Below please find a sample answer for Section I of the Fall 2007 semester final exam. Since you were not permitted to remove it from the test room, I have also posted a copy of the exam.

This sample is an actual student answer and thus is not meant as a model (i.e. perfect) answer, but instead as an actual example of a successful exam. I hope it will be helpful in identifying your strengths and weaknesses on this exam in particular and in exam-taking in general. I have not included any information pertaining to Section II, as that section was designed primarily to measure your ability to take and defend a position.

In addition to the sample, I have included some general comments for each question based on the exams as a whole. These are not meant to be exhaustive, but should help to fill in some gaps in the sample answer. The fact that a particular point is not mentioned in the sample or my comments does not mean that a student including that information in their answer did not receive credit for it; where an answer included information that was relevant and instructive in answering the question, credit was awarded accordingly. Finally, as I explained earlier, you are welcome to schedule a meeting with me to discuss your exam, but I strongly encourage you to review this material prior to scheduling such a meeting.

**QUESTION 1**

**Comments for Question 1:**

Most answers included some mention of the traditional bases for jurisdiction (consent, transient service, domicile) and reasonableness considerations. Some answers neglected to mention the Florida Long-Arm Statute, but the most consistent problems were (1) failure to explain the relationship between the “Stream of Commerce” and “Stream of Commerce Plus” tests with respect to Antelope and to explain how Antelope likely satisfies both due to its efforts to reach out to Florida; (2) incorrectly relying on the stream of commerce doctrine to find minimum contacts for Hood and/or failing to cite the
effects test as the most persuasive rationale; and (3) missing the issue of quasi-in-rem jurisdiction over Hood’s property in Florida, notwithstanding the fact that under Shaffer, property unrelated to the suit in question is not adequate to satisfy due process.

**Sample Answer to Question 1:**

When considering whether a court has personal jurisdiction over a defendant the court is determining whether the STATE can hear a claim against the person. There are two different ways to obtain jurisdiction over a person within a state. The first is in rem jurisdiction which is where the state attaches a defendant’s property to gain jurisdiction over that person. Here the only property in the state of Florida is Hood’s storage unit. Before the court’s decision in Shaffer, this property would have likely been enough to get personal jurisdiction over Hood, however, the court has changed the law to require a minimum contacts test in a suit that is totally unrelated to the property in the state. In this case, Hood’s equipment in his storage shed has nothing to do with the false advertising and negligence claims against him, thus a minimum contacts analysis will still have to be done to determine whether the court has jurisdiction over Hood.

The second type of personal jurisdiction is in personam jurisdiction which gives the court jurisdiction over the person himself. In this case we need to look at the personal jurisdiction of both Antelope and Hood. There are three traditional basis for the court being granted in personam jurisdiction, as laid out in Pennoyer. They are service within the forum state, or transient service, which doesn’t apply to Antelope because that is a corporation and also doesn’t apply to Hood because he was not served in Florida, but in Georgia. The second traditional basis is consent. In the facts given, nothing shows that either party consented to the jurisdiction in Florida, however, if they appear in court to argue about the case, they will then have consented, unless they are simply making a special appearance to argue that jurisdiction is improper. If either defendant makes a special appearance they will not be waiving their personal jurisdiction argument. Also, if they decide not to show up at all they can still rely on a collateral attack and argue
jurisdiction wasn’t proper in order to set aside the default judgment for not appearing. The third and final traditional basis is if the defendant is domiciled in the forum state, Florida. Here, Antelope is domiciled in Vermont where it was incorporated and Hood is domiciled in Georgia where he lives. A person can only have one domicile, which is where they live and where they intend to stay. If this suit had been filed while Hood was still living and working in Ocala, then that would be his domicile. However, since he sold his business and house and moved to Georgia, it appears from the facts that Georgia is where he intends to stay, thus his new domicile. The court looks at the defendant’s domicile at the time the suit was filed and at that time Hood was already living in Georgia. So domicile also doesn’t grant the court personal jurisdiction over either defendant.

Since there is no traditional basis of jurisdiction over either defendant we need to look at Florida’s long arm statute to determine if it grants jurisdiction under the facts. According to Florida’s long arm statute a person causing injury to another person within the state arising from solicitation within the state or products serviced or manufactured by defendant outside the state used within the state will be subject to personal jurisdiction within the state. (1)(f)1,2.

