

Civil Procedure II MC Question Review Exercise

The National Conference of Bar Examiners released the first 7 of these sample questions as an educational tool. They are very similar in format (including typeface) to the Multistate Bar Examination (MBE) and are intended to familiarize examinees with MBE-style questions on the topic of Civil Procedure, which was added to the exam beginning in February 2015. [The first 7 questions are subject to copyright by the NCBE, and I reproduce them here, with some modifications, under the “fair use” doctrine. The remaining 3 questions I made up, trying to follow the NCBE’s model. Please do not disseminate these questions or their answers outside our class.]

This is just as much an exercise in multiple-choice exam strategy as it is a review of substantive law, so as you approach these questions, please proceed as follows:

- (1) Read the call of the question first, and then the facts, *carefully*. Close enough is not close enough—you must understand the facts and the question precisely. Do not be distracted by ancillary issues that are not raised in the call of the question.
- (2) Read all of the options *carefully* with an eye toward accomplishing the next step (identifying clearly wrong answers) as quickly as possible.
 - Note: you will often not have to deal with issues you *thought would be* raised!
- (3) Identify *at least two* of the options that are *clearly wrong* for any reason—you can rest assured that at least one, and more likely two, of the options are obviously wrong.
 - sometimes the reason can be one word; e.g., “never” or “always”
 - often the wrong answer will contain correct statements of law that simply do not apply to the given facts
 - sometimes the wrong answer will misstate the given facts
- (4) If more than one option remains, identify as clearly as possible how they differ, and choose the *better* one. There is no penalty on the MBE (or my exam) for guessing, so never, ever leave a question blank. Much of human decision-making is subconscious, so choose an answer before moving on, and if you come back to a question, apply a strong presumption that your initial answer was right—change it only if you can clearly identify an error in that answer or a very powerful reason to choose another answer.

To simulate exam conditions, I suggest that you *first* try to answer these questions quickly, without looking anything up. You should spend no more than an average of about 2 minutes per question—though some questions are more/less complex than others and should be allotted more/less time, accordingly. Remember: this is a game—collect as many points as you can by following the game’s internal rules, recognizing that these rules often do not reflect actual law practice or even good legal analysis.

1. An entrepreneur from State A decided to sell hot sauce to the public, labeling it "Best Hot Sauce." A company incorporated in State B and headquartered in State C sued the entrepreneur in federal court in State C. The complaint sought \$50,000 in damages and alleged that the entrepreneur's use of the name "Best Hot Sauce" infringed the company's federal trademark. The entrepreneur filed an answer denying the allegations, and the parties began discovery. Six months later, the entrepreneur moved to dismiss for lack of subject-matter jurisdiction.

Should the court grant the entrepreneur's motion?

- (A) No, because the company's claim arises under federal law.
- (B) No, because the entrepreneur waived the right to challenge subject-matter jurisdiction by not raising the issue initially by motion or in the answer.
- (C) Yes, because although the claim arises under federal law, the amount in controversy is not satisfied.
- (D) Yes, because although there is diversity, the amount in controversy is not satisfied.

2. A patent holder brought a patent infringement action in federal court seeking \$50,000 in damages against a licensee of the patent. The patent holder believed that a jury would be more sympathetic to his claims than a judge, and asked his lawyer to obtain a jury trial.

What should the lawyer do to secure the patent holder's right to a jury trial?

- (A) File and serve a complaint that includes a jury trial demand.
- (B) Make a jury trial demand at the initial pretrial conference.
- (C) The patent holder's constitutional right to a jury trial is automatically preserved under these circumstances, so the lawyer need take no special action to secure that right.
- (D) The patent holder has no right to a jury trial under these circumstances.

3. A wholesaler brought a federal diversity action against a large pharmaceutical company for breach of contract. During jury selection, one potential juror stated that five years earlier he had been an employee of the company and still owned several hundred shares of its stock. The wholesaler's attorney has asked the judge to strike the potential juror for cause.

