

Memorandum

TO: Fall 2004 Civil Procedure Students

FROM: Mike Allen

DATE: December 2004

SUBJECT: Civil Procedure Final Examination

This memorandum provides some of my thoughts on possible answers to the final examination questions. 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 points not set forth in this memo. You can be sure that you received appropriate credit if the analysis was correct and relevant to the question. 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

Sam has asked you to draft a memorandum laying out his possible options, both offensively and defensively, in responding to Donald's complaint. You should have recognized where in the litigation Sam stood with respect to the other parties (*i.e.*, Donald v. Sam and Amy). Sam has told you that his preferred outcome would be to have the case go away. Failing that, Sam wishes to be as aggressive as he can be in responding to the complaint. A useful way in which to have divided your answer would have been to discuss matters for Donald, Amy and Troy & Bill separately. I will follow that structure.

Donald

Rule 12(b)(7) and Rule 19

Sam's principal goal is to have the lawsuit dismissed. The only possible means to do so under the facts presented is to make a motion to dismiss the case for failure to join Carolyn. Note that the question stated that you should have assumed that there was no issue concerning Donald's substantive claim. Thus, there was no possibility of a Rule 12(b)(6) motion. There was also no basis in the question for any of the other pre-answer motions under Rule 12. The

Rule 19 issue may be raised by a Rule 12(b)(7) per-answer motion, although using such a device is not required. Because Sam agreed to waive service of process under Rule 4(d) and he is a United States defendant, he will have 60 days after the date of the request to respond to the complaint.

The best way in which to proceed is to consider first whether Carolyn is a person to be joined if feasible under Rule 19(a). Thereafter, you should consider whether Carolyn may be joined. In our case, that concerns whether Carolyn's joinder would deprive the court of subject matter jurisdiction. Finally, one needs to consider the application of Rule 19(b) assuming that she may not be brought in as a party.

Rule 19(a) Analysis

Rule 19(a)(1)

Rule 19(a) sets out several situations under which a non-party should be "joined if feasible." First, under Rule 19(a)(1) the issue is whether complete relief can be afforded between Donald and Sam without Carolyn being present. Carolyn is not "necessary" under the terms of Rule 19(a)(1). In terms of affording relief to Donald, the Court can award Donald either specific relief or damages without Carolyn. Sam can be required to either pay Donald damages or to perform the contract correctly.

It is also probably appropriate for the court to consider Sam's potential counterclaim in making the Rule 19 analysis. Sam's counterclaim would seek the transfer of the 10% interest in the land under the contract, in other words specific performance. That counterclaim, discussed more fully below, would be compulsory under Rule 13(a) because it arose out of the same transaction or occurrence as Donald's claim against Sam. Indeed, the parties are suing over claimed breached of the same contract. Because the counterclaim is compulsory Sam would be required to bring it if the case proceeded. Thus, there is a strong argument that the court may properly consider that anticipated counterclaim in connection with a properly made Rule 19 motion.

Even if one were to take into consideration Sam's compulsory counterclaim seeking transfer of the 10% interest in the land there is likely no issue under Rule 19(a)(1) concerning relief in the case. The question provides that if a co-owner of property is "unavailable" then the jointly owned property may be transferred with the signature of only one owner. Thus, Sam could obtain the relief he would be seeking in the compulsory counterclaim, so long as the court deems Carolyn to be "unavailable." Should the court find otherwise, Rule 19(a)(1) would provide a basis upon which to classify Carolyn as a "necessary" party in the case.

Rule 19(a)(2)

Interest

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 satisfied in this situation because Carolyn claims an interest in the land and the contract with Sam; she is a co-owner of one and a co-party to the other. Either one of these interests standing alone would likely be sufficient. There is no doubt a sufficient interest is shown when these two matters are combined. Moreover, this analysis is an objective one so it does not matter if Carolyn actually is affirmatively asserting an interest at this time.

