer. In addition, I gave some points for any other reasonable arguments for or against sanctions in particular instances.

QUESTION II -- (3/4 hour)

Ignatius Reilly, a resident of New Orleans, Louisiana (in the Eastern District of Louisiana) is a self-indulgent, but very talented, writer. His former girlfriend, Myrna Minkoff, a resident of the Bronx, New York (in the Southern District of New York) has resented Ignatius's writing ability since he criticized an article that Myrna wrote for the New Yorker magazine by stating "Myrna, your New Yorker piece is fine considering it is the typical derivative, pseudo-intellectual tripe that fools who read the New Yorker eat up."

Ignatius has been working for over a decade, with the support of a grant from the federal government, on a multi-volume treatise on the continuing relevance of medieval social customs in the modern world. While Myrna was visiting New Orleans, she ran into Ignatius. Seeing her opportunity to get back at him, she asked to see a chapter of his treatise. Always vain, Ignatius gladly let Myrna review his work. Myrna copied the chapter without Ignatius's permission and took it back to New York.

Myrna then used several verbatim quotations from Ignatius's treatise in an article for the New Orleans Literature Review (which is owned and published by a Louisiana corporation, Cajun Literature, Inc). Cajun Literature's principal place of business is in New Orleans. The New Orleans Literature Review is sold only in New York City and New Orleans. Ignatius was incensed when Myrna, despite the magazine's limited circulation, won the Percy Award for Non-Fiction for her article.

Ignatius's lawyer brought a lawsuit against Myrna in the Circuit Court of New Orleans Parish (the Louisiana state court of general jurisdiction in New Orleans) pursuant to a federal statute which provides: "An individual who produces a written work with the support of a grant from the United States government shall have a cause of action for civil damages arising from theft of such work. Federal district courts shall have exclusive jurisdiction such cases." Ignatius's Complaint alleges damages totalling $50,000 for Myrna's theft of his work.

(A) You are Myrna's lawyer. Myrna has instructed you to "Get this case heard in the federal court in the Bronx. Some of the judges there read the New Orleans Literature Review you know." Assuming Myrna's request is a good tactical decision, what can you do to see that Myrna's wish comes true? Will you be successful?

ANSWER: There are two ways to approach this problem as Myrna's lawyer, one obvious and one not so obvious. First, you could seek to remove the case to the United States District Court for the Eastern District of Louisiana (the problem tells you that is the federal district court in New Orleans) and then file a motion to transfer venue to the United States District Court for the Southern District of New York (also given in the problem). Section 1441 of title 28 applies to the motion for removal.

The problem explicitly provides that the lawsuit was brought under a fictitious federal statute which gives the federal courts exclusive jurisdiction of Ignatius's cause of action. Please note that this was not a copyright case. (I purposely did not have Ignatius sue under the copyright statute because there is a special venue statute that applies to copyright actions. Many students treated this as a copyright case and therefore lost a few points because they did not read the question carefully.) Because the statute grants exclusive jurisdiction to federal district courts, section 1441(a) is satisfied. The case not only could have been brought in federal court, it should have been brought there in the first place. This fact is not an obstacle to removal, however, because section 1441(e) specifically provides that removal is permissible even if the state court did not have jurisdiction in the first place. Moreover, section 1441(b) provides that the action can be removed without regard to the citizenship of the parties. Remember that had this been a diversity case, you would have considered the citizenship of the parties (removal would have been proper anyway). Myrna will undoubtedly succeed in having the case removed to federal court in New Orleans.

(Please note that many students understood that removal was the proper route, but attempted to remove the case from Louisiana state court to the Bronx federal court. These answers received some credit, particularly if they had an otherwise correct discussion of removal, but please remember that such a procedure is impossible.)

The transfer of venue motion is more difficult. You received credit for an analysis under either section 1404 or section 1631 of title 28. Your choice depended upon whether or not you believed that the court in New Orleans has personal jurisdiction over Myrna. If yes, you would choose section 1404, if no, you would argue under section 1631. The standard you must meet appears to be the same in either case, but you should have recognized the issue.