Should the judge strike the potential juror for cause?

- (A) No, so long as the potential juror said that he could fairly consider the evidence in the case.
- (B) No, so long as the wholesaler's attorney still has a peremptory challenge that he could use to strike the potential juror.
- (C) Yes, so long as other potential jurors still remain available for the jury panel.
- (D) Yes, because the potential juror is presumed to be biased because of his relationship to the company.

4. After being fired, a woman sued her former employer in federal court, alleging that her supervisor had discriminated against her on the basis of her sex. The woman's complaint included a lengthy description of what the supervisor had said and done over the years, quoting his telephone calls and emails to her and her own emails to the supervisor's manager asking for help.

The employer moved for summary judgment, alleging that the woman was a pathological liar who had filed the action and included fictitious documents in revenge for having been fired. Because the woman's attorney was at a lengthy out-of-state trial when the summary-judgment motion was filed, he failed to respond to it. The court therefore granted the motion in a one-line order and entered final judgment. The woman has appealed.

Is the appellate court likely to uphold the trial court's ruling?

- (A) No, because the complaint's allegations were detailed and specific.
- (B) No, because the employer moved for summary judgment on the basis that the woman was not credible, creating a factual dispute.
- (C) Yes, because the woman's failure to respond to the summary-judgment motion means that there was no sworn affidavit to support her allegations and supporting documents.
- (D) Yes, because the woman's failure to respond to the summary-judgment motion was a default giving sufficient basis to grant the motion.

5. A man brought a federal diversity action against his insurance company, alleging that the company had breached its duty under his insurance policy by refusing to pay for his medical expenses resulting from a mountain-biking accident.

At the jury trial, the man presented evidence that he had paid all premiums on the insurance policy and that the policy covered personal-injury-related medical expenses arising from accidents. After he rested his case, the company presented evidence that a provision of the policy excluded payment for injury-related expenses resulting from an insured's "unduly risky" behavior. The company also presented a witness who testified that the accident had occurred in an area where posted signs warned bikers not to enter. The man did not cross-examine the witness.

After resting its case, the company moved for judgment as a matter of law.

Should the court grant the motion?

- (A) No, because a motion for judgment as a matter of law must first be made at the close of the plaintiff's case-in-chief.
- (B) No, because whether the man's behavior was unduly risky is a question of fact for the jury to resolve.
- (C) Yes, because the company's uncontradicted evidence of the man's unduly risky behavior means that no reasonable jury could find that the policy covers his injuries.
- (D) Yes, because the man waived his right to rebut the company's evidence by not addressing the "unduly risky" policy provision in his case-in-chief.

6. A motorcyclist was involved in a collision with a truck. The motorcyclist sued the truck driver in state court for damage to the motorcycle. The jury returned a verdict for the truck driver, and the court entered judgment. The motorcyclist then sued the company that employed the driver and owned the truck in federal court for personal-injury damages, and the company moved to dismiss based on the state-court judgment.

If the court grants the company's motion, what is the likely explanation?

- (A) Claim preclusion (*res judicata*) bars the motorcyclist's action against the company.
- (B) Issue preclusion (*collateral estoppel*) establishes the company's lack of negligence.
- (C) The motorcyclist violated the doctrine of election of remedies.
- (D) The state-court judgment is the law of the case.

7. A student at a private university sued the university in federal court for negligence after he fell from scaffolding in a university-owned theater building. At trial, after briefing from both parties, the court permitted the jury to hear testimony that there had been several previous accidents in the same building. The jury found for the student, and the university appealed. One of the university's arguments on appeal is that the testimony about the previous accidents should have been excluded as irrelevant and highly prejudicial.

Which standard of review applies to this argument?

- (A) Abuse of discretion.
- (B) Clearly erroneous.
- (C) De novo.
- (D) Harmless error.

