

MEMORANDUM

TO: Professor Allen's Civil Procedure Class
Fall Semester 2003

FROM: Mike Allen

DATE: December 2003

SUBJECT: Final Examination

This memorandum provides some of my thoughts on possible answers to the final examination questions. I have attached as Exhibit A a copy of the examination and as Exhibit B a copy of my grading grid for the exam. Set out below are some thoughts about how I would have analyzed each of the essay questions. You can be sure that I have not included all possible responses. No doubt, many of you included analysis not set forth in this memo. You can be sure that you received appropriate credit if the analysis was correct. In addition, you were under time pressure when you took the examination. That reality means that I did not expect your answer to be of the same quality that I produced below. The purpose of this memo is merely to give you some general ideas about what I thought about the exam. In addition, I have included a brief analysis of each multiple choice question so that you can gauge your responses.

With that brief introduction, here are my general thoughts about the exam:

Section I

Question #1

This question called on you to address issues of joinder under the Federal Rules of Civil Procedure and federal subject matter jurisdiction. If you discussed any other issues, you wasted time that is precious on an exam. The question asked you about joinder of two specific non-parties: Jefferson and Patriot. I would have approached the question using these two non-parties as the organizing theme.

Jefferson

- There were two issues to address, do the rules of joinder provide a basis for joining Jefferson in the action and can Jefferson be added as a matter of federal subject matter jurisdiction.

Joinder under the Rules

- The first step in the process is to determine whether the Federal Rules of Civil Procedure provide a mechanism for Jefferson's joinder in the case. The most likely possibility for Jefferson's joinder is Rule 14, impleader. Thus, you should have identified Rule 14 as the means by which to join Jefferson.

- Rule 14(a) provides a mechanism by which a defendant, such as Hancock, may bring a non-party such as Jefferson into a lawsuit. In order to do so, Hancock must be able to assert that Jefferson is or may be liable to him if he is liable to Madison. This is termed derivative or secondary liability.
- In this case, the contract between Jefferson and Patriot/Hancock provides a basis on which Jefferson may be implied. Hancock would argue that if Hancock has to go through with the sale of the Declaration at a below market price than Jefferson will need to make him whole for his losses in the case. Indeed, this is the classic case for impleader.
 - You should note that it would not make a difference in this case that (1) Patriot is not a party or (2) that Hancock would likely argue that Jefferson's liability would be the value of the price that the Declaration was actually worth, which might exceed the \$200,000 paid by Madison. In terms of Patriot, Hancock's indemnification right requires Jefferson to reimburse Hancock for his losses. Any losses Patriot could suffer might also be Jefferson's responsibility, but that is a separate issue. In terms of the valuation issue, there is nothing in Rule 14 to suggest that the liability of the third party defendant may not exceed the liability of the third party plaintiff to the plaintiff.

Jurisdiction

- The second issue to address in terms of Jefferson's joinder is whether Jefferson's joinder under Rule 14 would be consistent with the federal statutes regulating the subject matter jurisdiction of the federal courts. There are three possibilities that you should have at least considered.
 - The first possible option is jurisdiction under Section 1331. This provision grants federal courts jurisdiction over matters arising under the United States Constitution, treaties, and federal statutes. Hancock's claim against Jefferson arises under state contract law. It does not matter that the Declaration of Independence is involved even though that document is important on the national level in the United States. Thus, you should have rejected 1331 as a basis for subject matter jurisdiction over this claim.
 - The next possible jurisdictional basis is Section 1332, granting subject matter jurisdiction based on diversity of citizenship. There are two requirements that must be satisfied in order for a case to come within the ambit of Section 1332: there must be a sufficient amount in controversy and the parties must have certain relationships between them. You should have addressed each of these elements.

