



## **Chapter 2**

### **Civil Procedure**

This is a sample of BarMD's forthcoming MBE Book. This is a portion of the Civil Procedure chapter.

This book differs from others on the market in numerous ways. First, we include all of the black letter law for each subject, organized into bite-sized chunks, to make the massive amount of material more digestible for you.

Second, we include all sorts of tips, strategies, and patterns for particular question types in black boxes next to the relevant rules. This is designed to help you look for these patterns as you are working through the questions.

Third, we include the 410 most recently released MBE questions as targeted assignments after each section of review of the black letter law. For example, after the Jurisdiction and Venue section, there will be a series of real MBE questions testing you on Jurisdiction and Venue.

Fourth, we provide a daily study schedule that breaks preparing for the MBE into 75 days and instructions on how to incorporate your MBE Program into your prep. We did this because the majority of bar exam applicants use either Adaptibar or UWorld but we have found that many applicants don't have a strategic plan on how to use Adaptibar or UWorld. So, we help you create that structure, which is what I do for students I tutor as well.

The goal in writing this book is to make passing the MBE more accessible for all, to reduce the need for expensive tutoring services, and to ultimately help all people eligible to sit for the bar exam and MBE to pass.

We are open to feedback -- if there is something that you would like or need, please let us know!

The MBE Book will be available for purchase at Bar-MD.com on November 10 as a digital copy and by the end of November, we hope to be shipping hard copies as well.

Happy Studying!

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## Introduction to Civil Procedure

Civil Procedure on the MBE tends to be one of the toughest subjects for most bar exam applicants. The reason for this are threefold: (1) Civil Procedure questions tend to test you on multiple issues at the same time (i.e., they are multi-stream questions); (2) the Federal Rules of Civil Procedure are detailed and many; and (3) there are not a lot of real civil procedure questions for applicants to practice from, meaning on the actual exam, you are likely to see issues tested that you have not previously seen in practice.

### Multiple Issues at the Same Time

One of the challenges with civil procedure questions is that they are often testing multiple issues at the same time. For example, in many civil procedure questions, you need to identify whether there is personal jurisdiction and subject matter jurisdiction. Or you need to compare which is the best motion to file between several. For this reason, it's critical for you to know *how* each of those issues is tested.

### Federal Rules are Detailed and Nuanced

While the rules are detailed and nuanced, and there is no way around that, breaking it down into bite-sized chunks is the best way to learn the information. That is how we have presented the information here.

### Lack of Practice Questions

There are only approximately 65 real civil procedure questions that the NCBE has released. As such, you should supplement with additional resources and a variety of resources. The questions in Adaptibar are a great resource for additional Civil Procedure questions. As are the questions in Mastering Multiple Choice for Federal Civil Procedure by Janssen and Baicker-McKee.

## Some General Civil Procedure MBE Tips

### Diagramming

Civil Procedure is one of the subjects where you really have to keep track of what is going on as you are working your way through the problem because there is usually a lot going on and you cannot rely solely on your memory to track everything.

One way I track what is happening in a civil procedure MBE is by making shorthand notes of things like who is the plaintiff, who is the defendant, where the parties are domiciled, whether there is personal jurisdiction, subject matter jurisdiction, and the court is in the proper venue.

Let's say you have the following hypo:

Pam, a State A resident, has sued Dave, a State B resident, in State A federal court for injuries arising out of a car accident that occurred in State A for personal injuries and property damage, totaling \$125,000.

Above the fact pattern, I would note

P (A) v. D (B), State B Fed Ct.  
PJ ✓  
SMJ ✓  
Venue ?

The P is for the plaintiff, Pam. Inside the parenthesis, I indicate where the party is domiciled. I also indicate where the case was originally brought so I can remember where the case was brought in case I have to analyze whether the case was removed properly.

Additionally, I put a check mark or question mark next to each PJ, SMJ, and Venue indicating whether the court has personal jurisdiction, subject matter jurisdiction, and whether venue is proper or whether I was unable to ascertain one of those issues based on the facts.

#### Picking Between Two Answers

One pattern I have noticed with civil procedure MBE questions is often when an applicant is between two answers on civil procedure, one answer concerns a technical requirement (e.g., timing) and the other answer concerns a substantive issue (e.g., whether a genuine issue of material fact exists). You must determine whether the technical issue is actually satisfied (e.g., if a party files a motion for sanctions under Rule 11 only 18 days after serving the motion, the court will not get to the merits of the motion because the motion is not timely).



**Assignment # 1**  
**Jurisdiction and Venue**

## JURISDICTION AND VENUE

Jurisdiction and venue questions deal with subject matter jurisdiction, personal jurisdiction, venue, service, and notice. Approximately 6 questions on the MBE will test you on these topics, making this one of the “heavy hitter” categories in Civil Procedure.