Under either scenario, you should have pointed out that a transfer of venue is proper (a) to a court where the suit properly could have been brought initially and (b) in the interest of justice, convenience of witnesses, etc. In analyzing (a), you should have pointed out that section 1391(b)(1) makes the Southern District of New York a permissible venue -- it is Myrna's residence and this is a federal question case. Moreover, you could argue that at least some of the acts giving rise to the cause of action occurred in the Bronx. In addition, because Myrna's domicile appears to be in New York from the facts stated (most students correctly pointed out that we do not know Myrna's intent, but implied from the facts that she would be staying in New York), there is little question that the federal court in the Bronx has personal jurisdiction over Myrna. Taken with the obvious fact of subject matter jurisdiction, the case against Myrna unquestionably could have been brought in the Southern District of New York.

However, has the "interest of justice" and/or "convenience of witnesses and parties" test been met. I expected you to do a reasonably thorough job of laying out the considerations that a court would take into account in deciding the case -- the residence of the parties, where the prohibited conduct occurred, how witnesses would be affected, etc. I did

not care how you answered the question of whether or not you would be successful, as long as you did a reasonable analysis (i.e., more than just saying "I think Myrna will be successful). For what it is worth, I believe that Myrna would prevail, though I think it is a close case.

The second and, to my mind, less attractive option for Myrna is to file a motion to dismiss Ignatius's complaint for lack of subject matter jurisdiction in the Louisiana state court. Once again, the federal court has exclusive jurisdiction over this case, meaning that it cannot be heard by a state court. The New Orleans Parish court must dismiss the case. Some students who failed to see the removal/transfer technique saw this possibility, but nobody got the next step -- Myrna should file a declaratory judgment action in the federal court in the Bronx asking that court to find that she does not owe Ignatius under the federal statute. I was willing to give full credit for anybody who recognized that a declaratory judgment action was a possibility (without any further discussion). I gave partial credit if a student said that the case should be dismissed by the New Orleans court, but then had no idea how to get to New York. I had hoped somebody would recognize both possibilities, but nobody did.

(B) Assume that rather than filing Ignatius's lawsuit in Louisiana state court, Ignatius's lawyer originally filed the lawsuit in the United States District Court for the Southern District of New York and that you (on behalf of Myrna) have properly joined Cajun Literature, Inc. as a third-party defendant (pursuant to Federal Rule of Civil Procedure 14). Ignatius then properly amends his Complaint to assert a claim in the amount of $25,000 against Cajun Literature, Inc. based upon a theory under state law. Will Cajun Literature, Inc. be successful if it files a motion to dismiss Ignatius's claim against it for lack of subject-matter jurisdiction? Is there additional information you require before answering?

ANSWER: I discussed this precise situation in class and then at length in the review session. The hypothetical presents a supplemental jurisdiction question which is governed by section 1367 of title 28. Section 1367(a) provides that a federal court will have supplemental jurisdiction over state-law claims if they are part of the "same case or controversy" (under article III) as the federal claims. Case law has developed the "same case or controversy" test to determine when 1367(a) is met. In the hypothetical, you were given no information about Ignatius's claim against Cajun Literature, Inc., and therefore you cannot answer the section 1367(a) inquiry. You need more information. Without seeing Ignatius's complaint, for all you know, he is suing Cajun Literature because they did not properly forward his copies of the New Orleans Literature Review to him.

You should also have recognized that the exception in section 1367(b) does not apply in this situation because this is not a case "founded solely upon [diversity]." Therefore, the fact that Cajun was brought in as a third-party defendant pursuant to Rule 14 irrelevant except to confirm that Cajun was properly joined in the first place. It makes no difference to your 1367 inquiry.

Therefore, if Ignatius's case against Cajun can meet the "case or controversy" requirement, the federal court will exercise supplemental jurisdiction over the case as long as the case does not fall into one of the discretionary exceptions in section 1367(c). The applicable subsections of 1367(c) appear to be (i) does the case present a novel issue of state law? (ii) does the state-law claim predominate over the federal claims in the case? and (iii) are there any other compelling reasons for the court to decline to exercise supplemental jurisdiction? You obviously cannot answer these questions because you are given no facts about Ignatius's lawsuit against Cajun. You need more information that will permit you to weigh the likelihood of Cajun succeeding on any of the discretionary grounds mentioned. Given the information that you lack, you cannot make an informed decision about whether or not Cajun will be successful in its motion to dismiss for lack of subject matter jurisdiction.