- Amount in Controversy: The statute requires that the amount in controversy between Jefferson and Hancock “exceed” \$75,000 exclusive of interest and costs. In this case, the claim would exceed the jurisdictional threshold. At a minimum, if Hancock is ordered to give the Declaration to Madison, Jefferson may be liable for \$200,000. In all likelihood, the amount for which Jefferson may be liable will exceed \$200,000 if Hancock is correct that the sale to Madison was for too little money. Thus, you should have concluded that this element of establishing diversity jurisdiction had been satisfied.
- Citizenship: In addition, you would need to assure that Hancock and Jefferson fit into one of the appropriate categories in Section 1332(a). They do. Hancock is a citizen of the State of Texas. Jefferson is a citizen of Florida. Therefore, this is an action between citizens of different states.
 - It does not matter that Jefferson and Madison are both citizens of Florida. As the litigation is structured at this point, there is no claim between Jefferson and Madison.
- The final possibility for subject matter jurisdiction is supplemental jurisdiction under Section 1367. The analysis proceeds as follows:
 - The first step is to determine whether Hancock’s claim against Jefferson forms part of the same case or controversy under Section 1367(a) as does Madison’s claim against Hancock. Essentially, this question asks whether the Hancock versus Jefferson claim arises out of the same transaction or occurrence as the claim between Madison versus Hancock. It does. They both arise out of the purported sale of the Declaration to Madison. Thus, the claim satisfies the requirements of 1367(a).
 - You should also note that it does matter that we are joining an additional party and not just a claim. The last sentence of 1367(a) makes clear that its terms apply equally to party joinder and claim joinder.
 - The next step is to determine whether the exception in 1367(b) will cause a problem in this case. It will not. 1367(b) contains three “triggers” for the exception. The first of those triggers is present in this case. That trigger is that the original or anchor claim in the case was based on diversity of citizenship. However, there will not be a problem in this case because the second trigger is not satisfied. That second trigger is that the claim is being asserted by a plaintiff. That is not the case in this situation. As Rule 14(a) makes clear, Hancock is a third-party plaintiff and not a plaintiff. Thus, there is not problem here and the court has the power to exercise

subject matter jurisdiction over this claim.

- Given that this is the case, does it matter under which jurisdictional statute the case proceeds. That is, does it matter whether Hancock's claim is in court under 1332 or 1367? The answer is that it does because of the operation of 1367(c) that gives the court discretion to decline jurisdiction for a number of reasons.
 - Thus, you should have concluded that it was better for Hancock to argue that subject matter jurisdiction was based on diversity instead of supplemental jurisdiction.

Patriot

- There were two issues to address, do the rules of joinder provide a basis for joining Patriot in the action and can Patriot be added as a matter of federal subject matter jurisdiction. Of course, the context of the joinder question in this area is different. As discussed below, we could expect that Hancock is asserting this argument as means to thwart Madison's claim in this court. That does not, however, change the analysis.

Joinder under the Rules

- Once again, the first step in the process is to determine if there is a rule of civil procedure that could allow Hancock to add Patriot as a party. Rule 19 provides such a possible route to joinder of Patriot in this situation. The best way in which to proceed under this analysis is to consider first whether Patriot is a person to be joined if feasible under Rule 19(a). Thereafter, you should consider whether Hancock may be joined. In our case, that concerns an analysis of subject matter jurisdiction. Finally, one needs to consider the application of Rule 19(b).

Rule 19(a) Analysis

- Rule 19(a) sets out several situations under which a non-party should be "joined if feasible."
 - Under Rule 19(a)(1) the issue is whether complete relief can be afforded between Madison and Hancock without Patriot being present. We do not have enough information to answer this question definitively. If the law of Texas or Florida required that all owners of property consent to the transfer of property, then Rule 19(a)(1) would be satisfied. We need not decide this issue because of result of the analysis under Rule 19(a)(2).
 - Under Rule 19(a)(2), the initial question is whether the non-party claims an interest in the subject matter of the action. That requirement is easily satisfied in

this situation. Patriot claims at least some ownership portion of the Declaration that Madison is seeking in the case.

