MONTEREY COLLEGE OF LAW

HYBRID

CIVIL PROCEDURE II - SECTION 2

FINAL EXAMINATION

SPRING 2024

PROF. M. CHRISTENSEN

INSTRUCTIONS:
ANSWER THREE (3) ESSAY QUESTIONS
TOTAL TIME ALLOTTED: THREE (3) HOURS

Civil Procedure II,
Spring 2024,
Final Exam
Prof. M. Christensen

Question 1

PAM brought a negligence action against airplane manufacturer DOVE AVIATION in federal district court for causing her injuries when the DOVE airplane she was a passenger on had a very bumpy landing. The Court had diversity jurisdiction over the action.

On the same day that they timely answered PAM's complaint, DOVE also filed a complaint against Pilot TIM, alleging that TIM's mistakes in flying the plane caused the bumpy landing. In response, PAM amended her complaint to add TIM as a defendant.

1. **Can DOVE and PAM each bring their claims against TIM?**

PETER was on the same flight and also suffered injuries during the landing. A few days after PAM amended her complaint, PETER filed a motion to intervene in PAM's case against DOVE and TIM.

2. **How should the Court rule on PETER's motion to intervene?**

After discovery, dispositive motions, and trial, a jury found that DOVE was not liable, and that TIM was liable for PAM's injuries. Specifically, the jury indicated on a special verdict form that PAM's injuries were caused by the bumpy landing, which was caused by mistakes TIM made in flying the plane. TIM was held liable for $100,000 in damages.

Several months later, PAM had not received a dime from TIM, so she brought a new action against THUNDERBIRD AIRLINES, TIM's employer, alleging that THUNDERBIRD is vicariously liable for their employee's negligence and seeking $100,000 in damages. THUNDERBIRD timely moved to dismiss on the grounds that PAM was precluded from bringing this claim.

3. **Should the court preclude PAM from bringing her claim against THUNDERBIRD?**

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Civil Procedure II,
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Question 2

It was front page news when a sight-seeing boat operated by DAYDREAM Tours sank. Several passengers were injured or drowned. Within 24 hours of the accident, DAYDREAM sent their company lawyer to the scene to interview all of the employees at the scene and any witnesses they could find. The lawyer spent about two weeks conducting interviews and took notes on all of the conversations she had with DAYDREAM employees and witnesses. In order to be prepared for the lawsuits that would inevitably be filed against DAYDREAM, the lawyer did her best to keep track in her notes of things that were said to her that she thought would be especially important to defend her client.

PACO is one of the passengers who was injured. He filed a complaint against DAYDREAM in federal district court for his injuries. At the beginning of discovery, PACO's attorney propounded their first set of requests for production of documents. Two of the requests were as follows:

> REQUEST 1: All documents related to interviews conducted by any employee or representative of DAYDREAM of witnesses to the accident before Plaintiff filed his complaint in this action.
>
> REQUEST 2: All emails involving DAYDREAM employees regarding boat maintenance, from 10 years before the accident to present.

DAYDREAM raised objections to both requests. In lengthy meet and confer meetings, PACO's attorney expressed that he has tried to reach out to witnesses in order to interview them but has not been successful. Some of these witnesses are DAYDREAM employees who don't want to speak to him. Another witness, Will Wallace, moved out of the country after the accident and cannot be compelled to participate in the case. PACO's attorney is concerned that he needs Wallace's side of the story because in the midst of the commotion of the accident, PACO thought he heard Mr. Wallace cry out that he saw a leak in the boat.

The parties were unable to agree on what DAYDREAM would produce in response to Requests 1 and 2, leading Plaintiff to file a motion to compel.

How would the Court likely rule on the motion to compel documents responsive to Requests 1 and 2?

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Civil Procedure II,
Spring 2024,
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Question 3

PLUTO clothing retailer is suing DELOS clothing designer and manufacturer in federal district court for breach of a contract of sale. PLUTO alleges that they had a contract with DELOS for purchase of 400 hundred DELOS-brand shackets (it's a shirt that one wears as a jacket) for $80,000. The parties agree that DELOS never delivered any shackets to PLUTO, and DELOS' attorneys argue that no such contract was made.

After the close of discovery, DELOS moved for Summary Judgment.

How should the Court rule on the issue below?

