CIVIL PROCEDURE

LAW SCHOOL AND BAR EXAMS

(Federal Rules with California Comparison)

WHAT to Say and HOW to Say It!

Tim Tyler Ph.D.
Attorney at Law
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Chapter 3: Issue Spotting

Since you lose points for every required issue you fail to discuss, it is CRITICAL TO SPOT all of the issues. BUT DON'T waste time discussing issues that do not really exist. This is easier said than done and introduces a certain level of sadism peculiar to law school.

The grader/question writer always wants you to discuss certain required issues. But the graders fall into two basic schools. The first, rational school, simply states the issues to be discussed in the call of the question.

The second, less rational and often sadistic school of question writers uses only hints about the intended issues. Sometimes the "hints" are rather obvious. Other times they are so subtle the student has to be a psychic. At this extreme this approach is called HIDING THE BALL, and it is the stuff of law school horror stories.

The HIDE THE BALL question utilizes words and fact patterns that only vaguely suggest issues. This is like a code language known only to law school professors. The following is a list of "code" words and facts that are often used to indicate intended issues.

## Issue Spotting Hints

### CIVIL PROCEDURE:

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<thead>
<tr>
<th>Issue Area and Coded Hint</th>
<th>Intended Issue</th>
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<tbody>
<tr>
<td><strong>SUBJECT MATTER JURISDICTION</strong></td>
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<tr>
<td>1. Federal law, treaty, act:</td>
<td>Federal question?</td>
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<td>2. Federal question in state court:</td>
<td>Removal?</td>
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<td>3. Dollar amounts:</td>
<td>Enough for diversity? Good faith claim?</td>
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<td>4. States (State X, Nevada, etc.):</td>
<td>Diversity of domicile?</td>
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<td>5. Lives in hotel/motel:</td>
<td>State of domicile?</td>
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<td>6. $75,000</td>
<td>Borderline diversity case? Good faith claim?</td>
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<td>7. Joinder of parties:</td>
<td>Destroy diversity?</td>
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<tr>
<th><strong>PERSONAL JURISDICTION</strong></th>
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<tr>
<td>8. &quot;Every year&quot; visits:</td>
<td>Minimum contacts?</td>
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<tr>
<td>9. Ownership of land in state:</td>
<td>Minimum contacts?</td>
</tr>
<tr>
<td>10. Agreement by phone/internet:</td>
<td>Forum-related cause of action?</td>
</tr>
<tr>
<td>11. Service on party flying over state:</td>
<td>Sufficient presence?</td>
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<td>12. Answered/Special appearance:</td>
<td>Consent to jurisdiction?</td>
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<td>13. Advertisement in state:</td>
<td>Minimum contacts?</td>
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<td>14. Corporation:</td>
<td>State of headquarters and incorporation?</td>
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<td>15. Transient residents (students, soldiers):</td>
<td>State of domicile?</td>
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<th><strong>COLLATERAL ATTACK</strong></th>
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<td>16. Writ of execution, enforce judgment:</td>
<td>Collateral attack?</td>
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<td>17. Contempt action:</td>
<td>Improper first amendment restraint?</td>
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<tr>
<th><strong>CHOICE OF LAW IN DIVERSITY ACTION</strong></th>
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<tr>
<td>18. State X law different from State Y:</td>
<td>Eire Doctrine</td>
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<tr>
<td>19. Statutes of limitation:</td>
<td>Substantive or procedural?</td>
</tr>
<tr>
<td>20. Federal rule different:</td>
<td>Substantive or procedural?</td>
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Chapter 5: Organizing the Answer

ORGANIZE the essay answer based on the CALL of the question and the AREA of law.

Organized by CALL. If the CALL of the question indicates the organization of the answer, you must follow that organization EXACTLY because the Grading Key will be in that precise form.

For example, if the question asks,

"Discuss:
   a. What jurisdictional objections might W raise?
   b. What state's substantive law would apply?
   c. What issues of claim and issue preclusion would the Court consider?"

Then, this is the STRUCTURE for your answer, and this structure circumscribes the issues for you to discuss. DO NOT ALTER THE DISCUSSION ORDER OR DISCUSS ANYTHING ELSE, but within each of these subject areas you can present the issues suggested.

Organization of a CIVIL PROCEDURE Answer. If the question involves civil procedure, and the call just says "discuss", you should CONSIDER DISCUSSING the issues shown below. This does NOT mean that you should discuss all of these issues every time.