- Once you determine that Patriot has an “interest” in the subject matter of the action, you must proceed in the analysis. Rule 19(a)(2)(i) provides that Hancock’s interest might “as a practical matter” be impaired as a result of this litigation. The answer to this question seems clear. If the court orders the Declaration transferred to Madison’s interest in the declaration will certainly be harmed. Therefore, under this provision, Patriot is a person to be joined if feasible.
- Patriot is also likely to be a person to be joined if feasible under Rule 19(a)(2)(ii). The reason is that it is possible that Hancock could be subject to inconsistent obligations if ordered to transfer the Declaration to Madison if Patriot takes steps to preclude the transfer. Thus, and although it is not as strong a case, Patriot is also likely to be a person to be joined if feasible under this section.

Jurisdictional Analysis

- Once we have decided that Patriot should be joined if feasible, then it should be joined. Under the rule for this question, your assignment was limited to whether Patriot’s joinder would be an issue under principles of subject matter jurisdiction. Thus, we need to consider whether Patriot may be added to the case consistent with at least one of the basis for subject matter jurisdiction we studied this semester.
 - The first possibility is federal question jurisdiction. The claim at issue in this case is for breach of contract (Patriot would be added as a defendant in Madison’s suit). That suit is based on state law and, thus, does not fall within the ambit of Section 1331.
 - The second possibility for jurisdiction is diversity under Section 1332. In this case, diversity would not provide a basis for jurisdiction.
 - The amount in controversy would not be a problem. Patriot would be added as defendant. As such, the claim against it would be for at least \$200,000 (or I suppose even ½ that amount). Either of these amounts if above the jurisdictional threshold.
 - There is a problem in terms of citizenship. In Strawbridge, the Supreme Court held that Section 1332 required the complete diversity of citizenship of the parties. Since Patriot would be added as a defendant and since it is a citizen of both Florida and Texas (*see* Section 1332(c)) and Madison is also a citizen of Florida, there would not be complete diversity of

citizenship in this situation. As such, Madison's claim against would not be possible under diversity of citizenship jurisdiction.

- The final possibility for jurisdiction would be supplemental jurisdiction under Section 1367.
 - The first step to consider is whether 1367(a) provides for jurisdiction over the claim. It does. Madison's claim against both Patriot and Hancock arise from the exact same circumstances. In addition, the fact that we are adding a party instead of a claim does not matter under the last sentence of the section. Thus, the court has power under 1367(a) to hear the claim.
 - The next step is to determine whether the exception in 1367(b) ousts the court of jurisdiction. It does. You satisfy the first trigger in that this is a case for which the anchor claim is diversity under 1332. You also satisfy the second trigger by being a claim by a plaintiff. Madison will always be a plaintiff. Finally, you also satisfy the third trigger because Patriot is person joined under Rule 19. Thus, there is no supplemental jurisdiction.

Rule 19(b) Analysis

- Having concluded that Patriot is a person to be joined if feasible and that it cannot be joined as a matter of subject matter jurisdiction, we must now address whether Patriot is a person who is "indispensable" under the terms of Rule 19(b). To do so, one must consider the four factors set out in the rule.
 - The first factor under Rule 19(b) is whether a judgment rendered without Patriot would be prejudicial to Madison, Hancock or Patriot. As discussed above, at a minimum there is a serious risk that Patriot's interest will be harmed if it is not a party to the case. If the court orders the transfer of the Declaration under the terms of the contract, Patriot will potentially lose its interest in the Declaration. Therefore, there is a risk of prejudice to Patriot.
 - The second factor under Rule 19(b) is whether there is any protective measure the court can impose as part of its judgment so as to reduce or limit the prejudice to Patriot. In this case, it is difficult to see what the court could do to limit the prejudice to Patriot. While the court could order a part of the \$200,000 proceeds held in escrow for Patriot that would not alleviate the prejudice to Patriot flowing from losing the Declaration and its potentially greater value. Thus, there is not much that could be done to protect Patriot.
 - The third factor under Rule 19(b) is whether a judgment rendered without patriot would be adequate in terms of the dispute between Madison and Hancock. We do not have the information to fully answer the question because we do not know if

either Texas or Florida require both owners of a piece of property to take action to transfer ownership. At a minimum we can say that this is a real possibility.

