There are three portions of this volume, consisting of a miscellany of exam materials. First is an instruction sheet. Next are several exam problems, most of them dealing with materials we have covered or will cover by the time of the midterm. Last are some model answers and detailed memos with comments on particular questions. For some of the questions presented here, there is neither a model answer nor a comments memo -- but I think you’ll find ample materials here!

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Exam Instructions

Instructions from Fall 1999 Midterm

1. You may use any materials you wish. You should have with you your textbook, the supplement to it (including the Federal Rules), the booklet of supplemental materials, and class handouts.

2. The exam problem is set in the State of Grace, a new state that has not yet adopted a civil procedure code for its courts but that "accords all sources of American procedural law such persuasive authority as they may have."

3. There is no formal space limit on your answers. Please bear in mind the following, however: Perception and understanding of issues, crisp and organized expression, a sense of proportion, and sound, imaginative analysis will be rewarded. Excess verbiage and non-responsive statements will hurt your grade. Assume throughout that your reader is familiar with the facts of the problem and with principles of procedural law, but that he has not thought through the application of the law to these facts. If your answer would be affected by facts not stated in the problem, please specify, as best you can, what those facts are and what effect they would have.

4. The exam has one basic factual setting, but it is divided into 5 parts, to be weighed approximately in the proportions 1:1:1:2:1. Obviously, I expect concise answers! Do not use facts stated with respect to any given part in answering any prior part; also, such facts are not meant to "tip off" your answer to a prior part. Please note that you are playing one role in Parts A through C and another in Parts D and E.

5. PLEASE START YOUR ANSWER TO EACH PART ON A SEPARATE PAGE. There will be a small penalty each time you fail to do so. Bear in mind that I will read your answer for each part separately. At the top of each page, put a heading giving your exam ticket number, the question you are answering, the page number and how many pages there are in that answer -- for example, 11039 B 3/4.

If you are writing by hand, put your answers only on the legal pad provided. You may use whatever paper you like for notes. Please do not rip pages out of the pad. Instead, cross out anything not meant for me to read. Please be legible.

5. BUDGET YOUR TIME -- you could use much more than you are given, so use what you have to best advantage. I expect quite short answers to each of the four questions.

6. Please do consider this advice: AFTER (AS WELL AS DURING!) THE EXAM, DO
NOT TALK TO YOUR CLASSMATES ABOUT IT! YOU WON'T BE ABLE TO DO ANYTHING ABOUT IT THEN, AND YOU'LL HAVE PLENTY OF TIME TO REVIEW YOUR ANSWER AFTER I GRADE IT. In any event, GOOD LUCK!

*    *    *
Exam Questions

Two Questions from Winter 1990 Exam

II.

In Questions 11-14, assume that you are law clerk to the trial judge. Each of these questions asks you to write a memo to the judge. If you believe that additional information would likely affect your answer, indicate what that information is and why it might be significant.

1 (30 points)

Photo Researchers, Inc. ("PRI") is a photograph broker. It exhibits the work of various photographers to editors and other professional users. If a photograph is sold, PRI keeps a portion of the purchase price as its commission and remits the balance to the photographer. In April 1987, Stark, a professional "visual artist" since 1978, deposited with PRI a large quantity of color slides. PRI gave Stark a receipt identifying each slide by a number and its subject. None of the slides were sold, and in April 1988 Stark demanded their return. PRI returned all but 73, which it had apparently lost. Stark sued in state court, seeking damages for the 73 missing slides.

PRI has served on Stark a "Request for Documents and Interrogatories" asking for, among other things:

"(A) All similars or duplicates of the slides that are the subject of this action, together with a statement of the sale or license price of any of the similars or duplicates, and all documents relating to such sales or licenses.

"(B) All publications in which plaintiff's photographic works have appeared, as well as all agreements relating thereto.

"(C) Plaintiff's federal income tax returns from 1978 to the present."

Stark objects to these requests and PRI moves to compel discovery. Advise the judge how to rule on the motion.

* * *

1 (20 points)

Below are §§ (a)-(c) of Local Rule 46 of the United States District Court for the Southern District of New York, reprinted from pp. 401-02 of your Supplement:

(a) At the commencement of discovery, interrogatories will be restricted to those seeking names of witnesses with knowledge or information relevant to the subject matter of the action, the computation of each category of damage alleged, and the existence, custodian, location and general description of relevant documents, including pertinent
insurance agreements, and other physical evidence, or information of a similar nature.

(b) During discovery, interrogatories other than those seeking information described in paragraph (a), above may only be served if they are a more practical method of obtaining the information sought than a request for production or a deposition.

(c) At the conclusion of each party's discovery, and prior to the discovery cut-off date, interrogatories seeking the claims and contentions of the opposing party may be served unless the court has ordered otherwise. Questions seeking the names of expert witnesses and the substance of their opinions may also be served, if this information has not been previously obtained.

In a brief essay, discuss whether the United States District Court for the Ultimate District of Exuberance (a primarily urban district with much commercial litigation) should adopt this rule in whole or in part.

*   *   *
Questions from Summer 1990 Midterm Exam

A. (25 minutes)

To:  Associate  
From:  Partner  

Deborah and Donald Defoe, a young couple who live in Fun City, have come to us with a problem. Five years ago, they bought the house at 1200 Fat Street in the Lakeview Subdivision, an attractive area of about 1,000 homes in the northeast section of the city. The house has a two-car driveway. It also had a two-car garage, not visible from the street. Last year, acting on a plan they had developed when they bought the house, the Defoes began converting half the garage into an office and a waiting room. The Defoes are handy and they did most of the work themselves. Nevertheless, the materials alone cost them several thousand dollars. They finished the work six months ago, just about the time Deborah completed her training as a clinical psychologist. Since then, Deborah has been working 25 hours per week in a clinic downtown, and has been seeing patients privately about 15 hours per week in the new home office. She gets all her private patients by referral -- either from the clinic or from present or past colleagues, teachers, and patients. She does not advertise, and there is no sign or any other indication on the property that she is engaged in a profession there. Last week, the Defoes received valid service of the following complaint:

STATE OF EXUBERANCE  
COUNTY COURT OF EXHILARATION COUNTY  

----------------------------------------x  
LAKEVIEW HOMEOWNERS' ASSOCIATION and : x  
PAUL PRYOR, x  
Plaintiffs :  
x v.  
COMPLAINT x  
DEBORAH DEFOE and DONALD DEFOE, : Index No. 90-CIV-997  
Defendants x  

----------------------------------------:

Plaintiffs as their Complaint allege as follows:

1. Defendants are owners of the property known as 1200 Fat Street, in Fun City, and Plaintiff Paul Pryor is the owner of the adjacent property, known as 1204 Fat Street, also in Fun City. These properties are located in the Lakeview Subdivision ("the Subdivision") of Fun City.

2. The Subdivision was created in 1923. At that time, the developer recorded in the office of the Exhilaration County Register of Deeds a document titled "Constitutive Document of
the Lakeview Subdivision." That document is recorded in Book 51, Page 101 of the records of such office.

3. The Constitutive Document provided for the creation of the plaintiff Lakeview Homeowners' Association, an unincorporated association to which all owners of homes in the subdivision belong. The Document also contained numerous restrictions on use of property in the Subdivision. Among these were the following:

§ 4.1 Residential Use Only. The Subdivision shall be used and occupied for single residence purposes only, and nothing shall be done or permitted thereon which shall or may interfere with or detract from such use and occupation thereof. In particular, no person shall carry on a trade, business, or profession of any kind on property in the Subdivision, except such as may be strictly incidental to residential use.

*           *           *

§ 5.1 Binding Force of This Document. All deeds to property in the Subdivision shall be made subject to this Document. Any restrictions prescribed by this Document may be enforced by an action brought by the Homeowners' Association or by any homeowner in the subdivision.

4. The Defoes' deed is explicitly made subject to the terms of the Constitutive Document. In violation of § 4.1 of that document, defendant Deborah Defoe has used the Defoes' property, and defendant Donald Defoe has allowed the property to be used, for the pursuit of her profession as a psychologist, in particular by the consultation with and treatment of patients on said property. Unless retrained, defendant Deborah Defoe will continue such use.

5. Such use violates plaintiffs' contractual rights as prescribed by the Constitutive Document.

6. Such use also causes apprehension to, and is a nuisance to, plaintiffs, interfering with their quiet enjoyment of their homes and threatening the safety of their children, because of the nature of the ailments of the persons using the premises and the increase of traffic in said neighborhood as a result of such use.

7. WHEREFORE, plaintiffs demand damages, in an amount to be determined at trial, and preliminary and final injunctive relief against defendants' use of the property in violation of the restrictions set forth in the Constitutive Document.

/s/ Patricia Power
PATRICIA POWER, ESQ.
Attorney for Plaintiffs
1000 Main Street
Fun City, Exuberance  99999  
(989) 989-8989

[END OF COMPLAINT]

The Defoes confirmed to me that Pryor is their next-door neighbor, at 1204 Fat Street. I have had a legal assistant go to the office of the Register of Deeds. He reports that the Complaint accurately states where the Constitutive Document is filed. He has brought back copies of the Document, dated August 1, 1923, and of the Defoes' deed; I have reviewed them, and both say what the Complaint says they do.

I have also done some legal research, and I found a decision by the state supreme court, issued just last month, in Riverview Homeowners' Association v. Theresa Turnbull. Riverview is another subdivision in Fun City, with a Constitutive Document identical in all material respects to Lakeview's. Turnbull is also a clinical psychologist. She had worked downtown, but then decided to see patients in her study at home. When the Homeowners' Association sued, she moved for summary judgment, contending that the restriction in § 4.1 was void against public policy and in any event inapplicable. The motion was granted by the trial judge (not the judge to whom our case has been assigned), but the state supreme court reversed. The key language in the supreme court opinion was:

We are not persuaded by Turnbull's argument that regular consultation with patients, no matter how quiet, is what the drafters of this clause meant by activities "strictly incidental to residential use." Nor can we say that, if the clause be construed to reach activities such as Turnbull's, it is void against public policy. Such clauses appear to be reasonable methods of ensuring that a neighborhood is maintained for entirely residential purposes. Assuming that the restriction has been consistently applied, and that the Homeowners' Association has not been unduly slothful in asserting its rights, the courts should enforce the restriction.

Naturally, the Defoes are very upset by all this. They have told me that, although they were vaguely aware when they bought their home that a document separate from the deed stated restrictions on the use of the property, they assumed at the time that nothing in that document would prevent Deborah from seeing patients at home. They are eager to preserve Deborah's ability to do so, if possible without enormous expense. (They have a comfortable income, but are not wealthy.)

Please write a concise memo assessing the possible responses we could make to the complaint and advising me what course we should follow in doing so.

B. (10 minutes)

To: Associate  
From: Partner  

Day 2
Counsel for the plaintiffs has just told me that she is about to move for a preliminary injunction restraining Deborah from seeing patients at home pending the determination of this action. Please write a very brief memo indicating what arguments you anticipate the plaintiffs will make, what we should say or do in response, and what you think our chances of success will be.

C. (25 minutes)

To: Associate
From: Partner

The action against the Defoes has survived the pleading stage, with the Complaint unamended. Discovery is about to begin. Please write a concise memo setting out a plan for discovery. Tell me, to the extent you are able, what we should be trying to find out, for what purposes, from whom, and how, what resistance we might expect, and how you assess our chances of actually getting the discovery.

*   *   *
To: Law Clerk  
From: Judge Jughead  

Paul Perry v. Donna Delgado has been assigned to me. I need your advice on some pending motions. This case was commenced, by filing of the complaint in our court and service of a summons and complaint on Delgado, on October 1, 1991. The complaint, which sought $5 million in damages, alleged essentially as follows:

1. In 1987, Perry suddenly developed a condition known as hydrocephalus, in which excess fluid collects in the brain, threatening various nasty consequences, including eventual death.
2. On April 1, 1987, Delgado, a neurosurgeon, performed an operation in which she placed a shunt in Perry's cranium, thus removing the excess fluid and relieving the pressure on his brain.
3. The shunt performed well until June 1989. Perry then experienced an acute return of his earlier symptoms, necessitating an emergency operation on July 1, 1989.
4. The cause of the problem was that Delgado had negligently attached the shunt badly, thus creating a leak that eventually caused an almost complete separation of the shunt from the tissue that held it.
5. As a result of the leak, Perry had not only had to endure a second operation, but had suffered serious health problems, including some loss of brain function.

Consistent with the common practice in Surprise County, Perry agreed to give Delgado several extensions of time to respond to the complaint, beyond the time I would usually allow absent consent of the adverse party. Delgado answered the complaint on May 1, 1992. She admitted the allegations summarized above in paragraphs 1 and 2, admitted paragraph 3 to the extent that it alleged that the shunt performed well into June 1989, DKIed the rest of that paragraph, denied paragraph 4, and DKIed paragraph 5.

On July 1, 1992, Perry served on Delgado an interrogatory asking Delgado to identify any expert witnesses whom she expected to testify on her behalf. Again Delgado sought and was granted extra time, and on October 1, 1992, she replied that Edna Elkins, a well known neurosurgeon, would testify on her behalf. Meanwhile, in response to a similar interrogatory, Perry notified Delgado that he expected Norris Noll, the surgeon who had performed the July 1, 1989 operation, to testify on his behalf that Delgado had improperly attached the shunt in the first operation and that this was the cause of Perry's subsequent problems. After some negotiation between counsel, the parties agreed that each would depose the other's expert.
Pursuant to this agreement, Perry took Elkins' deposition on January 15, 1993. Elkins testified that, in her view, based on examination of records (including some videotapes) of both operations and of the first shunt, she believed that Delgado had done nothing wrong in the first operation. Delgado had attached the shunt properly, Elkins testified, but it had later become detached because of a latent defect in the shunt that caused the shunt to buckle. Noll had noticed the buckling, Elkins pointed out, but incorrectly perceived it to be an effect, rather than the cause, of the detaching of the shunt.