Here, starting with Antelope, he was the manufacturer of the tractor that exploded and caused injury to the tractor itself and Suzie as well in the state of Florida. This conduct falls under Florida’s long arm statute and grants personal jurisdiction over Antelope. However, this is not enough, the statute must also be constitutional. Meaning that Antelope, though having engaged in this activity, has to also have satisfied the minimum contacts test with Florida in order for the state to obtain jurisdiction over him constitutionally. (Int. Shoe). In order to determine minimum contacts we have to determine whether Antelope purposefully availed himself to Florida. A defendant can purposefully avail himself with a state through three different mechanisms. The first is through a contract, here Antelope’s contract with Hood was limited to Georgia, there was no contract with, nor any relation to, Florida thus this will not satisfy the minimum
contacts test through a contract. However, when a Georgia dealer contacted Antelope about extending antelope’s business into Florida, Antelope agreed he would do whatever he could to promote his sales in Florida. He even sent two of his executives to Florida to work on it. In *Burger King*, sending employees to BKU was a valid contact, however they also had a ongoing contract with the forum state as opposed to here where no contract exists. However, Antelope never reached a deal or any agreement to contract with the dealer, thus still not satisfying that purposeful availment test. The next test is the stream of commerce (or stream of commerce plus) test. This is where a manufacturer such as Antelope puts their products in the stream of commerce intending them to reach the forum state. In order for Antelope to reach this level of purposeful availment he will have had to purposefully placed his tractor in Florida. He did sell his tractor to Suzie knowing she would use it in Florida, however, he did not reach out to her and solicit her business, she contacted him, thus the court may have trouble finding that Antelope purposefully availed himself to Suzie in Florida. The final way a defendant can purposefully avail himself to the forum state is through the effects test which is not likely the case under these circumstances, since Antelope did not reach out to Florida and purposefully intend to “effect” Suzie or the forum state. Thus, stream of commerce is Suzie’s strongest argument (though not extremely strong) for obtaining personal jurisdiction over Antelope. After determining purposeful availment, the court must next determine whether Antelope’s contacts with the state are related to the cause of action, thus granting specific jurisdiction. If the court determines that Antelope’s selling Suzie a tractor in Florida is enough to satisfy minimum contacts, then it is likely the court will have specific jurisdiction over the cause of action because the tractor exploding is very related to the sale of the same tractor. However, since the stream of commerce ends when the consumer buys the product it is not likely Suzie’s argument for stream of commerce purposeful availment will suffice. After proving purposeful availment and relatedness, there is a presumption for minimum contacts that can only be argued against if it is so unreasonable to obtain jurisdiction that it would offend the traditional notions of fair play and substantial justice (*int. shoe*). Those factors were discussed in *Burger King* and consist of: the defendant’s burden to litigate in the forum state, which doesn’t appear to
be an issue since Florida is only a few hours south of GA where the defendant does business. Second factor is the plaintiff’s interest (Suzie) to obtain efficient and effective relief in the forum state, since this is Suzie’s home field she may have a greater interest in not having to travel and move the evidence around. The third factor is the forum state’s interest, and since the accident occurred within their borders, Florida has a legitimate interest in protecting it’s citizens from similar accidents. The 4th factor is the judicial systems interest and the 5th factor is the interest of furthering social policies. These interests are also not so unreasonable to be litigated in Florida. Thus, if the court finds that Antelope purposefully availed himself to Florida, then Florida will have specific jurisdiction to adjudicate Suzie’s claim based on Antelope’s actions in the state.

As to Hood, the long arm statute refers to solicitations in the state and since he contracted with Antelope to do the advertising for him, the court may have an easier time finding this to show minimum contacts. Since the facts state that Hood intentionally placed the flyers in locations likely to reach Florida residents it is likely that this contact will be sufficient. Since Hood didn’t really place any products in the stream of commerce that method of obtaining minimum contacts doesn’t really apply to him. However, Suzie could argue that Hood’s intentional placement of the advertisements falls under the effects test. Since Hood purposefully placed the ads in a location likely to reach Florida he was reaching out to Florida’s citizens for their business. Thus, he should have reasonably been expected to have been haled into court there based on these advertisements. However, hood will argue that his actions, though intentional were not tortious in nature, thus he was not intending any harm to Florida citizens (as was the case in Calder) instead he was intended to benefit Florida’s citizens. Though intending to benefit the citizens also shows an intent to benefit from the citizens and thus the laws of Florida, thus purposefully availing himself to Florida and its laws and benefits. This also will only give the courts jurisdiction over this cause of action and not general jurisdiction because Hood’s contacts are only isolated and irregular as opposed to substantially systematic and continuous. Since the cause of action arose out of these advertisements, the courts in Florida will have specific jurisdiction over this claim and over Hood for this
claim. It is also not unreasonable to obtain jurisdiction over Hood because he lives not that far and even has property still in the state of Florida (even in the same district).

