



**The University of New Mexico**

---

School of Law Library  
MSC11 6080  
1 University of New Mexico  
Albuquerque, NM 87131-0001  
Telephone (505) 277-0939  
FAX (505) 277-0068

This document was scanned pursuant to the express permission of its author and rights holder.

The purpose of scanning this document was to make it available to University of New Mexico law students to assist them in their preparation and study for Law School exams.

This document is the property of the University of New Mexico School of Law. Downloading and printing is restricted to UNM Law School students. Printing and file sharing outside of the UNM Law School is strictly prohibited.

**NOTICE: WARNING CONCERNING COPYRIGHT RESTRICTIONS**

The copyright law of the United States (Title 17, United States Code) governs the making of photocopies or other reproductions of copyrighted material.

Under certain conditions specified in the law, libraries and archives are authorized to furnish a photocopy or other reproduction. One of these specified conditions is that the photocopy or reproduction is no to be "used for any purpose other that private study, scholarship, or research." If the user makes a request for, or later uses, a photocopy or reproduction for purposes in excess of "fair use," that user may be liable for copyright infringement.

This institution reserves the right to refuse to accept a copying order if, in its judgment, fulfillment of the order would involve violation of copyright law.

**INSTRUCTIONS**

You have three and one-half hours to complete this examination, which consists of one fact pattern and ten questions related to it. The exam is designed to be completed in three hours, but we have given you thirty minutes more to organize your thoughts. You will probably find that it is helpful to outline (or even diagram) the facts you are presented, and you should take the questions one at a time, in the order they are presented. Organize your answer carefully, and write simply and clearly. You will be amply rewarded for a careful and thorough analysis of the issues presented, for concise writing, and for creative resolution of the questions. If you type your answer, please put your exam number on the top of each page. If you write your answer, please write legibly.

You must have your federal rules pamphlet with you. You may also have with you any materials distributed to you in class over the course of this semester, and any other materials that you prepared yourself or with your fellow students. You may not have any other materials with you.

**Good luck**

Congratulations. You have been appointed law clerk to Judge Indecision of the United States District Court for the District of New Mexico. She is a fine judge, but she needs help in Civil Procedure, your area of expertise. As you read the following fact pattern, answer the judge's questions (printed in bold) as they arise. Of course, the judge may not always follow your wise advice, so your succeeding answers should depend upon the way the judge resolved the issues, not on the way you did. On the other hand, your Civil Procedure teachers will be grading you on the wisdom of your advice at the time that it is given, not on whether the judge followed it.

---

Background:

Peter Piper, who lives in Farmington, New Mexico, suffers from a rare kind of intestinal bleeding that was, happily, diagnosed by his local physician. His physician also told him that the only effective treatment for this condition, complete laparoscopic endosausage sitzometry, was available at only a few medical centers in North America. After discussing the merits of the various sitzometry providers, PP learned that the actual surgery could be performed in any operating room, with the controls in the hands of an expert sitzometry surgeon elsewhere, through a closed circuit television and computer connection. After a great deal of research, including several visits to her web site, PP decided to engage Dr. Wonderkind of the LDS Hospital in Salt Lake City – the geographically nearest sitzometry surgeon, and the one who had pioneered closed circuit sitzometry surgery – to control the surgery. Dr. Wonderkind's web site points out that Dr. Wonderkind is "world renowned," a "consultant on sitzometry in demand all over the country," and "the first doctor to explain closed circuit sitzometry to the general public on national television." As it happens, Dr. Wonderkind owns a vacation cabin in Cuba, New Mexico, and she was delighted to have a patient in Farmington, which she passed through so often on the way to her cabin.

The surgery was scheduled for Farmington Memorial Outpatient Surgery Center on January 15, 1997, to be performed by Dr. Wonderkind (in Salt Lake City) through the electronic hookup, which was provided by contract with Qeast Telephone Services (Qeast), and the assistance of the Surgery Center staff. Unfortunately, the Qeast closed circuit television and computer lines went down in the middle of the surgery, the supporting medical staff in Farmington had no idea what to do, the surgery was discontinued, and PP suffered substantial intestinal tearing as the equipment was removed from his body by the Surgery Center staff. He was in the hospital for the next two months as a consequence of the abruptly ended surgery, and he then went to a clinic in Switzerland for more carefully done in-person (i.e., not closed circuit) sitzometry surgery that appropriately treated his condition.

Following his recovery from this second completed surgery, PP decided to sue for compensatory and punitive damages that resulted from his first, abruptly cancelled, surgery. In fact, at least one medical journal article had called it “gross negligence” to do this kind of surgery by closed circuit television because of the risks it created, and another pointed out that “no one would do this kind of surgery with the equipment now available unless he cared nothing for the life and health of his patient.”