Elkins' deposition testimony may have had some effect on Perry, because on February 1, 1993 he sought consent of Delgado to amend the complaint to add Medequip Co. (MC), a manufacturer, among other medical apparatus, of shunts for the hydrocephalus operation. Delgado gave written consent on February 15, and on March 15 Perry filed and served on both Delgado and MC an amended complaint, also serving MC with a summons. The amended complaint repeated the claim against Delgado unchanged, but added two claims against MC "in the alternative." Perry alleged in this portion of the amended complaint that MC had manufactured the shunt used in the first operation; he asserted that he knew this because, before the operation, Delgado had told him he would be using a MC shunt. Perry further alleged that the shunt had buckled, because of a latent defect, and that this caused his subsequent difficulties. This improper manufacture, Perry claimed, was both negligent and a breach of contractual obligations to him. (Under the law of Shock, it is quite unclear whether the undisputed fact that MC did not sell the shunt to Perry in itself defeats any contract claim of Perry against MC. One view of the law, but not a well established one, is that if MC sold the shunt with the expectation that it would be implanted in someone's brain, the person who actually received it would have a contract action against MC for damages attributable to any defects in the shunt, even though MC and the patient had no direct contractual relationship. I don't expect you to have any expertise on this issue; please understand that I might resolve it either way.)

Perry's claim against MC was apparently the first one ever against the manufacturer of a shunt for the hydrocephalus operation, and the complaint was written up in some detail in New Frontiers in Medical Apparatus, a widely read trade journal; some other medical and even general publications made brief mention of the case. After what is, for Surprise County, an unusually brief extension of time to respond to the complaint, MC answered on April 15. It denied that it had made the shunt used in the first operation, and DKIed all the other essential allegations made against it.

On May 15, 1993, Perry served on MC an interrogatory asking it to state all facts on which it based its denial that it made the shunt used in the first operation. On July 10, again after a rather brief extension, MC answered the interrogatory. It explained that the hydrocephalus shunts of the basic design now used are expensive and technologically advanced, that from the time when they were first developed, in 1986, until 1990, it did not sell many, and that it kept careful track of every one that it did sell. MC attached to its interrogatory response a copy of a document that it claimed to have prepared in 1990, purporting to list every hydrocephalus shunt that it had sold, with the date of sale and the patient who eventually received it. Perry's name was not on the list.
On August 1, Perry filed a motion with the court seeking leave to amend the complaint again. Perry has included in his motion papers the complaint as he seeks to amend it. This second amended complaint would add to the claim against Delgado the allegation that Delgado negligently used a defective shunt. It would also add a fraud claim against Delgado, alleging that Delgado told Perry, accurately, that MC was the best maker of hydrocephalus shunts, that she also told him that the shunt she would use was made by MC, that this statement was inaccurate and known to be inaccurate by Delgado, and that Perry suffered because the shunt actually used was made defectively. Finally, the second amended complaint would also seek to state negligence and contract claims against Apparatcheck, Inc. (AI), another maker of hydrocephalus shunts. These claims are essentially the same as the ones already stated against MC -- except, of course, that they allege that AI made the shunt used in the first operation. Perry has added an allegation that before 1991 MC made approximately 50% of all hydrocephalus shunts and AI approximately 20%.

Delgado and AI have filed papers opposing Perry's motion to amend. In addition, Delgado and AI have each moved for sanctions against Perry. (I understand that MC will soon move for summary judgment and for sanctions, but these motions are not yet before me.) I have barely scanned their papers, which seem to raise a lot of issues. I did notice a couple of points that might be of interest, though. First, Delgado has asserted in an affidavit that she was told by her distributor of medical apparatus, Art Allman, that the shunt that she bought for the Perry operation was made by MC. It is undisputed that Allman died suddenly of a heart attack in May. Second, AI asserts (again without dispute) that the 30% of pre-1991 shunts made by neither MC nor AI were made by Northern Medical Engineering, Inc. (NME), which is now defunct.

You also should know that the statutes of limitations in Shock are as follows: eight years for fraud, six years for contract claims, and four years for negligence claims.

Please advise me how to proceed on these motions. If you believe I have to do some fact finding before deciding them, tell me what and why.
A.

To:  Associate Day 50
From:  Partner

Our state legislature has adopted an anti-discrimination statute covering an area left generally untouched by any federal statute. (Please disregard any constitutional problems; I doubt there are any with respect to this case.) The key portions of the statute read as follows:

§ 1. No public employer shall discriminate with respect to employment against any person on grounds of physical attractiveness.

§ 2. Any public employer violating this statute shall be liable to the person discriminated against for damages caused by the violation, provided that before commencing suit such person must first exhaust any remedies for such discrimination provided by the public employer. Any action under this section shall be brought in the circuit court of the county where the discrimination occurred, and shall be commenced within one year from the time the cause of action has accrued.

§ 3. For purposes of this statute,

   a. "public employer" shall mean

      i. the state,

      ii. any municipal entity within the state, and

      iii. any other employer, if the person against whom the employer discriminates performs (or, but for the discrimination, would perform) work for the employer that is essential for the provision of goods or services by the employer to the state or to any municipality within the state; and

   b. "physical attractiveness" shall mean, without limitation, considerations of height, weight, body type and odor, disfigurements, scars and other markings, facial appearance, manner of speech, baldness, length, color, and style of hair, and dress style.

§ 4. Nothing in this statute shall require a public employer to employ, or maintain the employment of, any person in any capacity if

   a. such employment would pose a genuine risk to the health and safety of any person, or
The person lacks a genuine occupational qualification for the work in question.

§ 5. Neither the state nor any municipality within the state shall be liable for injury caused by a violation of the statute by an employer described by §3(a)(iii) of this statute unless such violation was in accordance with the policy of such state or municipality.

A local client of ours, Dravo Contracting Co. (DCC), is one of the leading construction contractors in Surprise City. From prior representations I know that a substantial portion, though probably not a majority, of its business is on public works projects for the City; I have heard rumors that this is largely because DCC's owner and chief executive officer, Deborah Dravo, is a close friend of the City Administrator, Charles Carrow.

Dravo has just asked us to represent DCC with respect to an action brought against it today by one Paula Pointer. (DCC received proper service of the Complaint, which was properly filed today in the circuit court for our county.) The key allegations of the Complaint are, in substance, as follows:

6. For a period of four years until Day 1, Pointer worked for DCC as a bookkeeper.

7. Pointer's work was essential for the provision of services by DCC to Surprise City.

8. Pointer's work was entirely satisfactory in every respect.

9. Nevertheless, her employment was terminated on Day 1, because she is obese and other members of the Bookkeeping Department therefore found her to be an undesirable presence.

10. The termination caused Pointer financial loss, and also physical and emotional pain and suffering, for which she seeks damages.

I have asked Dravo what she knows about Pointer, and she has told me that she does not remember her at all; she leaves management of the Bookkeeping Department pretty much to the Supervisor, Barbara Burson. Indeed, overall Dravo says that the management of DCC, which is not unionized, is heavily departmentalized. She says that, though there is no formalized procedure for employee grievances, she occasionally tells the entire staff of the company, either by memo or in a pep talk at staff meetings, that she maintains an "open door" policy and will consider complaints by any employee. From time to time employees terminated by a department supervisor have complained to her, and once during her ten years as head of DCC she reversed the supervisor's termination decision.

I would like to consider making a motion to dismiss the complaint. Please advise me, as best you can in a concise essay, what grounds we might have for such a motion, what our chances
of success would be, what we might hope to accomplish and what risks, if any, we incur by making the motion, and whether you advise making the motion.

B.

To: Associate
From: Partner

Just in case we have to prepare an Answer to the Complaint in Pointer v. DCC (whether because I decide in the end not to move to dismiss, or because we make the motion and it is denied): Please advise me, as best you can in a concise memo, what we should do. To the extent, if any, you believe you already know what we should put in the Answer, tell me; to the extent, if any, you believe we must do preparatory work, tell me what it is and what bearing it might have on what we put in the Answer.

C.

To: Associate
From: Partner

Pointer has served and filed a motion today to amend her Complaint to add a claim against Surprise City. This claim repeats the allegations in the claim against DCC. It adds an allegation, made "on information and belief," that the termination of Pointer "was in accordance with the policy of Surprise City." In support of this allegation, it cites an article in the Surprise Bulletin of Day 415, reporting that two former municipal employees, one of them a 911 operator and the other a clerk in the Board of Elections, had recently filed suit against the city claiming that they were fired because they were obese.

The City has asked us to represent them in this action. For purposes of this problem only, put aside any ethical problems that this representation may raise. I would like, on behalf of the City, to oppose the motion to amend, and also to move for sanctions. Please write a memo advising me what arguments we may make, what counter-arguments we should expect, what factual presentations, if any, we should be prepared to make in support of our motion or in opposition to Pointer's, and what our chances of success are.
Summer 1997 Midterm

Here is some law of the State of Exhaustion.

Civ. P. Code § 3.101 provides: "The limitations period for all product liability actions shall be one year from the date of injury."

Bus. L. § 5.23 provides in essence as follows: When a corporation dissolves, the assets are distributed among the shareholders, and they each remain responsible for the liabilities of the corporation up to the amount of the assets received. In addition, the corporation must post with the Secretary of State such security as required by the Secretary against all liabilities for a period of five years from the dissolution.

Excerpts from two 1996 decisions of the state supreme court:

Pinkerton v. Dilbert: A manufacturer of a product is liable, without a need for showing negligence, for any injuries caused by a defective condition in the product as supplied by the manufacturer. For this purpose, there are three varieties of defects: manufacturing defects, design defects, and inadequate warnings. A defect in manufacture or design means that the product is in an unreasonably dangerous condition. Of course, there are products, such as some drugs, that are incapable of being made safe. But manufacturers have a duty to warn purchasers or users of their products of dangers associated with the intended use or reasonably foreseeable misuse of their products, and they are liable for breach of this duty if a warning would have prevented injury. The scope of the duty is not unlimited, of course. A manufacturer cannot manufacture hammer that will not mash a thumb or a stove that will not burn a finger. The law does not require a manufacturer to warn of such common dangers. Where a manufactured article is simple and the danger is obvious to any reasonable and reasonably anticipated user, the manufacturer is not liable for failure to warn should the danger come to pass.

Peters v. Deak Corp: If one corporation purchases all the stock of another and the two corporations are merged into one, then the merged corporation necessarily becomes liable for all the liabilities of the two predecessor corporations. But if one corporation purchases all of the other assets of another corporation, the "purchased" corporation retains its corporate identity and its responsibility for all of its liabilities. The purchase contract may provide that the purchasing corporation will assume those liabilities, and if it does and the purchasing corporation is able to bear them then the "purchased" corporation should be relieved of those liabilities. But the purchase contract need not so provide. * * *
A.

To: Associate
From: Partner
Date: July 11, Year 1

Because you expressed interest in the law of pleadings as applied to waterslide cases, I thought you might be of assistance in this case. Our client, Derring-Do Slides, Inc. (DSI), has just been properly served with a summons and complaint in a case brought in state court, Pearl Parsons v. Derring-Do Slides, Inc., et al. Please assume that venue and jurisdiction are proper. So far as it applies to DSI, the complaint alleges as follows:

1. Plaintiff graduated from Fun City High School (FCHS) in June of Year 1. In connection with graduation festivities, the Student Organization (SO) of FCHS held a "Graduation Blast" at Tall Trees Amusement Park (TTAP) on the afternoon of June 25. Plaintiff, along with most of her classmates, attended this event.

2. One of the chief attractions of TTAP is an 80-foot-high waterslide. Users of the slide climb stairs to the top and then slide down a curved trough, with water running through it, to a pool at the bottom. The trough of the slide is made out of molded plastic. The slide is supported by the stairway structure and by a system of aluminum buttresses.

3. The waterslide at TTAP was manufactured by Do-Drop Manufacturing Co. (DMC), a predecessor of DSI.

4. DSI is liable for the torts of DMC.

5. As plaintiff slid down the slide at TTAP, it buckled. Plaintiff was thrown over the side and to the pavement below, suffering grievous injuries, including multiple broken bones and lacerations.

6. The slide was defective in design and in manufacture because it was inadequate to carry substantial weight. It was also defective in that it did not warn plaintiff of this inadequacy, and DSI did not otherwise warn plaintiff of it.

The complaint then asks for $1 million in damages. The complaint also asserts a claim against TTAP for negligence in supervising operation of the slide. Parsons is not suing the school district or anyone associated with it -- perhaps because, as I understand it, her mother is principal of a junior high school within the district.

I have made some inquiry about the case. The Fun City Gazette, a local newspaper, carried a story on June 26, containing all the information in ¶ 1 above. The story also reported as follows: Some of the students at the "Blast" formed an ever-lengthening series of "human chains" going down the slide. First 4, then 8, then 12, and then 16 students slid down, each one below
the top holding the ankles of the person above. Parsons joined the group to make the chain of 12; going down that time, some of them noticed a substantial vibration in the slide. She again joined the chain of 16, but that time the slide buckled. Most of the students escaped serious injury: Some were near the bottom already, some were able to climb back to the top, a few fell less than ten feet. Parsons was the only one seriously hurt.

