Model Answer
Final Examination
Selected Problems in New York Civil Practice
Spring 2001
Professor Schepard

Notes:

- I gave partial or full credit for answers whether or not I agreed with the exam takers conclusion that the statement is "true" or "false." In evaluating answers, the reasoning for the conclusion mattered far more than the conclusion itself.

- Note also that the answers which follow are far longer and more elaborate than I expected from exam takers. I hope that you will learn something from reading it. I include in my comment typical areas in which students had difficulties on each question.

3. True. Under the commencement by filing system (CPLR § 306 (a)) the date for determining whether the action is commenced for purposes of satisfying the statute of limitations is the date that the plaintiff purchases an index number for the summons and complaint. Some students made the mistake of believing the case had to be filed in the Court of Claims, not the Supreme Court (see 4 below).

4. True. Under CPLR § 306-b the plaintiff has 120 days to serve the summons and complaint unless that period is extended "for good cause shown or in the interests of justice" upon motion by the plaintiff. Many students did not seem to know, however, that CPLR § 306-b has recently been amended to eliminate the requirement that proof of service had to be filed or the case was automatically dismissed. They made comments in their answer indicating that if the 120 deadline was missed, the case was automatically dismissed. (See 3).

5. False. The last revision of the commencement system eliminated the requirement of the prior system that the plaintiff had to file proof of service be filed with the court by a date certain, 120 days after commencement. All that is required now is that the proof of service be filed in a reasonable time and before the time within which defendant responds to the complaint. Many students answered the question with the old, not the new law.

6. False. The Supreme Court has general subject matter jurisdiction over all cases in law and equity under the New York Constitution. The New York City Damages Action is an action at law for damages against a municipality, not the State, and can be heard in the Supreme Court. It is not excluded from the general subject matter jurisdiction of the Supreme Court by the State's waiver of sovereign immunity in return for the requirement

that lawsuits against the State be filed in the Court of Claims where there are no jury trials. If the action were, however, against the State it would have to be heard in the Court of Claims. Many students confused an action against the City with an action against the State and stated that the case had to be filed in the Court of Claims.

7. False. Although the CPLR does not specifically state when an OSC is authorized, the City has no need for emergency or injunctive relief or to vary the normal service requirements for a motion to dismiss the complaint. The OSC procedure places additional demands on the judiciary. A moving party should proceed by notice of motion whenever possible. Most students got this answer reasonably correct.

8. True. Under CPLR § 2215 Richter is not required to bring on a cross motion. He can, however, if he wants to. Bringing on a motion to extend the time for service would almost surely be a very wise tactical response to the City's motion to dismiss the complaint for failure to make timely service. Under CPLR § 2215 Richer must serve his cross-motion three days before the return date of the motion. Under CPLR § 2103 (b) 2, however, if Richter serves the cross motion (which requires a response from the other party or is otherwise granted by default and thus "measures another party's obligation") by mail five days are added to the prescribed period for service. While the Court of Appeals has not held this, at least one lower court case has. This means that Richter must place the cross-motion papers in the mailbox eight days before the return date of the original motion. Most students got this answer reasonably correct.

9. False. The lawyer has personal knowledge of the facts on the procedural matter of efforts to make service. She can put that personal knowledge into an affirmation. The facts the lawyer will attest to do not go to the merits of the New York City Damages Action. If they did, the lawyer would be disqualified as counsel because her personal credibility would be up for challenge because she is testifying about the merits of the case.

10. False (probably). CPLR § 306-b authorizes the court to extend the 120 service period "upon good cause shown" *or* "in the interests of justice". These are independent grounds. Emerging case law indicates that the court cannot consider the merits of Richter's claim in determining "good cause"; it is limited to considering length of delay in service, prejudice to the defendant as a result of untimely service, and promptness of the request for an extension. The "interests of justice" standard is broader, however, allowing consideration of the merits of plaintiff's claim in addition to other factors considered under the "good cause" heading. We do not, however, yet have a definitive Court of Appeals ruling on point, but do have some lower court decisions. Many students did not remember that CPLR § 306-b had recently been amended to eliminate the automatic dismissal for failure to serve within 120 days after commencement. Those who believed that automatic dismissal was required stated that the court had no discretion to extend the 120 day deadline for any reason.

