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Examination No. \_\_\_\_\_

**CIVIL PROCEDURE  
FINAL EXAMINATION  
SPRING 2003**

**Professor Kovnat  
Thursday, May 15, 2003  
1:30 to 5:00 pm**

### **INSTRUCTIONS**

This examination consists of five questions that are based on the facts given. If you think that you need any additional facts to respond to the questions, state the fact that you are assuming and proceed from there.

The questions are not equally weighted. I have suggested a time for each question to help you allocate the time you spend on each section of the exam. The suggested time reflects the approximate relative weight of each question in the final grade.

You may bring the *A Student's Guide to the Federal Rules of Civil Procedure* into the exam as well as an outline that you prepared either yourself or together with other students in the class. Statutes and rules that may be relevant to the questions are attached to this examination in the appendix. You may take no other materials into the exam.

Take a deep breath, think and write clearly, and when you finish this examination have a lovely summer.

**[Examination begins on the next page]**

## The Facts

In December of 2002, Night Works Ltd. a large French corporation (that does business throughout the United States) bought Day Dreams, Inc. a small software development company incorporated in New Mexico and located in Los Alamos, New Mexico. The sale was effected through an exchange of stock in Night Works for shares in Day Dreams. Before the sale, Day Dreams had been owned by thirteen shareholders, one of whom is a citizen of New Mexico, eleven of whom are citizens of New York, and one of whom, Peter Parma, is a citizen of Texas. All of Night Works management and all of their financial records are in France at their corporate headquarters. Daniel Dailey, a citizen of New York and a partner in the New York law firm of Dailey, Banks and Biddle, represented Night Works in the transaction that resulted in the purchase of Day Dreams.

During the course of this transaction, Dailey prepared and signed an opinion letter in New York on behalf of the firm and as part of its representation of Night Works. The opinion letter was mailed to each of the selling shareholders at their home addresses. It assured the selling shareholders of Day Dreams that the law firm had "investigated such questions of law for the purpose of rendering this opinion as it had deemed appropriate, that shares of Night Works were freely tradeable in U.S. stock exchanges, and that the Stock Purchase Agreement constitutes the valid and binding obligation of the Buyer enforceable against it in accordance with its terms."

As part of the Stock Purchase Agreement, the selling shareholders made a series of representations and warranties concerning Day Dreams based on information supplied to them from Kenneth Leigh, a citizen of New Mexico and chief financial officer of Day Dreams. The Stock Purchase Agreement also specified that the five largest shareholders of Day Dreams, including Parma, would indemnify Night Works, jointly and severally, for any losses or liabilities arising out of any misrepresentation or warranty made by the selling shareholders.

Following the sale of Day Dreams, disputes arose between Night Works and the selling shareholders of Day Dreams. Night Works asserted that the selling shareholders had misrepresented Day Dreams' financial statements by inflating Day Dreams' earnings. The selling shareholders, including Parma, were also disappointed in the transaction. They asserted that Night Works stocks were worthless in the United States and that they had been defrauded into selling their valuable Day Dreams shares only to get nothing in return. Lawyers from the firm of Dailey Banks and Biddle, but not Dailey himself, traveled to New Mexico to review documents and to interview Leigh and others who had been former employees of Day Dreams and to negotiate with the New Mexican shareholder who had sold his Day Dreams stock to Night Works. Soon after these interviews, Leigh went to a remote Caribbean Island where he had set up another enterprise. Some of the other employees of Day Dreams have also left New Mexico and are employed in other states. Eventually, Night Works reached a settlement with each of the selling shareholders except Parma.

Dailey, Banks and Biddle does not solicit business within New Mexico and has no office in New Mexico. although the firm has, on a few occasions, represented clients in New Mexico. Dailey has never traveled to New Mexico for business or pleasure. No lawyer in the firm is licensed to practice law in New Mexico. However, since 2001, lawyers like those of Dailey, Banks and Biddle would have been allowed to conduct some activities in New Mexico without fear of being charged with the “unlawful practice of law” because to reflect the realities of multijurisdictional law practice, New Mexico amended its rules of professional conduct so that “a lawyer who is admitted in a United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may practice in New Mexico on a temporary basis.” Among other things, the rule authorizes a lawyer who is not licensed in New Mexico to engage in “non-litigation work that arises out of or is reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.” The rule further provides that an out-of-state attorney practicing law under this rule is subject to the New Mexico Rules of Professional Responsibility and “shall be deemed to have obtained a license for the limited scope of practice specified in this rule.”

Parma filed a complaint in federal district court in the district of New Mexico against four defendants: Dailey; Dailey Banks and Biddle; Leigh; and Night Works, Ltd. His complaint alleges that federal jurisdiction is based on diversity of citizenship.