An investigator I hired, Ivan Inqvest, has spoken to some employees of TTAP. My understanding is that the SO rented out TTAP for the afternoon, and provided its own security and supervision; it appears that supervision was lax. Inqvest also checked out the slide. There is no doubt it is a Do-Drop. It bears a serial number that, according to old records in DSI's deep storage files, indicates it was sold to a distributor in the Fun City area in 1971. Distributors do not keep a large inventory of waterslides, and once they are set up these things are rarely moved; I assume this slide was in place at TTAP by 1972 at the latest. In case you're interested, Evan English, the top engineer at DSI and the person most familiar with its manufacturing operations, traveled all the way from Remote City, where DSI is located, just to take a look at the slide, and he confirms that it's a Do-Drop. English also tells me that this is the first claim ever made against DSI on the basis of a fall from a Do-Drop slide.

I'd like if possible to make a motion to dismiss the complaint for failure to state a claim on which relief can be granted and a motion for sanctions. Please write a very concise memo suggesting grounds on which these motions might be based, assessing the chance that they would each be granted, and evaluating the possible benefits (as well as risks, if any) to us of making these motions.

B.

To: Associate
From: Partner
Date: June 10, Year 2

Remember Parsons v. DSI? I made those motions, and at long last the trial court has decided them, denying both. Now we have to answer the complaint. The judge has given us until June 30 but I'm going out of town on the 20th and want to get this done quickly. Please advise me as to how I should answer the complaint, indicating what we should put in it, what preparatory work, if any, we should do and what additional information, if any, we need. But don't bother telling me about how to answer ¶ 4; I'll take care of that one myself.

C.

To: Associate
From: Partner
Date: August 1, Year 2

You'll remember that I said I would take care of ¶ 4 of the Parsons complaint by myself. I
did, and I admitted it. But now I want to move for leave to amend. Here's what happened. DSI is a small, privately held company. When I took the complaint to its top management, none of whom was with the company before 1984, they told me that DSI had bought all the stock of DMC in 1973, merged the companies, and formed the Do-Drop Division of DSI; they couldn't tell me then where the records of the transaction were. Well, as it happens, just yesterday I was working on another case and I came across a publication I'd never heard of before, Funk & Scott's index of business periodical literature. Just out of curiosity, I checked in the index for 1973 under Do-Drop and Derring-Do, and I found a reference to a notice in another periodical, Small Manufacturers Digest, which read as follows: "Derring-Do Slides, Inc. has bought all the assets of one of its competitors, Do-Drop Manufacturing Co."

Please write a concise memo assessing the chance that I'll get leave to amend.

D.

To: Associate
From: Partner
Date: Sept. 15, Year 2

I didn't get leave to amend. Discovery is about to begin. I assume we'll be able to get a physical exam of Parsons. Please write a concise memo setting out a plan for additional discovery. Tell me, to the extent you are able, what we should be trying to find out, for what purposes, from whom, and by what discovery devices, what resistance we might expect, and how you assess our chances of actually getting the discovery. Disregard any questions of privilege and work product. And you can assume that there is no system of automatic disclosure here.
Fall 1999 Midterm

All statutes of limitations of the State of Grace of concern here are two years. In 1997, the Supreme Court of Grace issued the following unanimous opinions:

Paulsen v. Donofrio: A parent is liable to a child for intentional torts against the child but not for negligent supervision of the child. To allow liability in the latter situation would be an intolerable intrusion of the state into family life. And recognizing the varied nature of family life in the modern age, we do not say that this immunity or limitation on liability is applicable only to parents. It is not necessary here to define the exact boundaries of this doctrine, but for a person other than a parent to be relieved from liability on this intra-familial basis, the person must be exercising more than merely temporary custody and control.

Prutzman v. Davila: When a dog bites someone other than its owner, we do not believe that liability should generally turn on whether the bite occurred on the owner’s property, or whether it occurred at night, or whether the victim was engaged in illegal activity. If the dog has exhibited violent tendencies towards humans – and a previous unprovoked bite of a human is sufficient to demonstrate such tendencies – then the owner is liable for injuries caused by any further unprovoked bites of humans. If these conditions are not satisfied, then the owner is not liable for injuries caused by the dog’s bite, but no one has a right to harbor a vicious dog.

A. (1/6)

To: Associate, Defense Law Firm
From: Partner
November 1, Year 0

Our client, Dexter Devlin, has just been served with a Complaint for an action brought against him, in a state court of proper jurisdiction and venue, by Marlene Mottley, on behalf of her son Peter. Devlin has told me that Mottley and Peter’s father, Fred Falk, are divorced, that Falk lives next door to Devlin with his parents, and that Peter spends some time in the Falk house. The critical allegations of the complaint are as follows:

¶ 1. Peter is a five-year-old boy. Around 11 a.m. on February 1 of Year 0, he was playing in his grandparents’ back yard. This yard adjoins Devlin’s back yard, in which Devlin kept his dog Trover, a Great Dane of vicious tendencies. Trover was tied to a chain but with ample room to roam.

¶ 2. After kicking a ball accidentally into Devlin’s back yard, Peter crossed into Devlin’s yard to retrieve the ball and was viciously attacked by Trover.

¶ 3. As a result, Peter suffered serious injuries.

Devlin has told me that he was at his office, across town, on that day, and that when he
got back around 6:30 p.m., his neighbor, Geraldine Falk, Peter’s grandmother, showed up at his door, and told him the story asserted in the Complaint. Devlin subsequently saw Peter with bandages on his face, hands, and legs. Once he asked Peter how he was doing and Peter said, “OK, I guess. Trover bit me lots, and now I can’t move my thumb so well.” Devlin says that Trover, who is three years old, is actually quite gentle; in the two years he has owned Trover, she had never bitten anybody. There are several nasty dogs in the neighborhood, he says, and Peter has a tendency to wander.

I am contemplating making a motion to dismiss the Complaint for failure to state a claim on which relief may be granted. Please advise me in a very concise memo what arguments we should make and what chance of success we will have.

B. (1/6)

To: Associate, Defense Law Firm
From: Partner
November 10, Year 0

I haven’t yet made the motion to dismiss in the Devlin case, but today Mottley’s lawyer called me and said he was about to make a motion for “preliminary relief.” Please advise me in a very concise memo what we need to do to prepare to contest this motion, what kinds of relief the court might grant, and what chance (as best you can evaluate it on what you now know) there is that the court will grant such relief.

C. (1/6)

To: Associate, Defense Law Firm
From: Partner
March 15, Year 1

The court did not grant any preliminary relief in the Devlin case, and I have just now gotten word from the court clerk’s office that our motion to dismiss was denied. So now we have to file an Answer to the Complaint. Please advise me as best you can in a very concise memo what preliminary work we have to do and what we should say in the Answer.

D. (2/6)

To: Associate, Plaintiff’s law firm
From: Partner
March 1, Year 2

As you know, we are representing Marlene Mottley in her suit, on behalf of her son Peter, against Dexter Devlin. Devlin’s Answer didn’t give us anything useful; for example, it simply denied ¶ 2 of the Complaint. We had some settlement discussions, which broke down, and so
discovery has been slow. But the court has set a deadline for discovery to be completed by March 15, with an anticipated trial date of April 1. I served a few Requests to Admit, seeking to establish that Trover had bitten a human at least once before or more generally that she was vicious to humans, but all I got was refusals to admit. I served an Interrogatory asking what Devlin’s contention was as to what happened. He answered that he did not know, but he denied that Trover bit Peter without provocation because it was “not in her nature to do so.” Today, I took Devlin’s deposition. I asked him whether he had any more information as to what happened on February 1 last year. He said that yesterday, in anticipation of the deposition, he had asked his neighbor Nina Nabors, who lives on the other side of him from the Falks, whether she knew anything about an incident in which Trover was supposed to have bitten Peter. She said that she heard Peter say, “I’m going to play soccer with Trover, Grandma,” that she then heard Geraldine Falk say, “Remember, don’t shoot until you’re close enough,” and that she then heard Trover barking and Peter screaming. This was all surprising to us. Mottley, who is not on very good terms with her former mother-in-law, has told me that Geraldine Falk said she was in her kitchen when she saw Peter cross over into Devlin’s yard, and that she called out to him to stop, but before she could reach him Trover had run up to him and mauled him.

I am preparing to make two motions. First, I will move to preclude Devlin from introducing any evidence of the soccer-playing incident as described in his deposition; the incident is clearly material to the case, but I will contend that Devlin should be precluded because he failed to give timely notice of it, either in his Answer or otherwise. Second, I will move to amend the Complaint to add Geraldine Falk as a defendant. I expect vigorous resistance to both motions. Please write me a memo advising me what arguments we should make, what the grounds of opposition will likely be, and what our chances of success are. Also, in case the motion to amend the Complaint is granted, please advise me what preparatory work we must do, what we must allege to state a claim against Geraldine Falk, and whether you think it is responsible to file such an amendment.

E. (1/6)

To: Associate, Plaintiff’s law firm
From: Partner
May 1, Year 2

The court granted leave to amend and extended the discovery deadline. We served and filed an Amended Complaint stating a claim against Geraldine Falk. She has answered, making clear that she will contend, among other things, that under Paulsen v. Donofrio she is not liable even if she was negligent. Please write a concise memo outlining a plan of discovery to assist us on this issue and also on the issue of whether Trover had previously exhibited violent tendencies towards humans. (I haven’t gotten anything on this so far except Devlin’s denials.) Please tell me, as specifically as you can, what discovery devices we should use, addressed to whom, asking what, for what purposes, and what our chances of getting the discovery are.
Prof. Syverud's Problem IV, 1987 Exam

Donovan & Dewey is an accounting firm owned by its 50 partners. It employs 400 people, including junior accountants, secretaries, and other staff. The firm is not a corporation. Last summer, three of the firm's partners and a firm secretary, Wanda Witness, were being driven to an audit in the firm limousine. The limousine crashed head-on into Phillip Plaintiff's car. Phillip and the limousine driver (a Donovan & Dewey employee) were killed instantly, but Wanda and the partners were unharmed.

In December 1987, Phillip Plaintiff's estate brought a negligence suit in federal court against Donovan & Dewey. Plaintiff demanded a jury trial. Donovan & Dewey immediately hired Arnie Attorney to defend it in the lawsuit. Arnie was busy with other litigation at the time, so he asked Donovan & Dewey to have the limousine passengers describe the accident to his research assistant. [Arnie's research assistant is his 19 year old daughter, home from Princeton on a semester break). Arnie told the firm that, once he reviewed his assistant's written reports of these interviews, he could recommend a litigation strategy and settlement posture. The research assistant duly interviewed the partners and Wanda Witness, and forwarded written accounts of the interviews to Arnie. The research assistant's account of the Wanda witness interview states that:

"Wanda was busy reading a document when the accident occurred, and she did not see what happened. But Wanda did recall that, a few minutes before the accident, the limousine driver seemed distracted and ran a stop sign. I think Wanda may suspect the limousine driver was drunk."

Plaintiff sought to depose Wanda Witness before trial, but Wanda became seriously ill the night before the deposition. When the deposition was delayed, Plaintiff moved to compel discovery from Arnie Attorney of "all documents related to interviews of Wanda Witness concerning the accident." Arnie opposed the motion on the ground of attorney-client privilege and work product doctrine. The trial judge reviewed the Wanda Witness interview account in camera, but, expecting Wanda to recover, refused to rule on the motion to compel until the trial. On the eve of the jury trial Wanda died.

At trial, the parties stipulated that whoever first crossed the center line was negligent and caused the crash. During the jury trial, Plaintiff offered extensive evidence as to all elements of Plaintiff's case except the issue of who crossed the center line first. Experts for both Plaintiff and defendant agreed in trial testimony that it was impossible to tell from the wreckage or the crash site which driver had first crossed the center line. The three partners who were passengers testified, however, that Plaintiff's car first crossed the center line and thereby caused the crash. Plaintiff's attorney was unable to offer any witness to testify to the contrary, but he renewed his request that the Court order disclosure of any documents related to interviews of Wanda Witness. Arnie Attorney again opposed the request. Arnie also moved, in a timely fashion, for a directed verdict for Donovan & Dewey.

Question: You are law clerk to the trial judge. Advise her as to how she should rule on
both Plaintiff's motion to compel and Defendant's motion for a directed verdict, and explain your advice. Bear in mind the possibility that your boss will reject one part of your advice but accept the other part. [Assume for purposes of discussion that all properly discoverable information would be admitted into evidence before the jury].

A Question Adapted From Another One of Professor Syverud's 45 minutes

One afternoon in 1990, Phillip Plaintiff, a New York artist, was walking in a Monterey, California park when he was struck from behind by a collie dog who was chasing a squirrel. Phillip fell and broke his leg. The following day Fiona Friend, an acquaintance of Philip, told him that Dawn Defendant, who lived about a quarter mile from the park, had a collie named Dasher who had run away twice during the past year and who had, during one of those jaunts, bitten a runner in the park. Phillip immediately contacted Amanda Attorney. Amanda had lunch that day with the Mayor of Monterey, and told the Mayor about Phillip's mishap. The Mayor was outraged at this apparent violation of the Monterey leash law, which states, "A dogowner whose dog runs free of a leash shall be liable for a civil fine not to exceed $100, and shall also be strictly liable in tort for any injuries thereby caused, unless the dogowner did not permit the dog to roam freely."

The following day the City of Monterey brought an action against Dawn in state court for violating the leash law. One week later, Phillip filed a $50,000 tort suit against Dawn in the United States District Court for the Northern District of California. The complaint based jurisdiction on diversity of citizenship, and then stated:

"Cause of Action for Strict Liability: 1. Defendant owns a dog named Dasher. 2. While off a leash in a Monterey Park, Dasher knocked Plaintiff down and caused him serious injuries. 3. Wherefore Defendant is liable to plaintiff for $50,000 in compensatory and punitive damages."