- The fourth factor under Rule 19(b) is whether Madison will have an adequate remedy of the action is dismissed for failure to join Patriot. In this case, Madison would have an adequate alternate forum in which to file an action. Specifically, she could sue both parties either in Texas or Florida state courts.
- Based on all these considerations, I would say that the actions should be dismissed. At a minimum, you should have come to a conclusion.

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Question #2

The second essay question presented a straight-forward personal jurisdiction issue. It required you to consider whether Montgomery would be subject to personal jurisdiction in Florida on Green's claim. This inquiry required you to address questions under both the Florida long-arm statute and the United States Constitution. If you addressed other issues, you wasted valuable time.

Long-Arm Statute

- The first step in the personal jurisdiction analysis is to determine if Florida's long arm statute allows this claim to proceed in a federal court in Florida. The Florida long-arm statute provides two basic ways in which it could be satisfied. Sub-section (2) would allow jurisdiction in a situation in which a defendant has substantial and not isolated activity *within* Florida. Based on these facts, Montgomery has engaged in no activity within Florida. Thus, the only possibility for jurisdiction under the long-arm statute would be based on sub-section (1).
- Sub-section (1) of the long-arm statute provides jurisdiction in a situation in which the plaintiff's claim "arises from" the doing of a number of different things that relate to Florida. The problem for Green in this case is that Montgomery's activities do not fall into any of the specific categories in the long-arm statute. The closest two possibilities are sub-sections (1)(a) and 1(g).
 - The problem with (1)(a) is that there is nothing in the facts to suggest that Montgomery carried on any business in Florida. The only possible argument here would be that the Internet site operated by Montgomery could be considered carrying on business in Florida. Given the facts we have, however, it seems difficult to make that argument. The site does not itself lead to a business transaction. It allowed customers to see products and submit information for a follow-up call. In this case, the business appeared to have been transacted in Washington. All this being said, it is

possible to argue that (1)(a) is satisfied, but I believe it would be a difficult argument.

- In terms of sub-section (1)(g), the issue is that Montgomery's breach, assuming there was a breach, was not of an obligation to perform in Florida. The delivery of the products was to be in California. Therefore, this sub-section would not be applicable.
- You should have come to an ultimate conclusion and then explained that you would go on to address the constitutional issues.

Constitutional Analysis

- The Court must determine whether the exercise of personal jurisdiction over Montgomery in Florida on plaintiff's claim comports with the Due Process Clause of the Fourteenth Amendment to the United States Constitution. There are two possible means by which Montgomery could be subject to personal jurisdiction in Florida under the terms of the Constitution: general jurisdiction and specific jurisdiction.

General Jurisdiction

- Montgomery would be subject to personal jurisdiction in Florida if it was incorporated here or if it had its principal place of business in Florida. It is undisputed that Montgomery falls into neither of these categories in that it is incorporated and has its principal and only place of business in Scotland. Montgomery could also be subject to general jurisdiction in Florida if it had engaged in systemic and continuous activities here. There is no evidence in the record of any such continuous or systemic activity in this state. While Montgomery has contacts with Florida, they do not even begin to approach what the Supreme Court rejected in terms of general jurisdiction in Helicopteros, namely the purchase of 80% of a company's fleet of helicopters from a given state. It is true that we are dealing with sales here instead of purchases. That being said, it simply does not appear that Montgomery has the requisite level of activity in Florida to subject it to general jurisdiction here.