## The Litigation

PP brought an action against Dr. Wonderkind and Qeast, a Colorado corporation with its headquarters and most of its employees in Denver, that does hundreds of thousand of dollars worth of business in every state in the country, on January 10, 1998. He filed the action in the United States District Court for the District of New Mexico. PP called and told Dr. Wonderkind she was being sued, and asked her to waive service under Rule 4(d). When she refused, PP called her and asked if she would accept a hand delivered copy of the summons and complaint, which he also read to her verbatim on the phone. She told him that she was playing hardball, and that he “would have to deliver that stuff to my receptionist up here in Salt Lake City.” PP hired a process server who went to Dr. Wonderkind’s office and left the summons and the complaint with her receptionist, who promised that Dr. Wonderkind would see it – “definitely, absolutely, I promise you” by the end of the day. Unfortunately, Dr. Wonderkind was called away for an out-of-state emergency that afternoon, and by the time she arrived back at the office the next week, the summons and complaint were lost. She never saw them.

Qeast was served by delivering a copy of the summons and complaint to the corporate secretary, who was designated to receive such documents, in Denver. Qeast filed a timely answer denying the substantive allegations of the complaint.

On May 1, 1998, PP moved for a default judgment against Dr. Wonderkind for the amount sought in the complaint, \$600,000. He gave no notice of that motion to Dr. Wonderkind who did not appear at the hearing.

### **1. Should the judge grant PP’s motion for a default judgment against Dr. Wonderkind for \$600,000? Why?**

Whether she should have or not, on June 1, 1998, the judge granted the default judgment in the amount of \$600,000. On July 1, 1998, Qeast filed a motion for summary judgment against PP on the claim for punitive damages, pointing to the (hypothetical) identical New Mexico and Utah statutes that prohibit punitive damages in medical malpractice cases unless the defendant is shown to have acted “with intent to injure the plaintiff.” Qeast also combed through the discovery that had been done to that point and demonstrated that there was no evidence of any intent on the part of Qeast to injure the plaintiff. PP responded that intent could be inferred under the facts of the case, that they would develop relevant evidence when Qeast officials testified at trial, and that, in any case, the limitation on punitive damages in the New Mexico and Utah statutes did not apply in the federal court.

**2. Should the judge grant Qeast's motion for summary judgment on the punitive damages claim? Why?**

Whether it was appropriate or not, the motion for summary judgment was granted. On February 1, 1999 Dr. Wonderkind moved under Rule 60(b) to reopen the default judgment that had been entered against her, arguing that she was not negligent in providing treatment, and that she was not properly served.

**3. Should the judge grant Dr. Wonderkind's Rule 60(b) motion to reopen the default judgment? Why?**

Correctly or not, the Court granted this motion on February 15, 1999, and the next day Dr. Wonderkind filed an answer denying the allegations of the complaint, and saying nothing more. On March 15, 1999 she filed a motion to amend her answer to include lack of jurisdiction over the person, insufficiency of service of process and the statutory limits on punitive damages as defenses, and to include a counterclaim against PP for failing to pay her surgery bill in the amount of \$3000.

**4. Without addressing the merits of the defenses and new claim raised by the amendment, should Dr. Wonderkind's motion to amend be granted? Why?**

The judge granted the motion to amend "with reluctance" and pointed out that the propriety of each of the amendments could be addressed individually. The judge also scheduled a special hearing on Dr. Wonderkind's defenses of lack of jurisdiction over the person and insufficiency of service of process.

**5. After that hearing, should the judge dismiss the action on the grounds that there is no personal jurisdiction over Dr. Wonderkind in this action? Why?**

**6. 6. After that hearing, should the judge dismiss the action for insufficiency of service of process? Why?**

Appropriately or not, the judge refused to dismiss the action. On April 1, 1999 PP moved to dismiss the counterclaim, arguing that the court had no subject matter jurisdiction over that claim.

**7. Should the judge dismiss the counterclaim for lack of subject matter jurisdiction? Why?**

The judge did not dismiss the counterclaim. On April 10, Dr. Wonderkind moved to dismiss the original complaint because venue was improper and there was no subject matter jurisdiction over the action.

- 8. Should the judge dismiss the original complaint for lack of jurisdiction over the subject matter? Why?**
- 9. Should the judge dismiss the original complaint for improper venue? Why?**

The judge did not dismiss the original complaints for either of these reasons. On May 1, 1999, during discovery, PP found out that the closed circuit transmission that went out during the surgery was not carried on Qeast's lines, but, rather, on the lines of their separately organized wholly owned subsidiary, Qeast Surgihelpers. PP immediately moved to amend the complaint to substitute Qeast Surgihelpers for Qeast as a party defendant. Qeast Surgihelpers opposed the amendment, and, alternatively, argued that any change in the name of the party should result in the dismissal of the original complaint because the statute of limitations barred any malpractice action filed over one year after the acts, which gave rise to the action.

- 10. Should PP be permitted to amend his complaint to change the name of the defendant? If so, should the claim against the newly named defendant be dismissed for as barred by the statute of limitations? Why?**

**[END OF EXAMINATION]**