Rule 19(a)(2)(i)

Once you determine that Carolyn has an “interest” in the subject matter of the action, you must proceed in the analysis under the balance of the rule. Rule 19(a)(2)(i) provides that Carolyn is a person to be joined if feasible if her ability to protect that interest might “as a practical matter” be impaired or impeded as a result of this litigation. It seems to me that this standard would be met here. No matter how one cuts it, the outcome of *Donald v. Sam* will have a practical impact – at the very least – on the ownership of at least 10% of the jointly owned land. For example, if Donald gets his preferred remedy – specific performance – Sam will be entitled to 10% of the land when he performs. Thus, Carolyn’s interest might “as a practical matter” be harmed and she will not be in the case to protect it. The same would be true, by the way, if we were to consider Sam’s compulsory counterclaim seeking the transfer of the 10% interest in the land directly. Finally, the law does not provide protection for Carolyn’s interest concerning the land because a single joint owner may transfer jointly held property if deemed unavailable.

As a result of this analysis, Carolyn is a person to be joined if feasible. While this would be sufficient under the rule, it would have been wise to continue the analysis to determine if Carolyn also qualified for joinder under the next portion of the rule.

Rule 19(a)(2)(ii)

It would also seem that Carolyn would qualify as a person to be joined if feasible under Rule 19(a)(2)(ii). Under this portion of the Rule, a non-party should be joined if the person’s absence would “leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.” This provision would support joining Carolyn. If we consider the transfer of the land that is so because either Donald or Sam could have inconsistent obligations imposed on them in terms of ownership of the land if Carolyn is not present. For example, Sam could receive a 10% interest in the land either as result of a counterclaim or as a result of performing based on Donald’s request for specific performance. Thereafter Carolyn could sue Sam in an attempt to retrieve the interest in the land. Of course, there is an argument that the risk of such an inconsistent judgment is very low because of the law allowing transfer of land without the signature of both co-owners.

One could also make an argument under this section in terms of the contract claim standing alone. For example, Sam could prevail in Donald's suit and still face the prospect of being order to perform the contract in a suit brought by Carolyn should she decide to sue.

Joining Carolyn

Once you determine that Carolyn is a Rule 19(a) party, she should be joined. The issue in this case is whether Carolyn's joinder would divest the court of subject matter jurisdiction. It would. First, Carolyn would be added as a party-plaintiff. The claim she would be asserting (i.e., the same claim as Donald) does not arise under federal law, the U.S. Constitution or a treaty to which the United States is a party. Thus, there is no federal question jurisdiction under 28 U.S.C. § 1331.

There is also no subject matter jurisdiction under 28 U.S.C. § 1332. The Supreme Court has held that there must be complete diversity of citizenship in a case to qualify under section 1332. Thus, no person on one side of the "v" may have the same citizenship as any party on the other side of the "v". In this case Donald is a citizen of New York and Carolyn is a citizen of Illinois. This means that neither Sam nor Amy may be citizens of either New York or Illinois. Sam is a citizen of both Illinois, the corporation's principal place of business and Delaware, its state of incorporation. *See* 28 U.S.C. 1332(c). Amy is also a citizen of Illinois because both her principal place of business and state of incorporation are in Illinois. Therefore, there are citizens of Illinois on both sides of the lawsuit and diversity of citizenship would be destroyed if Carolyn were added.

Finally, subject matter jurisdiction would also be inappropriate under the supplemental jurisdiction statute, 28 U.S.C. § 1367. It is true that the claim asserted by Carolyn forms part of the same case or controversy as the one asserted by Donald. Thus, the requirements of section 1367(a) are satisfied. The problem is that jurisdiction is precluded by the operation of section 1367(b) that precludes supplemental jurisdiction over claims by or against parties joined under Rule 19. Accordingly, joining Carolyn would destroy subject matter jurisdiction in this case.