Specific Jurisdiction

- The issue in specific jurisdiction is whether Montgomery's contacts with Florida are so closely related to the plaintiff's claim that it is constitutional to assert jurisdiction over the company in this case. In the words of the Supreme Court, the test is whether exercising jurisdiction over Montgomery in Florida comports with "traditional notions of fair play and substantial justice." International Shoe. The specific jurisdiction analysis is in two parts: minimum contacts and fairness. Asahi.

Minimum Contacts

- The first step in the specific jurisdiction analysis is to determine whether Montgomery's contacts with Florida are sufficient under the Constitution to support jurisdiction. The key to this analysis is to determine whether Montgomery's contacts with Florida are related closely enough to the claims at issue such that Montgomery could have reasonably foreseen being sued in Florida on Green's claim. Worldwide Volkswagen.
- An important starting point concerning the minimum contacts analysis is to recognize that Green is asserting a contract claim.
 - We know as an initial matter that a contract can itself be a contact. McGee.
 - More informatively, we know from Burger King that a useful way in which to consider contract cases in a personal jurisdiction setting is to look at the negotiating process, the terms of the contract, and the actual or anticipated course of performance.
 - In this case, the contract negotiations contained both Florida and non-Florida elements. Of importance in the jurisdictional analysis is that Montgomery's representatives conducted at least exploratory negotiations with Green with knowledge that Green was located in Florida. Such voluntary activity is a critical part of deciding about personal jurisdiction. See Hanson (setting forth the importance of purposeful activity directed to a given forum). It is true that the contract was signed in Virginia. That fact does not, however, negate the substantial initial ties to Florida in the negotiation process.
 - The Florida connection is further strengthened as a result of analyzing the contract terms. It is true that the contract concerns the sale of equipment to a California location. However, the contract makes clear that Florida plays an important role in the transaction. This is so because of the parties' designation of Florida law as governing the interpretation of the contract. See Burger King.
 - You should note that this provision of the contract concerns choice of law. It is far different from the forum selection clause in cases such as Carnival Cruise Lines.
 - The last feature of the Burger King Analysis concerns the anticipated course of performance under the contract. In this case, this factor would cut against jurisdiction because Montgomery's performance was to be in Florida.

- In sum, the Burger King jurisdictional factors tend to cut in favor of finding minimum contacts in this situation.
- There are additional factors to consider in the jurisdictional minimum contacts consideration. For example, Montgomery maintains a website that is viewable in Florida. Standing alone, that is not particularly instructive. Instead, we need to consider the interactivity of that website. Zippo. In this case, the site is only partially interactive. But the way in which the site is interactive is important in the analysis. The site is designed to have a potential customer such as Green provide contact information. It is then up to Montgomery whether or not to continue exploring a business relationship. In this case, that is precisely what Montgomery did: found out Green was in Florida and, nonetheless, continued exploring a commercial transaction. As mentioned above, such purposeful activity is a critical part of the jurisdictional analysis.
- You should then have come to an ultimate conclusion concerning the minimum contacts analysis. I would have found minimum contacts on these facts.

Fairness

- The second step in the specific jurisdictional analysis is to consider whether the exercise of jurisdiction over Montgomery in this case is fair. In order to determine whether the exercise of jurisdiction is fair under the terms of the Constitution the Court must look to the fairness factors the Supreme Court set forth in Worldwide Volkswagen.
 - The first, and primary, factor is the burden on the defendant. There would certainly be a burden on Montgomery to litigate in Florida. The issue is whether that the burden in this case would be an undue one. First, we are assuming that Montgomery has minimum contacts with Florida. Therefore, Montgomery made the determination that it was in its commercial interests to reach out to the United States – and Florida in particular – to get an economic advantage. It may also be important that Montgomery sent people to meet with Green’s representatives in Virginia. While this is not a contact related to Florida, it does show that when Montgomery views traveling to the United States to be in its interest, it will do so. The difference between adding an additional trip to Florida (assuming travel to Virginia is easier) is a burden, but it does not rise to the level of an undue burden.
 - One related point is worth making here. One could argue that the Supreme Court’s opinion in Ashai is relevant here in that Asahi, like Montgomery here, is a foreign corporation. The Asahi Court held that the foreign nature of the company made a difference in the burden analysis. While that is true, one could argue that this case is quite different than Asahi. There, both the plaintiff and the defendant were foreign.