QUESTION III
(3/4 hour)

The Virginia legislature recently passed a statute that provides:

> **Va. Code sec. 199-101 In all civil cases for recovery of damages in tort for a battery, a defendant's prior convictions for violent crimes shall be deemed relevant and admissible.**

The legislative history indicates that the statute was passed in order to "make sure that victims can recover damages for the violence of freed criminals who have returned to a life of crime."

Pulaski has sued Casimir in the United States District Court for the Eastern District of Virginia for damages arising from an alleged battery he suffered at the hands of Casimir in Richmond, Virginia (which is in the Eastern District of Virginia). Pulaski alleges in his Complaint that he was battered by Casimir in a tavern after he called Casimir a "no good, dirty dog." Assume that the court has personal jurisdiction over the parties, that the court's subject-matter jurisdiction is based upon diversity, and that venue is proper. Casimir has a long history of convictions for violent crimes, including battery, rape, and armed robbery.

(A) For purposes of this Question A, assume that there is a federal rule of evidence which provides: "No evidence of a defendant's prior criminal record shall be admissible in a civil case to prove damages for a tort." You are Casimir's lawyer in the civil action filed by Pulaski. What is your best argument that Casimir's prior criminal record is not admissible in the civil case?

ANSWER: This hypothetical presents one permutation of the "Erie" question. In order for there to be an Erie problem at all, the federal rule/practice/statute must directly conflict with the state rule/practice/statute. If there is no direct conflict between the state and

federal laws, a court can legitimately apply both.

A subtle but important point (overlooked by almost everyone) is that there may not be a true, direct conflict here. As Casimir's lawyer, you are trying to convince the court to apply the federal rule which would preclude his "record" from being introduced at the civil trial. You should be prepared for an argument by Pulaski's lawyer that Casimir's record will not be introduced to "prove damages for a tort" as contemplated by the federal rule of evidence. Rather, Pulaski might argue, Casimir's record might be introduced to show Casimir's tendency toward violence (this is probably not permissible under the FRE, but a lawyer might argue it anyway) or to show that Casimir knew that what he was doing was impermissible and therefore that he had committed an intentional tort. I think as a matter of common sense and as a matter of law, these types of arguments are weak and would be quickly rejected by a court, but I also think that Pulaski's lawyer likely would bring them up.

Moving on, we know that a federal rule of evidence will preempt state law that conflicts with the federal rule if the federal rule is validly promulgated. (Hanna II, U.S. const. art. VI, para. 2, the "Supremacy Clause"). Congress can constitutionally enact a federal rule of evidence (through granting the U.S. Supreme Court rulemaking authority and acquiescing in the Supreme Court's suggested rules), if the rule is "rationally capable of classification" as a procedural rule. (Hanna, 28 U.S.C. sec. 2072(a)).

A federal rule is procedural if it "regulates procedure -- the judicial process for enforcing the rights and duties recognized by substantive law, and for justly administering remedy and redress for disregard or infraction of them." (Sibbach). The federal rule of evidence in this case seems to fit the Sibbach test. It seeks to accomplish a quintessential procedural function -- regulation of the conduct of a trial by defining what evidence can or cannot be introduced. Pulaski's lawyer will argue that this rule does more than help enforce a substantive right -- it takes away a substantive right of Pulaski's by barring him from presenting all of the evidence to a jury. This is a weak argument both factually (it is well established that a court can regulate what evidence is permissible at trial for any number of reasons, not the least of which is danger of inflaming the jury), and on the law -- to date no federal rule of procedure or evidence has been found to be "substantive" in this sense.