Moving Party's Undisputed Fact	*Non-Moving Party's Response*	*Moving Party's Reply*
PLUTO never purchased 400 shackets from DELOS. Evidence cited: Deposition testimony from Bill, DELOS' Head of Sales, describing the steps taken by himself and his team to review their sales records and stating that they did not find any record of PLUTO placing this order. Deposition testimony from Liz, PLUTO's Head of Buying, saying she searched PLUTO's records and did not find any copy of a completed order form for this alleged purchase.	PLUTO made an agreement with DELOS for the purchase via email. Evidence cited: Deposition testimony from Liz saying that she emailed DELOS and corresponded with a representative and placed the order via email. Exhibit A copies of Liz's emails with salesguys@delos.com. Deposition testimony from Liz that her subordinate, Kevin, told her that he submitted payment for the order to DELOS using a wire transfer. Liz further testified that Kevin had the bank account information for DELOS because PLUTO had purchased clothes from them in the past. Bank statement from PLUTO showing that $80,000 was transferred to DELOS.	DELOS does not complete orders via email. A completed and approved purchase form is required in order to complete a contract of sale. Evidence cited: Letter to the Court from Bill explaining DELOS' sales policies and procedures. Objections to Non-Moving Party's Response: Liz's testimony about what Kevin told her is inadmissible hearsay.

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ANSWER OUTLINE
Civil Procedure II, Spring 2024, Final Exam-M. Christensen

Question 1

1. *Claims against TIM*
    a. *DOVE's claim*
        i. *Impleader (R14): D can add a third party who may be liable for all or part of P's claim against D*
        ii. *D can add a third party*
    b. *PAM's claim*
        i. *We're not told of a diversity problem between P and T. If P and T are not diverse, claim would need to be severed.*
2. *PETER's motion to intervene*
    a. *Intervention as of Right*
        i. *Outsider has interest related to the subject: PETER was also injured in the same incident but…*
        ii. *Disposing of case without them would impair their interest: PETER's injuries are not being decided in PAM's case. If PAM loses or wins, PETER could still bring his claim.*
            1. *Possible "Bonus" Discussion on Issue Preclusion:*
                a. *If PAM wins, and then PETER sues afterwards, PETER could try to use non-mutual offensive issue preclusion. D or T would need to argue they didn't have a full and fair opportunity to litigate the stakes raised by PETER's case in PAM's case (e.g. if PETER's injuries were significantly greater).*
                b. *If PAM loses, and PETER tries to sue afterwards, D or T cannot preclude PETER (Shaffer).*
                c. *In other words, PETER will not get precluded!*
        iii. *Interest is not already adequately represented: PAM will try to prove DOVE and TIM were negligent.*
        iv. *because PETER's interest would not be impaired, intervention as of right likely does not apply*
    b. *Permissive Intervention*
        i. *Rule: anyone who has a claim or defense that shares a common question of law or fact with the main case (subject to analysis of undue delay or prejudice to the original parties)*
        ii. *Here, PETER's claim is about getting injured in the same accident so there are common law and fact questions with PAM. He moved to intervene in the pleading stage so there doesn't seem to be an undue delay or prejudice to either party to include him.*
    c. *PETER's motion likely granted*
3. *Action 2: PAM v. THUNDERBIRD*
    a. *Claim Preclusion*
        i. *Judgment final valid and on the merits*
        ii. *Same parties: THUNDERBIRD was not in Action 1, but they're responsible for their employee's actions alleged in Action 1*
        iii. *Claim in Action 1 involves matters that were or should have been within the scope of Action 2: vicarious liability is part of the same tort as the employee's negligence, so P is precluded from suing EE in first case and then trying to bring the respondeat superior claim in a second case (see Mathews v. NY Racing)*
    b. *claim against THUNDERBIRD likely subject to claim preclusion, MTD should be granted*

Q2-MODEL ANSWER

REQUEST 1:

1. *Scope of discovery under 26(b)(1)*
    a. *Nonprivileged (most important):*
        i. *Communications between in house counsel and employees could be privileged (Upjohn)*
            1. *Interview statements from EEs likely privileged and not discoverable because employees at the accident are within the scope of the A-C relationship*
            2. *EE interviews not discoverable*
        ii. *Presumption that materials prepared in anticipation of litigation not discoverable unless requesting party has substantial need and can't obtain through other means (26(b)(3), Hickman)*
            1. *Here, Paco argues he has a substantial need for Wallace statement and can't get it in other ways. There could be other witnesses who saw what Wallace may have seen, but we don't have enough facts given.*
            2. *Wallace interview may be discoverable*
        iii. *AWP (mental impressions of attny) never discoverable*
            1. *Attny margin notes, underlines, highlighting, ways of organizing the interview information, etc. all convey her mental impressions and opinions, legal theories, etc.*
            2. *if Wallace interview is produced AWP must be redacted*
    b. *Relevant (if time, not likely to have time for this):*
        i. *Statements of witnesses present at the accident are highly relevant to show what might have caused the accident, whether any of the injured parties might have been partially at fault, and possibly relevant on damages questions*
    c. *Proportionality Factors (if time, not likely to have time for this):*
        i. *Importance of issues: causation is highly important*
        ii. *Amount in controversy: we're not told how much Paco seeks*
        iii. *P does not have access to information: this applies here*
        iv. *Unclear whether D has substantially more resources than P*
        v. *Burden v. Benefit: redacting may be difficult and P may be able to get the same information from other sources*
2. *Court might compel production of redacted notes of the attorney's conversation with Wallace. Interviews with EEs would be privileged and not discoverable.*

