

Civil Procedure

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Model Answer

Question I

- A. Nicole can argue that the federal court has personal jurisdiction because Illinois has asserted jurisdiction and that assertion does not violate the due process guarantee under the Fourteenth Amendment to the United States Constitution.

Under Fed.R.Civ.P. 4(k)(1), the district court has personal jurisdiction to the same extent that Illinois state courts have jurisdiction. Under § 2-209 of the Illinois long-arm statute, reprinted as an appendix to the exam, state courts have jurisdiction over non-residents who (1) transact any business within Illinois, (2) commit tortious acts within Illinois, or (7) make or perform any contract or promise substantially connected with Illinois.

Nicole's strongest argument for an affirmative assertion of jurisdiction is under paragraph (7). Dochnich made a contract with Nicole that was substantially connected with Illinois in that the movie Dochnich contracted to shoot was produced and cast in Illinois and, presumably, post-production and distribution would occur in Illinois. In addition, by entering into a contract with Illinois-based Nicole, he transacted business in Illinois, under paragraph (1). By intentionally interfering with her contracts with the actors, he committed a tort, damages from which were felt in Illinois. Under *Gray v. American Radiator*, a tort is committed where the last element—in this case damages—occurs.

Even if a state court would not have jurisdiction, Fed.R.Civ.P. 4(k)(2) asserts personal jurisdiction involving federal claims to the extent permitted by the constitution.

State assertion of jurisdiction, like Rule 4(k)(2), requires considering the constitutional limits of personal jurisdiction under *International Shoe*, which requires assessment of minimum contacts and fair play and substantial justice. (None of the categorical bases for constitutional assertion of jurisdiction suggested by the Scalia plurality in *Burnham*, such as personal service on one while present within the sovereign's borders, or in-rem actions involving property attached within the borders at the commencement of the action, is either asserted by Illinois or present on the facts).

General jurisdiction may exist because Dochnich lived in Illinois for two years while he was in school at UC. During that time, his contacts were systematic and continuous, meeting the requirements articulated for general jurisdiction in *Helicopteros*. But those contacts no longer exist, and further research would be necessary to determine if general jurisdiction, once established, ends when the contacts no longer exist.

Special jurisdiction also exists because Dochnich directed contacts toward Illinois by entering into a contract with Nicole in Illinois and, presumably, by engaging in further communications with her, knowing that she was in Illinois. While the IICR claim against him does not directly arise from his contract with Nicole, he surely was placed in a position through that contract to interfere with the actors' contracts, and thus is related to the contacts connected with his own contract. In addition, his contacts associated with his studies at UC arguably relate to the claim because Nicole would not have known him and thus would not have put him in a position to interfere with the actor contracts but for their joint studies at UC.

Fair play and substantial justice also is satisfied, according to the five factors. Dochnich might argue that it's burdensome for him to travel halfway around the world to litigate in Chicago, but it was not too burdensome for him to travel to Chicago to study, and there is no reason to think it would be any more burdensome now. Illinois clearly has an interest in this dispute because it wants to protect its citizens, including Nicole, from having their contracts interfered with. Nicole needs to litigate in the district court in Illinois because the only other plausible place she could get personal jurisdiction is in the courts of Uzbekistan, which are unavailable to her, because she would not be admitted, and as an American, she likely would not have access on any reasonable basis to the Uzbek courts. Most of the relevant evidence about the interference is available in Illinois: documentary evidence about the contracts, testimony from the actors about what Dochnich did to prevent them fulfilling their contracts, Nicole's testimony about economic loss. The shared interests of the several U.S. states militate toward litigation in Illinois rather than in Uzbekistan where a rule of law hardly can be said to exist.

Dochnich will argue that general jurisdiction does not exist because he no longer has systematic and continuous contacts in Illinois and that the nexus requirement for specific jurisdiction does not exist because the claim does not relate to his own contracts with Nicole and all of the contacts related to that contract and not to the ones he supposedly interfered with. The interference occurred in Uzbekistan, not Illinois.

Nicole has a far stronger position on these arguments than Dochnich.

We also may be able to quibble that a Rule 12(c) motion is not timely because the pleadings are not closed, but this does not matter because Rule 12 clearly

authorizes a defendant to file a motion asserting 12(b)(6) grounds for dismissal before filing an answer and thus closing the pleadings.

- B. Brian should argue that venue exists under 28 U.S.C. § 1391(d) because he is suing an alien. This is a slam-dunk argument.

If that fails for some reason, he should argue that venue is good under § 1391(b)(2) because a substantial part of the events giving rise to his claim occurred in Illinois. He has no argument under § 1391(a) because no diversity jurisdiction exists, as explained in the answer to subquestion (C), and because federal question is at least part of the basis for subject matter jurisdiction. Brian has no argument under § 1391(b)(1) because Dochnich is not a resident of Illinois. He has no argument under the catchall proviso in § 1391(b)(3) because Dochnich may not “be found” in any judicial district; he is in Uzbekistan.