A week after Phillip filed his complaint, the case of Monterey v. Dawn Defendant went to a bench trial. Dawn testified at the trial that Dasher had escaped from her locked house when a tree branch fell and shattered her patio doors. The trial judge entered judgment for the city and fined Dawn $50.

Two weeks after this judgment, Dawn moved to dismiss Phillip's complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. A supporting memorandum pointed out that Phillip had failed to plead that Dawn had permitted Dasher to roam freely, and moreover that Phillip had not a scintilla of evidence that it was Dasher (rather than any of the other 873 collies in Monterey) who knocked him down. Dawn also moved for sanctions under Rule 11. Phillip, meanwhile, moved for partial summary judgment on all issues pertaining to liability, citing the judgment of the state court in Monterey v. Dawn Defendant.
You are the United States District Judge assigned to Phillip Plaintiff v. Dawn Defendant. Question: Write an opinion explaining your rulings on the pending motions.
Some Model Answers and Comments Memos

The model answers presented here do not purport to be perfect. Perfection, of course, is unattainable. You may very well have valid points that are not made in these answers. Indeed, in most cases an equally good answer could have come to far different conclusions. Moreover, to simulate reality in part, for the most part I wrote these answers hurriedly, well within the time limits of the exam.

On the other hand, these answers are not a full simulation of reality: I recognize that students who must, within those time limits, read and absorb the facts of the exam for the first time could not write an answer this complete and (relatively) polished. (Some students do, however, write longer exams, but the extra length does not necessarily include more analysis.)

Having said all this, these models should give you some idea of what you should be trying to do on an exam, at least in this course, and how you should gear your answers. Notice that these answers are quite terse; there isn't a lot of fat in them, and sometimes even the headings move them along.

*     *     *

Model Answer to Question 11 from Winter 1990 Exam

11. (A) The request for duplicates certainly ought to be granted. If in fact Stark has any duplicates of the missing slides, his damages might be reduced to a trivial level (though this might depend on whether there is a possibility that he could be injured if the missing slides should eventually turn up and be pirated). In any event, if there are duplicates, they surely ought to be discoverable, because they are the best possible evidence of what the fighting is about.

The request for similars is ambiguous -- how similar do two slides have to be to qualify -- but perhaps this is a well-understood term of art within the industry. Assuming this problem isn't fatal, the request probably ought to be granted, at least to the extent Stark doesn't have actual duplicates. Stark's damages may be reduced drastically if he has slides very similar to the missing ones, and the similars, too, will give some idea of what the missing property is.

A statement of sale or license price is certainly appropriate discovery material, because it will probably help determine the market value of the missing property. PRI needn't, however, rely on Stark's asking prices or assume that the price is the only significant term of any deal he made, so the request for "all documents relating to . . ." is reasonable.

(B) The publications and agreements help show the market value of the slides; PRI might hope (especially since it failed to sell any of Stark's slides) that Stark does not have a strong name in the market, that his photos are rarely published, in poor magazines, with low-visibility placements, and at low rates.

If Stark has on file copies of all the publications and agreements, it is presumably not at all burdensome for him to produce them, though this could conceivably depend on how many there are and on how Stark maintains his files; if, as appears unlikely, the burden is very great, you should not hold that Stark, an artist, ought to be held accountable for the manner in which he
keeps his files. If Stark doesn't have copies of the publications but has, or can relatively easily compile, a list of them, you should require production of that.

(C) The returns might show the extent of Stark's income from the sale of photos; PRI will hope that it is very low. Conceivably, also, they will show that Stark wrote off some slides as valueless. But this request, which is intrusive, smacks of harassment. Requests A and B are more likely to give evidence of the market value of the slides, and the returns probably won't. Perhaps you shouldn't allow this request unless other discovery seems inadequate. In any event, you should allow discovery only of such portions, if any, that indicate income, loss, or value attributable to Stark's photographic works.

Model Answer to 1990 Summer Midterm

I. Move to dismiss for failure to state a claim. The Turnbull opinion leaves some room for us. We can argue that
(1) whether the restriction has been "consistently applied" and
(2) whether the Association has been "unduly slothful in asserting its rights" are elements of the plaintiffs' claim, and so should have been pleaded in the Complaint. Plainly, the Association has better access to the evidence on these points than we do. That Turnbull put these conditions in an "assuming" clause rather than in an "unless" clause may also be of some marginal assistance.

The plaintiffs will surely contend that these conditions are more in the nature of exceptions to our contractual commitment, and so must be raised by us as affirmative defenses. My best bet is that they'll win on this point, but we certainly have a good enough chance to make the argument.

We might also move to dismiss on the basis that the allegation in ¶ 4 regarding Deborah's work is insufficient to constitute non-incidental use -- but in light of Turnbull's talk of "regular consultation," I suppose that even if the plaintiffs were required to replead this would be a hollow victory.

B. If we have to answer: We can still deny violation of the contract in ¶¶ 4 and 5, because (assuming our preliminary investigation provides sufficient support) we will presumably plead inconsistent application, and we already know enough -- the late commencement of this action -- to plead undue sloth. We should also mention these matters as affirmative defenses (and should probably consider later mounting a summary judgment motion based on them). And I hope we will have enough of a basis after consulting with our clients to deny ¶ 6.

II. Plaintiffs will contend, on the basis of the deed restriction and Turnbull, that they have a high likelihood of success on the merits and should be given interim relief. We should be prepared to make whatever factual showing we can of inconsistent application and undue sloth, to support our contention that we are likely to prevail.

Plaintiffs will presumably also contend that the types of harms cited in ¶ 6 of the Complaint will occur during the litigation and should be stopped now. We must be prepared to demonstrate that these harms have not occurred and will not occur (and so should consider the possibility of offering to restrict
Deborah's practice for the interim to the extent of promising that she will not treat anyone at home who has exhibited any indication of violent tendency. We must also demonstrate the harm to her -- in terms of loss of income and continuity -- and to her patients if the preliminary injunction is granted.

III. **Depositions** -- Budget allowing, I would depose Pryor and one or more responsible officials of the Association to try to find out why they were so slow in bringing the action, and to try to get useful admissions from them in this respect. I would also try to learn from Pryor and any near neighbors who aren't friendly enough to talk with us whether they have any basis for claiming interference with their enjoyment of the property, and if possible to get admissions on this score as well.

**Interrogatories and Document Requests** -- The most important interrogatories would be addressed to the Association, asking it to identify everyone in the Subdivision from the beginning of the Association who might have conducted any sort of business out of their homes, and to state what action, if any was taken against them. In conjunction with this, we should ask for all documents that the Association has relating to any such uses. The Association will surely object to going back too far, and the issue might be moot if the Association doesn't have information going back very far, but given the "consistently applied" language of *Turnbull* we ought to be able to go back as far as the Association is able to.

**Excerpts From a Comments Memo Written After the Fall 1993 Midterm**

[I will probably use a memo like this after our midterm, using a code of circled letters alongside the answers. These are meant to call your attention in particular to the coded points in the memo.]

The comments are not presented here in strict alphabetical order; some of them I drafted before reading the exams, others I thought of while reading them, and I am trying to present them here in some sort of substantively organized manner.

One substantive comment that is very important but that somehow didn't make it into the letter code: Remember that this was a problem concerning *pleading*, not *proof*. The facts are not being tried now, and when they are the factfinder may be a jury. Accordingly, in order for Perry's proposed second amended complaint to be acceptable, he does not have to prove anything about the facts material to the substantive dispute -- though, depending on the issue and on the court's inclination, he may have to allege facts with some specificity. With respect to the statute of limitations issues, however, the court will probably want to make a resolution now, before proceeding further. Accordingly, it might demand proof -- for example, of AI's awareness of the prior litigation and of the possibility that MC didn't make the shunt in question -- and might even grant limited discovery to allow the parties to gather the proof.
The motion to amend the complaint to assert a claim against Delgado based on negligent use of a defective shunt.

The statute of limitations issue.

A. Assuming, as appears likely, that the limitations period began in June or July 1989, the period plainly expired before this claim was asserted. But the court should probably, in accordance with the practice exemplified by Fed. R. Civ. P. 15(c)(2), treat the complaint as relating back, for limitations purposes, to the date of the original complaint. Delgado was already a defendant in the action, and the new claim clearly arises from the same transaction or occurrence as the prior ones. Delgado might argue, however, that allowing the claim to relate back would prejudice her, because the evidence bearing on this claim is different from that bearing on the original claims. For support, she might argue that Allman's death, after she was given notice of this claim, precludes her from offering his testimony to corroborate her story. Even assuming that Allman's testimony would have corroborated Delgado's, rather than contradicted it, there is no guarantee that Allman would have testified had Delgado received earlier notice: The case has been moving slowly, and the fact that Allman's death was sudden suggests that Delgado probably would not have taken the precaution of preserving his testimony by taking his deposition. Delgado might also argue that, rather than simply follow Fed. R. Civ. P. 15(c)(2), the court should impose more of a burden on the plaintiff. For example, the court might hold that, if the plaintiff did not act with reasonable promptness after being in a position to determine that he had the claim that he now seeks to advance, then either the claim should not relate back at all, or it should relate back only to a date calculated by adding the period of the unexcused slowness to the date of the original complaint.

Does the complaint sufficiently state a claim?

B. The memo does not really give sufficient information to know with definiteness, but it appears at least that Perry had enough information to allege a claim that would satisfy a loose standard of pleading: Perry does have information indicating that the shunt was defective, that it was not made by MC, and that Perry intended to use an MC shunt. If the judge wants to be more stringent, he might demand that the complaint show some basis for pleading that Delgado had reason to know not only that the shunt was not made by MC but also that it was defective. Delgado's own expert has said that the shunt was defective, though she contended that the defect was latent.

The motion to amend the complaint to assert a fraud claim against Delgado.

(Note: On some of the answers I marked C-H, but I should have marked E-H.

C. There is no statute of limitations problem here. So the key question is: Is the pleading sufficient specific? The motion to amend ought not be granted if a motion to dismiss would be granted. The memo does not give the exact contents of the offered pleading, but it does summarize the pleading, and we also know information that the plaintiff had available. Like
courts following Fed. R. Civ. P. 9(b), this court may demand great specificity in pleading fraud.

D. Perry appears to be alleging with specificity a particular communication in which Delgado made the allegedly fraudulent representation.

E. He also appears to have a sufficient basis, given the MC interrogatory response, to allege that the representation was false -- that is, that the shunt actually used by Delgado was not made by MC.

F. We are told nothing supporting an allegation that Delgado knew the representation was false, other than the circumstance that one might expect a surgeon in Delgado's position to know the source of the shunt (and even if Delgado did know it was a non-MC shunt, this does not necessarily suggest that he knew it was defective, especially if the defect was, as Elkins said, latent) -- but the court should probably follow the path of Rule 9(b) and not require specificity in the pleading of the state of mind of Perry's adversary.

G. Perry appears to have a sufficient basis to allege that the use of a non-MC shunt was actually detrimental to him -- Elkins, Delgado's own expert, has testified that the shunt used by Delgado was deficient, and presumably another shunt would not have been (though there may be a question whether this is enough to support a fraud claim; was it the non-MC character of the shunt used that made a difference?).

H. Perry's greatest problem on pleading fraud may be on the element of reliance -- we are told nothing suggesting that, but for Delgado's comment on the source of the shunt, Perry would have declined to go ahead with the operation.

X. Some students, in arguing against allowing Perry to plead his fraud claim against Delgado, pointed to Delgado's affidavit asserting that Allman had told her that the shunt was made by MC. But how could this affidavit defeat Perry's claim at the pleading stage? Delgado's affidavit presents her version of events; Perry is not bound to accept her self-interested statement as the truth, and neither would the factfinder be. Of course, Perry must plead that Delgado knew the shunt was not made by MC, but he has done this, and eventually he must be able to prove it, but (assuming there is no other reason to dismiss the fraud claim before then) he must be given a chance to discover evidence on the point. At the very least, he should have an opportunity to subject Delgado to adverse examination in a deposition. Beyond that, there are other possibilities that he will find evidence supporting his contention regarding Delgado's knowledge. For example, it is plausible to suppose that there might be a receipt, in the files of either Delgado or Allman, indicating that Delgado knew the source of the shunt. The court might be reluctant to allow Perry to embark on a large fishing expedition based on little evidence, but given that Delgado is a surgeon who made a statement at the time of the operation about the source of the shunt, it is sufficiently plausible that she knew the actual source of the shunt to allow the plaintiff to have some discovery.

Z. I don't think there's really any issue of prejudice to Delgado on the fraud claim.
There's no statute of limitations question, so the issue of prejudice that arises when the plaintiff seeks to have the complaint relate back in time does not come into play; note that if Perry had not brought any action until now, he could still bring the fraud claim. Another prejudice issue, unrelated to the statute of limitations, potentially arises when a plaintiff seeks to amend the complaint to add a new claim. Here, the issue is not whether the defendant will be prejudiced by the passage of time since the claim arose, but whether she will be prejudiced by having insufficient notice to prepare her defense. But the memo gives no indication that a trial date has been set, or that for any other reason the defendant would have inadequate time to prepare.

The motion to amend the complaint to add claims against AI.

The statute of limitations issue.

When did the claims arise for limitations purposes?

