

Sample Answers

Civil Procedure Final Examination

Fall 2008

Professor Davies

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 Question

To: Lisa Marie Faith
Fine Art Events, Inc.

From: Exam No. 9999999

Re: Potential Appeal in *Paine Lovey, Inc. v. Faith*

You have asked me to advise you concerning your ability to appeal, and the advisability of so appealing, the judgment rendered in *Paine Lovey, Inc. v. Faith* in the United States District Court for the District of Utah. The sum of my advice is as follows: first, you may appeal to the Tenth Circuit; second, you should do so; and third, the grounds you should raise on appeal are (1) the constitutionality of the damages awarded, (2) the dismissal of your counterclaims, and (3) the trial court's decisions as to personal jurisdiction, venue, and forum non conveniens. However, the value of these latter grounds is likely primarily strategic in seeking to settle with Paine Lovey, Inc. ("Paine Lovey") and LaSteven Lovey ("Lovey"). Only the challenges to the punitive damages award and the dismissal of your counterclaims have independent substantive merit.

The remainder of this memorandum explains my advice and provides the analysis supporting it.

I. Appealability

The first question that must be asked before any appeal is lodged is whether an appeal is permissible. The general rule is that only final judgments may be appealed, with some limited exceptions (*e.g.*, collateral order rule doctrine, practical finality, interlocutory appeals, etc.). Here, none of the exceptions apply, but the court's judgment is clearly final and appealable. The judgment entered on the verdict resolves all of the merits of the case and is not open to further proceedings at the district court. Indeed, entry of judgment on a verdict is the prototypical final judgment. Thus, under the applicable statute, you have an appeal as of right to the United States Court of Appeals for the Tenth Circuit, in which the District of Utah sits. *See* 28 U.S.C. § 1294(1).

II. Grounds for Appeal

The court ruled against you at virtually every possible turn, and each of these rulings is a possible ground for appeal: the court's denial of your Rule 12 motion (personal jurisdiction, venue, and forum non conveniens), and the court's granting of Paine Lovey/Lovey's Rule 12 motion (dismissal of your counterclaims). In addition, you have strong grounds to challenge the amount of the verdict, which I would advise doing. The remainder of this section takes up each of these possible grounds for appeal and discusses why I would (or would not) suggest basing the appeal on them.

A. Substantive Grounds for Appeal

The various grounds for appeal that I would advise bringing fall into two groups—those that have independent substantive merit that could result in overturning the judgment entirely or providing a more favorable result, and those that are more procedural in nature but that could strengthen our bargaining position with Paine Lovey/Lovey to reach a potentially beneficial settlement agreement. Here, I address the two substantive grounds: the court’s dismissal of your counterclaims and the amount of punitive damages. There is also a minor substantive argument based on the terms of the injunction. The procedural grounds for appeal are discussed in the following section.

1. Dismissal of counterclaims.

Likely our strongest argument on appeal is that the trial court erred when it dismissed your counterclaims in libel and slander. Although the substantive merits of those claims are beyond the scope of this memorandum (and are assumed to be valid herein), any reinstatement of these claims should substantially strengthen our bargaining position. From a procedural perspective, it is likely that the Tenth Circuit will reinstate them.

Two grounds were pressed before the trial court for dismissal of your counterclaims; neither has merit. First, Paine Lovey/Lovey argued that the counterclaims should be dismissed based on *res judicata*. Second, they argued that the counterclaims were improper and beyond the case’s scope.

Res judicata clearly does not apply in this case. To establish *res judicata*, or claim preclusion as it is known in the modern terminology, three elements must be established: (1) there must be perfect mutuality of parties, that is, the original and subsequent litigation must be between the same parties, (2) there must be an identity of claims, that is, the claims subject to preclusion must be those that were raised or could and should have been raised in the original litigation, and (3) there must be a final judgment on the merits. None of these requirements—let alone all three of them—were met here. As the facts reveal, neither Paine Lovey nor Mr. Lovey had even heard of Dr. Faith or FAEI prior to the lawsuit in Utah, meaning there could not have been a final judgment in prior litigation between them of any kind. Accordingly, there was no prior final judgment between the parties that could be relied upon for claim preclusion purposes, so the doctrine cannot apply. If the trial court relied on this doctrine to dismiss the counterclaims, it was clear error to do so.

Likewise, the court should not have dismissed the counterclaims on a theory that they would too complicate the proceeding. Notions of distraction and complication certainly are factors that courts may properly weigh in crafting the procedure for resolving a case. In the instance of amendments, for example, a court might decline to grant leave to add a permissive counterclaim late in a case if adding the claim will too complicate the proceeding or prejudice the other party.

