

Sample Answers

Civil Procedure Midterm

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NOTE: The answers contained herein are samples and samples only. They are disjointed from reality in that they (or at least some of them) exceed what anyone likely could produce in the amount of time allotted.

Nevertheless, the answers also are not “ideal,” “model,” or “perfect.” Different portions of the questions could be approached in different ways, and the key is not necessarily the conclusion reached but the *analysis* undertaken.

Students thus will be well advised not to grasp the sample answers as talismans, but to see them as study tools. The prudent student will first assess the *questions* and use them as a way to test her own understanding of the material. Only after this would the student review the sample answers provided here, which can be used to identify potential areas for improvement.

Essay

Sample Answer:

Admission of Hiro-Ando Conversation

Conclusion: The information is not privileged so the judge's ruling is likely correct and should be affirmed.

Analysis: From the facts given, Ando raises AWP only as the objection at trial, but note that he previously raised both A/C and AWP in his objections to discovery, and if acting prudently may well have also relied on A/C and not AWP alone in arguing before the judge. Thus, each doctrine is addressed in turn.

A/C privilege consists of (1) a confidential communication (2) between attorney and client (3) for the purposes of giving or obtaining information to give legal advice.

AWP is (1) information prepared in anticipation of litigation that (2) reflects the thoughts or mental impressions of the attorney and (3) was created by the attorney or under the attorney's direction, and is protected unless undue hardship is shown.

Here, the information falls under neither protected category. Most crucial, any privilege was waived. The waitress clearly heard the conversation, and thus it was not confidential or protected from public disclosure. Having been disclosed once, Ando cannot rightly protect it from admission in trial (or from discovery). Not only is this clear from the facts, but Ando should have expected it based on where he was having the conversation—a busy diner. Indeed, this was a rather irresponsible act on his part, likely bordering on malpractice.

Moreover, the information arguably does not fall under A/C privilege, even if not waived. There is a real question whether Ando is actually giving his client legal advice in this situation. He is friends with Ando and that is the purpose of their lunch. Thus, one might conclude that Ando was not giving legal advice at all, but merely commenting in his role as friend to Hiro about some trouble his company could be in. That seems to be the gist of the conversation, particularly given Hiro's lack of stature or sway in YI.

Second, there is a question of whether Hiro is even the client. While the SCT in *Upjohn* discarded the former "control group" test, there is no obvious reason here why Ando should be representing Hiro even as employee of the company. As just noted, Hiro has essentially no

responsibility within the company, and nothing about his responsibilities fall within the scope of the incident. That is somewhat different from the *Upjohn* scenario, where the corporate employees were directly involved in the investigation in question. One might nevertheless make an argument that since Hiro is an employee of the company, this prong is satisfied. However, because Ando does not appear to be giving legal advice, and because the conversation does not appear to be confidential (occurring in a diner), even if the client prong of the test is satisfied, there still seem to be problems with affording this conversation privilege. This all thus militates against a finding of privilege, though, again, the real key here is waiver.

With respect to AWP, there is a slightly stronger argument that Ando's statements would be protected. Though not shrouded in legal jargon, they need not be to qualify. One difference between A/C and AWP is that A/C is supposed to be actual advice (or a communication to seek information in order to provide advice), but AWP covers anything that merely *reflects* the attorneys mental thoughts and impressions. Here, what Ando is saying clearly reflects his thoughts and impressions as YI's attorney about their case, in connection with the litigation that has begun, even if it is not *advice per se*. Ando says as much when he compares this case to others. And, potentially, this could still remain protected if he had only communicated it to Hiro, because, as discussed above, there is at least a colorable argument that he was communicating it to the corporate entity rather than Hiro as a friend. But, again, regardless of whether this test is satisfied, waiver destroys. And waiver controls.

Punitive Damages

Conclusion: The damages award is likely excessive and should be remanded to the lower court for further proceedings to determine what it should be reduced to.

Analysis: The damages award in this case raises a clear Due Process question under *State Farm*. Only \$5M in compensatory damages were awarded, but \$23M in punitives were awarded. Under *State Farm*, the propriety of a punitive damages award hinges on three things: (1) the reprehensibility of the defendant's action, (2) the reasonableness of the award as measured by the ratio of punitives to compensatories, and (3) the reasonableness of the award as measured by the ratio of punitives to potential civil penalties for the same type of action.

With respect to reprehensibility, there does not seem to be much evidence here. YI's effort to keep its employees health and fit is laudable. This type of accident has happened a couple of times in the past at the Las Vegas, which might give rise to a claim of recklessness for failure to fix the roof (or were the prior falls caused by something else, such as the fault of the deceased? – this would reduce the level of reprehensibility even

more, arguably), and thus, punitive damages. But this is far afield from the type of behavior at issue in *State Farm* and other suits, where the defendants intentionally harmed or deceived the plaintiffs. This arguably creates a beginning presumption that the award of punitives, if any, should be on the lower end of the spectrum rather than toward the higher end.