I. AI will presumably argue that the claims arose very early. In particular, it might argue that the contract claim arose when the allegedly defective shunt was actually inserted, in 1987. This would probably be too harsh a result, given that Perry then had no reason to suspect that the shunt was defective; note also that if it were the proper result here, then even Perry's original claim against Delgado would probably be time-barred. Perry, by contrast, will argue that the limitations period began to run only on February 15, 1993, when he first had reason to believe that a defective shunt was the source of the problem, or even on April 15, 1993, when he first had reason to believe that MC didn't make the shunt, or on July 10, when it became clear that MC's denial in the answer was not perfunctory. All these theories seem too generous to Perry; he was in a position earlier, beginning in June 1989 when he first felt a recurrence of symptoms, to investigate the source of his difficulty. Moreover, he has not litigated this action with much urgency. If his investigation came up with inaccurate answers, that should probably be his problem rather than that of potential defendants. Assuming that the limitations period began in June 1989, the negligence claim has been asserted against AI after the period ran, but not the contract claim.

Should the assertion of the claim against AI be deemed timely because of the earlier assertion of the claim against MC?

J. The court might adopt a rule of relief akin to Fed. R. Civ. P. 15(c). But note that it is not required to (recall that Rule 215(c) is not itself applicable), and not all jurisdictions have such rules. By the same token, it might decide to apply a more generous practice (like some states' John Doe practices).

K. Assuming the court does decide to adopt such a relief rule, and that the limitations period on both claims began in June 1989, the claim against MC was commenced properly within the limitations period.
L. Did AI know about the earlier action? Presumably, given the write-up in the trade journal -- though the court might want a more definite showing on this point. If it does, it should probably not deny the motion to amend solely on this basis without allowing Perry some discovery on the issue.

What quality notice AI must have received is measured by Fed. R. Civ. P. 15(c)(3)(A) by the question of whether AI would be prejudiced in defending on the merits. That is not a bad standard to use, though it may be hard to determine. One aspect of this is whether the passage of time since the date that the statute of limitations would have expired if the claim did not relate back has prejudiced the defendant. This would probably be hard to show -- but perhaps AI has an argument based on some information that we don't know about, possibly related to what it contends Allman would have testified. Another aspect of the notice-prejudice problem is that, even if AI knows about the action, that is not sufficient to preclude further prejudice unless AI the nature of the notice is such that AI is aware that it should prepare to defend itself. This issue is discussed in comment M.

M. Did AI have sufficient knowledge that, but for mistaken identity, the action would have been brought against it? Not necessarily. Even assuming it knew about the suit, AI might have had no information at all suggesting that MC was not the manufacturer of the shunt in question. That might depend on just how much was reported of the litigation -- was MC's denial that it was the manufacturer publicly reported? And AI may not have had any information -- especially at a level of corporate consciousness, whatever might have been buried in its files -- that it was the manufacturer. (This is especially true if it was not the manufacturer.) Again, the court might consider giving Perry discovery on this issue. And, given the nature of the jurisdiction, the court might conceivably decide not to impose this requirement of notice of mistaken identity on Perry, or to apply it lightly: It might hold that, given that AI was one of the leading manufacturers of shunts of this type, it was on sufficient notice, as soon as it learned of the action against MC, of the possibility that it would turn out to have been the manufacturer instead. That argument seems to be something of a reach, however, unless the difficulties of identifying manufacturers here are so substantial to make it reasonable that a company, upon learning of an action against one of its competitor, should prepare to defend itself. Note also that, if the court does decide to follow Rule 15(c)(3), Perry had a simple expedient given any uncertainty about the source of the shunt: He could have named MC, which he thought was the provider, in the amended complaint, and sent a copy of that complaint to AI with a letter indicating that he intended to sue it instead if it turned out that he was mistaken in the identity of the maker and later learned information suggesting that AI was the actual maker.

The merits of the claims against AI.

N. Given that the claims that Perry seeks to make against AI are essentially the same ones that Perry has made against MC, with just the identity of the defendant changed, the complaint is presumably pleaded with sufficient specificity. (There is of course the question of the legal sufficiency of the contract claim, but that is not a problem on which you have been asked to give an opinion.) But there is one additional problem with this complaint. By Perry's own
allegation, the probability that AI made the shunt in question, given only the market share information we are told, was only about 20%. Assuming, in accordance with MC's interrogatory response, that MC didn't make the shunt, that probability rises to 40%. In any event, we are given no information suggesting that it would be possible to infer reasonably that AI more likely than not made the shunt. Of course, Perry would argue that he should not be required to plead evidence. And he may argue that his pleading should be deemed no weaker than one stating in the alternative mutually inconsistent claims; in such a case, plainly at least one of the claims must be more likely false than true, and yet the pleading is allowed. But, given that Perry made the allegations of market share himself, the court could plausibly hold that he should also plead facts supporting the conclusory allegation that AI made the shunt. The court might be especially likely to do this if it does not adhere to the Federal Rules' faith in notice pleading.

The motions for sanctions.

O. Assuming the court is not significantly more stringent than most federal courts under Rule 11, there probably is no good ground for sanctions on Perry's motion to amend the complaint against Delgado -- though conceivably the court could later impose sanctions if it determines that Perry was asserting Delgado's knowledge without any valid basis.

P. There is a somewhat stronger, though still unlikely, basis for sanctions on the motion to assert a claim against AI. The court could hold on the basis of the arguments in Comment N that, unless Perry has information that we don't know about, he does not have a sufficient factual basis, and has not done sufficient investigatory work, to assert a claim that AI more likely than not manufactured the shunt in question. Perry's attempt to make a claim against AI raises some suspicion because, on the numbers alone, it would appear that NME is more likely than AI to have made the shunt -- but AI is the only one of the two with money in its pocket.

V. Note that if you grant Perry's motion to amend with respect to either party, that virtually moots out that party's motion for sanctions: It would be absurd to allow a party to amend and at the same time impose sanctions on him on the ground that he acted improperly in asking to amend. Conceivably, if the lateness of the request to amend imposed extra costs on the opposing party, the court could grant the motion subject to some cost penalty -- saying in effect, "OK, we'll allow you to amend, but because your tardiness in asking to do so has imposed extra costs on your adversary, we'll impose them on you." -- but I don't think any basis for fear of such extra costs is apparent in this case; in any event, if that was your logic for simultaneously granting the motion to amend and considering sanctions, it was important that you explain this. It is also conceivable that the court would decide in the end that the factual allegations of the complaint are frivolous, but the court cannot do that on the basis of the pleadings; if the court later grants summary judgment for a defendant, it might then consider imposing sanctions on the basis that the claim was factually frivolous.
Other comments

Q. Remember -- Don't simply restate the facts!

R. Similarly, avoid simple restatements of law. In particular, quoting language from the Federal Rules of Civil Procedure is a big waste of time. And describing other cases that are not binding authority is usually wasteful.

S. Delgado and AI haven't made motions to oppose Perry's motion to amend -- they've just opposed Perry's motions, and made their own motions for sanctions.

T. Comments on such matters as motions not yet pending and other actions that the plaintiff might bring are extraneous to this assignment! Concentrate on what you're asked to do -- it should keep you busy enough. In particular, the memo said that the anticipated motions by MC are not yet before the judge; the judge is seeking advice only on "pending motions." And recall my instructions that excess verbiage and extraneous material hurts your grade.

U. Please remember that in this jurisdiction the Federal Rules of Civil Procedure do not apply of their own force. They may have persuasive authority, of course. But you should not act as if they are controlling. And you should keep your mind open to alternative approaches.

W. Keep separate in your mind the time when the limitations period begins, which is generally when the cause of action is deemed to have arisen (though sometimes it is when the plaintiff had enough information to bring the suit), and the time when the limitations period stops running (which is generally when the action is commenced or the claim is stated). A "relating back" provision like Fed. R. Civ. P. 15(c) treats the claim as if it had been asserted at an earlier time than it actually was, and so moves the time at which the limitations period stopped running to an earlier date. It does not affect the time at which the limitations period begins.

Y. Remember the bright-line quality of statutes of limitations. There is no rule that, to take advantage of an applicable statute of limitations, the defendant must demonstrate prejudice. And operation of the statute will not be defeated simply because doing so would be prejudicial to the plaintiff's interests; usually operation of the statute will be prejudicial to the plaintiff's interests, and it is the plaintiff's good fortune if, having missed a statute of limitations on one claim, he has other viable claims that eliminate any harm to him of the missed statute. Even in the exam case, in which the plaintiff's tardiness could be attributable in part to his generosity in time to Delgado and MC, that will certainly not stop AI from claiming the statute of limitations. Conceivably, a defendant who delays the litigation by getting lengthy extensions of time to respond to the complaint or to discovery requests might herself be estopped from raising the statute of limitations in response to a claim that the plaintiff, acting on the basis of information learned from the defendant's response, seeks to assert against that defendant. Even that, I believe, is unlikely. Two lessons: First, when you are asked to give extra time, make sure you are not prejudicing your client's rights. Second, statutes of limitations are treated very seriously. Having said all this, there is, of course, the possibility in some cases that the assertion of the claim may be deemed to
relate back to a date earlier than the one on which it was actually asserted. But this is really a matter of measuring time for purposes of the statute, rather than of excusing a violation of it.

A Model Answer to the Summer 1994 Midterm

A. The following arguments for dismissal offer enough chance of success that we shouldn't be subject to sanctions, and I don't think there's any other down-side, so let's make the motion:

1. The complaint fails to plead exhaustion of employer-provided remedies. The defense might argue that the burden of pleading is on us. The "provided that" language seems to give us some marginal assistance here; more significant is the fact that the plaintiff has easier knowledge of what she did. On the other hand, we should know whether she used our remedies, and we are certainly in a better position to assert what measures we make available that we contend qualify as a remedy. So I don't think we have a great chance of success. If dismissal is granted on this point, she'll presumably have leave to replead, and if Dravo is telling the truth the only conscientious way she could plead on this point would be to assert that we offered no remedies within the meaning of the statute.

2. The complaint pleads conclusorily on

   a. "essentiality." It merely mimics the language of the statute, not asserting any factual basis, such as how her work affected the services provided to the city.

   b. the quality of her performance. It doesn't recite a factual basis, such as performance reviews.

   c. the cause of dismissal. Similarly, apart from the implicit assertion that she is obese and the conclusory assertion that her work was satisfactory, it gives no factual basis for the conclusion that obesity had anything to do with her firing or that other employees disliked her presence.

We may have a chance with respect to these if the court is tough on pleading, less of a chance if it inclines to a Conley-Leatherman stance. Even if we win, she may be able to satisfy the court on repleading, but at least we'd have a fuller complaint to defend against.

B. ¶1: Let's check the employment records very carefully, admitting if we have to but denying to the extent she got anything wrong.

   ¶2: I'd be inclined to deny, unless there's clear law to the contrary, by taking a restrictive but plausible interpretation of the statute that backroom accounting work, not directly related to construction, should not be deemed "essential." Apart from that, consultations with Burson might suggest that enough of her work was on non-city projects that we can deem her non-essential.
¶3: Hopefully conversations with Burson and others will suggest something wrong with her performance, allowing us to make a flat denial. I wouldn't be inclined to "admit, except . . . ." I might be inclined to "deny and further assert . . . .," depending on what we turn up.

¶4: If we can deny ¶3, hopefully the same defect will allow us to deny the central part of ¶4. Let's find out if she's really obese, and admit that only if that's indisputable or we plan on making an affirmative defense based on some qualification. I'd also be inclined to try to respond directly to the "undesirable presence" part, if we can -- either deny it, or assert that she was undesirable for some other reason.

¶5: Maybe we can deny just on the basis of failure to mitigate and exhaust remedies; otherwise DKI.

Affirmative defenses: Let's assert failure to exhaust remedies, and also failure to mitigate if we can. If Burson or others can tell us any job-related qualifications or health and safety considerations -- inability to travel to construction sites? -- let's assert them affirmatively.

C. First, oppose the motion to amend because the limitations period has passed. She has a weak argument that this claim didn't arise until she had knowledge of other obesity-related firings, and a possibly stronger argument that the assertion of the claim should relate back to Day 50. This may depend in part on the factual question of whether the city actually had notice of the action -- a plausible possibility, given the Dravo-Carrow relationship and the extent of work DCC does for the city. But even if so, if the court follows the FRCP it shouldn't relate back because this is in no sense a mistaken identity case. But conceivably the court would be inclined to rule that if the city knew about the action it should have known the plaintiff had a plausible action against it, and that this should be enough to relate back.

Second, we have a reasonable argument that the allegation that the city (1) had and (2) imposed on DCC a covert policy against obese employees is far too conclusory to allow the amendment. We would have to persuade the court that Leatherman is too receptive to claims virtually implausible on their face.

If we do persuade the court of that, we might have a chance for sanctions. Even if the other actions support an allegation of a policy, we have a good argument that they provide no basis to allege that Pointer's termination by DCC was at the behest of the city.
Comments Memo on the Summer 1997 Midterm

[Again, this is the entire substance of the memo, apart from the introductory portion.]

Generally Applicable Comments

A: I sometimes marked this when the answer struck me as wordy, non-responsive, or repetitive. It seems to me that I used this marking less on this exam than in prior years, which is nice to note. Perhaps this is because I kept you so busy that you had little choice but to be efficient.

I: Remember, this is not a Federal Rules jurisdiction, and you should not act as if the Federal Rules apply. Most departures from this Rule were essentially harmless -- such as referring to the motion to dismiss as a Rule 12(b)(6) motion -- but very mildly irksome because they weren't in accordance with the instructions. Some were slightly more bothersome because they reflected assumptions about the law -- such as that a 21-day safe harbor rule applies -- that were not in accordance with the instructions. Some students asserted some knowledge about the law of this state in addition to what the instructions indicated; that too was mildly annoying. I do mean mildly, but when I set problems in a jurisdiction like this I do so for a reason and I prefer that you go along with the instructions.