Rule 19(b)

Having concluded that Carolyn is a person to be joined if feasible and assuming that she cannot be joined, we must now address whether Carolyn is a person who is "indispensable" under the terms of Rule 19(b). In other words, we must decide whether the case should be dismissed or whether it is possible to proceed without Carolyn in the case. This determination is made based on a consideration of all relevant circumstance (i.e., in "equity and good conscience"). Rule 19(b) itself provides four factors that are most often useful in making the dismissal decision.

1. The first factor under Rule 19(b) is whether a judgment rendered without Carolyn

would be prejudicial to Donald, Carolyn, or Sam.¹ To begin with, there is a serious risk that Carolyn's interest will be harmed if she is not a party to the case. Carolyn has the potential to lose a portion of her interest in the land either on Donald's claim (because specific performance will allow Sam to get the land) or on Sam's compulsory counterclaim. Unlike other cases we have seen, it is difficult to discount this prejudice. We have no information that Carolyn knows about this case. Thus, we cannot say that she does not care. There also is no indications in the facts that Carolyn and Donald are attempting somehow to manipulate the system. As such, the court will likely be quite sensitive to the potential prejudice to Carolyn.

There is also a risk that Sam could face inconsistent obligations. The likely outcome of the present lawsuit will be that Sam gets his interest in the land no matter what. He will either get it after being ordered to perform based on Donald's claim or he will get on his own claim. Thus, Sam faces the prospect of a second suit by Carolyn over the ownership of the land.

2. The second factor under Rule 19(b) is whether there is any protective measures the court can impose as part of its judgment so as to reduce or limit the prejudice to Carolyn or Sam. It is possible for the court to limit the prejudice in this case. The idea would for the court to focus on monetary relief among the parties instead of ordering any type of specific relief. In that way, Carolyn's interest in the land would be secured because only money would change hands. So, for example, on Donald's claim the court could decline to enter specific performance and make Donald whole via the award of damages. Similarly, on Sam's counterclaim the court could award damages to Sam in lieu of ordering the transfer of the land. The willingness of the court to proceed in this fashion may be guided by the nature of the land. All land is deemed by the law to be unique. That being said, there are degrees of "uniqueness" that might make a difference here. The bottom line is that there are possible action for the court to take but they would be difficult.
3. The third factor under Rule 19(b) is whether a judgment rendered without Carolyn would be adequate in terms of the dispute between Donald and Sam. As discussed above in connection with Rule 19(a)(1), it would be. Thus, this fact negates consideration of this factor.
4. The fourth factor under Rule 19(b) is whether Donald will have an adequate remedy if the action is dismissed for failure to join Carolyn. This factor cuts

¹ One could also have evaluated the issues with respect to Amy. On these facts, it is less likely to find serious prejudice with respect to Amy based on Carolyn's absence. It was not inappropriate if you included some analysis concerning Amy.

against dismissal because if Carolyn cannot be served in Paraguay and Sam does not want to litigate the case in Paraguay, there is no place to get all the parties together.

You should have come to an ultimate determination on this difficult Rule 19(b) issue. So long as you explained and defended your answer, you should have been okay.

Answering

Sam could also answer the complaint and include the Rule 19 defense in the answer. If Sam decided to answer, or if he made a Rule 12(b)(7) motion which was then denied, the options discussed below are available to him. The overall concept here is that all of Sam's defenses in law or fact should be included in the answer. *See* Rule 12(b). As an offensive matter, Sam also has options for affirmatively asserting claims against Donald. Of course, no matter what he did, the requirements of Rule 11 concerning the motive for taking the actions and an investigation of the relevant facts and law would apply. Of course, Sam would need to respond to Donald's specific factual allegations by admitting them, denying them, or stating that he was without sufficient information to form a belief as to their truth or falsity. *See* Rule 8(b).

Affirmative Defense

Sam believes that he should prevail on Donald's claim in part because Donald defrauded him in connection with the contract. Sam may assert this as a defense. If he does so, however, Sam must assert this defense affirmatively. *See* Rule 8(c). If Sam does not assert the defense it will be waived. *Id.* In addition, Sam must plead this defense with particularity under Rule 9(b).