REQUEST 2:

2. *Scope of discovery under 26(b)(1)*
    a. *Nonprivileged:*
        i. *A lot of responsive documents are privileged if they're communications by D employees to their counsel, seeking legal advice, in confidence, and the contents of the communication was about the legal advice being given. D is entitled to withhold on the basis of privilege and must provide a privilege log. Cannot simply refuse to produce any responsive documents on the basis that a portion of responsive docs are privileged.*
    b. *Relevant:*
        i. *Communications between EEs about maintenance is highly relevant to breach and causation. However, records from 10 years before the accident are a lot less relevant.*
    c. *Proportionality Factors:*
        i. *Importance of issues: D's decision making around boat maintenance and safety is highly important.*
        ii. *Amount in controversy (same as Request 1)*
        iii. *P has no access to these communications, although P can depose D employees. But, P needs some discovery in order to know which employees to depose.*
        iv. *D might be a small business and lack the resources of large companies to search all their emails efficiently*
        v. *It would be unduly burdensome on D to produce records for more than a year or so before the accident. Older documents are less probative.*

3. *Court would likely compel production of documents for a specific set of custodians who were more involved, for a shorter time period more focused on the months leading up to the accident. Again, privileged documents are absolutely protected. D must withhold privileged documents and provide a privilege log.*

Q3 - MODEL ANSWER

I. *Moving Party (D) has burden of Production*
   a. *Here, D tries the Adickes method of citing evidence that forecloses a fact P is asserting by citing Bill's deposition testimony.*
   b. *D also tried the Celotex method by citing to Liz's deposition testimony that she couldn't prove she had a purchase order.*
   c. *D likely met burden of production.*

II. *Burden shifts to P to show GDMF*
   a. *P tries to dispute Bill's testimony and Liz's testimony by introducing other excerpts from Liz's testimony and the bank statement.*
   b. *Liz's testimony that she placed the order by email does raise a GDMF, but her testimony about Kevin telling her he paid for the order is inadmissible hearsay.*
   c. *The bank statement does not seem highly probative on whether there was a meeting of the minds, and Liz's email exchange may not be entirely probative on that either. We aren't able to see the email exchange. Maybe reasonable minds could differ on whether the email correspondence shows offer and acceptance – a meeting of the minds. But the court does not weigh evidence at SJ.*
   d. *P likely met their burden to show GDMF.*

III. *The Court must draw all reasonable inferences in favor of P and cannot weigh evidence or assess credibility.*
   a. *Court would likely infer here that a reasonable jury could find that the parties made an agreement.*
   b. *Bill's letter is inadmissible because it's not a sworn affidavit or declaration and cannot be considered.*
   c. *Court cannot weigh Bill's deposition testimony over Liz's email correspondence. The Court must infer that a reasonable jury could find that Liz was led to believe PLUTO had made this purchase.*

IV. *In sum, although P may not be able to persuade that there was an offer and acceptance between P and D, P's admissible evidence that there may have been an agreement via email raises a GDMF. Summary judgment should likely be denied.*

1) 80/100 -- good organization and coverage of all issues being asked, good rule statements, some confusion on supplemental jurisdiction and diversity, good approach to having thorough applications, make sure you're not covering anything extraneous

1. Dove and Pam v. Tim

Impleader

Once a defendant has had a claim brought against them, they can seek to implead, or join a third party defendant who may be liable wholly or in part, for the plaintiff's claims against the defendant, so long as their claim arises from the same transaction or occurrence, or series of occurrences, as the existing claim, and doesn't require adding a third party over whom the court would not have jurisdiction. Claims are said to arise under the same transaction or occurrence when (1) there is substantially the same evidence, (2) there are common questions of law or fact, (3) the claim would be barred by res judicata, or (4) any logical relation.