Comments on Part A

B: Remember: On a motion to dismiss for failure to state a claim upon which relief may be granted, do not argue what the facts are! Do not bring in facts you have learned, demand evidence from the plaintiff, or expect the court to draw factual conclusions. In this case, this principle applies both to the facts of DSI's succession to the liabilities of DMC and also to the facts of the alleged accident. If you bring in factual material, you are in effect making a summary judgment motion, and in all probability it would be rejected at this stage (see Comment G); at the very least you would have to argue why it should be granted, and we haven't studied summary judgment in depth yet.

In saying that you should not argue the facts on a motion to dismiss I do not, of course, mean that you cannot argue that the facts alleged are insufficient to warrant relief; this is a large part of what a motion to dismiss is all about. And in determining the possible payoff of the motion, it is certainly appropriate to note the possibility that, given the facts as you understand them, plaintiff would have difficulty on repleading to satisfy the demands of the court; see Comment F below. But this is much different from saying the court should grant the motion to dismiss on the basis of the facts as you perceive them.

A substantial number of students seemed to me to be arguing the facts at one point or another in response to this question, some more clearly and persistently than others. The more this type of argument dominated your answer to this question, the more I regarded it as a problem in the answer. In some cases, I circled words that seemed to be tip-offs that you were arguing on the basis of the facts as you perceived them rather than on the basis of the allegations.
C: The complaint is certainly vague and conclusory regarding DSI's liability for DMC's torts, but it does say that DMC is a predecessor to DSI -- which could arguably be taken as a reference to the first part of *Peters*. (On the other hand, there are two ways that DMC might be responsible for DSI's liabilities, and it is not clear that the plaintiff does mean to assert the stock purchase way to which *Peters* refers). And in ¶ 4 it ties this factor to DSI's liability. Given DSI's presumptively superior access to the facts on this point, this conclusory form of pleading might be sufficient.

D: It isn't clear whether if forced to replead on the issue of DMC's succession to DSI's liabilities, the plaintiff would responsibly be able to assert sufficient facts to satisfy the court. Accordingly, it is possible that the motion to dismiss, if granted, would indeed end the action.

E: The complaint is rather vague on the matter of defect; I think this is an important point to argue. The complaint says that the slide was inadequate to support substantial weight. But how much is "substantial"? Presumably the slide would not be considered unreasonably dangerous, and therefore defective, simply because it was unable to bear unlimited weight, and it is unclear from the complaint what standard the plaintiff is trying to hold the defendant to. It may well be difficult for the plaintiff to know, without discovery, what the causes of the inadequacy are, but it should be in a pretty good position to assert the symptoms -- that is, the amount of weight that caused the buckling. The problem, if the court perceives one, is not in the failure to use the term "unreasonably dangerous," which in itself is very conclusory, but in its failure to make non-conclusory factual allegations supporting this conclusion. As for failure or inadequacy of warning: Whether or not the danger was unreasonable, there is no duty to warn if the danger was obvious, and the complaint arguably gives no basis on which to conclude that this standard was met.

F: As with respect to the succession issue, repleading on the issue of defect might be a real problem for the plaintiff. If the facts are as reported in the newspaper story, and plaintiff recognizes them to be so, then if granting the motion to dismiss requires the plaintiff to lay out the facts underlying the claim in more detail, the amended complaint may not survive. A court could very well conclude that the inability of a slide to hold 16 people at once does not render it unreasonably dangerous, and that the manufacturer has no duty to warn of this danger. Thus, once again, the motion to dismiss could plausibly cause the end of the action against DSI.

G: A motion for summary judgment isn't really responsive to the assignment; the assignment concerned a motion to dismiss for failure to state a claim on which relief may be granted. In any event, a motion for summary judgment is unlikely to be granted at this point, before any discovery -- and certainly it wouldn't be granted without knowing what evidence (including her own testimony) Parsons might present.

H: A motion for sanctions on the ground that Parsons sued DSI when she should have sued DMC seems unlikely to prevail, at least on the information presented so far: It might be difficult for Parsons to determine the nature of the transaction between DSI and DMC, and given that DSI operates with a Do-Drop Division, it's reasonable for Parsons to think that DSI is the company liable for claims based on Do-Drop slides. A motion for sanctions based on lack of defect is
plausible, though probably not likely. Suppose the court dismisses, but gives leave to replead, and then Parsons pleads in accordance with the facts as reported in the Gazette article, or simply declines to replead and doesn't challenge the factual assertions in the sanctions motion. If the court thinks that on those facts the action is frivolous, it could conceivably grant sanctions.

**J:** [I marked this comment on a few answers to subsequent Parts.] Some students spoke about motions to dismiss for failure to join a necessary party -- such as the SO or the FCHS -- as a defendant. This isn't really responsive; the assignment was to advise with respect to a motion to dismiss for failure to state a claim, not for failure to join a party. Compulsory joinder is a topic we'll discuss at some length later, so I wouldn't ask about it now. In fact, as we'll see, there would not be compulsory joinder here. If Parsons doesn't want to sue other potential defendants, that's her business. (Possibly, though, her argument that she would be prejudiced by amendment of the answer would be affected by the fact that she has untapped potential for collecting from possible defendants she hasn't sued.)

**Comments on Part B**

**K:** I might be inclined to DKI ¶ 1 of the complaint. Most of the information probably is readily ascertainable to a high degree of confidence by interviews with people who were there or by checking with records, but all this investigation might be more work than the defendant should have to do at this point; it will probably be easier for the plaintiff, after the pleadings, to present proof to the defendant of anything she cares about and ask for a stipulation. (Does she care about the assertion that most of the class was there? It would be a lot of work for us to determine that now.) Most of the assertions here are probably benign, though they may have some significance in setting the atmosphere for the accident. In any event, I would not admit this paragraph on the basis of a newspaper report.

**L:** On ¶ 2, I would try to get access to the slide -- probably TTAP would give access to it -- and admit whatever we are confident is true based on this observation (taking into account that a year has gone by, and it's probably not in its pre- or immediately-post-accident condition) or earlier observations, on our records about the slide, and on the basis of our knowledge of how slides are used. I would not casually admit the description of the slide without checking carefully; it might turn out the slide is built differently from the way it is described. I would probably DKI the "chief attraction" allegation.

**M:** Assuming we're really confident about the first part of ¶ 3, I think we have no choice but to admit.

**N:** On the second part of ¶ 3, there's some ambiguity in the term "predecessor". [I probably should have made it clearer that the allegation here was simply that there had been some sort of merger or acquisition, with DSI succeeding to the business; I had meant the issue of whether DSI succeeded to tort liability to be covered entirely within ¶ 4. As it was, this paragraph could be read to raise the issue I had meant to put aside by saying not to advise on responding to ¶ 4.] Because the term might suggest succession to tort liability, I might, absent careful checking, be
inclined only to admit that DSI succeeded to the business of DMC.

O: If we are confident the court will not hold us to an extensive burden of inquiry, we may well DKI ¶ 5. Otherwise, we may have to conduct some extensive interviews, given that there presumably were witnesses, and only admit to the extent we are confident it is accurate. For example, we may find it appropriate to admit that the slide buckled and that she was thrown. But if we do, I would be inclined to make affirmative assertions based on the Gazette account. I would be loath to admit grievousness of injuries.

P: I'd probably deny the whole of ¶ 6, except -- if we are confident this is so -- to admit that the slide didn't carry an explicit warning. I'd also probably assert that none was necessary for the type of conduct that we're asserting happened here.

Q: I think it's important in this case not to rest on simple denials of allegations of the complaint, but to make affirmative assertions as well. They may not be affirmative defenses in the full sense, because perhaps we don't have the burden of pleading them (but we might as well act prudently as long as we are able, rather than getting an unpleasant surprise), and we might not have the burden of proving them. In fact, I might be inclined to note explicitly that we are pleading them only out of prudence, without admitting that in fact the burden was on us to do so. Look to the substantive law to figure out what these "defenses" should be. One is that the product was not unreasonably dangerous, and therefore there was no defect in design or manufacture. [This may well be covered by the denial of defect, but again, it's probably prudent to raise it affirmatively, given that it's easy to do and we have a clearly legitimate informational basis for raising it.] A second is that the injury resulted from a misuse of the slide that was not foreseeable, and therefore there was no duty to warn. Note, by the way, that this is not really a "contributory negligence" defense. If the plaintiff was injured as a result of misuse of the product, she might still recover for failure to warn if there was no warning and this was a misuse foreseeable to the supplier (and the danger was not obvious to the user).

R: A related affirmative "defense" is that the danger of this use, given the relatively simple nature of the slide, was obvious to the injured user (or to those supposed to be protecting her?) I think, by the way, there's a close relationship between this point and non-foreseeability: If the danger is sufficiently obvious to the user, then it might not be foreseeable to the supplier that the user would misuse the product in this way. (I think one of the classic cases involved a man who drove his lawnmower on the highway.)

S: A counterclaim here is unlikely. Parsons hasn't done anything actionable against DSI; she's just brought a lawsuit.

T: A cross-claim against TTAP might be plausible if TTAP violated its contractual obligations on use of the slide; we'd have to know more about the sale. I doubt a third-party claim against an entity not now a party would work, but in any event we haven't done more than scan through these topics in class; we'll have a better sense on them in a few weeks.
U: Affirmative defenses are really defenses to the entire claim, not to a particular allegation. It may be best to assert their substance in connection with the response to a particular allegation, but I would assert the defense separately as well. Of course, on a very brief exam question you don't really have time to do both.

V: If the school district or TTAP is liable to Parsons, that's unlikely to relieve DSI of any liability it may have against Parsons; think of Beeck going after all sorts of parties. If Parsons gets a judgment against more than one, she has a choice of how to collect.

Comments on Part C

W: Remember that we're still talking about pleading, so it is not the function of the court to determine what the facts actually are. The question is simply whether we ought to be allowed to amend the pleading. Ordinarily, the court doesn't look at the factual basis for a pleading when it is made. In this case, however, the court might take a somewhat different view. The court has to determine whether the pleading should be amended, and given that this might create some difficulties for the plaintiff the court might not want to allow the amendment unless it believes that denial would likely hurt the defendant. Here, I think the Digest article gives DSI a basis for pleading that it's not liable for DMC's torts, and that's probably enough. But if the court thinks that allowing the amendment is going to force Parsons to go after DMC, or its remnant, then it might be reluctant to allow this unless it believes DSI has a good factual basis for the amendment.

X: If DSI is allowed to amend the pleading, it's questionable whether Parsons would be time-barred in suing DSI (assuming it still exists as a corporate entity) or its shareholders. The key issue, it seems, is whether DSI or the shareholders had sufficient notice. Why would they? DMC sold all of its assets to DSI, and there's no indication of a continuing connection. Possibly the Gazette article gave them notice, however (though we haven't been given any particular reason, such as that DMC is in the area, to believe they might have read it). Note that under FRCP 15(c), the notice would have to be of the action (not the accident) and of the mistake of identity. A state court might take a more generous view, that notice of the accident is enough (though that seems to conflict with the general idea of a statute of limitations, which is based on being sued, not just knowing that someone has a gripe against you), or that in a case like this notice of the accident gives sufficient notice that there probably is an action against the wrong defendant.

Y: DSI might also argue from the other direction, that Parsons wouldn't be prejudiced by the amendment because she couldn't have gone after DMC or its shareholders effectively anyway. (a) It's a long, long time since DMC sold all its assets to DSI, according to the Digest article. We don't even know if the corporation or its shareholders are around. (It might help to learn that they aren't!) (b) Even assuming that the answer admitting DSI's liability for DMC's torts was served when Partner wanted to, as stated in Question B (I haven't told you whether it was or not), and if DSI had served an answer denying liability it would have done so on the same date, Parsons would have had very little time to find and serve DMC or its shareholders before the statute of limitations ran out. What's more, given the timing, DSI could validly have served an answer after the statute ran out.
Z: The court might be inclined against DSI because it did a somewhat lazy job of inquiring before making the admission in the complaint; this is, after all, a matter of DSI's own corporate history. (And if the response is that its records are in bad shape, the court might say: "Tough. You'll learn.") Arguably, Partner (motivated by his upcoming vacation?) shouldn't have simply rested with management's "We don't know." DSI may argue that it made a reasonable effort under the circumstances, and that it shouldn't be punished for doing what then appeared to be the responsible thing. It can also argue that Parsons should bear the burden of identifying the right defendant: It is Parsons who wants relief, and he as well as DSI could have done the library research to find the corporate history. I think the court might be inclined to say that DSI did a negligent job of pleading. That doesn't necessarily mean that it shouldn't be allowed to amend, but it may have some bearing on a collateral action for misrepresentation. (See Comment C below.) By the way, in an actual case that was similar to this aspect of the problem, the court was hard on the defendants; I found an article on the background of the transaction after a few minutes' search in the Business School library, and I wonder if I could do that why the plaintiffs couldn't have.

B: Also, DSI can argue that Parsons won't be prejudiced if she can recover from TTAP. (And again, how do we account, in determining prejudice, for the possibility that perhaps she could recover from the persons and entities she doesn't want to sue?)