Moreover, the defendant's home country had a court system that was quite different from that here in the United States. The same issues are not implicated here because the plaintiff is a United States citizen. In addition, the court systems of the United States and Scotland have many similarities, including at least a partial common language.

- At a minimum, you should have addressed the importance – or potential importance – of Montgomery's foreign citizenship.
- Another fairness factor here is Florida's interest in this litigation. Florida has a substantial interest in the litigation. Green is a Florida citizen. It is true the location at issue in the case is in California. Nonetheless, Green is a Florida citizen that entered into a contract governed by Florida law as a result of a contact established as an initial matter as a result of an Internet website viewable in Florida. These factors suggest that this factor counsels in favor of the fairness of jurisdiction in this case.
- A further factor is the plaintiff's interest in obtaining convenient and effective relief in Florida. The plaintiff certainly has such an interest in this case. In fact, Florida is the natural place in the United States for this litigation to proceed. Once again, one could contrast the situation in Asahi in which the plaintiff had little incentive to litigate anywhere in the United States given the procedural posture of the case.
- You may also have wanted to consider the final two fairness factors concerning the judicial system's interest in providing efficient relief and the interests of the states – or here, nations – in furthering fundamental social interests. It would seem that these factors would either be a wash or would tip slightly in favor of jurisdiction.
- You should have come to a conclusion on the fairness issue. You should also have come to an overall conclusion on the question as a whole.

Section II

Question #1

The correct answer is C. Option C is not a correct statement (and thus the appropriate answer to the question) because Rule 4(d)(1) makes clear that a waiver of service does not constitute a waiver of objections concerning venue or personal jurisdiction. All the other options are correct statements, and thus not appropriate answers. Option A states the rule set forth in Rule 4(d)(2). Option B states the basic under Rule 4(d) generally that plaintiff may seek a waiver of formal service but it is not required to do so. Option D is correct because Rule 4(d)(2)(B) makes clear that first-class mail is an appropriate means by which to transmit the

request for waiver of formal service. Finally, Option E is correct because the Federal Rules of Civil Procedure apply in a federal court. We would need to be concerned about a New York State rule if it was substantive.

Question #2

The correct answer is B. Option B is correct (and thus the correct answer) because the case meets the requirements of diversity jurisdiction under Section 1332. First, there is in excess of \$75,000 at issue, exclusive of interest and costs, based on the likely value of balls sold in a year. (There is no need that there be a guarantee that an award greater than \$75,000 will be recovered. Thus, Option D is not correct.) In addition, there is diversity of citizenship between NYAC and Bouncing Partners. NYAC is a New York citizen because it is both incorporated and has its principal place of business in that State. Bouncing Partners is a bit more complicated. For a partnership, you must look at the citizenship of the partners. Therefore, what matters is that Becker is a citizen of Germany and Andy's Tennis Balls is a citizen of both Delaware (state of incorporation) and Maryland (principal place of business). (It does not matter that the partnership's principal place of business is in New York. Therefore, Option E is not correct). Therefore, all the requirements of Section 1332 are satisfied. Option A is not correct because this case does not arise under a federal law, the Constitution or a treaty. In addition, Supplemental Jurisdiction is not applicable because we are talking about only one claim. So, Option C is not correct. Finally, Option F is not correct because the doctrine of forum non conveniens has nothing to do with subject matter jurisdiction.

Question #3

The correct answer is F. All of the statements set forth in options A through D are correct. Option A is a correct statement of Rule 15(a). Option B is a correct statement of Rule 41(a). Option C is a correct statement because the seven motions under Rule 12(b) must be made before answering. There are certainly other ways to raise some of these issues, but a Rule 12(b) motion is not one of them. Finally, Option D is correct because it correctly states the applicability of Rule 12(c) under the factual scenario set out in the question.

