Jared Mullen

Michael Green

October 26, 2017

Civ Pro Notes

Supplemental jurisdiction

* If core action is fed question, all you have to think about is whether the joined action is part of the same constitutional case or controversy as the core action
* If the core action is *solely diversity (or alienage)* and the joined action is part of the same constitutional case or controversy as the core action…
	+ If joined action not by plaintiff, you’re good – there is sup jur
	+ Only have to worry is when action is joined by plaintiff – look to whether it falls in this language
	+ (b) In any civil action of which the district courts have original jurisdiction founded **solely on section 1332 of this title**, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by **plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure**, or over **claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules**, when exercising supplemental jurisdiction over such claims would be **inconsistent with the jurisdictional requirements of section 1332**.
* Remember that if there is complete diversity the ruling in Allapattah means that a co-plaintiff’s action joined under R 20 will have suppl jur if it is below the jurisdictional minimum…
* If plaintiff brings fed question action in state court and joins unrelated state law action…
	+ No sup jurisdiction
	+ Can still remove under 1441(c) – fed ct will then break case apart and remand state law action
		- Otherwise plaintiff could make case un-removable by joining state law action

Discovery

* Scope of discovery
	+ Mere fact that what is being asked for is not admissible doesn’t mean it’s not discoverable
		- Same is true of a deposition
	+ As long as its reasonably calculated to lead to admissible evidence
* Privileges
	+ Attorney-client
		- Does not encourage free communication as much as you think
		- Cannot be used by lawyer to allow client to lie on stand or refuse to answer discovery or answer on the stand
		- What good is this in a civil context?
			* Client may say things that would look really bad at trial if conversations were discoverable
		- Clients should be careful about what they say to their lawyers
			* Lawyers have obligation to tell court if they know client is lying under oath
		- Who controls AC priv?
			* Client
			* Lawyer can waive privilege when acting on client’s behalf
				+ If done improperly could be grounds for malpractice
			* But it is the Client’s privilege
	+ Corporate attorney-client privilege
		- Disagreement on this
		- Common law AC privilege varies from state to state
		- Fed approach (Upjohn)
			* Comprehensive – any communication of corporate atty with an employee of corp is within the corp AC privilege (assuming that other requirements are satisfied) – basically, all employees are privileged parties
		- alternative way to think about it is client is control group – only officers, directors – not all employees
			* Fed approach are that any employee of corp. is covered by privilege
				+ Communications would be covered by work-product privilege anyway

Upjohn wrongly decided (Green)

* + Work-product privilege
		- Hickman v. Taylor (U.S. 1947)
			* Defendants attorney requested all of plaintiffs notes from interviews with witnesses
			* Not under attorney-client privilege because not communication between privileged parties
			* District court held not privileged
				+ Overturned by 3rd circuit (affirmed by Sup Court)
			* Why have work-product privilege
				+ Witnesses don’t control privilege

So it does not encourage them to speak freely

* + - * + Client’s privilege

Some circumstances, possibly attorney’s privilege

* + - * + Encourages careful lawyering

Without this, lawyers wouldn’t write things down

* + - * + Also obvious that you need to protect Trial strategies and Legal conclusions
				+ But why protect fact work product, eg witness statements?
				+ Prevents free rider problem

Opposing counsel won’t get such statements because they know they can get the other side’s

Green: Sounds unrealistic

Other side won’t ask the questions you want

* + - * + Lawyers might try and produce misleading work-product
				+ Lawyer would turn into a witness

The witness statement will inevitably vary from what the witness says on the stand

That discrepancy will be very useful for impeachment purposes

And then the person who created the WP will be asked to defend the version in the WP against the word of the friendly witness

* + - Originally Hickman was a common law privilege but now some of it is in R 26(b)(3)
		- Ordinarily, a party may not discover documents and tangible things that are ***prepared in anticipation of litigation or for trial by or for another party or its representative*** (including the other party’s attorney, consultant, surety, indemnitor, insurer, or agent).
			* Not just lawyers can create WP
			* Clients can do it all alone
			* also other agents
			* Fact intensive to figure out whether something is work-product
				+ Particularly when compared to attorney-client privilege
				+ Have to know history and motivation behind document
				+ Not necessarily identifiable by who produced It or for whom it was produced
		- Not something that cannot be overcome at all
		- subject to Rule 26(b)(4), those materials may be discovered if:
		 (i) they are otherwise discoverable under Rule 26(b)(1); and
		 (ii) the party shows that it has ***substantial need*** for the materials to prepare its case and ***cannot, without undue hardship, obtain their substantial equivalent*** by other means. prepared in anticipation of litigation or for trial by or for another party or its representative [
		- Opinion work-product treated differently than fact work-product
		- 26(b)(3)(B) Protection Against Disclosure. If the court orders discovery of those materials, it must ***protect against disclosure of the mental impressions, conclusions, opinions, or legal theories*** of a party’s attorney or other representative concerning the litigation.
			* Really hard to discover opinion work-product compared to fact work-product – maybe cannot be overcome at all
		- Existence of work-product is not itself work-product
			* If this weren’t true you would never be able to overcome privilege
				+ Wouldn’t know it exists
		- Can’t use work-product privilege to refuse to answer truthfully about a fact
			* Similar to point about AC privilege
		- Question about how much you have to anticipate litigation – does not have to be a suit yet, but
			* Normal documents generated in the course of business not work product
				+ Good example is insurance