If the federal rule of evidence is procedural, than it is valid as long as it does not "abridge, enlarge or modify" a substantive right. 28 U.S.C. sec 2072(b). Pulaski's lawyer will make the same type of argument here that was made above. By not permitting certain evidence to be entered at trial, Pulaski's "rights" are being abridged. The important point here is which substantive "right" of Pulaski's is being abridged. The only obvious candidate is his "right" to receive tort damages. However, the rule merely prevents certain evidence from being entered at trial, it does not take away from Pulaski's right to receive tort damages if Pulaski proves his case. Though there might be a case where a rule of evidence "abridges" the substantive right of a tort plaintiff (imagine if the rule prevented a plaintiff from presenting evidence to support his allegation of a breach of the duty of care for the alleged tort), any abridgement of Pulaski's substantive rights are incidental, at best. A federal procedural rule that only incidentally affects substantive rights is permissible. (Burlington

Northern).

At this point in the analysis, a short summation of the above is appropriate and much appreciated by the grader.

(B) For purposes of this Question B, assume the federal rule of evidence cited does not exist. Rather, assume it is the practice of federal judges not to permit any evidence of a defendant's prior criminal record in a tort case. You are Pulaski's lawyer in the civil case. What is your best argument that Casimir's prior criminal record is admissible in the civil case?

ANSWER: This hypothetical presents an Erie problem that varies only in two particulars from the previous question. First, the source of the federal law is not a federal rule of evidence, but rather a practice of federal judges. Second, you were asked to be Pulaski's lawyer in this case.

As a preliminary matter, you must at least mention the fact that there is a conflict between the state law and the federal law. A better answer would be to point to the arguments mentioned in part A, which would be mirrored in this situation.

The hypothetical is a relatively straightforward Erie analysis. First, Erie (and, the Rules of Decision Act) dictates that federal procedural "practices" are valid if they do not purport to establish "rules of primary behavior." A federal judge does not have the constitutional authority to establish such rules (for example, the standard of care in Erie). This line is easy to draw in most cases (ie., Erie itself). However, later caselaw has developed additional tests when the facts of a particular case fall within the gray area between "rules of primary behavior" and procedure.

When a federal judicial practice does not clearly fall into one category or the other, but the practice clearly relates to the litigation process, you must inquire as to whether the practice is "outcome determinative." (Hanna I, York, Byrd). The contours of the "outcome determinative" test are not clear, but certainly at its most basic level in this case the practice can be (but is not necessarily) outcome determinative. Without the information on Casimir's previous criminal record, a jury is less likely to hold Casimir liable for tort damages than otherwise. That, presumably, is the state's reason for passing the statute in question. The counter to this argument is that the federal practice simply regulates procedure and does not mandate a substantive result. Some analysis of this distinction under the "outcome determinative" test is required here, particularly in light of the post-Erie cases that we read that deal with issues such apportioning fact-finding responsibility between the judge and jury in a jury trial, etc.

Once you finished analyzing the outcome determinative test (and concluded on behalf of Pulaski that the practice was outcome determinative) you should have pointed out that the

presumption is that Virginia law would apply in this situation unless the federal policy reasons supporting the federal practice outweigh the state interests. The state interests are the twin aims of Erie -- (i) avoiding forum vertical shopping and (ii) inequitable administration of the laws. This balance requires additional analysis. The federal interests, which caselaw seems to find are powerful, would be judicial housekeeping and the ability of federal judges to run their own courtrooms. (I gave credit for any other reasonable or ingenious federal interests you could devise). I would argue that vertical forum shopping is not a huge concern here from Virginia's perspective -- why would Pulaski choose to go to federal court rather than state court knowing that the federal court was much more likely to bar Casimir's criminal record from being admitted. As Pulaski's lawyer, you must be prepared to either meet this argument or to concede the point.

Pulaski would be able, I believe, to argue more persuasively that there is a real danger of inequitable administration of laws in this case. Simply by choosing to go to federal court, which he is perfectly entitled to do, he is less likely to vindicate a substantive right (damages for Casimir's tort). The substantive law, Virginia's tort law, does not vary from state court to federal court under Erie. Why should Pulaski's case against Casimir be weakened by an "administrative" or merely "procedural" practice of federal judges? Note that this argument really is a rehashing of the outcome determinative inquiry.

Because you were told to assume that you represent Pulaski, you must argue that the state's interest against inequitable administration of laws outweighs the federal court's interest in setting its own procedural rules and running its own courtroom. This is a very difficult case to win, but you should have at least made the argument, and pointed out why this case is different from previous caselaw which would seem to dictate the opposite result.

