To: Fall 2005 Civil Procedure Students
From: David Levine
Date: January 22, 2006

Since I will not be seeing you this semester, this memorandum is the best way to share some thoughts about the examination.

The scores inside the front cover of your answers represent how you did on the short answer section and the three essay questions. The short answer score is your actual score. A perfect score was 60. The highest score in the class was 57; the lowest was 12. The average was 33 points. The essays are scored in a scaled way so the highest score in the class is always the maximum point value for the question (15, 15, 60). The average scaled scores were 6, 6 and 34, respectively.

The essay was based upon Tinoco v. Prestige Stations, Inc., 2003 WL 690703 (Cal.App.). Although the actual opinion comes from a state case, the fact pattern and legal issues were adapted to the federal context of the question.

**Question One**: Photographs and recorded conversations. It was best to deal with each category separately. Since the defendants did not disclose these items under FRCP 26(a)(1)(B), one can assume that they would not support their defenses.

*Photographs*. You should have at least briefly considered the preliminary questions: Were the photos relevant under FRCP 26(b)(1)? (Probably yes.) Was there some reason to limit discovery or order cost-shifting under FRCP 26(b)(2) and *Zubulake v. UBS Warburg*? (Probably not, but I wanted you to briefly tell me why.)

Were the photographs protected “tangible things” under the work product doctrine and FRCP 26(b)(3)? The defense would argue that the sign directing the taking of photos was enough to trigger the “in anticipation of litigation or for trial” requirement. However, plaintiffs might want to try to resist such a sweeping notion of work product. In comparison to the *Hickman* facts, where the attorney was retained to handle the matter after the accident took place, the facts here said that the employees were responding to a sign posted in the cashier’s booth. Does it seem consistent with the basic purpose of the federal rules to be able to cloak so information with work product protection with just a simple sign posted in every cashier’s booth in all the stations owned by Downstate? Why wouldn’t every company everywhere try to protect information from disclosure in a similar fashion?

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1I actually saw something like this in a tire store one time. I noticed that the chain’s blank form for customers to write down complaints had “Confidential: Attorney Work Product” printed on it.
Even if the defendants were able to get the court to consider the photographs to be protected as work product, the photos are most probably only going to get shell protection. Since we are told the station has been remodeled and there seems to be an issue of whether something on the ground was wet or dry, there is no substantial equivalent to photos taken within moments of the accident. The plaintiff still must demonstrate “substantial need of the materials.”

In the real world, the plaintiff would get the photographs without argument because the defendant’s lawyer would surely lose “Who’s the Twit?” if it ever came in court.

Recorded Conversations: Once the lawyers are notified of the accident, their communications with the employees are clearly infused with work product protection. In addition, attorney-client privilege under Upjohn would come into play. The classification would matter if the former employees are nowhere to be found. (The facts imply that the station attendants were still employees when they were interviewed just a day after the accident.) As attorney-client communications, the plaintiffs could not get the recordings unless Downstate waived its privilege. The fact that the employees were unavailable (or could not be reached without undue hardship) would not be material.

On the other hand, if the material is just protected by work product, then the plaintiffs might be able to make a showing of substantial need and undue hardship. What if the employees were now far away? It is one thing to tell the IRS to send agents all over the world to do interviews when investigating a large tax problem in a huge company, but would it be fair to tell sixteen year old Maria of Yuma, AZ, the same thing? What if the employees were deposed, but could not remember the events in question? (Compare Hickman facts.) Even if the recordings contain some core work product, Upjohn does not read FRCP 26(b)(3) to entirely forbid its disclosure.

Now suppose the employees could be located. After all, their names and last known addresses would be readily discoverable via an interrogatory posed to Downstate. If the recordings were classified as “statements,” the plaintiff’s lawyer could ask the employees to request the recordings from Downstate under FRCP 26(b)(3).