Here, after Pam brings her claim against Dove, the airplane manufacturer, Dove then seeks to implead the pilot, Tim, who they believe actually caused Pam's harm. In this case, Pam is bringing a negligence action which requires a showing of duty, breach, causation, and damages. By impleading Tim, Dove is making the claim that Tim is the one who was the cause of Pam's injuries that she sustained as a result of the bumpy landing. In this case, by impleading Tim, there will be additional evidence added, but the remainder of the evidence will remain the same and the evidence for the injury will be substantially the same. Pam will need to show that the bumping landing, whether caused by Dove or Tim's negligence. The case will remain a negligence claim, so there will be the same or common questions of law and/or fact. Although the claim is unlikely to be barred by res judicata at a later date, because there is substantially the same evidence, and common questions of law or fact, it is likely that the court will permit Dove's motion to implead Tim. If a misjoinder does occur, based on jurisdiction, discussed infra, then the court could issue a sua sponte and sever the case.

Subject Matter Jurisdiction

Because federal courts are courts of limited jurisdiction, they may only hear cases that either (1) raise a question of federal law, or (2) where there is complete diversity between the parties and the claim exceeds the amount in controversy requirement of $75,000.

Here, the facts tell us that the court has diversity jurisdiction over Pam's initial action against Dove, which means that Pam and Dove are not residents of the same state and Pam's claimed damages exceed the amount in controversy requirement of $75,000. So, the question becomes whether adding Tim to this case would destroy complete diversity and whether the claims against Tim meet the amount in controversy requirement. If adding Tim would not destroy diversity, meaning that Tim would be a resident of the same state as Pam, and the claims against Tim would exceed the amount in controversy requirement, then both conditions are met and the court will likely implead Tim.

If adding Tim would destroy diversity, or if the claims do not exceed the amount in controversy requirement, then adding Tim will destroy diversity and the court will not have subject matter jurisdiction over him. good

Supplemental Jurisdiction

When a federal court does not have subject matter jurisdiction, but the claims before it share a common nucleus of operative fact, the court may, in its discretion, decide to hear the case in the interest of efficiency and to avoid inconsistent results.

Here, if the court does not have subject matter jurisdiction over the claims against Tim, then the court could seek to exercise supplemental jurisdiction and hear the case anyway. As mentioned above, the claims arise under the same transaction or occurrence, which is a narrower requirement than that of common nucleus of operative fact, so this requirement would be met and the court could hear the case.

Conclusion

but if Tim is from same state as Pam, supplemental JD will not be available

Dove and Pam will likely be able to implead Tim to the current case because, even if adding him destroys diversity, the court can exercise supplemental jurisdiction.

2. Peter's Intervention

Intervention as of Right

Intervention as of right occurs when an outsider or absent party from the case (1) has an interest in the case, (2) disposing of the case without them would impair their ability to protect their interest, and (3) their interest is not already adequately represented by the existing parties.

Interest in the Case

Here, Peter has suffered injuries in the same way that Pam did, as a result of the very bumpy landing. His interest in this case would be seeking redress for the injuries his sustained, likely against the same parties that Pam has brought her claim against. Peter's interest also extends to the outcome of the case because his right to recover will be determined by the verdict - finding Dove and or Tim negligent in the case.

Peter will have an interest in the case.

Impair Interest

Here, it's unlikely that disposing of the case without Peter would impair his ability to protect his interest. Peter could likely use non-mutual offensive issue preclusion, should Pam win, to enforce a similar judgement against Dove and Tim. Perhaps the only way that Tim's interest could be impaired is if he sustained far more serious injuries than Pam and is seeking much more in damages. In the case, Dove and Tim could argue that their litigation against Pam did not afford them a full and fair opportunity to litigate the claim, if Peter later brings a second action with substantially more damages, in which case Peter would be precluded from bringing the claim under collateral estoppel (issue preclusion).

very good

Adequate Representation

As discussed above, it is likely that Peter's interest is adequately represented in the current case.

Conclusion

Because it's unlikely that Peter's interest would be impaired by the court disposing of the case without him, and because he is adequately represented by the current parties, Peter likely doesn't have a strong claim for intervention as of right. The court may permit him to join under permissive intervention, discussed below.

Permissive Intervention

Permissive intervention allows an outsider to join the case when (1) their claim shares common questions of law or fact with the existing claims, and (2) adding them would not cause undue consumption of time or prejudice to the parties. Additionally, the party seeking to intervene cannot destroy diversity jurisdiction.