So for the reasons stated above it is unlikely that the court state of Florida will have personal jurisdiction over Antelope, and more likely that it will over Hood.

**QUESTION 2**

**Comments for Question 2:**

A. **Joinder under the Rules**

   With respect to the joinder part of the question, the most common mistakes were (1) failing to apply the “logical relationship test” in determining whether claims arose from the same transaction or occurrence; (2) relying on Rule 14 for Antelope’s joinder of Wilson despite the absence of an indemnity relationship between Antelope and Wilson; and (3) properly relying on Rule 13(h) to join Wilson, but missing the fact that (a) under Rule 19, joint tortfeasors are not necessary parties (*Temple v. Synthes*); and (b) under Rule 20, the proper question is whether the claim against the joined party (Wilson) arises from the same transaction or occurrence as the counterclaim by the party seeking to join them under Rule 13(h) (Antelope), not as the plaintiff’s (Suzy’s) original claim.

B. **Subject Matter Jurisdiction**

   With respect to the subject matter jurisdiction question, the most common mistake was failing to consider § 1331 federal question and § 1332 diversity jurisdiction for each claim, in particular with regard to Antelope’s claim against Wilson, which should have been determined to satisfy diversity jurisdiction under § 1332 and the Total Activity Test.

**Sample Answer to Question 2:**

A. Since Antelope is joining claims and parties we will have to look at both FRCP 13(a) and (b), 13(h), 14 and FRCP 20 or 19. First for Antelopes joinder of the
counterclaim against Suzie, this claim will be permitted under rule 13(a) or (b) depending on whether or not it arises out of the same transaction or occurrence. According to Burlington’s logical relationship test there are several things to consider to determine if a claim is compulsory (arises from same transaction or occurrence) or is permissive (doesn’t). In this case, the claim is for defamation, which is a completely different claim than the products liability and negligence claims Suzie brought against him. However, if it weren’t for the tractor explosion neither claim would have surfaced. If the court finds there was only one accident and thus one happening of events that led to both claims it would have to be brought in under 13(a) as compulsory or Antelope would waive the claim altogether. However, if the court finds that there were two different happenings of events (i.e. first the tractor accident and then Suzie’s defamatory speech to the media) then Antelope’s claim would still be able to come in under 13(b) as permissive but if due to Subject matter jurisdiction discussed below it is unable to be brought in, he will not have waived it and can bring it at a later time.