Question Two: Downstate’s ability to depose Dr. Markowitz about his treatment and the opinions he expressed in the letter will depend on his status under FRCP 26(b)(4) and the discussion of the classifications of experts in Ager v. Jane C. Stormont Hospital. The facts suggest that the defendants have the letter already, so one might argue that the plaintiff has already waived any physician/patient privilege, at least in part.

The categorization of Dr. Markowitz will depend on whether he is “retained or specially employed ... in anticipation of litigation or preparation for trial.” It is not enough that he was paid for his professional services as Maria’s doctor.

Thus, Downstate will have to wait until they learn if Dr. Markowitz is named as an expert whose opinions may be presented at trial, FRCP 26(b)(4)(A), and after he writes the report
required to be disclosed under FRCP 26(a)(2)(B). The letter to his patient regarding future treatment probably does not qualify as that report because of the specific detail required in the disclosure.

If Dr. Markowitz should be categorized under FRCP 26(b)(4)(B), Downstate might argue that his unique opportunity to see the plaintiff’s injuries soon after the accident, to have treated her, and to have seen her progress over the months would qualify as exceptional circumstances. In the alternative, Downstate could easily have Maria examined under FRCP 35 (see Vinson) and then hope that the plaintiff’s request the report under FRCP 35(b). This would open the door to requesting any reports the plaintiff might have under FRCP 35(b)(1) and a waiver of privilege under FRCP 35(b)(2). Downstate could also try to have Dr. Markowitz classified as a percipient witness who happens to be an expert, but his testimony would be limited to discussion of the treatment.

**Question Three:** The first point to consider was the appealability of the judge’s decision granting a new trial. Was there a final judgment? Was this a “final decision” under Digital’s discussion of the collateral order doctrine? Would § 1292(a) or (b) apply? Was this decision so out of line that mandamus could be used by either party? The plaintiff has a slightly better chance at arguing that the order was appealable because her “right” not to have to go through a second trial is stronger than the privately-created right rejected in Digital. The defendant sought the motion for a new trial, so can hardly complain when it is granted. Nevertheless, the combination of denial of judgment as a matter of law with a grant of a motion for a new trial is usually not deemed appealable (Hazard p. 1131).

Assuming the order was appealable, was any error made? You needed to briefly address the propriety of denying the motion pre-verdict and then granting a motion for a new trial post-verdict. Why was that procedure acceptable under the rules?

Given the judge’s comments, the defendant would want to challenge why the motion for judgment as a matter of law was not granted. (Simblest.) What justified the lesser relief of a new trial? Did the judge make a legal error or abuse his discretion? (Spurlin.)

From the plaintiff’s point of view, why not let the jury verdict stand? Did the judge truly assess the state of the evidence properly, giving proper deference to the jury’s role?² (Stout.) If the damages were excessive (see O’Gee), shouldn’t the trial judge have given the plaintiff a chance to accept a lower figure under the remittitur process?

As always the hardest part for many of you was to apply the cases we read in a persuasive manner. I like to see answers which use the facts and reasoning from the principal

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²If this were a torts exam, there would be some real question as to whether the plaintiff had proven negligence here. Is the mere presence—in a gasoline station near the fuel pumps—of a spot of a liquid used in automobiles (gasoline, radiator fluid, motor oil, etc.) proof of negligence? The original opinion spends some time wrestling with this issue, but I didn’t expect much from you in this context.
cases in some reasonable detail.

Good luck with the classes this semester. I hope to see you in another course sometime.

ESSAY QUESTION
(Total Points: 60)
Time Available (90 Minutes)

On November 24, 2003, sixteen year old Maria Pinoco, a resident of Yuma, Arizona, was a passenger in her mother’s car when they stopped at a gas station in San Diego, California, owned by Downstate Stations, Inc., a California corporation. (Maria and her mother were on a trip to see family in San Diego for Thanksgiving.) Maria’s mother pumped gas while she went inside to pay the cashier. When returning to the car, Maria slipped near the gas pumps. She fell on her buttocks. She did not see any puddle of gasoline on the concrete before her fall, but after the fall she smelled gasoline on her jeans. Sometime after the accident, Maria noticed that the soles of her tennis shoes were slippery. A bystander also fell as he attempted to help Maria. Both Maria and her mother testified in their depositions and at trial that the concrete area where Maria fell contained a stain of “dry gasoline.” Maria and her mother drove home to Yuma the day of the accident. However, the next day, at a hospital in Yuma, Maria was diagnosed with a fractured coccyx, or “tailbone.”