### Subject Matter Jurisdiction

*Defined:* subject matter jurisdiction is the court’s power to preside over the issues in the case. A court must have SMJ over the case via federal question jurisdiction or diversity jurisdiction

#### Federal Question

Federal district courts have original jurisdiction over all civil actions arising under federal law. This includes actions arising under:

- The U.S. Constitution
- Laws of the United States
- Treaties of the United States

Common Distractors that Look Like a Federal Question but are NOT

- State law that mirrors federal law
- Citing federal law in the complaint but the claim is based on state law
- Court has to interpret some federal law but claim is based on state law
- Defendant asserts federal law as a defense to plaintiff’s claim

#### Diversity Jurisdiction

Federal district courts have original jurisdiction over civil actions when it involves:

1. Complete Diversity; AND
2. Amount in controversy exceeds \$75,000

*Exception:* even if all other requirements are met for diversity jurisdiction, a federal court will not hear cases involving:

- Certain actions under the Violence Against Women Act
- Certain actions against railroads;
- Divorce;
- Alimony;
- Child custody; or
- Probate

#### *Complete Diversity*

Human: an individual is a citizen of the state where she:

1. Is present; AND
2. Intends to permanently remain

Corporation: a corporation is a citizen of

- a. Every state where it is incorporated; AND
- b. The state where it has its principal place of business

Unincorporated Association: use citizenship of all members

#### Special Problem

- Legal Representative of Decedent, Infant, or Incompetent Individual: citizen of the same state as decedent, infant, or incompetent individual.

#### *Amount in Controversy*

The amount in controversy must exceed \$75,000; an amount pled in excess of \$75,000 in good faith is sufficient unless it is clear to a legal certainty that a plaintiff cannot recover more than \$75,000

#### *Aggregation*

- A single plaintiff may aggregate all claims against a single defendant
- Multiple plaintiffs cannot aggregate claims together
- Joint Tortfeasors: use the total amount of the claim against all tortfeasors to determine the amount

#### *Equitable Remedies*

There are two tests for amount in controversy when a plaintiff seeks an equitable remedy; satisfaction of either is sufficient:

- Plaintiff's Viewpoint: does the item cause a harm over \$75,000?
- Defendant's Viewpoint: would it cost more than \$75,000 to comply with an injunction?

#### **Supplemental Jurisdiction**

A court may hear additional claims when the additional claim shares a common nucleus of operative fact (i.e., it arises from the same transaction or occurrence) as the other claims validly in federal court

- Diversity Limit: a plaintiff may never use supplemental jurisdiction to overcome lack of diversity in a diversity jurisdiction case
  - *Exception*: where a defendant files a third party claim against another party for indemnity / contribution, it is OK if the 3P defendant is domiciled in the same jurisdiction as the plaintiff (i.e., it's ok for the defendant to bring in a 3P defendant that would otherwise destroy diversity)
- Tacking: a plaintiff may tack a claim that otherwise does not meet the amount in controversy requirement to a claim validly before the court

## Removal + Remand

### Removal

Generally: A defendant may remove a case filed in state court to federal court

- Only a defendant may remove
- All defendants must agree to remove
- Removal only goes from state court to federal court

Track the parties! Make sure it is the defendant who is removing!

Procedure: defendant must file in the district court embraced by the forum in which the action is pending:

1. A notice of removal signed pursuant to Rule 11
2. Containing a short and plain statement of the grounds for removal; and
3. A copy of all process, pleadings, and orders served

Timing: must be filed within 30 days after service of the first paper that renders the case removable

- Renewal: 30-day time limit starts fresh with service on an additional defendant

When a question asks whether removal was "proper," it is often asking about the technical requirements for removal, not about subject matter jurisdiction.

Exceptions:

- In State Defendant: no removal if any defendant is a citizen of the forum state (only applies if basis for removal is Diversity Jurisdiction)
- One-Year: no removal more than one year after filing in state court unless plaintiff acted in bad faith to prevent removal (only applies if basis for removal is Diversity Jurisdiction)

Waiver:

- If a defendant files a permissive counterclaim in state court, then defendant probably waives the right to remove
- If defendant files a compulsory counterclaim in state court, then probably does not waive right to remove

### Remand

If removal was improper, the federal court may remand back to state court

#### Procedure

The plaintiff's motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal



## PERSONAL JURISDICTION

### Personal Jurisdiction

Personal Jurisdiction is a court's power to exercise jurisdiction over the parties to the suit; a court must have personal jurisdiction over the defendant(s) to hear a case

Analysis:

Step 1. Can the court exercise jurisdiction via a traditional basis? If yes, end of analysis

Step 2. Does the state have a long arm statute?

Step 3. Does the exercise of personal jurisdiction meet the constitutional requirements?

1. Minimum Contacts;
2. Relatedness; AND
3. Fairness

### Traditional Basis

A traditional basis for in personam jurisdiction exists if the case is brought:

- Domicile: where the defendant is domiciled;
- Tagging: if the defendant is served with process while voluntarily present in the forum state; or
- The defendant expressly or impliedly consents to personal jurisdiction in the forum state

### Long Arm Statute

Generally, a long arm statute grants a court jurisdiction over a non-resident if the resident has minimum contact with the forum court state. A long arm statute may be limited or unlimited.