Where, however, the counterclaim is being asserted in the first instance along with a timely answer, the court's discretion is more circumscribed. A compulsory counterclaim is one that arises out of the same transaction or occurrence as the original claim. That was not the case here, as the original claims lodged by plaintiffs arose out of Dr. Faith's and FAEI's alleged misuse of the Seven Habits marks, but your counterclaims arose out of what Ms. McTwilly said about *Evening*. The counterclaims at issue are thus permissive, and as Rule 13(b) states, "A pleading may state as a counterclaim against an opposing party any claim that is not compulsory." Nothing in this language limits what counterclaims a party may lodge in a suit. Rather, it reflects the Federal Rules' strong policy of seeking substantive resolutions of disputes between parties and, importantly, the notion of fairness that once a party is hauled into court, it should be able to resolve any grievances it might have against those doing the hauling. Thus, Rule 13(i) further provides for trial courts to order separate trials on permissive counterclaims that are too distracting or disjointed from the original claim, or to otherwise avoid confusion or prejudice. If it believed the counterclaims would too complicate the case, invoking this Rule 13(i) authority would have been the proper course for the court below to deal with the counterclaims, not dismissing them altogether.

Indeed, we could argue on appeal that even this kind of procedural separation was not necessary, since, even though the claims and counterclaims arose out of different facts, they are logically related in that they involve the same general subject matter (*Evening*). In any case, even if that argument does not prevail, certainly dismissal was not proper. There is a wide difference between structuring proceedings, in which trial courts have great discretion, and denying a party its substantive rights, in which there is no discretion. Here, the trial court had the less intrusive option of separating the proceedings, but it took the more drastic measure of dismissing our counterclaims altogether. Even if it did so without prejudice so that we may refile those claims, that was error. And if it dismissed with prejudice, then it was more erroneous still.

As an alternate ground to defending the trial court's ruling, plaintiffs might argue that the counterclaims were improper because they require adding another party, McTwilly, who cannot or should not be added. But there should not have been any problem with adding McTwilly. Rule 13(h) specifically allows for this when lodging a counterclaim, and there is a very strong argument here that McTwilly is a necessary and indispensable party to the case under Rule 19, since she is the one who actually made the allegedly defamatory comments, while Paine Lovey would be liable only vicariously for the actions of its agent (McTwilly). Moreover, it does not appear that her addition creates any problem with respect to venue or jurisdiction, because subject matter jurisdiction is based upon diversity, and McTwilly is likely a resident of Utah (working at Paine Lovey headquarters) and (I assume) the alleged damages for the defamation claims exceed \$75,000. The analyses for venue and personal jurisdiction do not change by adding another party from Utah.

2. Punitive damages award.

A close second as our strongest argument is the punitive damages award entered by the trial court. The Supreme Court has long held that the Due Process Clause of the Fourteenth Amendment limits the amount of punitive damages that may be awarded in any case. The leading case is *State Farm*. There, the Court enunciated a two-step rule: It said that courts must evaluate the constitutionality of punitive awards by examining 1) the reprehensibility of the behavior being punished, 2) the ratio of punitives to compensatory damages, and 3) the ratio of punitives to civil penalties that could be imposed for the behavior in question. However, although the Court went to great pains to emphasize that this was a flexible test adaptable to numerous situations, it also indicated that punitive damages typically cannot exceed two different levels of ratios to general damages: as a default rule, a 4:1 ratio of punitives to compensatories if the economic damages awarded are small (or a 1:1 ratio if the economic damages are large), and as an exceptional rule that applies to “few” cases, a 9:1 ratio of punitives to compensatories.

Here, the damages awarded are precisely at the 4:1 boundary. Thus, while plaintiffs will certainly argue on appeal that the award should be deemed presumptively constitutional, we also have a strong argument that the punitive award should not even approach the 4:1 level, especially since the amount of economic damages awarded is so high (\$3 million). Given that fact, we have a strong argument that the ratio of punitives to compensatories should not exceed 1:1—but it does fourfold. Most critical, the behavior in question is hardly reprehensible. The kinds of behavior the Supreme Court has recognized as reprehensible typically are not for economic harm, but physical harm or intentional acts. At most, Paine Lovey/Lovey can claim economic harm here. Nor is there other evidence that the activities complained of showed a disregard for the safety of others, repeated harms, trickery, efforts to exploit the financially vulnerable, or the like. On the contrary, Dr. Faith was merely engaging in the normal, socially beneficial work of a playwright. There is nothing reprehensible or culpable about the behavior at all. Even if the behavior is seen as intentional, it is intentional only in that it would be parodying the Seven Habits work—in short, a legitimate artistic endeavor, not a dangerous or “culpable” one as *State Farm* requires. In fact, given this, we likely have an argument on appeal that *no* punitive damages should have been permissible, because there was nothing to punish. And, certainly, we can claim with substantial support that the punitive award imposed should not reach the outer limit of what the Supreme Court has deemed permissible in normal cases.