Common Questions of Law or Fact

Here, Peter's claim likely shares common questions or law or fact to Pam's claims. They are both likely seeking damages as a result of the injuries they sustained from the very bumpy landing, and will likely bring negligence claims. Whether the plane manufacturer was negligent in its design or production of the plane, or whether Tim was negligent in the operation of the plane will be similar questions of fact as well.

Peter's claims are likely to have common questions of law and/or fact as the existing claims.

Undue Consumption of Time or Prejudice

Here, because Peter's claim arises from the same transaction or occurrence as Pam's, and

because the evidence will be substantially the same, outside of the damages that each suffer, adding Peter is unlikely to cause an undue consumption of time. It may, however, prejudice Dove and/or Tim because adding Tim is likely to increase the amount of evidence against them. Without Peter, Pam would only be able to introduce her own evidence, while adding Peter increases the resources and evidence against Dove and/or Tim. These concerns, however, are unlikely to be considered prejudicial enough to exclude Tim from this case. The efficiency of adding Tim would likely outweigh these factors.

If the court decides that Peter does not have intervention as of right, then it will likely permit him to intervene permissively.

Subject Matter Jurisdiction

Supra.

Similar to the discussion above, adding Peter to the case can only be done if including him does not destroy diversity, and his claims exceed the amount in controversy of $75,000. It's unclear from the facts where Pam, Dove, Time, and Peter have residency, but the rule remains the same - there must be complete diversity between the parties for Peter to intervene. If Peter destroys diversity or his claims don't exceed the $75,000 amount, then he will be unable to intervene as the court will not have subject matter jurisdiction over him.

Supplemental Jurisdiction

Supra.

As before, if the court would otherwise not have subject matter jurisdiction over Peter, then it can, in its discretion exercise its right to use supplemental jurisdiction to hear the entire case. Again, because Peter's claim arises from the same transaction or occurrence, it is likely that the requirements would be met and the court would be allowed to exercise

supplemental jurisdiction.

Conclusion

Peter will likely be permitted to intervene in the existing claim, and if the court would not have subject matter jurisdiction, it could exercise supplemental jurisdiction to add him.

3. Pam v. Thunderbird

Claim Preclusion

Claim preclusion keeps parties from re-litigating the same claim again. Claim preclusion applies when (1) the parties in the first action are the same, or are in privity with those parties, (2) the first action received a final, valid judgement on the merits, and (3) the claim in the second action includes matters that were, or should have been, in the scope of the first action. Bar occurs when a plaintiff loses the first action and attempts to bring it again.

Same Parties

Here, the parties in the second action might not be the same, but Thunderbird Airlines is in privity with Tim because of their employer-employee relationship. Therefore, the parties of Pam v. Tim, in the first action, and Pam v. Thunderbird, will be considered the same parties. If it is considered that Tim is not in privity with Thunderbird, then Pam would have a strong claim to bring a non-mutual offensive issue preclusion claim against Thunderbird, discussed infra.

Final, Valid Judgement on Merits

A judgement is valid and final when it receives a successful motion for summary judgement or a verdict and the court no longer has anything left to do with the case. A case is decided on its merits when its substantive issues, rather than procedural, are decided.

Here, because the case went through its entire life cycle and ended with a verdict in favor of Pam, based on the substantive matters of the case (whether Tim or Dove was negligent to Pam), the first action will be considered to have received a final, valid judgement on the merits.

Same Claim

Here, Pam is attempting to re-litigate the exact same claim - whether Tim's negligence in operation of the plane cause the injuries that she sustained.

Conclusion

great

Because the second action is being brought with the same parties, after the first action received a final, valid judgement on the merits, and because the claims are exactly the same, Pam will be barred from bringing the second claim against Thunderbird.

Issue Preclusion (Collateral Estoppel)

could skip this

Issue preclusion keeps parties from re-litigating the same issue again. Issue preclusion applies when (1) the issues bring brought in the second action are identical to those brought in the first action, (2) the first action was actually litigated and decided, (3) the issue was necessary to the judgement of the first action, and (4) there was a full and fair opportunity to litigate in the first action. Here, Pam is attempting to use non-mutual offensive issue preclusion to use a prior judgement against a new defendant.

Same Issues

To determine whether there are the same issues, courts will look to the transactional test, including whether the evidence and facts are substantially the same, and whether there are common questions of law or fact.

Here, Pam is bringing the same issue, her claim for relief due to Tim's negligent operation of the plane. Her second action asserts the exact same claim, that Tim was negligent in

his operation of the plane and that she suffered damages as a result.

Actually Litigated

A case is actually litigated when it goes to trial and receives a final, valid judgement that is either in the form of summary judgement or a verdict. Cases that are dismissed for procedural matters are often times not considered to be actually litigated.