Normal documents that an adjuster generates not work product

Only if genuine worry that you’re going to be sued

* + - * Unsolicited letter from witness?
				+ Is it prepared in anticipation of litigation?
				+ Is it by or for another party?

If witness did it for you then it could be described as work-product

* + - One way to overcome privilege: if one party interviewed witnesses shortly after the events in question and the other party doesn’t have the opportunity to do so until substantial time has passed
			* Witnesses may not recall everything that happened later
			* Would put the discovering party at a disadvantage if they didn’t have access to this info
		- Sometimes you can overcome work-product privilege in order to impeach witness
			* Don’t want to make it impossible to do this
			* But also don’t want to allow someone to simply say “I want access to WP because it might have stuff that would impeach the witnesses”
				+ That would eviscerate the WP priv
			* To overcome privilege, you have to have some non-privileged info that you can show to the court that will then justify access to privileged material – something suggesting that the witness said something different in the WP from what they will say on the stand
				+ Court than can look at WP in camera to determine whether overcoming priv would actually be justified
		- Can p request in discovery any surveillance tapes that d may have made of p after the accident
			* Impeachment evidence against your own witness (in this case the P)
			* In general the federal rules assume that impeachment evidence is not discoverable
			* There is no obligation to overturn impeachment evidence against other side in disclosure (whether at the beginning of suit or pre-trial)
				+ Allowing access would allow the witness to change his story to accommodate the evidence
				+ Surprise seems important
				+ Same problem for non-work-product impeachment evidence
			* BUT not allowing access could be a problem
				+ Maybe impeachment evidence is trumped up

Surprise at trial means something is happening that other side can’t respond to

* + - * + Now impeachment evidence tends to be treated as discoverable

BUT before turning over impeachment evidence you have on other side’s witness, the court will allow you to depose witness before turning over

Can get element of surprise in the deposition, while allowing other side has a chance to check the impeachment evidence to make sure it is genuine

* + - Witness can always get their own statement
			* Friendly witness can request statement and give it to their side
	+ **Waiver**
		- Privileges can be waived
		- You can waive it by bringing it into issue
			* “I acted reasonably because I acted on advice of counsel”
				+ this creates right for other side to access those communications – and the context in which those communications were made
			* very dangerous to even refer to privilege
				+ will end up waiving more than you think
	+ **mechanism of disclosure**
		- disclosure is term used for info you are obligated to turn over without being asked
		- discovery is term for info you only have to turn over if asked
		- used to obligation to disclose all witnesses “likely to have discoverable information *relevant to disputed facts alleged with particularity* in the pleadings” and all documents and tangible things “in possession custody or control of party that are *relevant to disputed facts alleged with particularity* in the pleadings
			* broad disclosure obligation
			* didn’t work well
			* now it is limited to ‘good stuff’ – in support of you claims or defenses
		- pretrial disclosure obligation
			* have to disclose evidence you will bring at trial other than impeachment evidence 30 days before trial
		- disclosure concerning experts
			* when you have an expert testifying at trial: witness has to write report to give to other side that discloses compensation, history as witness, and evidence that they looked at (even if its privileged information)
	+ **mechanism of discovery**
		- request for admission
			* you discover that something happened that you think other party would have admitted to had it been in complaint
			* mostly used to determine validity of documents
			* can insurer impleaded by defendant request an admission from the plaintiff?
				+ Yes
				+ 3rd party defendant can raise any defense that the defendant can raise so make sense that can also request admissions
			* also, true for co-plaintiffs/co-defendants – can ask admissions from one another (even though they cannot offer the other’s defenses)
		- document request can only be served on a party
			* get documents from 3rd parties via subpoena duces tecum
				+ need subpoena to put any third party under control of court
		- p’s lawyer wants to find out who at D Corp. knows how something specific was done
			* use interrogatories
				+ corp. has to provide any information that it has access to
				+ usually done first, followed by document request and finally depositions
		- deposition applicable to both parties and non-parties
			* have to subpoena non-party
			* almost like trial
				+ will be used for settlement or summary judgement
			* in depositions, counsel can object, but client must be allowed to answer the question
				+ objections can then be brought up later