At the time of the accident, two employees were working at the gas station, neither of whom witnessed Maria’s fall. One employee took pictures of the accident site with a camera. The employee did so because there was a sign in the cashier’s booth from Downstate’s lawyers saying that in the event of an accident, employees were to immediately take pictures and then send the digital photos to the lawyers’ office. A lawyer for Downstate called the two employees the next day and asked them questions; the telephone calls were recorded. By the time Maria filed suit in federal court in early 2004, the gas station had been remodeled and the two employees who had been on duty at the time of her fall were no longer employed there.

QUESTION ONE: Maria’s lawyer seeks copies of the photographs and the recorded conversations. Downstate objects. Maria’s lawyer files a motion to compel. How should the trial court rule?

Maria was treated at the hospital in Yuma by an orthopedic surgeon, Dr. Harold Markowitz. Maria’s fractured coccyx healed about three months after the accident, but it was in a displaced position and she had continuing and chronic pain or irritation in the area. At the end of his treatment, Dr. Markowitz wrote Maria a letter regarding her future prognosis, saying that it was possible she may need future surgeries to remove her coccyx, which would cost about $25,000.

QUESTION TWO: Downstate’s lawyers would like to depose Dr. Markowitz about this letter and his treatment of Maria. Maria’s lawyer objects. Downstate’s lawyers file a motion to compel. How should the trial court rule?

At the trial, Downstate’s senior chemical engineer, Nicole Pham, testified that 1.25 ounces of gasoline poured onto a concrete surface evaporates in about five minutes; it takes 24 hours for a gasoline stain to disappear completely. After gasoline evaporates, the spot is not slippery. On the other hand, antifreeze or transmission oil is slippery. Maria’s expert engineer, Ralph Engdahl, testified that he agreed with Pham that a combination of drying gasoline on top of another substance like radiator fluid or engine oil would be consistent with a slippery material. Engdahl did not visit the gas station until after it was remodeled. He
admitted on cross-examination at trial that he did not know whether some slippery substance like radiator fluid or engine oil was actually on the cement surface the day of Maria’s accident.

At the close of all evidence, Downstate moved for judgment as a matter of law, which was denied. The jury returned a general verdict in favor of Maria and awarded her damages of $200,000.

Downstate renewed its motion for judgment as a matter of law and for a new trial. Judge Hatchett indicated at the hearing that she would grant Downstate some relief. Maria’s counsel asked why Downstate should get any relief when the motion for judgment as a matter of law had been denied before the jury got the case, Judge Hatchett responded:

“I contemplated granting it at the time, but I figured that the jurors would have sense enough to understand that dry gas does not create a hazard. But they didn't. So now I'm going to grant a new trial. I should have granted a directed verdict motion in this case. I didn't. I'm curing that by granting a new trial because I think the jury went cuckoo in this case. That's the long and the short of it.”

The court later issued a brief order, which provided:

“The Court grants defendants' motion for new trial for the following reasons: [¶] 1. Plaintiff and her mother consistently testified that Maria slipped and fell on ‘dry gasoline;' if so, it would not constitute a dangerous condition. [¶] 2. No evidence was offered of any substance on the concrete where Maria fell other than 'dry gas' (e.g., no evidence of any oil spot, water, or other potentially hazardous slippery matter on the ground). [¶] 3. The damages were substantially excessive. [¶] 4. There was never any charted medical prognosis for plaintiff to undergo removal of her coccyx bone; such recommendation appeared to have been concocted for trial. [¶] Defendants' motion for judgment as a matter of law is denied.”

**QUESTION THREE:** Each side appeals from Judge Hatchett’s post-trial order. How should these appeals be resolved?