3. Terms of injunction.

Finally, there is another substantive argument we might raise that the injunction is overly broad. Injunctions are proper where 1) the plaintiff has suffered irreparable harm, 2) that harm outweighs any harm that will be done to the defendant by an injunction’s issuance, 3) issuance of the injunction will not be adverse to the public interest, and 4) the plaintiff has a substantial likelihood (for a preliminary injunction) or actual (for a permanent injunction) success on the merits. Here, the court ruled that the merits of the case go against us, but we have an argument that the terms of the injunction are too broad

even if issuance of *an* injunction of some sort was proper: Presumably, the substantial economic and punitive damages awarded should more than compensate plaintiffs for whatever small amount of harm our local play could possibly do to a multinational brand. Moreover, it is not that we need to cancel the show entirely; a proper injunction would only make us remove the material that is dilutive of plaintiffs' intellectual property rights. However, whether we make this argument depends on the extent to which the "Seven Habits" marks are integrated into the play and its advertising. Given that they are the basis of the play's title, and thus one of the very points of the play is to satirize or parody the Seven Habits franchise, it may be too difficult to disentangle the infringing material from the play and advertising to make this argument.

(There is also a substantive argument that, as a matter of law, the play and advertising do not create the kind of violations the complaint alleges. Even assuming that we preserved this argument by raising it as a defense in the answer, however, the fact pattern does not give enough information to evaluate it either procedurally or as a matter of substantive law.)

B. Procedural Grounds for Appeal

In addition to the substantive grounds above, we can challenge on appeal three aspects of where the case was tried: personal jurisdiction and venue in two different ways. These arguments are admittedly weaker than the substantive grounds above, and even if we prevail on them, all they allow us is a new trial in a different place. However, such a move would put us in a better bargaining position, as it might make Paine Lovey/Lovey more willing to negotiate a settlement rather than go through another proceeding, with all its attendant costs and risks that they will not prevail. So, even though these are not the strongest arguments, we should at least consider pressing them on appeal.

1. Personal jurisdiction.

The first argument is that the court lacked personal jurisdiction—the power to exercise jurisdiction over Dr. Faith and FAEI as defendants. The analysis for determining whether a court has personal jurisdiction proceeds in two steps. First, the court must have jurisdiction under the state's long-arm statute (if the defendant is not a resident). Second, exercise of the jurisdiction must not violate the Due Process Clause of the Fourteenth Amendment. The purpose of this latter test is to ensure that, procedurally, the burden of a lawsuit on a defendant is not too heavy, measured by how many and what kind of contacts the defendant has had with the forum state (the state where the lawsuit is being heard). Certain kinds of contacts, actual or virtual, have been deemed sufficient in and of themselves to satisfy due process. If a defendant is served with a lawsuit in the forum state, that is sufficient, as is if the defendant consents to the lawsuit being prosecuted there, or if the defendant has so many contacts with the jurisdiction that s/he should expect to be sued there for any kind of lawsuit (general jurisdiction). If none of these three criteria are met, a fuller, transaction-specific analysis must be undertaken pursuant to the Supreme Court's decision in *Burger King* and its progeny.

Here, the long-arm statute analysis is straightforward, and likely not a ground we will want to press on appeal. The suit was filed in Utah, so Utah's long-arm statute controls. Although Utah's statute is enumerated—it provides for specific categories of personal jurisdiction over non-residents rather than extending to the full extent of the Due Process Clause, as California's statute does—the harm complained of here seems to clearly fall within one of the statute's enumerations.

Section 78B-3-205(3) of the Utah Code provides for long-arm jurisdiction over acts by nonresident that cause “any injury within this state whether tortious or by breach of warranty.” The alleged violation of Paine Lovey/Lovey's marks would seem to clearly fall within this category, as the company is based in Utah (as is Mr. Lovey) and thus would suffer the alleged harm there. This is true for both FAEI and Dr. Faith, since both of their actions (respectively, holding the play and advertising the play) arguably harm Paine Lovey/Lovey in Utah. The argument is even stronger as to FAEI, since the website in question is by definition worldwide. Thus, FAEI is not only engaging in an activity whose effects might extend to Utah, it is specifically sending those effects to Utah.