Counterclaims

Sam has two potential claims against Donald: (1) Breach of the contract; and (2) Fraud in getting into the contract in the first instance. Points that one could have made concerning these counterclaims include the following:

- Both counterclaims can be asserted in this case under Rule 13(a) and Rule 18. Both of these claims must be asserted in this case if Sam does not want to lose them because they are both compulsory counterclaims under Rule 13(a) in that they arose out of the same transaction or occurrence as Donald's claim against Sam. One could attempt to argue that the fraud claim actually is permissive under Rule 13(b) in that the evidence used in support of that claim will be quite different than the evidence used to support the breach of contract claim. The fact is, however, that in a situation such as this where a question is close, the consequences of not asserting the claim if it is later claimed to be compulsory (preclusion of the claim) are such that you would want to advise Sam to bring it now or take the very real risk that he will be precluded later.

- There is no problem in asserting both of the counterclaims even if one considers them to be inconsistent in some respects. Rule 8(e) allows inconsistent allegations/claims in pleadings. Of course, Rule 11's requirements are still applicable.
- The counterclaims must be made in the answer. *See* Rules 13(a) and 13(b).
- Sam can plead the breach of contract claim generally under Rule 8(a). The fraud claim must be pled with particularity under the terms of Rule 9(b). Thus, Sam will essentially need to plead the who, what, when, where, and why of the fraud claim.
- You would also need to ensure that there was subject matter jurisdiction over both counterclaims. Neither claim is based on the Constitution, a federal statute or a treaty to which the U.S. is a party. Thus, section 1331 does not provide a basis for jurisdiction. The parties are of diverse citizenship (Donald (NY) and Sam (IL/DE)). In addition, each claim has more than \$75,000 at issue. Thus, section 1332 is satisfied. Even if it was not, however, the requirements of section 1367(a) are met because the claims form part of the same case or controversy as the plaintiff's claims. Moreover, section 1367(b) does not preclude the exercise of supplemental jurisdiction.

Troy & Bill

Sam has two potential claims against Troy & Bill based on the facts of the case. First, Sam has a claim against Troy concerning what may be defective work on the basement of the mansion. Second, it appears from the facts that Troy & Bill and Sam are also engaged in an unrelated dispute concerning the equipment Sam believes Troy & Bill took from another job site. A proper analysis of whether Sam may assert these claims requires consideration of both the propriety of joinder under the Federal Rules as well as whether the claims are proper as a matter of subject matter jurisdiction. As discussed below, Sam will be able to bring both claims against Troy in this case as a matter of joinder, but he will be able to assert only one of them as a result of the principles of subject matter jurisdiction.

Joinder under the Rules

First, Rule 14(a) allows Sam to bring a claim against Troy & Bill asserting that its poor work on the mansion project is the cause of any damages (or the monetary equivalent of any work Sam is ordered to perform) that Sam may end up having to pay (or do) as a result of Donald's claim. It does not matter that Donald may not (depending on the relevant law) have a claim against Troy & Bill. The key is that Sam will be saying that if he is liable to Donald for breaching the contract because of a defective basement, Troy & Bill is liable to Sam for making the basement defective in the first place. Of course, a necessary risk of impleading Troy & Bill

is that it will be able to assert any claims he has against Sam, whether related to this project or not, as counterclaims under Rules 13(a) and 13(b).

Once Sam has been able to implead Troy & Bill on the claim concerning the basement, Rule 18 allows Sam to bring any other claims against Troy & Bill that he has. One such claim under the facts is the one concerning the lost/stolen tools.

Sam could also arguably joined Troy & Bill by using Rule 13(h) and Rule 20. Assuming Sam asserted a counterclaim against Donald for breach of contract, Sam could also add a claim of breach concerning Troy & Bill if you deemed the two claims to arise out of the same transaction or occurrence and have a question of law or fact in common.