As to Antelope’s joinder of parties (Wilson and Green Mountain) since Antelope is a defendant we will first look to Rules 13(h) and 14 to determine if the claims can come in and then we will look to FRCP 20 or 19. If the court allows the counterclaim against Suzie, which it is likely for the above mentioned reasons, that they will, then Antelope can bring Wilson in under rule 13(h). This rule states that there must first be a counterclaim or cross-claim and then the party may be brought in under a rule 19 or 20 analysis. The easier rule to use is rule 20 which states that the claim must arise under the same transaction or occurrence and must have a common question of law or fact. In this case, Wilson was the provider of several parts of the tractor that exploded and thus arising from the same tractor explosion as Suzie’s claim in the first place. Thus, arising under the same transaction or occurrence. Also, there are several common questions of law or fact such as which part was the cause of the accident and why the tractor exploded to begin with. These particular questions will have to be answered in both cases (against antelope and against Wilson) thus satisfying rule 20.
If however, though unlikely, the court finds that the claim against Wilson for negligence does not fulfill rule 20’s requirements then we will have to look to rule 19 to determine if Wilson is an indispensable party. First determining if Wilson is necessary, meaning that the existing parties cannot have complete relief without him, which may be true because if Wilson was the producer of the part that was negligently made or the reason for the malfunction in the tractor, then Suzie would need to have him there to solve her case. A party is also necessary if Wilson will be harmed if he is not included and/or if Suzie or Antelope will be harmed if Wilson is not included. It is likely that if Antelope isn’t able to join Wilson, that his interests will be harmed because the jury will not be able to weigh all the evidence that might be in his favor, thus the court will likely find Wilson to be a necessary party. Next we have to determine if it is feasible to join Wilson. The court must have personal and subject matter jurisdiction over him. The subject matter question will be discussed below. As to personal jurisdiction, it is unlikely that because of Wilson’s isolated and irregular contacts the court will have personal jurisdiction over him. Wilson made no purposeful contacts with Florida, even though his product was in the stream of commerce. This case is similar to Asahi, where the Japanese corp. sold parts that ended up in CA and the court used the stream of commerce plus theory to determine minimum contacts. Since, Wilson did not intend to benefit in any way from Florida’s laws the court will likely have personal jurisdiction over him. Thus, the court will then need to determine if he is indispensable since it is not feasible to join him. To determine if he is indispensable the court will look to several factors: prejudice to existing parties, courts ability to lessen the prejudice (through jury instructions and the like), the adequacy of the judgment if Wilson is not joined, and the adequacy of Antelope’s remedy if the case is dismissed. If the court finds these factors make Wilson and indispensable party then the suit must be dismissed, however, if not, the court may proceed in good conscience. It is likely however that Wilson will be joined under rule 20. If however, the court does not allow the counterclaim against Suzie, then Antelope’s only other means to join Wilson would be through rule 14 for indemnification and since Wilson refused to enter into an indemnity agreement with antelope, he will not be able to join him under this rule.
As to Green Mountain, regardless of whether the court allows the counterclaim against Suzie or not, this party will be brought in under rule 14 for indemnification. In order for this claim to work however, Green Mountain must be liable to Antelope for indemnity. Meaning Antelope must first be found liable to Suzie for the claim and then Green Mountain will be liable to Antelope for indemnification. If Antelope is bringing Green Mountain in only as a defense that Green Mountain is liable themselves to Suzie, the court will not allow joinder of Green Mountain (Wallkill). However, under the facts it appears that Green Mountain will only be brought in due to their indemnification agreement with Antelope, thus this joinder will be allowed.

B. As to the subject matter jurisdiction over Antelope’s claims: First the counterclaim against Suzie; since this counterclaim has no independent basis for subject matter jurisdiction (no federal question and it does not meet the amount in controversy for diversity claims) the counterclaim against Suzie will be allowed in under supplemental jurisdiction, section 1367. Under 1367(a) (supplemental jurisdiction statute) supplemental jurisdiction will be granted if the federal court has original jurisdiction over the claim to which the counterclaim will be attached. This federal hook exists because the original claim is based on complete diversity and the amount in controversy (Suzie $85,000 claim) is exceeded. The next requirement is that the counterclaim be a part of the same case or controversy, creating one constitutional case. However this may be more difficult than the original jurisdiction question because as stated above the court could likely find that this counterclaim arises from separate incidents then the accident. Even though Suzie’s defamatory comments were because of the accident, they may be considered separate. If they are a separate event and it is not a compulsory counterclaim then it would need its own basis for jurisdiction, which because it does not meet the amount in controversy requirement it will not be able to stay in fed court. However, if the court finds that it is a compulsory counterclaim then the standard of “same transaction or occurrence” satisfies the “same case or controversy” requirement for supplemental jurisdiction. If that is the case, then the counterclaim will be able to come into federal court bootstrapped to Suzie’s original claim. If this claim is allowed in, there are
exceptions according to 1367(b) because original jurisdiction is based solely on diversity. The exceptions are for: claims by plaintiffs against parties joined under rules 14, 19, 20, or 24, claims by persons sought to join as plaintiffs under rule 19 or claims by persons seeking to intervene under rule 24. None of those exceptions apply here since Antelope is bringing the claim and he is not a plaintiff. Since there are no exceptions, if the court allows the claim to come in, they still have the discretion to remand the claim to state court as per 1367(c). This discretion may be exercised for 1 of 4 reasons: due to jury confusion for a complex issue of state law, if state law predominates over the original claim, if all other federal claims have been dismissed, or if there would be needless decisions of state law. Here, there is a good change this claim won’t be allowed in based on not being a part of the same case or controversy and Antelope will be required to bring this claim in a separate suit in state court. As far as the joinder of the claim against Wilson, this claim will be able to come in because it has it’s own basis of jurisdiction. It is not a federal question (a question arising under the laws of the united states) but Wilson does not destroy the complete diversity of the parties since he is from CT and the claim satisfies the amount in controversy requirement, this claim will be allowed in under section 1332 (diversity of citizenship). A corporation, for purposes of diversity jurisdiction, is from the state of its incorporation and the state where it has its principal place of business. According to the facts, both of these requirements are in CT thus, Wilson is a citizen of CT for purposes of diversity jurisdiction. The only party that is questionable as to citizenship for diversity purposes would be Antelope due to his principal place of business. Antelope is incorporated in VT thus a citizen of VT and most of its business is done in VT. However, it has another big location where it’s tractors are produced which is in CT. the court will likely use a place of activity test under these circumstances because of Antelope’s significant offices in a few locations as opposed to a nerve center test which applies when a corporation has far flung and varied activities. That is not the case here since CT does 50% of Antelope’s production this is significant business in a couple locations, however it is still likely the court will find Antelope’s principal place of business to also be in VT because that is where 40% of their production is done as well as 90% of their officers and directors and their legal and accounting
departments as well as HR departments. VT is also responsible for 100% of Antelope’s billing, for these reasons under a total activity test, Antelope is going to be a citizen of VT for its place of incorporation and its principal place of business. Even though CT is Antelope’s second largest employer and accounts for a significant amount of revenue, VT is still number one. Since no other party in the suit is a citizen of CT, complete diversity is not destroyed. Also, the claim against Wilson satisfies the amount in controversy, because $85,000 exceeds $75,000 the statutory requirement. If however, Wilson objects to the amount in controversy then he will have to state with legal certainty that it is impossible that the claim will exceed the required amount. However, the court will look to the amount plead in Antelope’s claim against Wilson and will determine if it was plead in good faith. Since it appears that Antelope relied on Suzie’s claim to determine the amount for her injuries it is likely that Antelope plead that amount in good faith, both objectively and subjectively, thus, this claim will be joined on its own basis for subject matter jurisdiction (diversity).

