

To: Civil Procedure Students  
From: David I. Levine  
Date: January 9, 2002  
Re: Fall 2001 Mid-Year Exam

Inside the cover of your answer to the essay question, you will find two numbers and your letter grade.

Short Answer Section: The first number is your raw score on the short answer section of the exam. The scores ranged from a high of 54 to a low of 11. The mean score was a 34. In calculating how many points to award out of the total possible points on this section, I curved your raw score against the highest score in the class.

This section of the exam will be available for your review during office hours this semester. You will be able to compare your answers to suggested answers.

Essay Section: The second number is a raw score representing how you did on the essay question. These are expressed in 5 point increments with a range from the high score of 55 to a low score of 5. The mean score was 25. In calculating how many points to award out of the total possible points for this section, for purposes of assigning a letter grade I curved your raw score against the highest score in the class.

The essay question clearly asked you to address only the pending discovery issues.(The reference to a jury trial demand was a red herring.) The actual case is *Surles v. Air France*, 2001 WL 815522 (opinion of magistrate judge) and 2001 WL 1142231 (S.D.N.Y. 2001) (opinion of district judge affirming magistrate). The following discussion is adapted from the portion of the magistrate's opinion addressing the issues presented in the exam question. The magistrate (affirmed by the district judge) decided not to allow any of the requested discovery. (Many members of the class, in contrast, would have allowed some or all of the requested discovery.)

#### *A. Rule 26 Standard*

It was important to recognize that the relevant rules were changed as of December 1, 2000. As amended, Fed.R.Civ.P. 26 now requires each party to disclose at the outset of the litigation, *inter alia*, "the name and, if known, the address and telephone number of each individual likely to have discoverable information *that the disclosing party may use* to support its claims or defenses." Fed.R.Civ.P. 26(a)(1)(A)(emphasis added). (The prior rule referred to disclosure of individuals "likely to have discoverable information relevant to disputed facts

alleged with particularity in the pleadings.”) There is no indication that either Lutringer or the unnamed co-borrower on the car loan had information that Surles intended to use as part of his case. Accordingly, Surles had no obligation to disclose any identifying information about either of them (the question made express reference only to Lutringer) in the absence of a specific request. (It is too early in the case to consider who might need to be disclosed under the pretrial disclosures required under Rule 26(a)(3).)

Air France,<sup>1</sup> of course, has now made such a request. Surles does not bear the burden of establishing a basis for resisting Air France’s discovery. Under the recent amendments to the Federal Rules of Civil Procedure, a party seeking discovery as of right is entitled only to non-privileged information that is "relevant to the claim or defense of any party." Fed.R.Civ.P. 26(b)(1). In this instance, because Surles testified at his deposition that Weisser did not express any need to know the reason that Surles was seeking money from his retirement account, it does not appear that the information sought regarding the car loan or retirement account beneficiary meets this relevance standard. Under the revised version of Rule 26(b)(1), a party may also seek discovery which is merely relevant to the subject matter of the action (which was the prior standard). With respect to such discovery, however, the party making the request--in this instance, Air France—now bears the burden of establishing "good cause."

Obviously you had no case law available indicating how the new discovery standards should be applied. However, as *Davis v. Ross* (p. 346 in Marcus) indicates, even under the former version of Rule 26, discovery requests could not be based on pure speculation or conjecture. The new rule narrows the scope of discovery—at least to a small degree--from what is was previously. It shouldn’t be interpreted to make it easier to seek discovery on the basis of mere speculation than it was under the previous version of the rule.

### B. *Car Loan*

The reason that Surles sought to invade his contributions to his retirement account<sup>2</sup> seems rather extraneous to the issues of alleged discrimination that lie at the core of Surles’ case. When parsed carefully, Air France's desire to learn additional details about the car loan (which has unquestionably been whetted by Surles' refusal to respond) from the co-obligor on the loan seems to be based upon little more than the speculative hope that useful impeachment material will be

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<sup>1</sup> A few students identified the defendant as the “Air Force.” While it did not seem to make much difference to the analysis on those papers, it does underscore the need to read exam questions very carefully.

<sup>2</sup> By the way, such a withdrawal may well have important tax consequences. My friendly advice is that you not withdraw money from any retirement funds you have or may acquire in the future without having a full understanding of the consequences.

unearthed.<sup>3</sup> Such speculation, however, is probably not sufficiently related to the claims or defenses in the case and probably shouldn't rise to the level of "good cause."