Here, the prior case goes through its complete life cycle and ends with judgement against Tim, who is found liable for Pam's injuries. Because the case ended with a special verdict, finding Tim negligent, the case will be considered to have been actually litigated.

Necessary

good application showing correct understanding of this rule

The issue being brought in the second action must have been necessary to the judgement of the first action. In this case, Pam is bringing the exact same suit again. The determination of Tim's negligence in the first action was the clear determining factor in the court finding Tim liable to Pam for negligence. Without the finding of causation - that Tim was negligent in the operation of the plane and that negligence caused Pam harm - the case could not have been decided in the way that it was.

Full and Fair Opportunity

Here, there appears to be a full and fair opportunity to litigate in the first action. The damages that Pam brings in the second action are the same as in the first action, $100,000.

Conclusion

If Tim and Thunderbird are considered to be in privity to each other, then Pam would be unable to bring the second claim and she would be barred under res judicata. If there are not in privity, then Pam could bring a non-mutual offensive issue preclusion claim against Thunderbird.

2) 80/100 -- relatively minor issues with 26(b)(3) analysis but good clear organization of analyzing 26(b)(1) for both requests

Discovery: a process of gathering facts prior to filing suit. requested documents must be non-privileged, relevant, proportional.

Request 1: documents related to interviews conducted by any employees or rep of Daydream (DD) of witnesses to the accident before P filed his complaint.

1.Non-privileged:documents that are covered by attorney client privilege or attorney work product are not discoverable and the providing party shall provide a privilege log describing the nature of the withheld privilege document.

A. attorney work product (AWP): any document prepared by attorney or client's representative in anticipation of litigation is not deliverable. The requesting party might access the documents if they show that they can't gather the documents any other way and there is a substantial need. However, AWP documents that are absolutely not discoverable are attorney's mental impression, legal theories or legal conclusions. excellent

Here, DD send their lawyer to interview witnesses and employees in anticipation of lawsuit that would arise from boat sinking and subsequent damages that resulted from the incident. Lawyers made note of all the conversation and interviews they had for the whole 2 weeks. DD would claim their only documents related to interviews conducted by any employees or rep of Daydrem (DD) of witnesses to the accident before P filed his complaint, were their lawyer's interviews and notes from those 2 weeks. DD would argue that all those notes and interviews would be protected by AWP because DD's attorneys prepared those documents in anticipation of litigation. Paco may argue that DD was not aware of the upcoming lawsuit at the time they took those notes or interviewed the staff and witnesses. Paco can argue that those notes and interviews are substantial to his claim and he has no other way to access them since DD employee's don't talk to him and other witness with important discoverable information, Will, moved out of the country.

In conclusion, because Paco has no other way to access the document or find (or depose) Will, the court might order DD to produce the notes that were taken by the lawyers during the interview of witnesses and employees, only if the notes did not include DD attorney's mental impression, legal theories or legal conclusions. DD must provide a privilege log describing the nature of the withheld privilege document.

Mental impressions etc could be redacted

B. Attorney client privilege (ACP): any confidential communication between the attorney and the client for the purpose of legal services are not discoverable.

Here, DD can argue that any communication between DD employee's and DD lawyers are privileged because they were confidential communication between the attorney and the client for the purpose of legal services. DD employees would be considered as client since lawyers were corporate attorneys. Paco may argue that not all the communication between the lawyers and employees were confidential and for legal purposes. Some communication might have been for other purposes or shared with 3rd parties who could ruin th confidentiality aspect of communication. good

In conclusion, the court would order DD to provide documents that were not confidential communication between DD lawyer and employees or the communications there were not for the purpose of obtaining legal services (As long as the documents related to interviews conducted by any employees or rep of DD of witnesses to the accident before P filed his complaint.) And provide a privilege log describing the nature of the withheld privilege document. very good

2. Relevant: any evidence that tends to prove or disprove a fact of consequence.

Here, Paco's request of documents related to interviews conducted by any employees or rep of DD of witnesses to the accident before P filed his complaint tends to prove or

disprove the fact that the accident was DD's or DD's employee's fault. Paco filed a complaint for his injuries against DD, however, he needs the interview notes and employee conversations in order to prove whether his damages were caused by boat sinking due to DD's negligent or other issues. Paco heard Mr. Wallace cry out that he saw a leak in the boat. However, Paco doesn't have access to Mr. Wallace because he is out of country and court can't subpoena him. However, DD might argue that not all the interviews DD employees and rep conducted are relevant because some might have been related to other issues including not boat related issues. Maybe DD employees interevied witnesses regarding their experience in the city or how they liked the snack that was provided during the trip. Therefore even though some of the requested document is crucial to Paco's case, some of the interviews might be irrelevant to the incident.

