CIVIL PROCEDURE EXAM Prof. Nivala Fall 1998

This exam consists of 2 questions, one worth 100 points, one worth 50 points. The only material you will be allowed to use is the Federal Rules of Civil Procedure accompanying this exam.

Please write legibly in ink. Write on every other line. You may use both sides of a page. Include your exam number on each bluebook.

QUESTION 1 100 points

In 1990, Peter Penurious filed a voluntary petition in bankruptcy in Rhode Island. During the bankruptcy proceeding, the United States, represented by a Justice Department attorney named Greg Avoid, filed a claim seeking about \$6.5 million in unpaid federal taxes (resulting primarily from the disallowance of deductions claimed by Penurious). Penurious responded that in 1989 he accepted a settlement offer made by the IRS which substantially reduced his tax liability.

To resolve this dispute, the parties undertook discovery. On April 30, 1991, Penurious served a request for production of documents seeking the following:

- 1. Documents regarding all extension of statute of limitations for Penurious for the tax years 1978 to present;
- 2. All tax returns filed by Penurious with the IRS from 1978 to present;

- 3. All IRS workpapers developed or used in connection with any audit of tax returns filed by Penurious from 1978 to present; and
- 4. All internal correspondence and documents regarding tax returns filed by Penurious from 1978 to present.

The Government failed to respond and, on June 10, 1991, Penurious moved to compel production. On June 18, 1991, the Government produced some documents and objected to other requests, claiming they were overbroad, burdensome, and sought privileged material.

On June 27, 1991, the court heard Penurious' motion, overruled the Government's objections, and ordered production of the remaining documents within 45 days. The Government produced some, but not all, of the documents within that period.

On April 7, 1992, Penurious filed a motion for partial summary judgment claiming that, for several of the relevant tax years, the Government had not produced documents relating to extension of the statute of limitations or the tax audits. The court denied this motion.

Penurious then filed a motion on May 3, 1992 seeking to preclude the Government from introducing the same documents at trial. The Government, in response, admitted that it had not provided the audit information documents but claimed that Penurious had not properly requested them. Because the parties told the court that they were trying to negotiate a settlement, the court postponed a hearing on the motion.

The settlement negotiations were protracted. The court did not hear Penurious's preclusion motion until January 3, 1995. For the first time, the court heard the following facts.

When he received Penurious' preclusion motion, Greg Avoid contacted Steve Agonistes, an IRS staff attorney in Washington, D.C., seeking help in locating the requested documents. Agonistes

was very familiar with Penurious' tax matters although he had not (and never did) enter an appearance in Penurious' bankruptcy case.

Avoid and Agonistes met in June 1992 to discuss Penurious' production requests.

Afterwards, Avoid told Penurious' attorney, Peter Lethargic, on four occasions that the

Government would produce all non-privileged documents. Taking Avoid at his word, Lethargic did not press the preclusion motion.

By a letter dated July 30, 1992, Lethargic was informed that the Government would permit Lethargic to review all audit documents at the IRS District Counsel's office in New York City. Lethargic was told to contact Avoid; when he did so, Avoid told him to contact Agonistes.

Over the course of the next several months, Lethargic attempted to contact Agonistes, leaving what amounted to over 100 messages. Agonistes did not respond until Lethargic, on October 30, 1992, sent a letter to Avoid asking for access to the documents. On November 12, 1992, Lethargic was permitted to review documents which were not indexed; he was told that some documents were missing. When Lethargic finished his review, he asked that a small stack of documents be copied and sent to him; he did not get these for three months.

On November 30, 1992, Lethargic sent Avoid an "Items Missing" list which described 11 documents he was entitled to. Avoid contacted Agonistes who, by a letter dated January 13, 1993, responded that he would need four months to produce the documents. They were not produced until December, 1993.

After receiving this information, the court took Penurious' preclusion motion under advisement. On April 14, 1995, it denied the motion. However, in a published opinion, it found that Avoid and Agonistes "repeatedly and deliberately" avoided their obligations to produce

documents. The court described their conduct as "egregious," "autocratic," "bureaucratic," "disdainful," "intentional, unprofessional, unjustified." The court said Avoid and Agonistes "acted in bad faith and flouted the order regarding production of documents." In addition to this published reprimand, the court fined both attorneys \$750 and enjoined them from seeking reimbursement from the United States. He ordered them to pay the fine to Penurious as a reimbursed expense.

Both Avoid and Agonistes have appealed the monetary sanctions and what they characterize as the court's written sanctions. You are a law clerk for a Court of Appeals judge who has been assigned to hear this appeal. Prepare a memo describing the merits of both appeals including reasons for affirming and reversing the trial court.

QUESTION 2 50 points

On March 26, 1995, Paula Pratfall, a resident of the Slippery Slope Apartments complex, slipped and fell down the front steps of her apartment unit. She suffered temporary and permanent injuries.

Her attorney, Adam Aardvark, sent the Slippery Slope manager a letter on September 11, 1995 providing notice that he represented Ms. Pratfall and requesting the name of Slippery Slope's insurance carrier. When there was no response, Aardvark sent a follow-up letter on October 29, 1996; Slippery Slope responded on November 8, 1996 requesting certain information about Ms. Pratfall. Aardvark supplied that on December 3, 1996.

On December 15, 1996, Slippery Slope sent Aardvark a letter telling him to forward a

letter of representation to Master Management, a Baltimore firm. Aardvark did so on December 17. On January 8, 1997, Aardvark sent a follow-up letter to Master Management and did so again on February 11. Master Management did not respond to any letter.

On March 17, 1997, Aardvark filed a complaint in state court alleging negligence on the part of Slippery Slope. The complaint also alleged that a management firm identified as XYZ Management failed to properly train and supervise Slippery Slope employees and failed to maintain the property. The statute of limitations for Ms. Pratfall's injury ran out March 26, 1997.

On July 17, 1997, the Department of Safe Steps, a federal agency responsible for maintaining complexes such as Slippery Slope, filed an appearance as a real party in interest and properly filed a motion to remove the case to federal court. The Department attached a copy of the complaint to its motion. On August 27, 1997, the parties attended a scheduling conference after which the judge directed Aardvark to file an amended complaint adding the Department of Safe Steps as a defendant and deleting the XYZ designation. Aardvark did so on September 26.

On October 15, 1997, the Department filed a motion for summary judgment on the ground that the state common law negligence claims are time-barred. The motion included an affidavit from a paralegal in its legal department who is responsible for reviewing records relating to Slippery Slope Apartments. The affidavit stated, in part, that the Department "received a copy of the summons and complaint from an entity known as Master Management, a property management company with whom the Department does business." The affidavit did not say when the summons and complaint were received. On November 5, 1997, Aardvark responded to the Department's summary judgement motion without attaching affidavits but providing the chronology described above.

You are a law clerk for the federal district court judge assigned this case. Prepare a memo discussing the merits of the Department's motion — procedurally and substantively — and recommending a disposition of it.