For Green Mountain (GM)’s claim, it is also not a federal question, we would then look to diversity of citizenship. Since GM is not diverse from Antelope and they would be opposing parties this claim cannot come in under section 1332. Since the claim against GM does not have its own basis for subject matter jurisdiction, we can look to supplemental jurisdiction to determine if the claim can come in bootstrapped to Suzie’s original claim. Starting with section 1367(a) which grants supplemental jurisdiction we need a claim that the court has original jurisdiction over, that would be Suzie’s diversity claim which satisfies the amount in controversy. We also need the claim we are trying to join to be a part of the same case or controversy as the original jurisdiction claim. Since this suit is for indemnification it is definitely part of the same case or controversy because GM is only liable for indemnification if Antelope is liable in the first place, thus both cases are dependent on the same facts and thus would be expected to be tried in the same case. The statute also states that claims by joinder are okay. So under 1367(a) the court will grant supplemental jurisdiction over Antelope’s claim against GM. However, since this claim is based solely on diversity and not on federal question, we have to look again
to 1367(b) for the exceptions. There is an exception for claims by plaintiff against parties brought in under rule 14, however, since antelope is not an original plaintiff this rule still does not apply to him. The language of claims by plaintiff only refers to the original plaintiff and not a 3d party plaintiff, the purpose of that rule is so that plaintiffs cannot bring diverse claims to get defendants into federal court and then join non diverse parties that destroy federal subject matter jurisdiction. Since the claim against GM is brought by Antelope and not Suzie (the plaintiff) it does not fit into that exception. The other 2 exceptions also do not apply. Since the claim against GM also satisfies the amount in controversy requirement this claim can be brought in under 1367 supplemental jurisdiction. Since it lacks its own basis for subject matter jurisdiction. However, the court still has discretion as mentioned above to remand it to federal court and require Antelope to bring a separate action in state court.

**QUESTION 3**

**Comments for Question 3:**

Most students properly identified § 1404 as the transfer vehicle because venue was proper in Ocala, but many did not explain why venue was proper, namely because a substantial part of the events giving rise to the claim occurred there. § 1391(a)(2).