Further, since Utah residents can purchase tickets and other *Evening*-related merchandise on the website from Utah, arguably the complained-of behavior also qualifies under subsection (1) of the above provision, at least as to FAEI. That subsection provides for long-arm jurisdiction over “the transaction of any business within the state.”

Any personal jurisdiction argument we have on appeal thus likely rests on the Due Process Clause, not Utah's long-arm statute. None of the three “short-cuts” to satisfying the Due Process Clause seem to apply. Both Dr. Faith and FAEI were served in New York, not Utah, so “tag” jurisdiction does not apply. (Also, a corporation cannot be tagged.) Nor is there any kind of apparent consent at play here; since the parties did not know each other prior to this suit, there is not a forum-selection clause as in a case like *Carnival Cruise Lines*, and both defendants preserved the personal jurisdiction defense below by raising it in a Rule 12 motion. Finally, neither Dr. Faith's nor FAEI's contacts with Utah are so “systematic and continuous,” as the *International Shoe* Court put it, to create general jurisdiction. Although FAEI (and possibly Dr. Faith) has had some contacts with Utah via the website (discussed more below), those contacts certainly are not so numerous and repeated that FAEI would reasonably expect to be sued in the state for any kind of lawsuit in which it might be named whatsoever. Thus, if the district court had personal jurisdiction, it would have had to come under specific jurisdiction.

The specific jurisdiction analysis under *Burger King* itself proceeds in two steps. First, it must be determined whether there were “minimum contacts” that were purposefully directed at the forum state in a way that it would be foreseeable for the defendant to be haled into court there (*i.e.*, the lawsuit arises out of the contact with the state). Second, it must be determined whether those contacts are outweighed by “traditional notions of fair play and substantial justice.” That is, under the specific jurisdiction analysis, we look, as the Supreme Court said in *International Shoe*, to ensure that the defendant had minimum contacts with the jurisdiction such that exercise of jurisdiction will not offend traditional notions of fair play and substantial justice. This

analysis must be conducted for each defendant. Thus, contrary to the long-arm analysis above, where both defendants' behavior allegedly harmed Paine Lovey/Lovey in Utah, the result of the due process analysis might be different for each defendant here.

The argument that personal jurisdiction was lacking is strongest as to Dr. Faith. Arguably, she had no contacts with Utah (even though the long-arm statute treats harm accrued as a "contact" as a statutory—but not due process—question). She never went to the state. She never sent materials to the state. She never performed her play in the state. True, Utahns well could have been within the audience of her performances, but again, those performances were all in New York City—not Utah. Without any contact with the forum state, the exercise of personal jurisdiction would not be proper.

The strongest argument plaintiffs could make in response would be to attempt to analogize this case to *Calder v. Jones*, saying that Dr. Faith was intentionally harming Paine Lovey/Lovey, and thus she knew that the harm would accrue in Utah (so the contacts should be measured by where the harm occurs). Plaintiffs can, and likely will, make this argument. But we do have strong counterpoints. Foremost among them, this case is not analogous at all to *Jones*, because the complained-of behavior is not an intentional tort like the libel and slander there. Even if plaintiffs' allegations are taken as true, at most defendants stripped some value from their intellectual property. They did not *intend* to harm plaintiffs through torts aimed at Utah. Dr. Faith's activities were clearly aimed at New York and, at most, the surrounding states. Moreover, equating trademark infringement to an intentional tort would create absurd results. Under this theory, anyone sued for trademark infringement could be sued anywhere, wherever the effects of that infringement happened to accrue. That is markedly different from *Calder*, where the defendants knew the residence of the plaintiff they wrote about.

This analysis could change if Dr. Faith had control over the website, or if a court were willing to ascribe to her control the actions that FAEI took to market the play over the website. But if Dr. Faith merely hired FAEI to market the play generally, or if she hired them to market the play specifically to the New York or Northeast market, then the argument weakens. That would be more analogous to *World Wide Volkswagen*, where the Supreme Court said that a local car dealer did not purposefully avail itself of Oklahoma's jurisdiction by marketing cars in and around the tri-state area, even though it was foreseeable that, at some point, a car might end up in Oklahoma.