Even if the identity of the co-obligor were deemed relevant under Rule 26(b)(1), you should have considered whether to limit discovery under Rule 26(b)(2). For example, the court might have concluded that an inspection of the car loan documents, if any, would be a more convenient, less burdensome or less expensive source of information than a potential deposition of the co-obligor. You should also have addressed Surles' contention that the information was "highly personal." Although this is not a recognized privilege, you might have decided whether it was possible to grant discovery under a Rule 26(c) protective order, which would have minimized Surles' apparent embarrassment or other concern. See, e.g., *Vinson v. Superior Court* (Kane and Levine p. 549) as an example of a court taking such considerations into account.

### *C. Beneficiary of Retirement Plan*

Turning to the named beneficiary of Surles' retirement plan, Air France speculates that Lutringer *may* have information concerning such topics as Surles' possible failure to mitigate his damages and whether his testimony concerning the car loan was truthful. As indicated above, Surles had no obligation to disclose Lutringer to Air France unless he intended to use Lutringer to support his claims.

The magistrate judge believed that to open the door to the discovery that Air France seeks based on such a speculative showing "would fly in the face of the recent amendments to Rule 26(b)(1), which were intended to focus the attention of both the parties and the Court on the actual claims and defenses involved in a suit." For example, with respect to the issue of mitigation, Air France's argument would suggest that it also has a right to discover the names, addresses and telephone numbers of (and ultimately to depose) the superintendent of Surles' building, his neighbors and close relatives, and his accountant because they too *may* have information about Surles and his activities. The mere fact that

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<sup>3</sup> The actual opinions in the case do not discuss whether Air France had requested that Surles make available any documents related to the car loan. My view is that the existence of such documents would have assuaged any doubts about the veracity of Surles' story regarding the existence of the car loan. Documents related to paying off the loan would have confirmed whether the dates of Surles' resignation and re-hiring generally conformed to the pay-off. The documents would have identified the mysterious co-obligor, but that person's identity would have been of little import if the documents supported Surles' story. The court might have taken a different view of the request for the identity of the co-obligor had Surles previously refused to allow an inspection of the documents even with the name of the other person redacted, or had Surles asserted that no such documents existed.

The existence of the car loan would not, of course, resolve whether Air France had cause to fire Surles, or whether the discovery of the resign/rehire plan was just a pretext for terminating Surles for invalid reasons, as he alleged.

Air France sought to obtain discovery from just one potential witness does not make its request any less speculative. Moreover, since Surles' claims regard his rights to be free from discrimination based on age and national origin, it is unclear how details regarding how he might have otherwise paid off the car loan have any bearing on mitigation of damages resulting from his claimed injuries. Air France's defense is that Surles was terminated for cause--improperly raiding the retirement account using the resign/rehire scheme. Lutringer seems pretty tangential to this defense, especially in light of what Surles has already stated in his deposition. In addition, since Air France has Lutringer's name, and perhaps at least a former address on the retirement account documents which Air France should have in its possession, Air France could make some independent efforts to find and talk to Lutringer, whether through a phone listing or other public information.

On the other hand, it would not have been very burdensome for Surles to simply provide whatever identifying information he has concerning Lutringer. The requested information is no more than what parties have to disclose automatically for their own witnesses now under Rule 26(a). The issue of whether Air France could depose Lutringer or to inquire into certain topics could be postponed until a later date. (Lutringer might not have any objection to testifying about these matters.) Although Lutringer seems even more collateral to the case than the co-obligor on the car loan (assuming these are different people), some judges would have ordered disclosure of Lutringer's address and phone number, even though the two judges in this case chose not to do so.

#### *D. Defense Counsel's Interview of Weisser*

At the deposition, Surles' counsel questioned Weisser in detail about events relevant to this case that had occurred prior to her departure from Air France. In addition, however, Surles' counsel sought to inquire about Weisser's subsequent conversations with Air France's counsel concerning this case. Air France objected to these questions and instructed Weisser not to answer. As a consequence, Surles sought an order compelling Weisser to respond to the unanswered questions about his conversations with Air France's counsel. Air France objected to any such questioning and sought a protective order on the ground that its attorneys' discussion with Weisser is protected by the attorney-client privilege and work product doctrine. The magistrate agreed with Air France and refused to order the questioning.