Unlimited: a court may exercise jurisdiction on any basis not inconsistent with the Constitution

- Requires minimum contacts, relatedness, and exercise of jurisdiction to be fair
- Most states have an unlimited long arm statute
- Unless instructed otherwise, assume you are dealing with an unlimited long arm statute

Limited: a limited long arm statute imposes some additional requirement for exercising personal jurisdiction beyond the Constitution

### Constitutional Test

#### *Minimum Contacts*

A defendant must have sufficient minimum contacts with the forum state such that exercising jurisdiction over him would not offend to traditional notions of fair play and substantial justice; requires purposeful availment and foreseeability

1. Purposeful availment: the defendant must have availed himself of the privileges and benefits of the state (e.g., using roads employing state residents, advertising or selling goods in the state)
2. Foreseeability: it must be foreseeable for the defendant that he could be haled into court in the forum state

#### *Relatedness*

The litigation must be related to the forum state through either specific or general jurisdiction:

- Specific Jurisdiction: a claim that arises from defendant's contacts within the forum state; even one act related to the claim can be sufficient to establish specific jurisdiction
- General Jurisdiction: the defendant's contacts with the state are so systematic and continuous such that he is essentially at home there; the current claim does not arise from the defendant's contacts in the state.

### *Fairness*

To satisfy the minimum contacts test, it must be fair for the court to exercise personal jurisdiction over the defendant; the court considers the following factors:

- a. Convenience: the court will examine the defendant's convenience in litigating in the forum state; whether the defendant has deeper pockets which makes it easier for defendant to travel is irrelevant to the convenience analysis;
- b. State's Interest: any relevant state interests, such as protecting its citizens;
- c. Plaintiff's Interest: convenience for plaintiff
- d. Location of Evidence and Witnesses

## Venue

### Generally

Venue: the proper place within a state to bring an action; venue is proper in any district where:

- Any defendant resides, if all in the same state;
- Where a substantial part of the claim arose or where a substantial part of property that is the subject of the claim is located; OR
- If neither of the above apply, where any defendant is subject to personal jurisdiction with respect to the case

### *Residence*

- Human: where domiciled
- Business: in all districts in which the business is subject to personal jurisdiction for the suit

### Venue Transfer

A court may transfer a case to another court where the case could have been filed to a proper venue that has personal jurisdiction over the defendant

→ If original venue is proper, the court has discretion to transfer to another jurisdiction based on an examination of convenience for the parties and the interests of justice; the transferee court applies choice of law rules of the original court and looks to the following factors:

#### Public Factors

- a. What law applies
- b. What community should be burdened with jury service
- c. The interests of justice

#### Private Factors

- d. Location of witnesses and evidence; and
- e. Convenience

→ If original venue improper: court may transfer in the interest of justice or dismiss; however, court may only transfer to a venue where it would have been proper to file originally

## Service of Process and Notice

Plaintiff must serve the defendant; proper service consists of serving a copy of:

1. Summons; AND
2. Complaint

Know the difference between proper process and proper service of process. Process is serving the summons and the complaint. Service is all of the technical rules re: timing, who may serve, and method of service.

### Timing

Plaintiff must serve within 120 days otherwise the case is dismissed without prejudice unless plaintiff shows good cause for delay in service

### Who May Serve

1. Non-party
2. Who is at least 18 years-old

### Waiver

Plaintiff may mail defendant a copy of the complaint and two copies of a waiver form; if defendant executes and mails waiver form to plaintiff within 30 days, defendant waives formal service

- Defendant gets 60 days from mailing to respond to complaint
- Waiver becomes effective once plaintiff files
- If defendant fails to return waiver, plaintiff must serve via regular method, but defendant must pay the costs of service

**NOTE:** a state law must allow service of process to serve someone outside the state in which the federal court sits

### Method of Service

- State Approved Method: any method of service of process that is valid under state law is valid for federal service of process
- Personal Service: papers personally served on defendant by a non-party who is at least 18 years old
- Service on Defendant's Agent: process may be served on defendant's agent
- Defendant's Home: leaving a copy of the summons and complaint at the defendant's dwelling or usual place of abode with someone of suitable age and discretion who resides there
- E-mail: service by e-mail is improper
- Foreign Country: can serve via any reasonable means that is reasonably calculated to give notice, such as those authorized by treaty or the foreign country's law

### Service of Corporation Partnership, or Association

A corporation, partnership, or association can be served by:

- a. Serving an officer, managing or general agent, or an authorized agent;
- b. Serving in accord with state rules; OR
- c. By waiving service

### Service of Foreign Corporation

A federal court has the power to permit a plaintiff to serve a foreign defendant by a variety of methods, including:

- a. Any means allowed by international agreement, foreign law, or general international practice
- b. Any means not prohibited by international agreement

**Notice**

Due process requires a reasonable method be used to notify the defendant of a pending lawsuit so they can have an opportunity to appear and be heard. Notice must be reasonably calculated, under all the circumstances, to apprise the interested parties of the pendency of the action and afford them an opportunity to present their objections.

*NOTE:* if a statute is silent regarding notice, it is probably unconstitutional