Question #4

The correct answer is E. It seems fairly certain that Bouncing Partners' claim is a violation of Rule 11(b)(2) in that the defense it is asserting is not "warranted by existing law or a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." This is so because the reason one breaches a contract is generally not relevant. Option A is not correct, however, because Rule 12(c)(1)(A) requires that the NYAC provide Bouncing Partners with a 21 day period during which it may withdraw the allegedly offending paper. Option B is incorrect for the same reason in addition to which it does not appear that Bouncing Partners' argument is a violation of Rule 11(b)(3). Option C is incorrect because the court is not required to wait 21 days before issuing the show cause order.

See Rule 11(c)(1)(B). Finally, Option D is not correct because Rule 11 requires that a motion under that rule be asserted “separately.” See Rule 11(c)(1)(A).

Question #5

The correct answer is C. Option C is correct because Professor Plum and Mrs. White are co-defendants. As such, Rule 13(g) allows crossclaims only if they arise out of the same transaction or occurrence as the original claim, or any counterclaim. The claim in Option C does not meet this test. All of the other options state correct principles under the Rules. Options A and B are both correct because Rule 13(a) and 13(b) together provide that a defendant may assert any counterclaims against a plaintiff. Option D is a correct statement because Professor Plum could implead Col. Mustard under Rule 14(a) by claiming that if Professor Plum is liable to Miss Scarlet for the accident, Col. Mustard is liable to Professor Plum based on Mustard’s failure to ensure that the light bulbs were in working order. Finally, Option E is correct because under Rule 18, one claim can validly be asserted (here under Rule 14) all other claims may be made under the Rules.

Question #6

The correct answer is A. Option A correctly states the requirement of Rule 26(a)(1)(D). Option B is not correct because under Rule 33(a) interrogatories may only be used against a party. Thus, because Mr. Green is a non-party, the interrogatories are improper. Option C is not correct because Mr. Green’s testimony would be relevant and not privileged. In addition, Rule 45 allows a party to depose non-parties and Rule 37(a) provides that motions to compel may be made with respect to non-parties. Option D is not correct because other than requiring that use of discovery devices be delayed until after making required disclosures, *see* Rule 26(d), the sequencing of discovery is within the judgment of the parties.

Question #7

The correct answer is E. Option E is correct because all of the statements in Options A through D are correct under Rule 37(b)(2). Option A is allowed under Rule 37(b)(2)(A). Options B and C are allowed under the final paragraph of Rule 37(b)(2). Finally, Option D is allowed under Rule 37(b)(2)(C).

Question #8

The correct answer is B. Option B is correct because Rule 56(b) provides that a defending party may move for summary judgment “at any time.” The same is not true for a plaintiff. See Rule 56(a). As such, Option A is incorrect. Option C is incorrect because Rule 12(b) gives William the *option* to file a motion concerning venue. William could elect to include the venue-based defense in his answer. Option D is not correct. Ruth would not even be a Rule 19(a) person let alone a Rule 19(b) person.

Question #9

The correct answer is D. Option D is correct because it is most likely in this case that the court would conclude that the verdict in William's favor is against the great weight of the evidence. Option E is not correct because there is no earlier time that Sandra could have filed such a motion. Option F is not correct because the court may not consider credibility issue in terms of a Rule 59 motion. In addition, Option E misstates the relevant legal standard. Options A, B and C are all not correct because, at a minimum, a rational jury could find in favor of William in this case. It is highly unlikely, but it is possible. As such, the threshold issue for granting a renewed motion for judgment as a matter of law is missing.

Question #10

The correct answer is E. This question concerns the doctrines of claim preclusion and issue preclusion. Under both of these doctrines, one must have been a party to an earlier case in order to be precluded as to either a claim or an issue. Because Ruth was not a party to Sandra v. William, she may not be precluded in any way in connection with her litigation with William.