You should also advise Sam that he should assert the Third-Party claim against Troy & Bill within 10 days of serving Sam's answer to Donald's complaint. Rule 14(a) allows such a claim to be made without leave of court if done within this 10 day window. If he missed this window of opportunity sam would need to obtain the court's permission to serve the third party complaint. Sam would need to either formally serve Troy & Bill under Rule 4 or to obtain a waiver of formal service under Rule 4(d).

Subject Matter Jurisdiction

Each claim in a federal court must have its own independent basis of subject matter jurisdiction. You should have analyzed each claim Sam wishes to assert against Troy & Bill. The first claim is that Troy & Bill caused the damage which Donald now claims. This claim is one for breach of contract under state law. As such, 28 U.S.C. § 1331 does not provide a basis for jurisdiction. The claim fairs better under 20 U.S.C. § 1332, the diversity statute. Sam is a citizen of Illinois. Sam is a citizen of Illinois. Both Troy and Bill are citizens of Indiana. It is irrelevant for purposes of diversity that the Troy & Bill partnership has its principal place of business in Illinois. The principal place of business analysis is only relevant for corporations. Thus, there is complete diversity of citizenship. The second requirement for jurisdiction under section 1332 is that there be more than \$75,000 in controversy, exclusive of interests and costs. That is satisfied here given the size of Donald's claim and the nature of Sam's claim against Troy & Bill. Although diversity is a better form of jurisdiction because it does not allow the court discretion to decline to hear the claim, there would also be supplemental jurisdiction over this claim. Under 28 U.S.C. § 1367(a) this claim forms part of the same case or controversy as does Donald's claim against Sam. In addition, the exception in section 1367(b) does not apply because this is not a claim by a plaintiff.

As to the second claim, it is also not a federal question under section 1331 in that it is based on state law. Under section 1332, the same analysis concerning the citizenship of the parties applies. The amount in controversy for this claim is \$75,000 exactly. This would seem to suggest that it could not be brought because the amount in controversy does not *exceed* \$75,000. In fact this fact does not pose a problem here because a single plaintiff (Sam) is allowed to add together (aggregate) the value of all claims it has against a single defendant (Troy

& Bill). Thus, the amount in controversy requirement is satisfied. To be complete, you could also have noted that there would be no supplemental jurisdiction over this claim under section 1367. This claim does not form a part of the same case or controversy as any other claim in the action. Therefore, the requirements of section 1367(a) are not satisfied.

Amy

Sam's preferred result with respect to Amy is to get her out of the lawsuit if it must continue. The way in which to at least make this attempt is to claim that Donald cannot properly sue Amy and Sam together in this action under the terms of Rule 20(a). In other words, Sam could assert misjoinder under Rule 21. Under Rule 20(a), Donald may sue Sam and Amy together if (1) his claims against them arose out of the same transaction or occurrence or series of transactions or occurrences and (2) there is any question of law or fact in common between or among the claims.

It is a close question under Rule 20 in this case. You should have been sure to analyze both prongs of Rule 20 and defended the result you reached. Some points to have considered were how broad "transaction" should be considered in this case. In other words, is each unrelated contract separate or is the entire parcel taken together as single "transaction or occurrence." You could have used some of the factors discussed in *Plant v. Blazer Financial* to make your analysis. In addition, you should have addressed what would be the common factual or legal question here? We may not have enough information to make a determination. For example, if there is a common problem in the soil that caused both the pool problem and the basement problem the requirement could be met. All things being considered, it seems there is a strong argument for misjoinder here.

Assuming misjoinder was found, you should have advised Sam that the consequence is not the dismissal of the entire action. Rather, Rule 21 provides that the action should essentially be split into two. Thus, there would be one action of *Donald v. Sam* and a second one that is *Donald v. Amy*.

Assuming that the court did not agree that there was misjoinder here, you should have advised Sam about how to proceed. First, all would not necessarily be lost in terms of splitting the case. The trial court would have discretion under Rule 20(b) to sever the claims against Sam and Amy for trial. You would need to attempt to convince the judge to do so before trial.