In the second part of the question, many answers either ignored or answered incorrectly the question of whether the transfer was proper because the new division was one in which the case “might have been brought” (see § 1404(a)). That requirement asks the court to determine if personal jurisdiction over the parties and venue are proper in the proposed transferee district or division (in this case, Tampa). Because the transfer request is between divisions, rather than districts, we know the case is staying in the Middle District of Florida. Thus, personal jurisdiction (because the case remains in the same State) as well as venue (because the case is staying within the same district) are unchanged from the original action. Since both were satisfied in Ocala, personal jurisdiction and venue are similarly satisfied in Tampa and the transfer is therefore permitted if it comports with notions of convenience and justice as applied in Smith.
Sample Answer to Question 3:

A. This transfer should be brought under section 1404 because the original venue was proper. Venue is proper where any one defendant resides if they all reside in the same state, or where a substantial part of events giving rise to the action occurred. Since neither of the defendants reside in Florida we have to look to whether a substantial part of events occurred in Ocala. Since in this case, the accident of the tractor explosion occurred in Ocala, Florida (in the district where the suit was brought originally) this satisfies the venue requirements. According to first of Michigan, the court held that it can be any substantial even and it need not be the most substantial event, thus the accident that Suzie is suing on is likely to be substantial enough to have proper venue in that district. Section 1404 grants transfer of venue when venue in the original location was proper, thus this would be the right avenue to move for a transfer of venue.

B. Transfer of venue under section 1404 is discretionary, meaning the court does not have to grant this transfer if it deems it unnecessary. According to the statute, transfer is granted in the interest of justice and to a venue where the case might have been brought originally. In considering the interests of justice, the plaintiff’s original choice of forum is of utmost importance. Here, Antelope is moving to transfer the case to another district in Florida, however, the facts don’t indicate his reasons for such a transfer and the court is likely to weigh Suzie’s choice of forum much more heavily then Antelope’s. Such as in Smith (where a Galveston judge refused to transfer the case based on a more convenient airport location) this court is unlikely to transfer the case based solely on the defendant’s desires to move to another city without more justification. The requirement that the case be transferred to a location where it might have been brought originally refers to where the court will have personal jurisdiction and proper venue. Since both defendant’s consented to jurisdiction in Florida, by not objecting to it and appearing in court, any district in Florida will have personal jurisdiction over the defendants. However, venue in this case was originally based on a substantial part of events giving rise to the cause of action which none of took place in Tampa, thus that would not be a proper location that
this case could have been brought originally. Just because antelope sent executives to Florida doesn’t mean that any substantial event occurred that GAVE RISE TO THIS CLAIM. Subject matter jurisdiction is not an issue in transferring cases because subject matter jurisdiction only determines which court system a defendant ends up in and in transferring venue the court is only transferring the case horizontally to a different court within the same system, so subject matter jurisdiction in that particular court system already exists. Because of the above stated reasons, it is unlikely the court will grant this motion to transfer venue to Tampa, Florida.

C. Antelope may want this transfer so that Suzie does not have a home field advantage in her home town, also he may know someone in Tampa and feel the citizens of Tampa, Florida have a higher success rate for defendant corporations. Most likely he wants this transfer for the former as opposed to the latter reason. Maybe he has a good lawyer that lives in Tampa and that will argue for a better reason such as witnesses who live in Tampa, or evidence that for some reason might be located in Tampa, and hopefully not because they have better airports closer to the courthouse!!

**Question 4**

**Comments for Question 4:**

A. **Methods of Discovery**

Many students missed the point that the “name and contact information” of people interviewed by Antelope’s general counsel and the “impressions” (as distinct from the “notes”) of Antelope’s General Counsel (“GC”) regarding those interviews should probably not be sought in a document request because neither category of information is necessarily going to exist in full in an existing document. The names and contact information of people interviewed is best pursued through an interrogatory, thereby assuring you will receive all the contact information at once, and the impressions of Antelope’s GC about those interviews should be pursued through an interrogatory or
deposition (notwithstanding the inevitable objections) because you do not want to limit your discovery to the impressions that counsel took the time to write down in his notes.

B. **Possible Objections**

Regarding the available objections to your discovery requests, many answers failed to notice that the people interviewed by Antelope’s GC were not “clients” of his and thus the attorney-client privilege cannot apply. There were also a significant number of answers that neglected to consider the exception to the work product doctrine for information for which the requesting party has a “substantial need” and cannot obtain through other means “without undue hardship.” In this case, the names and contact information of people interviewed by Antelope’s GC will likely fall under this exception despite a colorable claim that it is attorney work product, while recordings of the interviews, which are also likely work product under Rule 26(b)(3), will probably not.