11. False. Under CPLR § 5513 (a) & (b) the thirty day time period for an appellant to file and serve a notice of appeal from an order of a lower court begin from the date of service of notice of entry of the order from which the appeal is taken. The CPLR does not, however, specify how long a party has to serve notice of entry from the date that the order is actually entered in the clerk's office. Nor is there any requirement that the party who loses the motion leading to the order from which the appeal is taken be the party that serves notice of entry. Either party can serve notice of entry, winner or looser. The winning party often has more incentive, however, to serve notice of entry to start the time to serve a notice of appeal running. Many students confused the process of serving notice of entry of a signed order by the trial court with the process of getting the order signed by the trial court when the trial court states that the parties "settle order" or requires that the winning party "submit" an order. That process has a sixty day time limit which, if not completed, leads to the order being dismissed. The assumption for this question was that the order had already been signed by the trial court and entered in the Clerk's Office.

12. True. The denial of a motion to dismiss is an "intermediate" (non-final) order. The Appellate Division generally hears appeals from intermediate orders in civil cases. Indeed, the losing party usually has an appeal as "of right" to the Appellate Division. An order denying a motion to dismiss a complaint certainly "involves some part of the merits" CPLR § 5701 (a) 2 (iv) and (v). The First Department hears appeals from the orders of the Supreme Court, New York County. Some students stated that the appeal would be to the Appellate Term, not the Appellate Division. The Appellate Term is for appeals in small civil cases beginning in the Civil or District Court. The facts stated that this case was in the Supreme Court of New York County. Appeals will taken to the Appellate Division.

13. False. The assumption changed for this question. The Appellate Division affirmed the Supreme Court's order dismissing the Complaint. The Appellate Division's affirmance of the Supreme Court's order of dismissal means that there is a final judgment in the New York City Damages Action which can be reviewed by the Court of Appeals. CPLR § 5611. However, the order appealed from does not fall into any of the categories of "appeal as of right" to the Court of Appeals specified in CPLR § 5601. Richter would need permission permission from the Court of Appeals (or the Appellate Division, which is unlikely to be granted) under CPLR § 5602 (a) to appeal to the Court of Appeals.

14. False. Under CPLR § 2221 (e), the secretary's affidavit would be the basis for a motion to the trial court to renew consideration of the motion to dismiss the complaint for failure to serve. Had the information from the secretary been before the court considering the motion, it might well have changed the result. In contrast to a motion to reargue the decision on a motion (see CPLR § 2221 (d) 3) CPLR § 2221 (e) puts no time limit on making a motion to renew. The motion to renew says, in effect, not that the court made a mistake (which can be corrected on appeal) but that the factual record for the court's determination was incomplete or in error. To successfully make a motion to renew Richter will have to show the information from the secretary was not available to him while the

motion was under consideration. He also will need to show that he made the motion promptly after the information became available to him. Richter can appeal from the trial court's denial of a motion to renew (in contrast, he cannot appeal from the denial of a motion to reargue). Typical mistakes here included confusing the motion to renew with an appeal to the Appellate Division.

15. True. Under CPLR § 503(a) venue is generally appropriate in the county where one of the parties resides when the action was commenced. Richter, a prisoner in Rikers Island, is currently a resident of New York County where Rikers Island is located. Even if Richter is not a resident of New York County Zap is also not a resident of New York County. Richter then gets to choose the venue, subject to a motion by Zap under CPLR § 510 to change venue to a more convenient county.

16. False. What Richter's sister said to Richter is hearsay and would not be admissible if he testified in person. In addition, Richter's sister is the process server in the action and is required to complete the proof of service of the summons and complaint, which must be filed with the court since the validity of service is called into question by Zap's motion to dismiss. CPLR § 306.

17. True. The Court can (does not have to) order discovery on jurisdictional issues before it determines whether it has personal jurisdiction over a defendant ("jurisdiction to determine jurisdiction"). The scope of the discovery is in the trial court's discretion. CPLR § 3211(d). See the federal court *Landoil* case where the court allowed discovery on the motion to dismiss for lack of personal jurisdiction. Many papers did not recognize the existence of the "jurisdiction to decide jurisdiction" doctrine.