The § 1391(b)(2) argument is that Brian was tortured by Dochnich only because of the contract made between him and Nicole in Illinois and because of the contract between Dochnich and Nicole made in Illinois.

Dochnich will argue that the making of the two contracts is only tangentially related to the conduct allegedly constituting torture and inflicting emotion distress and therefore does not satisfy § 1391(b)(2).

But he has no plausible response to the § 1391(d) argument, and thus Brian will prevail.

- C. Attacks on subject matter jurisdiction are never waived.

Brian has a compelling argument that federal question jurisdiction exists over his Alien Tort Act claim. The Alien Tort Act itself explicitly grants subject matter jurisdiction. Even if it didn't, this claim plainly arises from the grant of a private right of action in the Act, thus conferring subject matter jurisdiction under 28 U.S.C. § 1331. It makes no difference how strong or how weak his claim is on the merits; what matters is that he has asserted a claim based on a right granted by a federal statute.

As to his IIED claim, a state common-law claim, he has a strong argument that subject matter jurisdiction in the form of supplemental jurisdiction under 28 U.S.C. § 1367(a) exists (§ 1367(b) is not involved because the anchor claim is not based on diversity). The very acts that constituted torture in violation of treaty and the law of nations gave rise to the emotional distress; they were intentional; and they caused injury. So there is almost perfect conformity of the elements between the federal and state claims and the evidence will be the same—the requisites for the test of “common nucleus of operative fact.”

On the other hand Brian has no argument for diversity jurisdiction over the IIED claim because both he and Dochnich are aliens—citizens of Uzbekistan and

Kosovo respectively—and 28 U.S.C. § 1332 requires that at least one of the parties be a citizen of a (U.S.) state.

I can't see what non-frivolous arguments Dochnich would have to counter these assertions of jurisdiction.

D. The three plaintiffs may be able to join in one action under Fed.R.Civ.P. 20. It depends on whether all of their claims out of the same occurrence or transactions or series thereof, *and*, whether they present any question of law or fact. We don't know what Sterling is suing for, but presumably he has the same claim for IICR as Nicole. Arguably both the IICR and torture/IIED claims arose from the making of the contracts in Illinois. But for those contracts, Dochnich would not have been in a position either to interfere or to torture. Moreover the conduct allegedly constituting torture was exactly the conduct constituting interference. So there are two clusters of transactions or occurrences, one in Illinois, one in Uzbekistan, that satisfy the first prong of Rule 20. As to the second prong, the same questions of fact—exactly what happened in Uzbekistan—and of law—whether it was “intentional” on Dochnich's part, and “improper” as required for IICR and for torture, are involved in all the claims.

Dochnich's only counterargument is that IICR and Brian's claims present totally different legal theories.

Question II

- A. Unless we amend our complaint, the motion will be granted. Fraudulent misrepresentation must be pleaded specifically, i.e. according to fact pleading rules, under Fed.R.Civ.P. 9(b). While our complaint might satisfy the notice-pleading requirements of Fed.R.Civ.P. 8, it does not satisfy the Rule 9 requirements. Therefore it does not make out a claim upon which relief can be granted, under the pertinent pleading requirements.

Fortunately, we are entitled to amend as a matter of course under Fed.R.Civ.P. 15(a)(1)(A) because no pleading responsive to our complaint has yet been filed (a motion to dismiss is not a “pleading”). I will file an amended complaint with the clerk right away, pleading Count II as follows:

“COUNT II FRAUDULENT MISREPRESENTATION

“1. On 13 January 2009, the defendant told the plaintiff in an email that he could play volleyball well.

“2. At the time he made this statement, he knew that he was a terrible volleyball player.

“3. He made the statement intending to deceive the plaintiff and intending that she rely on it

“4. Plaintiff relied on the statement by casting defendant in a movie in which he would be portrayed as an Olympic-level volleyball player

“5. As a result of defendant’s false statement and plaintiff’s reliance thereon plaintiff has incurred expenses which she will be unable to recover, including \$50,000 compensation to a cinematographer, \$15,000 camera rental, \$25,000 compensation for other cast members, \$5,000 for location insurance, and \$12,000 for municipal permits for shooting footage which now must be discarded and reshot with another volleyball player.”

Thus pleaded, this portion of the complaint states specific facts that satisfy each element of fraudulent misrepresentation, as required by Rule 9.