Counts I and II of the complaint allege that Parma lost \$3,000,000 because he relied on Dailey’s opinion letter, and that Dailey and the law firm were negligent in the preparation of the opinion letter because they had inadequately researched the legal questions governing the transaction and marketability of Night Works shares in the U.S. Count III alleged generally that Night Works, Inc had misrepresented the value of their shares in the United States and thus had defrauded Parma and breached the stock purchase agreement. Count IV alleged that Leigh had lied about the financial condition of Day Dreams, that Parma relied on his representations when he agreed to indemnify Night Works and was thus made vulnerable to an indemnity claim that could be brought against him by Night Works.

Parma effected service by delivering a copy of the complaint and summons on Dailey personally in the New York offices of Dailey Banks and Biddle. He believed that this would be adequate notice to Night Works as well. However, just to be sure, he mailed a copy of the complaint and summons to Night Works’ corporate headquarters in France. He served Leigh by posting a copy of the complaint and summons on the front door of Kenneth Leigh’s last known residence in Los Alamos.

### **Question I (One hour)**

Dailey, and the law firm of Dailey, Banks and Biddle make timely pre-answer motions to dismiss Parma’s complaint against them for lack of jurisdiction over their persons, improper venue and improper service of process. Three days later, but still within the time allowed for them to answer the complaint, they move for dismissal on the ground that the complaint fails to state a claim on which relief can be granted.

Congratulations. You have been appointed law clerk to Judge Knowitall. Make recommendations to her for ruling on the motions, giving reasons for your recommendations.

**Question II (One hour and 15 minutes)**

Night Works answers Parma's complaint asserting the procedural defenses of improper venue and improper service, and it also seeks a change of venue to the federal district court in New York or in the alternative, dismissal of Parma's complaint against it on grounds of forum non conveniens and for failure to state a claim on which relief can be granted. In the substantive part of its answer, Night Works denies all of Parma's allegations and also asserts two counterclaims against Parma. The first counterclaim is based on the Stock Purchase Agreement. The counter-claim seeks indemnification from Parma for the losses incurred by Night Works as a result of misrepresentations about the financial condition of Day Dreams. The second counterclaim alleges that Parma libeled Night Works by publishing an op-ed article in the Dallas Morning News calling Night Works a typical cheating French company that would do anything, legal or illegal, to harm an upstanding Texan. Judge Knowitall really needs your help on this one because Parma is arguing that Night Work's assertion of the counterclaims is a waiver of its other defenses and that the federal court must apply New Mexico and not federal law with respect to whether the complaint is sufficient to allege fraud. Write a brief memo addressing each of Night Work's defenses and Parma's arguments.

**Question III (15 minutes)**

Leigh doesn't respond at all. Parma moves for entry of a default judgment and Judge Knowitall enters the default as to liability. When Leigh returns from the Caribbean Island where he has started another business, he sees the complaint and summons posted on his front door and learns about the default judgment. He moves to set aside the judgment even though he has no meritorious defense on grounds that he never received notice of the lawsuit. Advise the Judge on how to rule on Leigh's motion providing reasons for your recommendation.

**Question IV (15 minutes)**

Assume Judge Knowitall has denied all of the motions and procedural defenses and has set aside the default judgment against Leigh. (Make these assumptions no matter what you concluded in response to Questions I, II, and III.). Parma serves interrogatories on Dailey, Banks, and Biddle asking for the identity of any Day Dreams employees their lawyers interviewed and for memoranda of those interviews. Dailey, Banks, and Biddle objected to those interrogatories and moved for a protective order. Judge Knowitall has lent you to the magistrate judge dealing with discovery matters in this case. Make a recommendation to the magistrate judge on this motion for a protective order.

**Question V (15 minutes)**

At the end of the discovery period, Dailey, Dailey, Banks and Biddle and Night Works move for summary judgment. They support their motion with an affidavit from an investment banker who attests that Night Works' stock is freely tradeable in the U.S., but it has lost value because of the general decline in the markets. Night Works also points out that there are no

documents, depositions or answers to interrogatories that show the Night Works made any misrepresentations. Parma responds with a counter-affidavit from another investment banker who attests that Night Works' investment banker has taken a bribe from Night Works to inflate the value of Night Works' stocks. Judge Knowitall wants the benefit of your opinion about Night Works' motion. Give her your opinion.