Further, under the second part of the due process test, it would seem quite odd to hold the case in Utah when all of Dr. Faith's activities were in New York. Under this part of the analysis, a rather heavy burden fell on Dr. Faith through the case's prosecution in Utah. Given that her contacts with that state should be deemed as minimal to none, these traditional notions of fair play and substantial justice should outweigh those contacts. Dr. Faith has a clear burden, as Utah is far from New York. The plaintiff's interest in convenient and effective relief does not demand that the case be heard in Utah, because it could just as well be heard in New York. Utah does have an interest in the suit because both Mr. Lovey and Paine Lovey are residents of the state, but both Utah and New York law is at play, and just as many if not more of the witnesses are located in New York and

the surrounding vicinity (*e.g.*, Dr. Faith, employees of FAEI). Resolution of the case in New York would thus serve the judicial system's interest in efficient resolutions just as well as, if not better than, doing so in Utah. All this weighs in favor of no personal jurisdiction over Dr. Faith.

The question is closer with respect to FAEI. Although FAEI has been targeting primarily the Northeast (and to some extent the Mid-Atlantic) in its marketing of *Evening*, its establishment of a website accessible anywhere in the United States and the world makes it more vulnerable to personal jurisdiction in Utah. This is a case somewhere between *World Wide Volkswagen*, where the Court found personal jurisdiction lacking, and *International Shoe*, where the Court found personal jurisdiction proper because the company had so many salesmen working in the state. In this respect, it is more like *Asahi*, where an Asian company knew that its products were being used in California and it was profiting from that activity. Likely, even under the *Asahi* plurality's view of purposefulness, courts would be willing to recognize a website that specifically targets the world to sell tickets, merchandise, or other goods and services as sufficiently purposefully availing itself of anywhere it conducts such a sale. The question then becomes one of foreseeability—does the lawsuit arise out of the contact, made via the website, with that state?

By this standard, FAEI probably does have minimum contacts in Utah via the website alone. And those contacts are purposeful: FAEI is seeking to sell tickets and merchandise to anyone who will buy them, including in Utah. The question then comes down to whether the complained-of behavior arises out of those same contacts with Utah. Since the suit here is for the alleged dilution of the Seven Habits marks, this criterion likely would be satisfied. The mark is diluted wherever infringing materials are displayed, and in the case of the website, they are displayed not only in the world generally, but in Utah specifically too. This, by itself, could make exercise of personal jurisdiction over FAEI proper in Utah.

There is an argument that traditional notions of fair play and substantial justice outweigh these contacts, but because the Supreme Court has said it is a rare case where this is possible, this is an uphill argument. The argument would proceed like this: Though there are some, there are not many contacts—the bulk of FAEI's behavior remained centered around New York and the surrounding states, even if some of it spread across the country. Given that many of the other factors, as discussed above with respect to Dr. Faith, militate in favor of no jurisdiction in Utah, those would apply with respect to FAEI also (distance from New York to Utah, presence of both Utah and New York law, witnesses in New York). As noted, the court might find these factors insufficient to outweigh FAEI's contacts, but there is at least one factor that weighs more heavily in favor of finding no personal jurisdiction with respect to FAEI: If there is no jurisdiction over Dr. Faith, then exercising it over FAEI would create piecemeal litigation. Thus, there is a clear judicial efficiency concern that might help in this argument, though it is still by no means certain that the argument would prevail.

In sum, the personal jurisdiction argument is fairly strong with respect to Dr. Faith, not quite as strong with respect to FAEI, but colorable as to both defendants.

2. Venue.

Another argument we could raise on appeal largely relies on the personal jurisdiction argument from above. It is that venue was improper in Utah.

Under 28 U.S.C. § 1391, venue is proper in three circumstances: (1) where the defendant resides, if all defendants reside in the same state, (2) where “a substantial part of the events or omissions giving rise to the claim occurred,” or (3) where the court has personal jurisdiction over the defendants, if neither of the first two options are available. For corporate defendants, they are deemed to reside where they are subject to personal jurisdiction, provided, however, that each district is treated as its own state for purposes of conducting this analysis.

Here, it is clear the district court in Utah did not have venue under the first option. Dr. Faith resides in New York, not Utah. Thus, even if personal jurisdiction existed over FAEI, the requirement that “all” defendants reside in the district is defeated.