Most of the students who discussed the attorney-client privilege simply assumed that the privilege would not extend to conversations with Weisser because she was a former employee of Air France. Our major case on the attorney-client privilege, *Upjohn* (Marcus at 372), held that the control group test was too narrow a definition for the attorney-client relationship in the corporate setting because the lawyers needed to be able to seek factual information and impart legal advice widely within the corporation. The opinion did not directly

address the issue of former employees. The magistrate in *Surles* noted that the vast majority of federal cases have held that under *Upjohn's* rationale, communications between company counsel and former company employees are protected by the attorney-client privilege if they are focused on exploring what the former employee knows as a result of his prior employment about the circumstances giving rise to the lawsuit.

A top quality answer to the question would have considered whether the basic rationale of *Upjohn* should extend to an interview with Weisser after she left Air France's employment. For example, in the concurring opinion in *Upjohn* (which is not included in the Marcus version of the case), Chief Justice Burger expressed his view that the rule should be that "a communication is privileged at least when, as here, an employee or former employee speaks at the direction of the management with an attorney regarding conduct or proposed conduct within the scope of employment. The attorney must be one authorized by the management to inquire into the subject and must be seeking information to assist counsel in performing any of the following functions: (a) evaluating whether the employee's conduct has bound or would bind the corporation; (b) assessing the legal consequences, if any, of that conduct; or (c) formulating appropriate legal responses to actions that have been or may be taken by others with regard to that conduct." In this instance, Air France's attorneys needed to talk to Weisser to determine whether she had authorized the resign/rehire plan that Surles claimed he had followed with her permission. If Weisser had agreed to this plan, even if it were in violation of Air France's written rules regarding the retirement plan, Air France might be bound by Weisser's conduct. The legal consequences of that conduct would affect Air France's position vis-a-vis Surles' claims and might influence Air France's legal responses to Surles' civil action. Obviously, I would not expect you to have spontaneously created as well-thought out an answer as Chief Justice Burger's. Nevertheless, I hoped that that you could have thought through the implications of *Upjohn* to a limited degree.

In addition to the attorney-client privilege, Air France asserted protection of the work product doctrine. The magistrate in *Surles* agreed that this was an additional consideration in denying discovery of Weisser's conversations with Air France's counsel. In an exam answer, however, I wanted you to consider how the doctrine might apply. Rule 26(b)(3) covers only "documents and tangible things." An oral deposition of Weisser's recollection of that conversation doesn't qualify for protection under the rule. However, *Hickman v. Taylor* (Marcus p. 360) is still valid law. You should have considered whether *Hickman's* rationale should apply here. In contrast to *Hickman*, Surles' lawyer is not seeking to invade directly the files or brains of Air France's attorneys. Instead, the lawyer wants to be able to get at intangible material indirectly by asking Weisser what she recalls of what she discussed with the lawyers. This line of questioning might expose defense counsel's thought processes to some degree. The question is whether this would impermissibly expose thought processes. For example, if Weisser is treated as a former employee, why wouldn't any discussion with her be treated as a waiver of

any work product protection?

More generally, lawyers expose their thought processes all the time in a suit. For example, they have to expose some of their thinking indirectly when they file a pleading or a motion, or ask certain questions in a deposition. How would a conversation with Weisser be any different? The way for Air France's lawyers to protect their thought processes would be to expose as little as possible when they talk to witnesses with an ambiguous status such as Weisser. They could ask open-ended questions like, "Would you please tell us what happened?" They don't need to react in front of Weisser, or inform her of their opinions about the potential legal consequences of her statements and actions.

#### *E. Expenses*

However you resolved the discovery issues, you needed to consider whether to award expenses to the prevailing parties under Rule 37(a)(4)(A) or (B). Should the attorneys or the parties whose conduct necessitated the motions have to pay reasonable expenses incurred by the other side? Was the losing party's position substantially justified? Are there any other circumstances making an award of expenses unjust? Should expenses be apportioned under Rule 37(a)(4)(C)?