**APPENDIX**

**New Mexico Statute Annotated Sec. 38-1-16 Personal service of process outside state.**

A. Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts enumerated in this subsection thereby submits himself or his personal representative to the jurisdiction of the courts of this state as to any cause of action arising from:

- (1) the transaction of any business within this state;
- (2) the operation of a motor vehicle upon the highways of this state;
- (3) the commission of a tortious act within this state;
- (4) the contracting to insure any person, property or risk located within this state at the time of contracting;
- (5) with respect to actions for divorce, separate maintenance or annulment,

the circumstance of living in the marital relationship within the state, notwithstanding subsequent departure from the state, as to all obligations arising from alimony, child support or real or personal property settlements under Chapter 40, Article 4 NMSA 1978 if one party to the marital relationship continues to reside in the state.

B. Service of process may be made upon any person subject to the jurisdiction of the courts of this state under this section by personally serving the summons upon the defendant outside this state and such service has the same force and effect as though service had been personally made within this state.

C. Only causes of action arising from acts enumerated in this section may be asserted against a defendant in an action in which jurisdiction is based upon this section.

D. Nothing contained in this section limits or affects the right to serve any process in any other manner now or hereafter provided by law.

**N.M. Rule of Civil Procedure 1-004. PROCESS**

A. Summons; Issuance. Upon the filing of the complaint, the clerk shall forthwith issue a summons and deliver it for service. Upon the request of the plaintiff separate or additional summons shall issue against any defendants. Any defendant may waive the issuance or service of summons.



D. Summons; By Whom Served. In civil actions any process may be served by the sheriff of the county where the defendant may be found, or by any other person who is over the age of

eighteen (18) years and not a party to the action, except for writs of attachment, writs of replevin, and writs of habeas corpus,

which shall be served by any person not a party to the action over the age of eighteen (18) years who may be especially designated by the court to perform such service, or by the sheriff of the county where the property or person may be found.

E. Summons; Service By Mail. A summons and complaint may be served upon a defendant of any class referred to in Subparagraph (1) or (2) of Paragraph F of this rule by mailing a copy of the summons and of the complaint (by first-class mail, postage prepaid) to the person to be served, together with two (2) copies of a notice and acknowledgment conforming with the form set out below and a return envelope, postage prepaid, addressed to the sender. If no acknowledgment of service under this subdivision of this rule is received by the sender within twenty (20) days after the date of mailing, service of such summons and complaint shall be made by a person authorized by Paragraph D of this rule, in the manner prescribed by Subparagraph (1) or (2) of Paragraph F of this rule. Unless good cause is shown for not doing so, the court shall order the payment of the costs of personal service by the person served if such person does not complete and return within twenty (20) days after mailing the notice and acknowledgement of receipt of summons.

F. Summons; How Served. Service shall be made as follows:

(1) upon an individual other than a minor or an incapacitated person by delivering a copy of the summons and of the complaint to the individual personally; or if the individual refuses to receive such, by leaving same at the location where the individual has been found; and if the individual refuses to receive such copies or permit them to be left, such action shall constitute valid service. If the individual is absent, service may be made by delivering a copy of the process or other papers to be served to some person residing at the usual place of abode of the defendant who is over the age of fifteen (15) years; and if there is no such person available or willing to accept delivery, then service may be made by posting such copies in the most public part of the defendant's premises, and by mailing to the defendant at defendant's last known mailing address copies of the process;

(2) upon domestic or foreign corporation by delivering a copy of the summons and of the complaint to an officer, a managing or a general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant; upon a partnership by delivering a copy of the summons and of the complaint to any general partner; and upon other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by law to receive service and the statute so requires, by also mailing a copy to the unincorporated association. If the person refuses to receive such copies, such action shall constitute valid service. If none of the persons mentioned is available, service may be made by delivering a copy of the process or other papers to be served at the principal office or place of business during regular business hours to the person in charge thereof;

Service shall be made with reasonable diligence, and the original summons with proof of service shall be returned to the clerk of the court from which it was issued.

H. Service By Publication. In actions where the relief sought does not require personal service and the party to be served is so situated that process cannot be personally served upon the party within the state, or in situations where the party to be served is a New Mexico resident who, by deliberate

concealment to avoid service of process, has effectively prevented service on the party in the manner provided in Paragraph F of this rule, service by publication shall be as follows:

(1) In any such action or proceeding, the clerk of the court shall cause to be issued a notice of the pendency of the action or proceeding upon the filing by plaintiff, the plaintiff's agent or attorney, of a sworn pleading or affidavit stating that any defendant (whether an individual, corporation, partnership or association): resides or has gone out of the state; or is concealed within the state; or, in appropriate cases, is deliberately concealed to avoid service of process and thereby has effectively prevented service on the party; or the party's whereabouts cannot be discovered after due inquiry and search has been made; or is in any manner situated so that the process cannot be served upon the party in the State of New Mexico.