Further, the evidence about what happened in L.A. and Tokyo is irrelevant under *State Farm* and cannot be used for the Las Vegas case because it is outside the jurisdictional limits of the state. This is an important point and one of the primary rules of law *State Farm* stands for.

With respect to the P:C ratio, the award here is out of whack. The SCT said in *State Farm* that only in exceptional cases should the ratio exceed 4:1, and only in the rarest of cases can it constitutionally exceed 9:1. Here, it is 4.6:1, which is by definition above the normal limit, and far higher than one would expect given the type of reprehensibility evidence in question, as discussed above. Thus, it is unlikely that any violation of the 4:1 rule will not be tolerated. Of course, one might argue that the behavior is very reprehensible given that there are deaths involved, but a test that measures reprehensibility by *results* or *effects* rather than *behavior* seems somewhat hard to defend. Punitive damages are largely about deterrence, and it is unclear what behavior of YI's really needed to be deterred here: We do not know why the other deaths occurred, or even if they were YI's fault. So without more evidence or other stated assumptions, it seems hard to make this leap, particularly given (1) the apparent lack of intentional behavior, as noted above, and (2) an injunction that seems to solve the problem anyway.

Finally, we do not know much about what kind of civil penalties are available for failure to properly maintain your rooftop, but we can likely imagine that they are well below \$5M. It is hard to imagine a municipal entity with the authority to impose fines that high for what at most might be building code violations. So, though we are not sure, this could well be another limiting factor on the damages award.

The Injunction

Conclusion: The injunction is likely proper and should be sustained on appeal.

Analysis: An injunction may issue when (1) a party will suffer irreparable injury unless the injunction issues; (2) the threatened injury outweighs whatever damage the proposed injunction may cause the opposing party; (3) the injunction, if issued, would not be adverse to the public interest; and (4) there is a substantial likelihood of success, or actual success, on the merits.

The last three of these elements are easily satisfied. The jury found against YI, so there is success for plaintiff on the merits.

The judge also seems to have narrowly tailored the relief awarded, giving YI two different options to comply, so it is unlikely that spending some money to retrofit its roof for safety or to move the venue of its calisthenics sessions would outweigh the possibility of saving lives. In fact, YI may have to do this now as a matter of code violation, assuming that this incident has come to the locality's attention. The second and third factors therefore should be satisfied.

The only real question, then, is whether the party will suffer irreparable injury. The deceased worker's estate is the complainant here, but the worker is deceased. What harm could he or his estate continue to suffer? Probably what the court sees here is a psychological harm / benefit that at least this one worker will not have died in vain, so that may satisfy this requirement. Money may well compensate the estate, and the line between whether there can ever be irreparable harm and whether \$5B, for instance, could replace this injunctive relief is blurry. But the line is always blurry. The court has the power to grant equitable relief, and even the small harm identified here might well justify it in this case.

One might also question whether the judge could raise this issue sua sponte. This does seem a bit odd that the judge would inject herself into the proceeding in this way, but there is no clear reason why what the judge has done, given that it appears correct on the law, should be overturned on this ground alone. Indeed, most likely the complaint, even if asking only for money in general, also asks for "all other relief" that the court "may deem just and equitable." That is standard boilerplate on most complaints.

Rule 11 Sanctions

Conclusion: This ruling was erroneous and should be reversed.

Analysis: This ruling by the judge borders on the nonsensical. All Rule 11 requires is that attorneys not make arguments or sign pleadings (1) for an improper purpose, (2) in a way not warranted by existing law or a nonfrivolous argument to extend it, and (3) if evidentiary, if an allegation or denial thereof has evidentiary support.

There is absolutely no evidence here that Ando was making his objections for an improper purpose, and factual allegations are not in question (this is a question of law that has been raised).

One potentially could claim that Ando based his objection without legal support, but the real key is waiver, and he may not have necessarily known that Claire heard him. He thus has at least a colorable argument that his conversation was protected because he was making it to an employee of the company he represents, as discussed above. Indeed, it is

odd that the court first denied the motion to compel, but then ordered sanctions under R. 11. This itself casts serious doubt upon the judge's decision on R. 11.

Moreover, these R. 11 sanctions deal with the motion to compel, and Ando had numerous other and perfectly valid arguments for why there should be no disclosure there, including, for example, those he made earlier that the discovery was overly broad, unduly burdensome, and unreasonably cumulative.

That the judge held the sanctions against not only Ando but also his client and his law partners is expressly allowed under the rule. The judge also gave Ando time to respond, so that is not an issue. And the judge can raise the question sua sponte under R. 11.

The judge lacks the authority to hold Ando's wife liable, however. Moreover, though R. 11 sanctions are intended as a penalty, and even if R. 11 sanctions were in order, this penalty may be too much here since the rule requires the sanctions to be tailored to the egregiousness of the harm and that harm does not seem to be particularly great here. That is another reason for reversal.