C: DSI may also argue that Parsons isn't prejudiced because there's the possibility of the Beeck solution -- that is, allow the amendment on the understanding that, if it turns out in the end that Parsons is prejudiced by a [fill in -- negligent? reckless?] inaccuracy in pleading, she can recover in a collateral action. I might not want to push this possibility too hard, because I don't want to say anything now about how easy that action is for the plaintiff; such an acknowledgment might haunt us later. And in the end we might wind up paying anyway. But the argument has some force; it's saying, in effect, "Judge, don't make me act as if what isn't so is true. If you think we acted wrongly and plaintiff was hurt, you should still allow us to amend so that we can defend on a viable ground, put the burden on plaintiff to mitigate its damages and then collect from us whatever it wasn't able to mitigate."

D: Given that there has been so little time from the initial answer to the motion to amend -- less than 2 months -- there probably is very little prejudice for expenses already undergone. And there's nothing indicating a trial date has been set, so there's no prejudice in the sense of inability to get ready for trial.

E: It's not really meaningful to talk about an amendment to an answer (putting aside a counterclaim, which is not involved here) as relating back. Obviously the amendment comes out of the same transaction; it is replying to the complaint. There is no statute of limitations problem; the answer isn't asserting a claim, so there's nothing to relate back. Relating back enters this problem only to the extent that the question is whether, if the amendment is allowed, Parsons would be able to bring a new action that she arguably had no cause to bring until she was alerted by the amendment.
**F:** The Do-Drop Division is a part of DSI; a suit against it is in effect a suit against DSI. The question is whether a suit may now be brought against the original Do-Drop – that is, DMC -- or, assuming it has dissolved, its shareholders.

**Comments on Part D**

I used fewer coded letters on this question, in part because the question was so open-ended I had fewer recurrent comments.

**G:** Probably the most important discovery here is that which we will get from the plaintiff herself. We want to know what she will testify to; we want to see whether we can get admissions from her of what happened and at least helping to establish whether the danger was obvious. I might be inclined to start with requests to admit, and then, assuming less than perfect satisfaction, move to interrogatories (which should ask, among other things, for lists of observers; we don't know who was in a position to see, or who was participating in the chain). Assuming the litigation moves forward, we are almost certainly going to have to take her deposition; that will probably be the most important single discovery event of the case.

**H:** Remember: There is no need to depose, or otherwise take discovery from, a friendly witness, and we wouldn't want to take such a witness's deposition unless we have reason to believe that we would want his or testimony at trial but he or she is unlikely to be able to give it in person.

**J:** Remember also: You can't pose interrogatories of a nonparty (at least in the federal system, and any state system I'm aware of).
Comments Memo on the Fall 1999 Midterm

[Again, this is the substance of the memo, apart from the introductory portion.]

A Generally Applicable Comment

A: As in prior years, I used this comment to indicate language that I thought was wordy, non-responsive, or too general. In some cases, you might be surprised to see this marking. I used it where I thought the language was extraneous, given the instructions that your reader is familiar with the facts and with the law. Try hard on an exam not to waste any words! On the whole, I thought the class did quite well in this respect.

Comments on Question A

B: On a motion to dismiss for failure to state a claim on which relief may be granted, you must not argue what the facts are! Remember: The motion is addressed to the face of the Complaint.

C: Under Prutzman, the plaintiff can recover only if "the dog has exhibited violent tendencies towards humans." There does not appear to be anything in the complaint indicating such tendencies towards humans. Probably the burden of pleading is on the plaintiff in this respect. The defendant presumably has better access to evidence, but the existence of a prior demonstration of violence towards humans is more appropriate for pleading than the universal proposition that the dog has never demonstrated such tendencies. Once might also argue that the essence of the claim is that the plaintiff was injured by a dog who had previously shown violent tendencies.

D: A prior bite of a human is a sufficient, not necessary, under Prutzman to show violent tendencies towards humans. Therefore, there is no absolute need to allege prior bites. Presumably, a history of yapping restrained before actual contact would be sufficient to demonstrate such tendencies.

E: Nor is there a need to allege evidence as such. Of course, the boundary line between allegations of evidence and allegations of fact (to the extent that the court does demand factual allegations) is sometimes murky, but basically the idea is this: If the allegation concerns what occurred, it is one of fact, while if it concerns what proof the plaintiff plans on presenting on court, then it is one of evidence.

F: The plaintiff may, if the court is at all demanding, need to allege facts supporting the conclusion that the dog had "exhibited violent tendencies towards humans." I think this is what some students meant by saying that the complaint should allege how the dog was vicious.

G: Arguably, the plaintiff needs to allege lack of provocation. Again, there is a question of whether the plaintiff does bear the burden of pleading on this point. Provocation is an existential
rather than a universal proposition, which suggests that the defendant would have the burden. On
the other hand, plaintiffs presumably have better access to evidence on this point. (There is an
interesting complexity here: Should the question of better access be decided as a general matter -
- that is, on the basis of the run of cases in which plaintiffs claim that they have been bitten by
dogs -- or on the basis of the facts as alleged in the complaint here, or perhaps on the basis of
facts that include allegations that might be made by the defendant? In this case, the defendant
would contend that he was not present, and therefore had a poor access to these facts.) An
essentialist view would tend to put the burden on the plaintiff, because one might say that the
nature of the claim is that the plaintiff was bitten without provocation.

**H:** The plaintiff might contend that, even if she has the burden of pleading lack of provocation,
the Complaint is sufficient to do the job, in alleging that Peter crossed into the yard simply to
retrieve a ball. This is somewhat dubious. Even assuming that Peter crossed in to the yard to
retrieve the ball, as alleged in the Complaint, that does not logically imply that there was no
provocation. But a court might conclude that there is a sufficient implication, as a matter of
ordinary usage, to satisfy the plaintiff's burden.

**I:** Detailed pleading regarding injuries usually is not necessary except where the injury claimed
would constitute "special damages" as under Fed. R. Civ. P. 9(g). Put another way, if the alleged
breach of duty is the type that would be expected to cause injury, as in this case, then injuries of
the type that would expected to result do not have to be pleaded with specificity. Moreover, even
if the allegation of injury is inadequate, the question is likely to arise not at the pleading stage but
at trial or whenever else the plaintiff belatedly attempts to raise an injury that is surprising given
the allegations of breach. At this point, in the pleading stage, there isn't much for the defendant to
argue about on this score. Moreover, even if the court were to demand additional pleading
regarding injury, not much would be accomplished because the plaintiff would be able to supply it.
Not much is necessary in this context regarding causation, either. The Complaint alleges that the
dog viciously attacked the child, and so injuries would be expected.

**J:** Is the allegation of a vicious attack conclusory? Perhaps not – it isn't clear how such an
allegation would reasonably be made less conclusory. I doubt that the plaintiff would be required
to supply more detail in the Complaint. In particular, it is common experience that if a dog
attacks a person, most of the damage will be done by the teeth. In any event, the law under
*Prutzman* does not require the attack to be "vicious." Rather, the key question is whether it is
unprovoked.

**K:** The allegation of ample room may be conclusory, but so what? This allegation isn't clearly
necessary in any event. Conceivably, we might make a motion for a more definite statement, but
that wouldn't do us a lot of good.

**Comments on Question B**

**L:** On a motion for preliminary relief, unlike on a motion to dismiss for failure to state a claim,
the facts are important. The plaintiff must be prepared to demonstrate that the dog is likely to cause harm in the future, and we must be prepared to contest that proposition. A significant part of this will be based on the question of whether the allegations of the attack as made in the Complaint are accurate. It will help us if there is substantial doubt as to whether a dog attack occurred, and if it did whether it was in fact by Trover rather than by another dog. It is possible that the court will allow some discovery on this motion, but of course it probably will not want to turn the preliminary injunction motion into a full-scale trial on the merits. In any event, we must gather what evidence we can, such as from neighbors.

M: Even if the plaintiff is able to persuade the court that the child probably was injured as alleged, that in itself will not support preliminary relief. Preliminary injunctive relief is forward-looking, concerned with what will happen in the future if relief is not granted. Past harms are compensated by damages, and it would be extraordinary to grant preliminary monetary relief. If it appears that the defendant is likely to move assets out of the jurisdiction, and that this would make recovery of a judgment more difficult, that might lead to preliminary relief such as attachment.

S: The court may order garnishment or attachment, but it is unlikely to order preliminary monetary compensation. As indicated above, in comment M, damages after trial are usually considered adequate for past harms.

N: The one biting incident, if proven, may or may not be considered enough to warrant preliminary injunctive relief. The court might (but need not) take the view that the law, in exposing a defendant to damages after one bite, achieves the benefits of injunctive relief anyway, in that the defendant will have strong incentive to prevent further bites. The court might also be less concerned with ultimate success on the merits in this type of case than in some others. That is, the court might believe that the plaintiff is unlikely to prevail on the merits eventually because she may be unable to prove a previous history of violent tendencies towards humans, and yet the court may be concerned that the probability of further incidents pending the litigation is sufficiently high and sufficiently grave that preliminary relief is warranted.

O: Preliminary relief might come in many forms. It might include, for example, a requirement that the defendant put a muzzle on Trover when she is outside; that he fence the yard; that she be kept on a tighter leash when she is outside; that she not be allowed outside, at least at certain times of day, unless supervised; or that she be kept elsewhere pending the litigation. The most extreme relief -- but highly unlikely as a matter of preliminary relief -- would be an order that she be destroyed. All these requirements impose varying degrees of cost on the defendant -- monetary, in life style, companionship of the dog, convenience, and security. Presumably harm to the dog might be taken into account.

P: If the dog has no prior history of violence, and the court concludes that this is one incident with a five-year-old boy who came too close and has learned a lesson, then the court may be inclined not to grant any preliminary relief.

Q: Danger to others, not only to Peter, should, however, enter into the calculus. Thus, for
example, if there are other children in the neighborhood who might be expected to come close to Trover, the court might conclude that it is not enough that Peter will not repeat his adventure.

**R:** What really is at stake is a preliminary injunction, not a temporary restraining order. The court is unlikely to grant a temporary restraining order, at least one without notice, especially given the length of time that the plaintiff has waited to move. The matter does not seem to demand the urgency of an ex parte order.

**T:** It is useful to think of possible concessions, both because they may help us come to an agreement with our adversary and because, if we are afraid that the court is going against us, it would be useful to come up with a moderate result that is tolerable. But we don't want to give up too much, essentially conceding the motion before it is decided against us. It may well be that our client believes it is important to let Trover continue as she has been, and that doing so does not impose much risk to others.

### Comments on Question C

**U:** Absent good information, such as the defendant's memory or a birth certificate, we should probably DKI Peter's age. It may be a simple matter to call plaintiff's counsel, saying that we are prepared to admit that allegation if they furnish us with a birth certificate.

**V:** I think we should DKI the second sentence of the first paragraph. Devlin has no way of knowing this information personally, which is entirely in the hands of Peter and his parents and grandparents. Therefore, Devlin should not have a burden of satisfying himself on this score before he has had a chance for discovery.

**W:** With respect to the third sentence of the first paragraph: If Devlin confirms these assertions, we should admit that the grandparents' yard joins Devlin's backyard, that Devlin kept his dog Trover there, and that Trover is a Great Dane. We should otherwise deny the sentence – that is, we should deny any vicious tendencies.

**X:** With respect to the fourth sentence, if Devlin confirms the assertion, we should admit that Trover was tied to a chain – a fact that seems to be good for us. We should not admit the ample room to roam, which is vague and subjective and contains a suggestion harmful to us. We could perhaps DKI this assertion, but that would sound somewhat odd given that it is our dog, our yard, and our chain. A preferable approach would be to assert affirmatively how much room the chain gave Trover to roam, or a maximum amount (“no more than “x feet”), and otherwise deny the assertion.

**Y:** With respect to paragraph 2, we should probably deny the attack. We could DKI it, but given Devlin's perception of Trover's nature, we have a basis for denying it. We should probably DKI the rest of the sentence, because we don't know what Peter did.
With respect to paragraph 3, we might deny the whole paragraph. Certainly we are going to want to deny that Peter suffered serious injuries "as a result" of the allegations in paragraph 2 -- which include an allegation of a vicious attack by Trover. This is especially so if, as suggested in Comment Y, we deny the attack altogether. Because the whole sentence is linked to this assertion of causation, that gives us reason to deny the entire attack. At most we should DKI this assertion, admit that Peter suffered some injury to his hand, deny that it was as a result of an attack by Trover, and DKI the rest of the sentence. But this may be conceding too much. Without discovery, I don't think we are required to accept Peter's assertion, even though Devlin saw him with bandages.

Affirmative defenses are crucial here. At least you must think about whether they are available and necessary to state. Affirmative defenses are stated to the claim as a whole, not to a particular paragraph, because they are not mere denials of a given assertion; rather, their effect, if proven, is to defeat the claim.

We are certainly going to want to plead provocation as an affirmative defense if we can. (Perhaps lack of provocation should be considered an element of the claim, but the fact that the motion to dismiss has been denied suggests that it is not.) It is worth doing some investigation to see if we can find some evidence of provocation. Even if not, we may be justified in pleading lack of provocation. Our client indicates that Trover is a gentle dog, with no bad prior history, so perhaps we are justified in inferring for pleading purposes that if she bit Peter it likely was because she was provoked.

We also should plead lack of any history of violence to humans as an affirmative defense. (Again, the fact that the Complaint was not dismissed although it did not refer to humans may suggest that this burden is on us; it may, however, be simply that the court thought that the pleading was sufficient.) The matter may well be covered by our broad denial of a history of violence, but I would not want to leave the matter to chance.

Perhaps we have a contributory negligence defense. Whether a small child can be contributorily negligent, I do not know, but it is worth at least looking into the law. As with respect to provocation, it would be nice if an investigation turned up supporting facts, but even if not, perhaps we have enough of a basis to assert the defense. Similarly, it may be that negligent supervision by the grandmother creates a defense for us, even if she herself is immune from liability. The idea here may be that if Peter himself is too young to be contributorily negligent, then the person who was supposed to be watching him is in effect negligent on his behalf. Whether this theory would fly or not, I do not know.