(2) The notice of pendency of action shall contain the names of the plaintiff and the defendant to the cause, or if there is more than one defendant to the cause, the notice shall contain the name of the plaintiff and the names of the defendants against whom constructive service is sought to be obtained; except as hereinafter provided, the notice shall contain also the name of the court in which the cause is pending and a statement of the general objects of the action; shall show the name of plaintiff's attorney, with the plaintiff's attorney's office or post office address; and shall notify each defendant that

unless the defendant files a responsive pleading or motion within the time required, judgment or other appropriate relief will be rendered in the cause against the defendant by default. The notice shall be signed by the clerk under the seal of the court.

(3) The notice shall be published in some newspaper published in the county where the cause is pending; or, if there be no newspaper published in the county, then in some newspaper in general circulation in said county.

(4) The publication of said notice shall be proved by the affidavit of the publisher, manager or agent of the newspaper, and the same shall be taken and considered as sufficient service of process and valid in law, and the plaintiff thereupon may prosecute the cause to a final judgment.

J. Service of Summons Outside of State Equivalent to Publication. Personal service of a copy of the summons and of the complaint out of the state shall be equivalent to service by publication and mailing as provided for by Paragraphs H and I of this rule. The defendant so served shall be required to respond as required by law on or before thirty (30) days from the date of service. Return of such service shall be made by affidavit of the person making same.

L. Service in Manner Approved By Court. Upon motion, without notice, and showing by affidavit that service cannot reasonably be made as otherwise provided by this rule, the court may order service by any method or combination of methods, including publication, that is reasonably calculated under all the circumstances to apprise the defendant of the existence and pendency of the action and to afford a reasonable opportunity to appear and defend.



**APPENDIX**

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- (1) the transaction of any business within this state;
- (2) the operation of a motor vehicle upon the highways of this state;
- (3) the commission of a tortious act within this state;
- (4) the contracting to insure any person, property or risk located within this state at the time of contracting;
- (5) with respect to actions for divorce, separate maintenance or annulment,

the circumstance of living in the marital relationship within the state, notwithstanding subsequent departure from the state, as to all obligations arising from alimony, child support or real or personal property settlements under Chapter 40, Article 4 NMSA 1978 if one party to the marital relationship continues to reside in the state.

B. Service of process may be made upon any person subject to the jurisdiction of the courts of this state under this section by personally serving the summons upon the defendant outside this state and such service has the same force and effect as though service had been personally made within this state.

C. Only causes of action arising from acts enumerated in this section may be asserted against a defendant in an action in which jurisdiction is based upon this section.

D. Nothing contained in this section limits or affects the right to serve any process in any other manner now or hereafter provided by law.

**N.M. Rule of Civil Procedure 1-004. PROCESS**

A. Summons; Issuance. Upon the filing of the complaint, the clerk shall forthwith issue a summons and deliver it for service. Upon the request of the plaintiff separate or additional summons shall issue against any defendants. Any defendant may waive the issuance or service of summons.

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D. Summons; By Whom Served. In civil actions any process may be served by the sheriff of the county where the defendant may be found, or by any other person who is over the age of eighteen (18) years and not a party to the action, except for writs of attachment, writs of replevin, and writs of habeas corpus,

which shall be served by any person not a party to the action over the age of eighteen (18) years who may be especially designated by the court to perform such service, or by the sheriff of the county where the property or person may be found.

E. Summons; Service By Mail. A summons and complaint may be served upon a defendant of any class referred to in Subparagraph (1) or (2) of Paragraph F of this rule by mailing a copy of the summons and of the complaint (by first-class mail, postage prepaid) to the person to be served, together with two (2) copies of a notice and acknowledgment conforming with the form set out below and a return envelope, postage prepaid, addressed to the sender. If no acknowledgment of service under this subdivision of this rule is received by the sender within twenty (20) days after the date of mailing, service of such summons and complaint shall be made by a person authorized by Paragraph D of this rule, in the manner prescribed by Subparagraph (1) or (2) of Paragraph F of this rule. Unless good cause is shown for not doing so, the court shall order the payment of the costs of personal service by the person served if such person does not complete and return within twenty (20) days after mailing the notice and acknowledgement of receipt of summons.

F. Summons: How Served. Service shall be made as follows:

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(2) upon domestic or foreign corporation by delivering a copy of the summons and of the complaint to an officer, a managing or a general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant; upon a partnership by delivering a copy of the summons and of the complaint to any general partner; and upon other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by law to receive service and the statute so requires, by also mailing a copy to the unincorporated association. If the person refuses to receive such copies, such action shall constitute valid service. If none of the persons mentioned is available, service may be made by delivering a copy of the process or other papers to be served at the principal office or place of business during regular business hours to the person in charge thereof;

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**[END OF EXAMINATION]**