(C) Assume that, given the facts you have been told to assume in Questions A and B, a federal judge would rule in your favor in both instances. What explains these seemingly inconsistent results?

ANSWER: Nobody hit this nail on the head, though I gave some points for nibbling around the edges. The question requires you to recognize that the two hypotheticals present two sides of the Hanna coin -- by that I mean they illustrate the distinction between the Hanna I and the Hanna II analyses. I wanted you to recount the two Hanna tests that apply in A and B, and take a hard look at what each is attempting to do. Remember that ultimately, both Hanna analyses are attempting to draw the line between what is "substance" and what is "procedure" in certain situations. Because of the different sources of the tests -- the REA on the one hand and the RDA and Erie on the other hand -- as well as the authors of the federal law in each case (federal judges vs. Congress), the tests in Hanna I and Hanna II differ, at least on the margins. Thus, what constitutes "substance" can vary in a close case depending upon who has promulgated the federal law in question. By telling you to assume that disparate results might be expected in A and B, I had hoped that you could explain how

and why those results could vary so much with so little change in the facts. No student came close to this explanation, although a few pointed out that the tests were different.

QUESTION IV
(1/4 hour)

Answer the following questions as succinctly as possible, preferably in a sentence or two:

(A) Pursuant to Rule 68 of the Federal Rules of Civil Procedure, Defendant offers Plaintiff $100,000 on June 1 to settle a lawsuit. Plaintiff rejects the offer on June 10. Plaintiff recovers $10,000. True or false (and why?) -- Plaintiff owes defendant costs that accrued after June 10.

ANSWER: FALSE. Rule 68 provides that a plaintiff who rejects an offer of settlement (done pursuant to the Rule) which is greater than the plaintiff's eventual recovery is responsible for costs accrued from the date of the offer. Therefore, the plaintiff in the hypothetical owes the defendant costs that accrued after June 1.

(B) Your client wants an injunction to force a competitor to stop its unfair trade practices. What must you allege in the Complaint that you file on behalf of your client in order for a court to issue an injunction after a trial on the merits?

ANSWER: The pleading requirements for an injunction are (1) the plaintiff has no adequate remedy at law; (2) the hardship to the plaintiff caused by not granting an injunction outweighs the harm to the defendant that would be caused by an injunction; (3) The plaintiff will suffer irreparable harm if an injunction is not granted; and, (4) the injunction is not injurious to the public interest. Because the phrase, "after a trial on the merits" was meant to signal that the injunctive remedy sought was a permanent, rather than a preliminary injunction, students that inserted preliminary injunction requirements such as "likelihood of success on the merits" lost a few points (i.e., did not receive full credit).

(C) True or false (and why) -- Publication notice is always a constitutional means of providing an individual with notice of a lawsuit that has been filed against him or her.

ANSWER: FALSE. Mullane held that publication notice must be reasonably designed, under the circumstances, to alert affected parties of the pendency of a lawsuit or legal proceeding that potentially will affect their legal rights, such as their right to property. Observe that this does not mean that every use of publication notice is constitutional under Mullane. The easiest example is the typical two-party car accident case where an injured party is suing another driver for personal injuries caused by the alleged negligence of the driver. If the injured party knows the address of the defendant, merely publishing a notice in the newspaper of the pendency of the lawsuit will not, under Mullane, be sufficient notice. [Most students aced this question. Well done.]

(D) True or false (and why) -- **State statutes must provide that a prejudgment seizure of a defendant's property by a sheriff at the request of a creditor of the defendant cannot occur until the defendant has been afforded notice and the opportunity for a hearing.**

ANSWER: FALSE. Fuentes, though nearly absolute on its face in disallowing prejudgment seizures of a defendant's property by the state at the request of a creditor, left intact the possibility that such procedures might pass muster under the constitution if certain guidelines were met. For example, if the state provided a procedure whereby the plaintiff went before a Judge and presented some form of proof, such as a sworn affidavit, that the defendant was a "flight risk" or that the defendant might destroy the property if notified of the suit before seizure, then such a procedure might be constitutional even under Fuentes. Indeed, most states provide just such a limited procedure for prejudgment seizure. [We explicitly discussed this fact just a few days before the exam.]