Sam also has a claim against Amy that he would like to assert in this case if it goes forward with both Sam and Amy as defendants. That claim concerns money that Amy allegedly owes Sam on other projects. Sam will not be able to assert this claim against Amy in this case. Rule 13(g) provides that Sam may assert a crossclaim against Amy only if it arises out of the same transaction or occurrence as Donald's claim against Sam or any counterclaims asserted in the case. That condition is not satisfied in this case so the crossclaim may not be brought.

Moreover, there would be no subject matter jurisdiction over the claim. There is no federal question. Amy and Sam are both citizens of Illinois, thus negating diversity jurisdiction. Finally, there is no supplemental jurisdiction because the claim does not form the same case or controversy of any other claim in the action.

END OF ANSWER TO ESSAY QUESTION #1

Question #2

You were the judge in this question which meant that it was critical that you actually decide Abbott's motion. In addition, you should have limited your analysis to personal jurisdiction. Any other information would have been wasted effort.

Long Arm Statute

The first step in the personal jurisdiction analysis is to determine if California's long arm statute allows this claim to proceed in California state court. The California long arm statute extends to the full extent of the United States Constitution. Therefore, if the Court determines that jurisdiction over Abbott is proper under the Constitution, the requirements of the long arm statute will also be satisfied. If, on the other hand, jurisdiction is not proper under the Constitution, it would not be proper under the long arm statute.

Constitutional Analysis

The Court must determine whether the exercise of personal jurisdiction over Abbott in California 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 Abbott could be subject to personal jurisdiction in California under the terms of the Constitution: general jurisdiction and specific jurisdiction.

It might also have been worthwhile noting that this is not a case in which there is a forum selection clause. There is a clause in the Abbott/Costello contract that requires that California law apply to the interpretation, etc. of the agreement. This fact may be significant in the specific jurisdictional analysis, discussed below. This contractual provision does not, however, require that all suits be brought in California. *Compare Carnival Cruise Lines*

General Jurisdiction

Abbott would be subject to general personal jurisdiction in California if he was a citizen of that state. It is uncontroverted in this case that Abbott is a citizen of New York State. Abbott could also be subject to general jurisdiction in California if he had engaged in systemic and continuous activities in the state. There is no evidence in the record of any such continuous or systemic activity in this state. Indeed, the facts are silent as to any dealings Abbot had with California beyond entering into the contract with Costello that is the subject of the instant litigation.

Specific Jurisdiction

The issue in specific jurisdiction is whether Abbott's contacts with California are so closely related to the Costello's claim that it is constitutional to assert jurisdiction over the him in this case. In the words of the Supreme Court, the test is whether exercising jurisdiction over Laces in California 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 Abbott's contacts with California are sufficient under the Constitution to support jurisdiction, or in the words of the Court whether they are "minimum contacts." Costello's claim is that Abbott breached the agency agreement. The question is whether Abbott's contacts with California as they relate to that breach of contract claim are such that he could reasonably foresee being sued in California on the claim. *World-Wide Volkswagen*. Alternatively, you could phrase the question as whether Abbott has purposefully availed himself of the privilege of conducting business with California.

Burger King provides the relevant framework for assessing the jurisdictional issues. *Burger King* essentially outlined that the issues to be considered concern the (1) negotiation process, (2) the language of the contract itself, and (3) the post contractual dealings of the parties. The purpose of looking at the issues is to consider whether Abbott could have reasonable foreseen being sued in California on the claim.

You should have recognized that merely entering into a contract with a citizen of California is not standing alone enough to establish personal jurisdiction over the contracting party. That being said, the existence of a contract with an in-state entity is a very strong contact in the analysis. The reasons is that by its very nature the contracting process concerns voluntary activity. As we discussed in class, voluntary activity directed at a given forum is in many respects at the heart of the jurisdictional equation. Nonetheless, this is a closer case in terms of minimum contacts than most contract matters. The key is that you should have explained your reasoning. I have set out below some things you may have wished to discuss.