18. False, but a close question. Tag jurisdiction generally provides general jurisdiction over the defendant in New York. In cases such as *Hammett* (CB 19) New York courts have recognized the traditional defense to common law tag jurisdiction that "when a non resident defendant ... has been enticed into the state by fraud or deceit for the purpose of obtaining service on him, the service thereby effected will be invalidated ... It is equally well established that if the defendant ...is here of his own free will, the service will not be invalidated merely because it was accomplished through the use of deception." (CB 20). Here, Zap was brought into the State through deception. He had no other reason to be in New York. No one, however, forced him to come into the State.

19. Neither true nor false. The answer here depends on the interpretation of the Supreme Courts ruling in Burnham (CB 4). Four justices, led by Justice Scalia, hold that minimum contacts analysis is inapplicable to "tag" jurisdiction. Four justices, led by Justice Brennan, believe that all assertions of personal jurisdiction must satisfy the constitutional requirement of minimum contacts though in most instances assertions of tag jurisdiction will meet that test. The ultimate result is still "up in the air".

20. False. Being a member of the bar of New York alone is not the equivalent of being "domiciled" in New York for an individual. It does not establish general jurisdiction over a defendant. Someone can pass the New York bar but never live or practice law in New York. Nor does bar membership constitute enough activity in New York to satisfy the "presence"doctrine, even assuming that doctrine applies to individuals in addition to corporations. Bar membership may, of course, be a factor in assessing whether "minimum contacts" exists over a defendant in a § 302(a) case (assuming the statutory tests for specific jurisdiction are satisfied).

21. True (but a very close question). In contrast to questions 16, 17 and 18, which dealt with "general jurisdiction" under CPLR § 301, the "transaction of business" test under CPLR § 302(a)(1) invokes long arm or specific jurisdiction. If Zap satisfies the "transaction of business" test he is subject to jurisdiction in the Zap Malpractice Action only, not all cases. If Richter's version of events is credited, Zap agreed to represent Richter in a New York action and then committed malpractice. Zap never physically entered the state during the events giving rise to the malpractice claim (he entered the state after the malpractice was committed and was served with the summons here). He did not do other extensive business with New York. There is a dispute in New York cases about whether a single phone call with a New Yorker in New York can constitute the transaction of business in New York. Moreover, Richter placed the call from New York to Zap in New Jersey, not vice versa. On the other hand, Zap created a purposeful affiliation with New York by agreeing to represent Richter in a New York civil action. He is also a continuing member of the New York bar. Finally, he and Richter have something of a continuing relationship in that Zap represented Richter in a previous matter. New York does have a strong regulatory interest in providing a forum for claims arising out of the conduct of lawyers in its courts. Overall, a close call.

22. False. Generally, the plaintiff has the right to choose the forum state. Zap has to make a strong showing that New Jersey is a better forum for the court to dismiss the case on forum non conveniens grounds. The fundamental claim here is that Zap committed malpractice in New York. Thus, New York has a strong interest in providing a forum for this litigation. New York law would probably apply to determine the rights and liabilities of the parties in a choice of law analysis. The records of the New York City Damages Action are in New York. Richter is in New York. No third party witnesses have been identified for whom trial in New Jersey would be more convenient (a very important consideration). It would a pain in the neck for Richter, who is in jail, to go to New Jersey for trial. His sister, another possible witness, is probably a New Yorker. The only person for whom trial is more convenient in New Jersey is Zap himself.

23. False. Since Werth commenced litigation on disputes Rivilin contends is covered by the agreement to arbitrate, Rivilin must make a motion to stay the action and compel arbitration in the litigation commenced by Werth. The sooner she makes that motion, the better. If Rivilin takes Werth's deposition before making that motion, she runs the risk of

waiving her right to arbitrate by inconsistent conduct.

24. True (though a close question). Under New York law Rivilin is not entitled to a commission on the nursing home transaction because she is not a licensed real estate broker. As there is a positive statutory command seemingly bringing Rivilin's recovery into question, there is a good argument that any award to her violates public policy even in light of the cases that narrow the public policy exception. On the other hand, Rivilin's efforts did result in the consummation of the nursing home transaction. Whether she is a licensed broker or not does not change the benefit Werth received from the transaction and Rivilin's efforts. It might be argued that Rivilin's punishment should come from the state agency that regulates real estate brokers, not by denying her the right to arbitrate. In addition, the problem raises the question whether a potential recovery of punitive damages in arbitration violates public policy. A court may, in addition, decide that any decision that any claim or remedy violates public policy should await a final determination by the arbitrator and the question should be raised on review of the award, not on the motion to compel arbitration. After all, the arbitrator may decline to award Rivilin anything and may not award punitive damages.

