

GRADER'S GUIDE

*** QUESTION NO. 7 ***

SUBJECT: CIVIL PROCEDURE

1. Civil Rule 9(b): Pleading Special Matters – Fraud; Civil Rule 12(b) (50 Points)

Alaska, like most states using the modern civil rules, utilizes “notice pleading” standards, which generally do not require that the averments of wrongdoing in an initial complaint be made with specificity. Civil Rule 9, however, creates an exception to the general “notice pleading” standards when certain “special matters” are pled. These matters are considered so significant that they must be pled with particularity in order to afford the defendant an appropriate opportunity to respond.

Perhaps foremost among these special matters are allegations of fraud. “Fraud, even in an initial pleading, must be averred with particularity. Alaska R. Civ. P. 9(b).” Law Offices of Vincent Vitale, P.C. v. Tabbytite, 942 P.2d 1141, 1147 (Alaska 1997). In order to satisfy Civil Rule 9(b), a complaint must identify the particular actions or statements that are averred to be fraudulent and why.

Civil Rule 9, however, does not provide, in and of itself, a procedural means for seeking dismissal of a complaint. Instead, it only establishes the standards applicable to complaints dealing with special matters such as fraud. Motions seeking dismissal of causes of action based solely on the inadequacy of the complaint on its face are addressed by Civil Rules 12(b)(6) and 12(c). In this case, the motion would be based on the complaint’s failure to meet the Rule 9 (b) standards for pleading special matters, and would fall under the rubric of Rule 12(b)(6).

The distinction between motions brought pursuant to Civil Rules 12(b)(6) and 12(c) is a fine one. Generally, motions brought pursuant to Civil Rule 12(c) involve cases where the facts are neither undiscovered nor in dispute, and the court in such cases is called upon only to decide purely legal issues. See Wright & Miller, Federal Practice and Procedure, Civil 2d § 1369-70. Civil Rule 12(b)(6), however, is generally the procedural basis for motions to dismiss based on the formal or procedural insufficiency of a pleading under Civil Rules 8 or 9. See Wright & Miller, supra at § 1363; see also Brooks v. Trans World Airlines, Inc., 574 F.Supp. 805 (D. Colo. 1983).

The examinee may note that a judge could grant such a motion to dismiss with or without prejudice. See Wright and Miller, supra, § 1300. Modern practice has been for courts to offer a plaintiff at least one additional

attempt to meet the standards of Civil Rule 9(b), either through a dismissal without prejudice to amend the deficient complaint or through an order issued under Civil Rule 12(e) for a more definite statement. *Id.* If two or more attempts to file an appropriate complaint result in deficient filings, however, a complaint may be dismissed with prejudice on this ground. See Washington v. Baenziger, 656 F.Supp. 1176 (D.Cal. 1987); Andreo v. Friedlander, Gaines, Cohen, Rosenthal & Rosenthal, 651 F.Supp. 977 (D. Conn. 1986).

Chuck's attorney should therefore file a motion for judgment on the pleadings under the authority of Civil Rule 12(b)(6), averring that Les's complaint should be dismissed for its failure to meet the standards applicable to pleading matters of fraud found in Civil Rule 9(b).

2. Civil Rules 11, 82, and 95: Fees and Attorney Sanctions

A) Award of Attorney's Fees Against Les Under Civil Rule 82 (25 points)

If the complaint is dismissed, Chuck, as the prevailing party, is automatically entitled to an award of 20% of his reasonable attorney's fees under Civil Rule 82(a) & (b)(2).

Chuck may also seek an enhanced award of attorney's fees against Les pursuant to Civil Rule 82(b)(3)(G), based on Les's vexatious or bad faith conduct, or Civil Rule 82(b)(3)(F), based on the lack of a reasonable basis for the claims pursued by Les. Such a request is committed to the sound discretion of the trial court, and the trial court must state its reasons for departing from the fee schedule outlined in Civil Rule 82(b)(2). Mullen v. Christenson, 642 P.2d 1345 (Alaska 1982). If the trial court determines that Les engaged in vexatious litigation tactics or bad faith conduct, it can award Chuck enhanced fees, up to and including an award of full actual attorney's fees. Garrison v. Dixon, 19 P.3d 1229 (Alaska 2001).

B) Award made under authority of Rule 95 Based Upon A Violation of Rule 11. (25 Points)

Civil Rule 95 states that, "[f]or any infraction of these rules, the court may ... assess costs or attorney's fees ... upon offending attorneys." Ak. R. Civ. Proc. 95. An award of fees as sanctions under Civil Rule 95 must be based on a specific finding that an attorney has violated one of the civil rules. Wilson v. Municipality of Anchorage, 977 P.2d 713, 727 (Alaska 1999).

In order to seek such an award, Chuck must file a motion under Civil Rule 95 alleging a specific Rule violation. Wilson, supra. Because the relief sought is penal in nature, the Court must afford Furman and Les sufficient notice of the motion, an opportunity to be heard, and an opportunity to present evidence at a hearing to defend themselves. Stephenson v. Superior Court, 697

P.2d 653, 655-56 (Alaska 1985). The procedural protections afforded to Les and Furman are limited, however. They are not entitled to discovery, a peremptory challenge of the judge, or a jury trial. Weidner v. Superior Court, 715 P.2d 264, 268-69 (Alaska App. 1986); Weidner v. State, 764 P.2d 717, 721-23 (Alaska App. 1988).

To receive an award of fees under Civil Rule 95, Chuck must show a specific violation of the Civil Rules. An award of fees can be authorized under Civil Rule 95 for a violation of Civil Rule 11. See Matter of Benson, 816 P.2d 200, 201 (Alaska 1991); Keen v. Ruddy, 784 P.2d 653, 658-59 (Alaska 1989).

The facts in this case indicate that Furman may have violated Rule 11. Rule 11 requires that all pleadings be signed by an attorney. The facts indicate that Furman signed the complaint against Chuck. Rule 11 further states that an attorney's signature "constitutes a certificate by him ... that to the best of his knowledge, information and belief formed after reasonable inquiry it is well grounded in fact" Ak. R. Civ. Proc. 11. See Keen, supra, 784 P.2d at 658.

Rule 11 thus imposes a requirement upon attorneys to make "reasonable inquiry" into the factual and legal bases for a pleading, and to certify through their signature that each pleading filed has a reasonable basis in fact and law. The Alaska Supreme Court has stated that this inquiry must be "reasonable under the circumstances." Keen, supra, 784 P.2d at 659. This creates an objective standard that is more stringent than a subjective "good faith" standard. Keen, supra, 784 P.2d at 659. At the same time, however, courts should not use hindsight, and should not base their inquiry on any facts not reasonably available to the attorney at the time he or she signed the pleading. Benson, supra, 816 P.2d at 201.

The facts indicate that Furman did no research regarding the complaint, relying solely on Les's vague assertion that "[h]e lied to me." In the Benson case, the Alaska Supreme Court determined that it was not a Rule 11 violation for an attorney faced with severe time constraints to rely on a sworn affidavit without further investigation as the basis for a pleading. Benson, supra, 816 P.2d at 201. In this case, however, Furman was faced with no time constraints, yet performed no investigation at all, relying solely on an unsworn, vague statement by Les to support his Rule 11 certification that the pleading was "well grounded in fact." Under these circumstances, this constitutes a violation of Rule 11.

Rule 11 vests discretion in the trial court as to what level of sanction is appropriate under the circumstances. Keen, supra, 784 P.2d at 659. The trial court could award anything up to and including full fees. Id.