As for counsel’s notes and impressions, a fair number of responses neglected to point out that they constitute “opinion” work product, and thus subject to even greater protections than “ordinary” work product. Finally, the report from Antelope’s GC to management is protected by both the attorney-client privilege and the work product doctrine, a fact that was lost in many answers.

**Sample Answer to Question 4:**

A. First, if the people interviewed are intended witnesses by the other parties then they are forced to disclose them as part of 26(a)(1)(A) mandatory disclosures. If however they are not, then there are five other methods of obtaining such information. First, through depositions, interrogatories, requests for productions, physical and mental exams (not pertinent to this case), and requests for admissions. To obtain the names and contacts of the interviewee’s interrogatories would be a good place to start. Also, Suzie could schedule depositions according to FRCP 30-32 for opposing parties and also for any witnesses or potential witnesses. Since these people may not be willing to cooperate with Suzie she can subpoena them with a court order to do so. If Suzie decides to use
interrogatories (FRCP 33) she is allowed to send them only to another party in the suit and not to any witnesses or outside people, without leave of the court. Here, Suzie could send interrogatories (only 25 questions unless stipulated to) to Antelope and he would be required to answer them (unless of course he objects). In order to obtain the recordings of the interviews a request for production would be most helpful (FRCP 34). This is a request for tangible items for the party making the request to inspect and copy. This would be the best way to obtain this type of information, unless of course antelope objects. To obtain antelope’s counsel’s notes and impressions regarding the interviews would also be made through request for production as stated above. The items requested through FRCP 34 must be stated with particularity so the person knows exactly what you are requesting. These requests can also (like interrogatories) be made only to other parties to the suit. The reports to Antelope’s management will also best be obtained through this method.

B. Antelope is likely to object to all of the previously discussed requests, however, he may only be successful on part of them. As to the names and contact information, he will object based on his attorney client privilege. Attorney client privilege is based on a communication between the attorney and their client for the purpose of seeking legal advice and intended to be confidential. In *Upjohn* the court held that this privilege extends to all employees that the attorney would have to communicate with in pursuit of the case. In this case, however, the persons interviewed were not employees of Antelope’s corporation. Thus, this privilege might not extend to them. If the court finds that this privilege does extend to the persons interviewed then there is no exception to attorney client privilege and the objection will be successful. However, the more likely outcome is that these people that were interviewed are not employees and thus not seeking legal advice through the corporations counsel and therefore not covered by the privilege. If this is the case then Antelope’s objection will fail. On the other hand, the reports by Antelope’s council to the management of antelope’s corporation are likely to also be successfully objected to under attorney client privilege. Here, these communications, for legal advice on consequences to the corporation, are likely to be
protected. In Upjohn, not only are the corporation’s agents protected but all employees the attorney communicated with during his investigation are also protected. Antelope will also object on the grounds that this information is work product and thus is also privileged. Work product is any tangible item prepared in anticipation of litigation. It can be argued that these names and contact information was part of his litigation strategy and thus part of his preparation for trial. This objection will also likely be made on all of the other information requested by Suzie. If the court finds that these requests are for work product information then they will not have to be disclosed, however, unlike attorney client privilege (where there are no exceptions) work product has an exception. The exception here would be that Suzie had a substantial need for these materials and that without undue hardship she would not be able to obtain sufficient equivalents to them. Since Suzie would want to also interview these people she will have a substantial need to know which people were interviewed and how to contact them. It would also be difficult for her to obtain this information any other way, without Antelope disclosing it. As to the names and contacts, this work product exception will likely apply and Antelope’s claim of privilege will likely fail. As to the recordings of the interviews the same work product exception will likely apply, thus not satisfying Antelope’s objection. However, as to Antelope’s counsel’s notes and impressions Antelope’s objection will likely be successful. The rule requires that the court shall protect against the disclosure of mental impressions, conclusions, opinions, or legal theories of the attorney, this is considered opinion work product and will be absolutely protected. In Upjohn the court held that the attorney’s notes regarding the interviews revealed the attorneys’ mental processes and thus were opinion work product and protected under the work product privilege. Here, the attorney’s notes about the interviews are also opinion work product because they represent his thoughts and impressions on the information in the interviews, the information in the interviews itself is not the opinion of the attorney, however, his thoughts about that information is and should be protected. Thus, Antelope’s objection to the notes, and the reports to management should be successful while the recordings and names and contact information will probably not be.