#### *F. Final Comments*

You certainly did not need to reach the same conclusions as did the judges in this case to have written a very good answer. I selected the fact pattern in large part because I thought that the issues could have been resolved in a number of different ways. You did need to apply the correct and current rules with some measure of precision, interpret the rules in light of the cases we read and our class discussions, respond to the arguments of counsel, and show your reasoning process as fully as possible. Since the essay question largely directed you to the issues, the quality and nature of the discussion was the most important determinant in grading this section of the exam.

## ESSAY QUESTION

The following is the beginning of a judicial opinion. Complete the opinion, analyzing only the matters raised by the parties through motions.

In his complaint, plaintiff Robert W. Surles alleged that his former employer, defendant Air France, declined to promote him and terminated his employment because of his age and national origin, in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* ("ADEA"), Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e *et seq.* ("Title VII"). Surles is a United States citizen who was 57 years old at the time of his termination in 1999. Surles seeks reinstatement, emotional distress damages, and back pay for what he alleges was his wrongful termination. Surles has requested a jury trial.

Air France disputes Surles' discrimination claim, contending that the decision to terminate him was based upon its discovery of his participation in a fraudulent scheme to "resign" from Air France and then be rehired. In that regard, at his deposition Surles admitted that he had arranged to resign from his position as Manager of Recruitment in Training in the United States in 1997, only to be rehired days later, so that he could withdraw money from his retirement savings account in order to repay a car loan that he had cosigned. Surles contends, however, that the resignation and rehiring procedure was common at Air France and approved by his supervisor. Surles contends that Air France's attempted reliance upon the actions he took in 1997 as the reason for subsequently terminating him in 1999 is therefore pretextual.

The discovery issues before the court are whether: (i) Air France is entitled to information about both the principal obligor on the car loan and the individual named as the primary beneficiary of Surles' retirement account; and (ii) Surles is entitled to inquire into post-lawsuit communications between Air France's counsel and Helene Weisser, who is now a former Air France employee but who was Surles' immediate supervisor.

### Air France's Motion to Compel Discovery:

At his deposition taken on October 10, 2001, Surles testified that he advised Weisser in August 1997 that he wished to resign from Air France so that he could gain access to the contributions that he had made to his retirement account. Surles testified in the deposition that he informed Weisser that he needed the money so that he could repay a car loan for which he had served as a cosigner. It appears that under the employment rules which then were applicable, active Air France employees were not permitted to make withdrawals for such purposes. Surles testified at his deposition that Weisser agreed to let him "resign and be rehired immediately" so that he could access his funds without actually having to leave Air France. Surles also testified that Weisser never asked for the identity of the other borrower on the car loan or for any other details about his financial difficulties.

When Air France's attorney requested additional details about the other borrower during the deposition, Surles declined to respond for reasons that his counsel described as "highly personal." Despite his reluctance, Surles did testify that his co-obligor was a personal friend who was not an Air France employee, did not do business with Air France and was, in fact, unknown to Air France.

During his deposition, Surles also identified a Beneficiary Designation Form for his Air France retirement account, which listed a man named Gabriel Lutringer as his primary beneficiary in the event of Surles' death. Surles identified Lutringer as a former roommate. During his deposition, Surles refused the request of Air France's counsel that he provide the current telephone number and address of Lutringer. Air France contends that Lutringer's name, address and telephone number should have been disclosed earlier as well as in response to the specific request made during Surles' deposition. Air France contends that Lutringer may have information about such topics as the veracity of Surles' prior statements concerning the alleged car loan and Surles' possible failure to mitigate damages by finding another source of funds to pay off the loan.

Surles' Motion to Compel Discovery:

Weisser served as Air France's Director of Personnel Services in the United States from in or around 1990 until April 1999, and was Surles' direct supervisor for most of that time. Weisser left Air France's employ approximately one month prior to Surles' termination. After Surles filed his action in this court, Air France instructed its counsel to find and interview Weisser about her knowledge of the events relevant to this lawsuit. At her deposition, Surles' counsel questioned Weisser in detail about events relevant to this case that had occurred prior to her departure from Air France. In addition, Surles' counsel sought to inquire about Weisser's conversations with Air France's counsel concerning this case after she had left Air France's employment. Air France objected to these questions and instructed Weisser not to answer. As a consequence, Surles seeks an order compelling Weisser to respond to the unanswered questions about her conversations with Air France's counsel. Air France objects to any such questioning and has moved for a protective order on the ground that its attorneys' discussion with Weisser is protected.

Complete the opinion.