In terms of contractual negotiations, the contacts with California are fairly strong. After receiving the contract from Costello, Abbott engaged in negotiations with a California corporation concerning the contract. It is immaterial that the negotiations took place via email as opposed to in person or by some other means. The negotiations reflect a voluntary action directed to California. The electronic nature of the negotiations are reflective of modern day practice and would likely not be deemed to have lesser jurisdictional significance.

It is true that Abbott did not initiate the contact with Costello. In fact, Costello came into the picture only after Foxx entered into a deal with become affiliated with Costello. In that sense

this case is like *Hanson*. If the fact pattern had stopped at this point, there would be a strong argument that Abbott did not display the requisite level of voluntary action to warrant jurisdiction. In other words, we would have been dealing with what amounted to a unilateral action of Costello. But Abbott did not simply sit back. Instead, he voluntarily chose to enter into negotiations with Costello and eventually signed a contract. These facts take outside of the *Hanson* paradigm.

The terms of the contract also weight in favor of finding minimum contacts. First, the contract is with a California entity and was entered with the advice of counsel (or at least the opportunity of obtaining such advice). Second, the contract is a long term one. Under paragraph 3, the contract is for an indefinite term. It is true that either party has the ability to terminate the agreement on 6 months. However, this “out” does not alter the potentially long term nature of the deal. The Supreme Court highlighted the long term nature of the deal at issue in *Burger King* as support for its holding there. Finally, as in *Burger King*, this contract expressly provides that California law will govern the interpretation, etc. of the agreement. This factor is yet another indication that Abbott could have reasonably foreseen being sued in California under the agreement. Of courser, there are also non-California issues in the agreement concerning the contemplated course of performance. Those matters are discussed below.

Matters become somewhat less clear when one considers the post-execution dealings of the parties. The course of dealing contemplated under the agreement was followed. Therefore, Abbott dealt only with Foxx in New York as Costello’s agent. It appears that there was no California connection contemplated by the parties after execution. Indeed, there is no indication that any service was to be performed in California, even transmitting payments. This fact could be significant in the jurisdictional equation. While I suspect that a court would still find there to be minimum contacts here, it is by no means a foregone conclusion.

Fairness Factors

The second step in the specific jurisdictional analysis is to consider whether the exercise of jurisdiction over Abbott 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*. As *Asahi* made clear, the fairness analysis is an independent part of the jurisdictional calculus.

The first, and primary, factor is the burden on the defendant. There would certainly be a burden on Abbott to litigate in California. The issue is whether that the burden in this case would be an undue one. We do not know much about Abbott’s financial condition, but there is nothing to suggest he is in a particularly vulnerable position. Moreover, we are assuming that there are minimum contacts here. Thus, Abbott will have a heavy burden to justify a burden to be called to account for actions in California when he had the ability to enter into a commercial agreement there. Moreover, there is no issue concerning an injury that would prevent Abbott from traveling. In fact, the injury Costello claimed is one that actually gave more money to Abbott than he would otherwise have had.

partial common language.

Another fairness factor is California's interest in this litigation. While California has an interest in protecting its citizens (i.e., Costello), it strikes me that this interest is at its weakest in a commercial dispute such as this one. California could also assert an interest in adjudicating this dispute because California law is at issue. Finally, one could argue that California has a higher interest in adjudicating this case because the entertainment industry, something quite important to the economic life of the state. This factor leads to uncertain results in the analysis.

A further factor is the plaintiff's interest in obtaining convenient and effective relief in California. The plaintiff certainly has such an interest in this case, but that is almost always the case. It seems to me that this is not a strong case for protecting Costello's right to sue in a particular strong fashion. After all, Costello structured the transaction at issue here to require performance in New York. Moreover, under *Carnival Cruise Lines* it could have used a forum selection clause if a California forum was truly significant.