- B. Yes, we can get the emails from Dochnich’s ISP. We should serve a Rule 34 request for production of documents on the ISP, accompanied by a Rule 45 subpoena. Fed.R.Civ.P. 34(c) extends the obligations of Rule 34 to non-parties “as provided in Rule 45.” While Rule 34 thus may apply to a non-party directly, the subpoena is important because the sanctions language of Fed.R.Civ.P. 37 appear to authorize sanctions only against “parties.” Rule 45(e), on the other hand, expressly permits contempt sanctions to be imposed on a “person” who fails, without adequate excuse, to obey the subpoena. Rule 45(a)(1)(iii) expressly authorizes subpoenas commanding a person to “produce . . . electronically stored information.”

The ISP can be expected to move to quash the subpoena under Rule 45(c)(3)(A) on the grounds that providing the requested emails will impose an “undue burden,” because the ISP will have to sort through millions of emails. Alternatively, it may claim that the emails are protected or privileged. We can overcome the burdensomeness objection by specifying as narrowly as possible the desired emails, by sender, address, and date and time sent. Any ISP can identify one or more emails with that information with very little burden, because that is how email systems are inherently organized. Any protection or privilege argument can be overcome by establishing that the requested email is within the scope of discovery under Rule 26(b)(1) because, as the verbal conduct satisfying an element of the fraudulent misrepresentation claim, it is clearly relevant, and that any privilege was waived by sending it to the plaintiff.

Our prospects for success are high.

- C. Nicole must respond to the interrogatory, but she may object to all are part of it. She has no basis for objecting to the question about whether any communications exist. She should answer, “yes.” But she need not provide copies of the communications, and she should object to that part of the interrogatory.

In her objection, which must be stated with specificity under Fed.R.Civ.P. 33(b)(3) and (4), she should object that one of the requested communications is

protected by attorney-client privilege, and that another is protected attorney work product.

The message from me to Nicole is attorney work product, protected from discovery by Fed.R.Civ.P. 26(b)(3) because they are “documents” “prepared in anticipation of litigation” by Nicole’s attorney (me). My assessment of the strength of her legal claims against Hanna is exactly the kind of mental impression of a lawyer that the work-product doctrine is meant to protect. In theory such protection could be overcome by a showing of sufficient need and an inability to get the information elsewhere, but such a showing cannot be made in this case. Whom we decide not to sue is irrelevant to the defenses of those we do sue, and thus no requesting party should demonstrate any need for it.

The message from Nicole to me is a privileged attorney-client communication. She, the client, communicated this to me, in order to obtain legal advice or representation. The other side may argue that its pejorative tone indicates that it is not a request for legal advice, but it was made in the context of an attorney-client dialogue about representation. Attorney-client privilege is interpreted broadly, and no showing can compel the disclosure of information determined to be privileged.

- D. I would expect Nicole’s lawyer to file a motion with the court under Fed.R.Civ.P. 37 to compel us to continue with the deposition, and to require us to pay the expenses of making the motion.

I will oppose the motion and file for a protective order exempting Andre from any further requests to participate in any further “demonstrative depositions” of this sort.

In my motions I will make several arguments, all of which are winners. First, the authority of the court to compel is limited, by Rule 37(a)(3)(B), to compelling an answer a question in a deposition. Andre was asked no questions, merely told “Play.”

Second, the episode in the gym was not a deposition. Depositions, under Fed.R.Civ.P. 30 are limited to “examination” and “cross-examination.” Requiring a person to play volleyball is neither an examination nor a cross-examination.

Third, requiring Andre, with his poor volleyball skills, to play basketball with all the extras from the movie would unreasonably “annoy” and “embarrass” Andre under Rule 30(d)(3)(A), permitting us to adjourn the deposition for the time necessary to obtain a protective order.

Fourth, the conduct of the “deposition,” was an attempt to conduct a Rule 35 physical examination without meeting the requirements of Rule 35. It thus was conducted in bad faith.

Fifth, Nicole filed the Rule 37 motion without any attempt to confer with me, as required by Rule 37(a)(1).

I expect that Nicole's lawyer will argue that we failed to confer before terminating the deposition and that we were entitled to terminate it only for the purpose of seeing a protective order, which we did not do in a timely way.

More ambitiously, she may argue that since a witness being "examined" at trial may be required to demonstrate certain physical activities during the trial, a similar obligation is without the scope of a Rule 30 deposition. It is hard to imagine that a judge would accept the idea that a witness would be obligated at trial to play a volleyball game with ten other people in the courtroom.

These arguments may be a problem for us unless I do attempt to confer before we go to court and unless I file for a protective order promptly after terminating the deposition.

In any event, however, we will prevail in our position that any volleyball playing can be compelled only through a Rule 35 court order, and only then with the safeguards provided in Rule 35.

- E. The judge is authorized by Rule 16(a)(5) to convene a pretrial conference for the purpose of "facilitating settlement." Trial judges have broad discretion to decide how to "facilitate."