Plaintiffs could argue, and potentially prevail on the argument, that venue is proper in Utah because a “substantial” part of the events occurred there. However, we would have a strong counterargument that this is not the case. The lawsuit is all about the play, and the play is based in, performed in, and marketed in (and around) New York. This part of the analysis itself makes venue a close question, but assuming we can prevail in arguing that a mere fraction—not a substantial portion—of the events giving rise to suit occurred in New York, the success of the venue argument turns on the personal jurisdiction analysis.

Thus, if we can show that the court lacked personal jurisdiction over both Dr. Faith and FAEI, we could also potentially succeed in showing that venue was improper. Because this argument depends on prevailing on the personal jurisdiction argument, it is not an independent ground for reversal, but making it could help show just how far removed the case was from Utah: Not only did virtually everything at issue in the case occur in and around New York, but the suit was filed in the wrong place both because the court lacked power over the defendants and because venue was improper. On the other hand, if plaintiffs can show that personal jurisdiction was proper for either Dr. Faith or (more likely) FAEI, then venue also was proper. As Section 1391(b)(3) states, venue is proper in a district where “*any* defendant may be found.” If plaintiffs prevail on personal jurisdiction, then, our arguments as to venue would likely have to defer to judicial discretion under *forum non conveniens*, rather than a statutory venue contention.

3. Forum non conveniens.

The final argument is *forum non conveniens*—that trying the case in Utah was inordinately inconvenient such that the court should have dismissed (or transferred to pursuant to 28 U.S.C. § 1404) so that the case could be heard in another forum.

The forum non conveniens analysis presumes that the plaintiff's choice of forum should receive preference, but assesses whether the inconvenience to the defendant and the courts outweighs that preference. The court first assesses whether there is an alternate forum. If there is, the court then conducts the analysis by applying both the "private" and "public" factors identified by the Supreme Court in *Gilbert*. The court has rather broad discretion in applying these factors, thus making this a difficult argument on appeal, though if we are unable to prevail on arguing improper venue generally, this argument is a useful fallback. It also complements our personal jurisdiction argument. The "private" factors include access to proof, availability of compulsory process for the attendance of witnesses, cost of obtaining the attendance of willing witnesses, possibility of viewing premises in question, and "all other practical problems" regarding the ease and efficiency of trying a case. The so-called "public" factors include comparative court congestion, the local interest in having localized controversies decided locally, court familiarity with the controlling law, the avoidance of unnecessary questions of conflict of laws, and the unfairness of burdening citizens in an unrelated forum with jury duty.

Here, the private factors provide our strongest forum non conveniens-based argument for appeal. The argument is not overwhelmingly strong, and thus will likely be a difficult sale on appeal. It relies on some of the same themes running through the personal jurisdiction and venue analysis. Foremost, we could argue that it would be much easier to hear from key witnesses in New York (or New Jersey), because all of the *Evening*-related witnesses are located there. Likewise, the cost of obtaining testimony from witnesses would be less expensive there than in Utah, and Paine Lovey, a national corporation, would not be burdened significantly by having to hear the case in New York, whereas Dr. Faith and FAEI were by trial in Utah, because they are local—not national or even regional—entities by definition. Paine Lovey/Lovey's clear retort will be that they also need to testify concerning the harm that has been done them, and those witnesses are located in Utah. They would also argue that the wealth of a party should not be a factor for determining where a trial should be held, at least when there is evidence in both possible forums.

Further, under the public factors, plaintiffs could retort that since *Evening* was advertised on a worldwide internet site, this is not a particularly localized case demanding local adjudication. To the same degree, since Paine Lovey and Lovey are both located in Utah, enlistment of citizens of the state to serve as jurors in the case was not problematic. We could respond that, again, the center of the dispute was where *Evening* is playing—in New York. This is a sensible argument, and if convenience of venue were measured on a ledger sheet, with the prevailing forum established as the one that came out at all ahead, we might do well with this argument. But since the trial court will receive deference in its forum non conveniens ruling, we should likely make this argument, but not emphasize it and certainly not bank on it prevailing.

Short Answer

Ms. Adams: “Objection. That question is entirely improper, and I therefore direct Mr. Muteesa not to answer it. The question calls for a response that would clearly breach the attorney-client privilege and may implicate the attorney work product privilege. Counsel, if you have any more questions that go to material that is actually discoverable, I suggest you move on to that.”

Note No. 1 to Students: Read Rule 30 if you do not understand why it is *procedurally* important that Adams instructs Muteesa not to answer, rather than merely objecting. From a *practical/substantive/strategic* perspective, why is the rule written that way?

Note No. 2 to Students: Why does attorney-client privilege clearly apply but attorney work product only *might* be implicated? Run the analysis for each theory