8. A pedestrian was struck by a motorcycle and severely injured while crossing the street. The pedestrian was fairly certain she recognized the driver of the motorcycle, so after her release from the hospital one year after the incident, she filed suit against that person in federal court, seeking damages for negligent operation of the motorcycle. The defendant consistently claimed that he had not been involved in the incident. In discovery, the defendant produced the names of several credible witnesses who attested that the defendant was at a different location at the time of the incident. After reviewing this evidence with her lawyer, the pedestrian was convinced that she had mistakenly sued the wrong person.

Six months after filing the lawsuit, and after the statute of limitations for the tort action had run, the pedestrian discovered the true identity of the driver of the motorcycle. The pedestrian moved to amend her complaint to name the newly identified driver of the motorcycle as defendant, the court granted the motion, and the amended complaint was promptly served on the new defendant.

Knowing nothing about the earlier case against the previous defendant, the new defendant immediately moved to dismiss the case on the basis that the statute of limitations had run before the new defendant was served.

How should the court rule on the motion to dismiss?

- (A) The motion should be denied, because the court granted the motion to amend, so the amended complaint automatically relates back to the time of its original filing.
- (B) The motion should be denied, because the pedestrian was legitimately mistaken as to the identity of the proper defendant, and she moved diligently to amend her pleading and serve the proper defendant as soon as the mistake was established.
- (C) The motion should be granted, because running of the statute of limitations is an affirmative defense that conclusively cuts off any claim against the new defendant.
- (D) The motion should be granted, because the new defendant had no knowledge that the action had been filed against the original defendant.

9. In a trial for wrongful death resulting from the plaintiff's ingestion of a certain drug, the parties rested their cases, and the jury began deliberating. The key divisive issue in deliberations was causation, with several jurors opining that they wished the parties had put on evidence of the normal absorption of the drug into the system after ingestion. One of the jurors did some quick research on his smartphone to discover several websites that suggested an absorption rate that would undermine the plaintiff's claims that the drug caused the death. Convinced by these findings, the jury returned a verdict for the defendant.

Later, hoping to help the plaintiff's lawyer avoid similar mistakes in future cases, another juror sent an email to the plaintiff's lawyer. The email explained that evidence of the drug's absorption rate had been key to the jury's verdict, and if the plaintiff's lawyer had presented evidence that contradicted the other juror's smartphone research findings, the case might well have come out differently.

The plaintiff immediately moved for a new trial.

Should the court grant this motion?

- (A) No, because nothing in the email suggests sufficient grounds for a new trial, as jurors are allowed to arrive at their verdict on whatever basis they as a group consider appropriate.
- (B) No, because no evidence of a juror's comments about statements, incidents, or influences during jury deliberations can be used as evidence to challenge the validity of a verdict.
- (C) Yes, because the email shows that extraneous information and/or an outside influence was improperly brought to the jury's attention and influenced the verdict.
- (D) Yes, because the second juror sent the email voluntarily, under no compulsion to testify.

10. A woman obtained a \$1 million judgment in federal court in Illinois against her former employer for sexual harassment. The former employer has many assets (accounts receivable, bank accounts, furniture, vehicles), but the woman would like to enforce her judgment against the employer's office building, which the employer owns free and clear of any mortgage and which is valued at approximately \$750,000.

Can the woman enforce her judgment against the office building?

- (A) Yes, by serving a citation to discover assets on the recorder of deeds of the county where the building is located, and obtaining a turnover order from the court in supplementary proceedings.
- (B) Yes, by recording a certified copy of the judgment in the land records of the county where the building is located, and enforcing this lien using the process for mortgage foreclosure.
- (C) No, because the law of marshalling requires the woman to at least attempt to enforce her judgment first against the employer's personal (movable) property before pursuing real (immovable) property.
- (D) No, because the employer's exempt interest in the property and the prior recorded mortgage most likely exceed the value of the property.