It is always worth thinking about whether there is a counterclaim. In this case, the chances seem pretty slight. If there is any injury to Trover, then that might provide a basis. The trespass by Peter to retrieve his ball does not sound in itself like a potentially fruitful source of recovery.

With respect to preliminary work: If we have not already done so, we could speak to neighbors about the events of the day and any prior tendencies towards violence on Trover's part.
that he/they have observed. We should also speak to the prior owner of Trover to find out any history that we have not heard before, and hopefully to support us that he has no prior violent history. We can ask the plaintiff's lawyer for Peter's birth certificate, so that if he is as old as alleged we can simply admit that. Perhaps we can also ask for his medical records from the accident, so that if the injury is clear we can at least admit that he was injured. Of course, we are not yet in discovery, but the plaintiff may be perfectly willing to give us records such as these immediately.

H: It is fine to assert that Peter has a tendency to wander and that there are other vicious dogs in the neighborhood, because these assertions are unlikely to hurt us (or, in the usual expression, come back to bite us!), but such an assertion in the Answer is not necessary. It is a basis for denial of the Complaint's allegations, not an affirmative defense.

I: Because we have not yet pleaded, there would not ordinarily be discovery yet from unwilling sources. We may, of course, gather whatever information we can from informal investigation.

Comments on Question D

L: First, there is the question of whether the defendant had to give notice on the provocation issue. This is a replay of the question concerning the burden of pleading.

X: [I may have marked W by mistake on one or two answers.] The defendant may contend that denial of the allegations of the Complaint was enough to put this issue into play. The defendant will also likely contend that at least the interrogatory answer, stating that it was not in Trover's nature to bite, may have given notice that the defense would contend that, if there was a bite, something unusual and provocative likely happened.

M: Even if the defendant did have to give prior notice of the intention to defend on the basis of provocation, there is a question of whether the plaintiff is prejudiced. If not, presumably the defendant ought to be allowed to defend on the merits on this basis. If the court deemed it necessary, the defendant could be allowed to amend his answer to state the provocation defense; remember that most modern jurisdictions take a liberal attitude towards amendments to pleading when the adverse party is not prejudiced.

N: So what prejudice is there? The fact that the discovery deadline is about to expire is not an overwhelming point. There is still time to take discovery and discovery deadlines are not fixed in stone. The court might also take the view that if the plaintiff were discovering the case well, we might have spoken to the neighbors before. Similarly, the fact that the trial is approaching is not necessarily persuasive. This case does not seem to require an enormous amount of discovery or trial preparation, and there is still time. How about dissipation of evidence – that is, the possibility that we have lost evidence because of the defendant’s delay? That is a possibility, but we would have to demonstrate it.
O: In a case like this, I might think of the possibility of prejudice arising on grounds similar to those in Zielinski – that is, that the plaintiff had been lured until after the expiration of the statute of limitations into thinking that she had the right plaintiff, and only afterwards did new information indicate that she should have been going after someone else. I don't think that this argument is particularly strong here, however. We should have been on notice from the first of the possibility that the grandmother would have liability. Also, this does not seem necessarily to be the type of case in which claims against the two are incompatible with each other.

V: No statute of limitations runs on the defense (expect when it is stating a claim, such as a counterclaim or cross-claim), so there is no need to relate new matter back to an earlier date. Notice, for example, that in Zielinski and Beeck, though there was concern whether the plaintiff would be barred from bringing new claims by the statute of limitations, there was not suggestion that the statute itself barred the defendant from raising new matter.

P: With respect to the possibility of stating a claim against Falk, the statute of limitations is an apparent problem. Therefore, if we are to state this claim, we are going to have to relate it back to an earlier time, presumably the time of the Complaint.

Q: Clearly, the transaction or occurrence is the same as the one alleged in the original Complaint – the dog-biting incident. The problem here is that we are seeking to add a party.

R: Presumably, Falk knew about the institution of the action. The difficulty is whether, assuming that something like Fed.R.Civ.P. 15 (c)(3) is applied, this is really a mistake in identity concerning the proper party. (Arguably, the court should not apply this requirement, but if you are so contending, you need to indicate why, and you should at least acknowledge that you are departing from the federal requirement, which seems on its face to make sense.) The argument would be that the plaintiff thought it was the dog's fault, but now realizes that the incident was Falk's fault for generating the provocation. This argument may be something of a stretch – it does not sound particularly like a mistake in identity. The court might again place emphasis on the fact that the plaintiff was in a position to learn the facts and sue; therefore, the grandmother may have concluded that the plaintiff was simply not interest in pursuing a claim against her. On the other hand, if the information we have just received in the deposition is correct, presumably the grandmother realized that our client, Mottley, did not realize the facts creating the grandmother's fault.

S: Assuming that the amendment is allowed, we probably have to allege that the grandmother was supervising Peter at the time of the incident and that she was negligent. We probably don't have to allege that she was merely a temporary custodian; it seems fairly clear that the defense has the burden of pleading that immunity issue. That would be the essentialist view, she has better access to information, and the immunity is based on existential propositions, the existence of facts showing more than temporary custody. (Some students indicated that we might claim an intentional tort, in which case there would be liability whether or not she had immune. It's worth thinking about, but I think that is something of a stretch.)
T: Even though we presumably do not have the burden of pleading on the immunity issue, we need to check with our client, Mottley, whether the facts indicate that Falk exercises parental-like custody. Even if she was a very close custodian, we can argue against expansion of *Paulsen* immunity. This is specially so because *Paulsen* itself is not definitive that immunity would be expanded; it only sets limits on the expansion. But if it appears likely that Falk would be held immune, the claim becomes less worthwhile.

U: Given Nabor's statement, as reported to us by Devlin in his deposition, and the points made in comment T above, it does not seem irresponsible to bring this claim.

W: Whether the grandmother exercised full control and custody over Peter is a matter of fact that may eventually have to be tried. It is not a matter on which our claim will be dismissed at the pleading stage. Whatever else it did, *Paulsen* did not establish a *per se* rule that grandparents are immune. For now, all we need is a basis for believing that it is plausible that she is not immune. We probably do need such a basis, even if, as I have indicated about in Comment S, we don't have the burden of pleading on that point; if Falk has a rock-solid defense on this issue, then presumably it is not worthwhile to bring the claim. Probably the legal argument suggested in comment T would be enough to save us from charges of irresponsibility, but wisdom is another matter.

Y: Whatever the situation was with respect to the provocation issue in our claim against Devlin, with respect to our claim against Falk it is hard to argue that we could not reasonably have asserted the claim earlier because we did not know the facts. This is unambiguously our claim – that is, provocation might be a basis for getting relief against her – we were in a position to know that depending on the facts we might have a claim against Falk for negligent supervision, and we were in a position to ask Nabors what the events of the incident were. We might contend that we had no reason to ask her -- this was just a lucky hit by Devlin -- but I doubt that a court would accept that.

**Comments on Question E**

First, a couple of general comments, which tie in to comment Z below, but go beyond it. Obviously, by the time you got to this question you were under a good deal of time pressure – to put mildly, I can hear some of you saying. *Especially* when under time pressure, it is very important to make sure that everything you say is on point. On an exam – at least this holds for me, and I think it probably holds for most of my colleagues – avoid generalities that merely restate the law but do not advance understanding of the particular problem for one who already understands the law. Avoid restating the question, for that doesn’t help somebody who already knows the factual setting. Some students, though they had time only to write a few sentences, made their words count very well, and got good scores.

A few students failed to answer this question at all. That hurts, though over the whole course to a relatively small degree, given that this was only a 10-minute question and that I compressed the grading in a relatively low range. Please try to budget your time as best you can
and make sure to save time to say at least *something* on each question.

Here, for what it is worth, is what a good but quite short response to this question might have looked like:

Ask our client what she knows about F’s custody of P, and get a copy of the custody agreement. Pose interrogatories to F and depose her, her husband, and her son, asking: How often does P stay there? How much time does she spend with him when he is there? What personal effects does he keep there?

Pose interrogatories to Devlin asking for identification of the veterinarian and the prior owner and then ask them informally or by deposition if necessary, for history regarding violence. Speak to neighbors and if necessary take their depositions to ask about prior violence.

Z: The question did not ask for general discovery regarding the incident at issue, but rather for discovery on the *Paulsen* issue and on the question of prior violence. Keep your answers focused!

B: On the prior violence question: We’ve already taken Devlin’s deposition, and presumably explored the issue of Trover’s violent tendencies, but if we haven’t done that we must. Neighbors may also be helpful; we can try talking to them, and if they don’t want to cooperate we may take their depositions, though presumably we will not want to do too much of that because it is expensive and is searching for needles. We should find out from Devlin, through interrogatories if need be, who the prior owner was, and we should speak to, and perhaps depose, that person, and ask for documents related to the dog. It would help to find out who the vet is, speak to or depose him or her, and get the dog’s records, if we can. I have never heard for a doctor-doggie privilege, but stranger things have happened.

C: Our client Mottley, should be a good source of information as to how much time Peter spends in the Falk house, and Peter may be helpful as to how much of the time that he is there is in the custody of his grandmother. The custody agreement or order may help. We would likely want to take the deposition of the grandmother, and perhaps of the father and grandfather as well, asking about routines – how much of the time Peter is alone with her, or with both grandparents, who picks out his clothes, who feeds him, who reads to him, who plays with him, who disciplines him, who bathes him, who puts him to bed, and so forth. Remember that we’re trying to show that Falk does *not* exercise parent-like custody or control.

D: Peter and Mottley may be useful sources of information, but there is no need to depose them. Mottley is our client, and presumably she can cause Peter, her young son, to talk to us.
Model Answer to Prof. Syverud's Problem IV, 1987 Exam

[Note that this case was brought in federal court, so the Federal Rules apply.]

The document is clearly within the scope of discovery, but should probably be protected by privilege. If the privilege does not apply, the work product rule should probably prevent the disclosure of part, but not all of the document. A directed verdict is clearly appropriate if the document is not admitted into evidence, and probably appropriate if all but the last sentence is introduced. It is probably inappropriate if the entire document is introduced. [Note: It may be helpful to have an introductory paragraph like this stating your conclusions very briefly. If you are short on time, however, you may do without it -- don't spend exam time on an introduction at the expense of substance.]

I. The Attorney-Client Privilege

D&D is not a corporation, and Upjohn does not explicitly apply beyond corporations. No reason appears, however, to confine Upjohn to corporations; a partnership is as much an entity as a corporation, is as entitled to legal representation, and also may act through employees.

Was Wanda a client within the meaning of the privilege? Although Upjohn indicated that even low-level employees can be covered by the privilege, it didn't purport to establish a universal rule that any employee is covered. And here there are strong arguments for refusing coverage. Wanda had little or nothing at stake in the litigation, because she was an observer of the incident, not a participant in it, and because she is not a principal of the firm, so that any liability of D&D presumably would not cost her financially. Indeed, Wanda is about as close to a third-party witness as the employee of a party is ever likely to be. Nevertheless, I think it is better to hold that she is covered. She may well have feelings of loyalty to the firm, and in talking to the assistant she may have thought of herself as part of the firm; whether this is true or not in the particular case, it is important to have bright-line rules so that employees can have confidence that their conversations are privileged.

Was this a conversation for legal representation? Yes -- even though the daughter was only 19, she was clearly assisting her father in performing his lawyerly duties, and she was a conduit by which Wanda could communicate with the lawyer.

II. Work Product

The document is clearly work product, because it was prepared in anticipation of trial. The first two sentences, however, should probably be discoverable. Plaintiff has a substantial need of these materials in its case, because they are obviously very relevant (although conceivably you might hold that discovery should not be ordered because, even if it were, plaintiff couldn't survive the directed verdict motion). And plaintiff is unable to obtain the substantial equivalent of this material by other means, no matter how much hardship it is willing to endure in trying to do so: Although there are other witnesses to the incident, they do not say what Wanda did, and they had a far greater interest than Wanda did.

The last sentence of the document stands in a different position: This records the research
assistant's mental impression, and so should probably be protected -- although this protection under Rule 26(b)(3) is not absolute, and this presents an appealing case for overcoming it, given that this impression might make a decisive difference on the directed verdict motion [assuming that the jury could really consider the document for the truth of the assistant's expressed suspicion.]

III. The Directed Verdict Motion

If the document is precluded, a directed verdict is clearly appropriate; under that hypothesis, there is no evidence from which the jury could conclude to a preponderance that the driver was negligent. At the other extreme, if the entire document is admitted, a directed verdict seems inappropriate: If the jurors are allowed to conclude that the driver was drunk, they should be allowed also to conclude that, given the fact of the accident, it is more likely than not that the driver's negligence caused it. As for the intermediate case: If you admit all but the last sentence of the document, you should probably (but not certainly) grant the motion. That the driver seemed distracted and ran a stop sign a few minutes before is a rather flimsy basis on which to conclude that he crossed the line at the time of the accident. On the other hand, the jurors are free to reject the self-serving evidence offered by the defendant, and if they do that they may conclude that such evidence as there is makes it somewhat more likely than not that the defendant was negligent. The question may really come down to whether you think that the plaintiff must not only convince the jury that its explanation is the most likely one on the evidence presented, but must also introduce some quantum of evidence sufficient to overcome inertia -- i.e., sufficient to force the judicial system to disturb the status quo.
SAMPLE MIDTERM EXAM MATERIALS