Excellent! So important to be in the habit of fully explaining relevance

In conclusion, the court would probably narrow the discovery request to the interviews that are more relevant to the incident.

How?

3. Proportional: court considers several factors to assess proportionality: party's access to the document, party's resources, Amount in controversy, burden of producing the document v. the benefit the the requesting party.

Here, the court would consider whether all of the documents related to interviews conducted by DD's employees or rep of DD of witnesses to the accident would be proportional. Some factors that would be tested include DD's access to the document or the cost of providing all the requested documents and the burden of providing vs. the benefit to Paco. The amount for Paco's claim might have been more than 75k since he filed his claim in federal court (if it's based on diversity) but the facts don't mention it. If Paco's claim is for a high amount, then the court would consider the amount that DD would have to spend to provide the requested documents and whether they have access to it.

In conclusion, the court would probably find that this discovery requests proportional

depending on the Amount in controversy and the burden on DD. The court would probably narrow the discovery request to the interviews that are more relevant to the incident. The court would narrow the discovery request to the interviews that are not protected by ACP or AWP.

Request 2: all emails involving DD employees re boat maintenance from 10 years before the accident to present.

1.Non-privileged:supra

A. attorney work product (AWP): Supra

Here, DD would argue that some of those emails could have been prepared by the attorney or DD representative in anticipation of this litigation and therefore not discoverable. However, Paco may argue that a lot of these emails would be protected by AWP because they were made before the incident. therefore, they were not prepared in anticipation of litigation.

In conclusion, because Paco has no other way to access the emails, the court would order DD to produce the emails that were not prepared in anticipation of litigation and provide a privilege log describing the nature of the withheld privilege document.

B. Attorney client privilege (ACP): Supra

Here, DD may argue that some of those emails were between DD employees and DD lawyers for the purpose of legal services for this matter or other matters, Therefore, emails would not be discoverable. However, Paco may argue that not all the emails were between DD employees and attorneys and not all of them were sent for the purpose of legal services.

In conclusion, the court would order DD to provide emails that were not confidential communication between DD lawyer and employees and the communications there were not for the purpose of obtaining legal services and provide a privilege log describing the nature of the withheld privilege document.

2. Relevant: any evidence that tends to prove or disprove a fact of consequence.

Here, Paco's request of all of the emails between employees re the boat maintenance from 10 years before to present is partially relevant because some emails might tend to prove or disprove the fact that the boat was not maintained very well or the fact that it was used with a leak in it. The emails could prove the condition of the boat and the maintenance report and employees thoughts on the boat maintenance. However, DD may argue that not all the emails between employees from 10 years ago to now are relevant to this claim. For example majority of those email could include minor issues regarding that boat or other boats that the company has had over the 10 years period. the relevancy of this requested document is not valid due to the length and broadness of the request. Also not all the employees emails re the boat maintenance would be helpful for example employees in human resources emails re the boat maintenance would not be relevant.

In conclusion, the court would probably narrow the discovery request to the emails that are more relevant to the boat in incident and shorted time period because the boat maintenance that was done 10 years ago would possibly not be helpful to Paco's claim. Therefore, the court could narrow the request to emails between DD employees, that their job involved the boat, regarding boat maintenance from 3 years before the accident to present. Excellent

3. Proportional: court considers several factors to assess proportionality: party's access to the document, party's resources, Amount in controversy, burden of producing the document v. the benefit the the requesting party.

Here, the court would consider whether all of the emails involving DD employees re boat maintenance from 10 years before the accident to present would be proportional to Paco's claim. Court would consider the cost of gathering all these emails and the AIC from Paco's damages, DD's access to the employee's emails and DD's resources.

In conclusion, the court would probably find that this discovery requests is not proportional because gathering all the emails from previous 10 years would be costly and extremely burdensome on DD. Therefore, the court might narrow the request to make it more proportional for example decreasing the time period and changing it to only employees that their work revolved around the boat and its maintainable.

Good

In conclusion, the court would probably narrow the discovery request to the emails that are more relevant to the boat in incident and shorted time period. The court might narrow the request to make it more proportional for example decreasing the time period and changing it to only employees that their work revolved around the boat and its maintainable. The court would order DD to provide emails that were not confidential communication between DD lawyer and employees and the communications there were not for the purpose of obtaining legal services and provide a privilege log describing the nature of the withheld privilege document. The court would order DD to produce the emails that were not prepared in anticipation of litigation and provide a privilege log describing the nature of the withheld privilege document.