1) Does the Court have SUBJECT MATTER JURISDICTION?
   Action in a federal court?
   Supplemental jurisdiction?
   Waiver of SMJ?
2) Does the Court have PERSONAL (territorial) JURISDICTION?
   Pennoyer v. Neff: Presence, Domicile, Consent?
   International Shoe: CASA? FRCA?
   Waiver of PJ?
3) Was original VENUE proper (if action transferred to another state)?
4) What is the SUBSTANTIVE LAW that applies to a diversity action (Erie Doctrine)?
5) JOINDER?
   Joinder of CLAIMS?
   Joinder of PARTIES? Effect on SMJ?
6) Does CLAIM PRECLUSION (res judicata) bar a claim?
   Prior litigation? Same parties? A privity issue?
7) Does ISSUE PRECLUSION (collateral estoppel) bar litigation of an issue?
   Prior litigation? Offensive or defensive issue preclusion?
8) Can prior judgment be COLLATERALLY ATTACKED?
9) Does party have right to JURY TRIAL?
10) CLASS ACTIONS?
11) Is MOTION properly argued (e.g. summary judgment)?
Chapter 15: Answering Civil Procedure Questions

CIVIL PROCEDURE concerns whether an action has been brought in the right court, with proper jurisdiction, with proper notice, the proper law to apply, and the preclusion of claims and issues that have already been decided.

Some State Bars only test on the FEDERAL RULES OF CIVIL PROCEDURE but others test on differences between State and federal rules. The explanations given here are consistent with California rules of civil procedure.

Tangential Issues. Civil Procedure necessarily touches on peripheral issues that are more closely regarded in classes on EVIDENCE, REMEDIES and CONSTITUTIONAL LAW. There is no bright line that entirely divides one subject area from another. For example, the 14th Amendment guarantees due process and in *Mullane* it was held that reasonable notice that would afford an individual an opportunity to be heard is a jurisdictional requirement. Therefore, *Mullane* is a case that impacts both Civil Procedure issues (jurisdiction) and Constitutional Law issues (due process).

Generally civil procedure questions raise court jurisdiction as an issue.

Be Prepared. You MUST be prepared to give a good recitation of rules for 1) the SUBJECT MATTER JURISDICTION, 2) PERSONAL JURISDICTION, 3) the ERIE DOCTRINE, 4) ISSUE PRECLUSION (collateral estoppel) and 5) CLAIM PRECLUSION (res judicata).

Mnemonics. Minimum contacts may be shown if there is a Forum Related Cause of Action [FRCA = "fur-kuh"] or Continuous And Systematic Activities [CASA = "ka-suh"].

CIVIL PROCEDURE ISSUES AND ANSWERS

FOLLOW THE CALL of the question. But if the call is general list the issues as follows:

1. **Does the court have SUBJECT MATTER JURISDICTION?**
   Under federal rules of CIVIL PROCEDURE, federal courts have limited SUBJECT MATTER jurisdiction based on 1) DIVERSITY or 2) a FEDERAL QUESTION. And under the WELL-PLED COMPLAINT RULE complaints (or petitions) filed in federal court must expressly state why the court has jurisdiction. **Important!**

   [This is only an issue if an action is filed in a federal court. It is not an issue if an action is filed in a State court because they have general jurisdiction. Then add additional statements conditioned upon the factual situation as follows:]
Further, the claim of [a party] that [some unrelated, independent claim of the party or a related claim against an additional party (a third-party defendant)] could also be joined because it would be reasonable to expect them to be litigated at the same time.

Therefore ... 

[This issue pertains to both State and federal courts, but is most significant in federal courts because of possible effects on SMJ and supplemental jurisdiction. 

In both State and federal courts the parties to an action have a right to join any and all other claims they have against each other whether they all arise out of the same event or not. But a federal court only has jurisdiction (“supplemental jurisdiction”) over claims arising from the same events (the “common nucleus of operative fact”) and unrelated (independent) claims must each meet the requirements of subject matter jurisdiction.

Rules for “aggregating claims” to meet the $75,000 limit for a diversity action are complex. Read Nailing the Bar’s Simple Civil Procedure Outline before exams.

In both State and federal courts plaintiffs can amend to add additional defendants, defendants can join additional plaintiffs by naming them in a cross-complaint, defendants can join third-party defendants, and plaintiffs and defendants can compel third parties to join in an action if their participation is necessary to prevent inadequate or inconsistent remedies, and outsiders can join in an action. But new parties can only join or be joined in an action if their claims or the claims against them arise out of the same events that give rise to claims already raised in the action.

And in federal courts no parties can be joined if it would destroy diversity jurisdiction.] 

3. Does the Court have SUPPLEMENTAL JURISDICTION over the joined claims?  
Under federal rules (28 USC § 1367) if a federal court has subject matter jurisdiction over any claim between the parties the court has discretion to exercise SUPPLEMENTAL JURISDICTION over all other claims of the same parties that arise out of the same case or controversy, even if the court would not have otherwise had subject matter jurisdiction over those other claims.