25. True (though again a close question). Whether the defamation claim is excluded from the arbitration turns on whether it is a dispute "relating to the interpretation or application of this contract", the phrase that determines the scope of the arbitration clause. The defamation claim would not have arisen if it had not been for the contractual relationship between Rivilin and Werth. The defamation claim, however, involves a tort and does not involve a claim that a term of the contract has been breached. In addition, the defamation claim includes the claim for punitive damages. Even if the entire claim is not excluded, the arbitrator or the court might exclude punitive damages from consideration.

26. True. The formal rules of evidence do not apply at an arbitration hearing. Courts will generally not vacate an arbitration award based on the arbitrator's failure to follow those rules. The arbitrator can consider hearsay testimony such as when a witness testifies about what others said for "what it is worth."

27. False. Under 7511 (a) a disappointed party has ninety (90) days from date of delivery to move to vacate or modify an award. It is likely, however, that Rivilin will move in the litigation commenced by Werth to confirm the arbitration award. She has one year to do so. CPLR § 7510. If so, despite the ninety-day time limit of CPLR § 7511 (a), the courts have held that defenses to a confirmation proceeding can be asserted in response to application to confirm whenever the application is brought. Thus, the defenses can be raised in response to a confirmation proceeding even after the ninety-day period for an application to vacate expires. CB 1178.

28. False. Werth must bring on its application by motion in the plenary action it filed in which Rivilin successfully moved to compel arbitration. CPLR § 7502(a)(iii). No new index

number need be purchased, as the motion to confirm is part of the original action. CPLR § 7502(a)(iii) was recently passed in response to a Court of Appeals decision which held that a special proceeding to compel arbitration terminated with the entry of judgment and that a new special proceeding (perhaps before a different judge) was required for confirmation of the award that results.

29. (Double question). False (but a close question). There are several potential obstacles to an Article 78 proceeding to challenge the decision of the SUNY Trustees. The first is "finality". Finality is required because review is likely of the SUNY Trustees decision is likely to be sought by an Article 78 proceeding in the nature of mandamus to review. CPLR § 7803 3. Mandamus to compel is not appropriate, as the SUNY Trustees have acted on the charter. Prohibition is inappropriate in that the SUNY Board is acting within its subject matter jurisdiction as determined by the Act and has not engaged in quasi-judicial conduct. Certiorari is inappropriate in that the SUNY Trustees decision was not made as a result of a hearing at which evidence was taken. The Mandamus to Review catch all is the remaining writ and requires finality. The problem with finality is that the Regents have the power to review the charter after the SUNY Trustees act. But an argument can be made that since the Regents do not actually have the power to disapprove the charter the SUNY Trustees action is final. A second problem with a potential Article 78 action is compliance with the 120 day statute of limitations. CPLR § 217 1. The SUNY Trustees approved the charter on January 5, 2001 which means that the Article 78 action must be commenced by May 5, 2001. Today is May 3, 2001. The School District must begin drafting its papers quickly, as time is short. A final problem is that the School District must show that the SUNY Trustees decision to approve the charter was "arbitrary and capricious and an abuse of discretion." The burden of persuasion will be on the School District to establish that claim, as a reviewing court will give deference in cases of doubt to the expertise of the administrative agency.

30. (Double question). True (but a close question). The most appropriate writ here is in the nature of mandamus to compel. CPLR § 7803 1. It looks like the Board of Regents has a non-discretionary duty to take action on charters proposed by the SUNY Trustees. Before, however, making an application for a mandamus to compel, the Charter School must make a formal demand on the Regents to act on the charter. It must also wait a reasonable time after the demand is made for the Board of Regents to respond to the demand. The Article 78 petition would not be seeking approval of the charter by the Board, only that the Board take action on the charter. The Board will probably defend by arguing that the Act does not require action by them in any particular time. The Charter School will have to show that the Board is taking more time with this application than with others it has acted on without providing any explanation as to why greater delay is necessary.