3) 85/100 -- this was particularly clearly written and shows a good understand of the rule and how it applies, and you managed to spot all the potential admissibility issues as well

Summary Judgement

Under Rule 56, a party may move for summary judgement, seeking judgement as a matter of law, by showing that there is no genuine dispute of material fact. The moving party, or movant, bears the burden of production to show that no genuine dispute of material fact exists. They can do this in two ways (1) by foreclosing on a fact that the non-moving party (NMP) asserts (Adickes) or (2) showing, with more than a mere cursory assertion, that the NMP does not have evidence for a fact they assert (Celotex). The moving party may bring this motion within thirty (30) days after the close of discovery. very good

The main fact being disputed in this case appears to be whether a contract was formed. Contracts are formed when there is an offer, acceptance of that offer, and consideration. Pluto is bringing the claim because they allege that there was in fact a contract between Pluto and Delos for shackets and Delos breached by not delivering the benefit of the bargain. good

Here, in Delos' motion for summary judgement is alleging that no contract was formed and therefore they are not in breach of the contract. Using what appears to be the Adickes method, Delos seeks to foreclose on the fact that there was a contract. They do this by introducing deposition testimony from Delos' Head of Sales and Pluto's Head of Buying showing that Pluto never submitted, and Delos never received Pluto's order, and therefore a contract didn't form. In this instance, Delos is saying that, although they are offering the shackets for sale, Pluto never completed the contract by accepting the offer and paying consideration. This forecloses on a fact that Pluto needs for its case, that a contract was actually formed. very good -- did they ALSO try Celotex?

At this point, it appears that Delos has met the burden of production by providing evidence that shows that there is no genuine dispute of material fact. If Pluto never

submitted an order to Delos then a contract never formed and, therefore, Delos could not have breached.

Burden Shifts

If the moving party meets their burden and shows that there is no genuine dispute of material fact, then the burden shifts back to the NMP, to show that there is a genuine dispute of material fact.

To rebut this foreclosure of fact, and to prove that a contract was in fact formed, Pluto responds with four evidentiary items seeking to prove that a contract was formed.

The first piece of evidence is the deposition from Liz, Pluto's Head of Buying, which seems to contradict the statement from her deposition that Delos introduced in its motion, that an order was in fact placed, through email. This would prove that, despite the fact that Pluto didn't submit an order through the normal channel, than an order was placed, and a contract was formed when Liz and the Delos representative corresponded over email. To substantiate these claims, Pluto introduces its second piece of evidence, the email correspondence between Liz and saleguys@delos.com showing that an order was placed.

The third piece of evidence is deposition from Liz, stating that her subordinate Kevin told her he submitted payment for the order through wire transfer. This piece of evidence, however, seems to be excluded as a statement of hearsay, that will not be admissible. The remainder of Liz's testimony, that Kevin had the bank account information for Delos because Pluto had purchased clothes from them in the past, will be admissible. This evidence can be used to substantiate the fourth piece of evidence, being the bank statement from Pluto showing the $80,000 was transferred.

Where the first two pieces of evidence will show that there was an offer and acceptance, the second pieces of information can be used to show consideration was paid, and therefore, a contract was formed.

Burden Shifts Again

Finally, the burden shifts back again to the Moving party to prove that there is still no genuine dispute of material fact.

To rebut the evidence submitted by Pluto, Delos offers a Letter to the Court from Bill explaining Delos' sales policies and procedures. Although this seems to rebut the formation of a contract, through express company policies excluding sales that are not made in the normal channels, there is a question as to whether the letter will be admissible. The letter does not seem to be under oath or even notarized to show that Bill is attesting to the statement he is making. good

Even if Bill's letter were to be given consideration by the court, it may still not be enough to warrant a summary judgement. After all submittals, the court will review the responses, without weighing evidence or assessing credibility, and will draw all reasonable inferences in favor of the NMP. Just because Delos has a policy that excludes the completion of contract without an approved purchase form, does not necessarily mean that a contract could not still have been formed. Excellent

Conclusion

At the conclusion, the court will review both parties' responses, without weighing evidence or assessing credibility, and finding all reasonable inferences in favor of the NMP in order to determine if Summary Judgement is appropriate. It's unlikely that the court will grant Delos' motion for summary judgement as there is still the possibility that a contract was formed. This is especially true if the court is unwilling to give consideration to Bill's Letter to the Court. I tend to agree.

END OF EXAM