Here the district court would have discretion to assert supplemental jurisdiction over the issue of [a supplemental claim] because...

[This issue only pertains to a federal court action. Old cases used the terms ‘pendant’ and ‘ancillary’ jurisdiction, but those terms have been abandoned. Supplemental jurisdiction rules are complex. Read Nailing the Bar’s Simple Civil Procedure Outline before exams.]
Practice Question 15-1

Tom lived in Sacramento and gambled on the internet, although it was illegal in California. He won $80,000 playing blackjack on Winbig.com, a Nevada-based internet casino that frequently advertised on the Yahoo internet service provider home page.

Internet gambling was legal in Nevada where Winbig.com was located, but Winbig.com would never pay Tom.

Tom discovered that Winbig.com was an unincorporated business owned by Harry the Horse, a shady character who kept his permanent residence in Las Vegas. Harry spent most of the year in California at Lake Tahoe in a hotel room.

Tom sued Harry in the Federal District Court for the Eastern District of California and hired Dick to serve the summons.

Dick served the summons by taping it to the gate of Harry's palatial estate.

Harry found the summons but decided to ignore it.

Tom got a default judgment for $80,000 from the District Court.

When Tom tried to enforce the judgment with a lien on Harry’s palatial estate, Harry challenged the judgment.

Discuss:
1) Did the court have subject matter jurisdiction over the matter? How?
2) Did the court have personal jurisdiction over Harry? How?
3) Did Harry have proper notice of the action?
4) What state's laws should have been applied? Why?
5) Is Harry's challenge an impermissible collateral attack?
Appendix B: Sample Answers

The sample answers are presented in italics. Comments are in [square brackets and plain text]. An answer explanation follows each.

Sample Answer 15-1: Subject Matter and Personal Jurisdiction, Notice, Choice of Law

1. **Did the court have SUBJECT MATTER JURISDICTION?**
   Under the FRCP a federal court has SUBJECT MATTER JURISDICTION either because there is a FEDERAL QUESTION arising under 1) the U.S. Constitution, 2) U.S. Treaties, or 3) Federal statutes, OR because there is DIVERSITY. Diversity requires 1) that all plaintiffs be from different states from all defendants and 2) the controversy be over a good faith claim of at least $75,000.

   One is from the state where they have DOMICILE, the place where one intends to return and reside indefinitely.

   Here Tom is domiciled in California because he “lived in Sacramento”, and Harry is domiciled in Nevada because “his permanent residence” is in Las Vegas. Therefore the parties are from different states.

   Here the amount is more than $75,000, because it is for “$80,000”.

   Therefore, subject matter jurisdiction exists based on DIVERSITY.

2. **Did the court have PERSONAL JURISDICTION?**
   Under PENNOYER v. NEFF personal jurisdiction was based on 1) PRESENCE, 2) DOMICILE, and 3) CONSENT. Under INTERNATIONAL SHOE personal jurisdiction was also held to exist based on MINIMUM CONTACTS because of CONTINUOUS AND SYSTEMATIC ACTIVITIES or where there was a FORUM RELATED CAUSE OF ACTION and the defendant had availed himself of the benefits and protections of forum-state law such that exercise of jurisdiction did not offend traditional notions of fair play and substantial justice.

   Here Harry did not have presence or domicile in California at the time he was served because he was served at his residence in Nevada. And he did not consent to the court’s jurisdiction because he did not answer.

   Here the plaintiff would argue that the defendant had sufficient minimum contacts and had availed himself of the benefits of California law because he “spent most of the year in California”. The defendant would argue his activities in California were insufficient.

   Here the plaintiff would argue there was a forum related cause of action because the debt arose from him playing the internet game while IN CALIFORNIA. The defendant would argue that his activities were all in NEVADA and that the plaintiff was communicating into Nevada to play the game.
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WHAT to Say and HOW to Say it on CIVIL PROCEDURE Law School and Bar Exams —

* The MOST COMMONLY TESTED ISSUES and RULES AND DEFINITIONS to Help Answer Them!
* How to SPOT ISSUES!
* FEDERAL Rules with Comparison to CALIFORNIA Rules!
* How to BUDGET TIME on Exams!
* CONCLUSIONARY Answers and How to Avoid Them!
* 6 PRACTICE QUESTIONS with SAMPLE ANSWERS!

This is what LAW STUDENTS are saying about NAILING THE BAR —

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I passed! THANKS! Your approach taught me a LOT — Annie B.

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I passed. In fact, Q4 of the Bar’s Selected Answers was MY essay. Your method works!! — Steve D.

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With Nailing the Bar I am able to understand IRAC and issue spotting for the first time — Beverly W.

"Nailing the Bar" was the best guide I have found. Using it I passed the Bar in one try — Sabrina

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