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. The one feature that could tip them – at least slightly – in favor of the defendant is the presence of most witnesses and other evidence being in New York or New Jersey.

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.

END OF ANSWER TO ESSAY #2

Section II

Question #1

The correct answer is E. None of the statements set forth in answers A through D is correct. A is not correct because while George's service was improper, *see* Rule 4(e), John waived his defense of improper service by not including it in his initial pre-answer motion. *See* Rule 12(h)(1). B is not correct because Rule 18 allows joinder of all claims without regard to a transactional connection and nothing in Rule 15 requires such a connection in this case. C is incorrect because Rule 15 affords George the opportunity to amend the complaint without leave of court or consent from the other party once before a responsive pleading is served. The motion for a more definite statement is not a pleading. *See* Rule 7(a). Finally, D is not correct because affirmative defenses are to be asserted in a pleading, here an answer. Since the motion for a more definite statement is not a pleading, there was no waive of the defense of "release."

Question #2

The correct answer is A. John's lawyer has violated Rule 11(b)(2) by asserting a claim that is not warranted by existing law or a good faith argument for the modification of existing law. Under Rule 11(c) both John and his lawyer may be sanctioned for that violation. Option B is incorrect because while Rule 11(c)(2)(A) precludes the imposition of a monetary sanction against John under these circumstances, it does not preclude the imposition of all sanctions. Option C is incorrect because the option to identify matters as likely having evidentiary support after further investigation is limited to factual matters. *See* Rule 11(b)(3). Option D is incorrect because of the "separate motion requirement." *See* Rule 11(c)(1)(A). Option E is incorrect because the Court may initiate a Rule 11 inquiry on its own. *See* Rule 11(c)(1)(B).

Question #3

The correct answer is A. Rule 30(d)(1) makes clear that George may state any objections to questions at the deposition, thus making answer D incorrect. That rule also makes clear, however, that George's attorney may not properly instruct the witness not to answer a question unless it is to enforce a court order, seek a protective order, or preserve a privilege. Since none of those criteria is met in this instance, options B, C, and E are all incorrect.

Question #4

The correct answer is E. Because John does not have the burden of production at trial on the good faith issue, he may satisfy his burden as the movant in two ways: submitting affirmative proof on the issue or showing an absence of evidence in the record on the issue. Either approach will shift the burden to George. *See Celeotex*. Option A is incorrect because there is no requirement that a party defer filing a summary judgment motion until after discovery has been completed. Option B is incorrect because it describes a standard for a motion to dismiss for failure to state a claim under Rule 12(b)(6).

Question #5

The correct answer is C. Rule 26(a)(1)(B) requires automatic disclosure of documents only if “the disclosing party may use [them] to support its claims or defenses, unless used solely for impeachment.” The only document that fits in that category of the three described in the question is the design packet. Both the report and the complaint listing are harmful to Acme’s case.

Question #6

The correct answer is B. Rule 26(b)(1) provides that information is discoverable if it is not privileged and is relevant to a claim or defense of any party. All three documents are relevant to the plaintiff’s claims or the defendant’s defenses and none of them is privileged. It does not matter here – as opposed to the disclosure that is the subject of Question #4 – whether the documents will be used in support of Acme or against it. Option E is not correct because, unlike interrogatories, there are no limits imposed under the rules concerning the number of document requests that may be issued by a party. *Compare* Fed. R. Civ. P. 33 *with* 34.

Question #7

The correct answer is D. Acme may not make a renewed motion for judgment as a matter of law because it did not make a motion for judgment as a matter of law at the close of all the evidence. *See* Rule 50(b). Thus, Option B is not correct. There is no similar requirement concerning the motion for a new trial. Therefore, Option C is not correct. Option A is not correct because the two motions may, and often are, both made after a verdict. Indeed, Rule 50(c) gives a court direction as to how to rule as such motions made in tandem. The motion for a new trial should be granted because there is no evidence in the trial record concerning a defect in the product. Therefore, the verdict is against the great weight of the evidence.