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Examination Number _____

UNM School of Law
Professor Occhialino
Three Credits

Spring 2003
Thursday, May 15, 2003
1:30 p.m. to 5:00 p.m.

CIVIL PROCEDURE I

Final Examination

Instructions

1. Write your examination number on the top of this page in the space provided and on every bluebook.
2. This is a three and one-half hour examination.
3. This is a closed book exam except that you may bring into the exam any standard Federal Rules of Civil Procedure Supplement. The Rules Supplement may be annotated rule-by-rule but the volume may contain no course outlines or portions of course outlines.
4. This is a two-part examination. Part One consists of ten multiple choice questions relating to Discovery and Summary Judgment. Answer the multiple choice questions on the "bubble sheet" provided to you when you receive this examination. Use the pencil provided to you. Be sure to enter your examination number in the appropriate spot on the bubble sheet. The total multiple choice questions, including those on this exam are worth 25% of your total grade. The suggested time for the multiple choice questions is one-half hour.
5. Part Two is the "Essay Question." The suggested time for this Part is three hours. There is a "Mandatory Question" that all students must answer. The suggested time for the "Mandatory Question" is one hour. Then there are ten more questions. You are to answer any SIX of those ten questions. The suggested time for answering each is twenty minutes. Each of the ten questions is equally important for grading purposes so choose the questions that you feel most comfortable answering. The suggested times reflect the relative grading value of the "Mandatory Question" and the "Six Other Questions." Answer the "Mandatory Question" in one bluebook and begin the "Six Other Questions" in a separate bluebook. I would appreciate it if you would try to answer the "Six Other Questions" in the descending order in which they appear on the examination. This will make it easier for me to grade the questions. Answer each of the six questions fully, explaining your reasoning. They are not short answer questions.
6. *** **Please** write on only one side of a page. Write only on every other line on each page. Write as neatly as possible under the circumstances.

Placing Your Examination Number on the "Bubble Sheet" Sample

(Please do not use the sample examination number.)

BIRTH DATE			IDENTIFICATION NUMBER										SPECIAL CODES					
MO.	DAY	YR.	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P
Jan.	<i>Leave Blank</i>		0	9	4								<i>Leave Blank</i>					
Feb.																		
Mar.																		
Apr.																		
May.																		
Jun.																		
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Sept.																		
Oct.																		
Nov.																		
Dec.																		

[SAMPLE]

Part Two: Essay Question
Three Hours

Michael is a twenty-one-year old male from Ada, Ohio. At age eighteen, Michael joined the United States Central Intelligence Agency. In November, 0001, Michael was assigned to the Kirtland Air Force Base in Albuquerque, New Mexico for training. Michael went barhopping on the evening of December 1, 0001. He met Florence, a UNM student. Their two-week romance culminated on the evening of December 15, 0001 when they spent the night together at the Albuquerque Hilton and had sexual intercourse for the first (and only) time.

Three days later, American troops went into San Selmo on a peacekeeping mission. The CIA ordered Michael to assist and he was in San Selmo by December 20, 0001. Some American personnel have joined with indigenous rebel troops to act as advisors. These personnel are out of contact with American military command and will be for an extended period of time in order to protect their safety.

Florence wrote several letters to Michael after he left for San Selmo. Each was addressed to Michael c/o U.S. Peace Keeping Force, San Selmo and was sent to P.O. Box 1776, Washington, D.C. 20006, pursuant to directions given by American authorities. She sent the first of those letters on January 13, 0002 and received a response from Michael on February 1, 0002.

In March, 0002, Florence learned that she was pregnant. She immediately wrote to Michael to inform him of her pregnancy and his impending fatherhood. She said that she would leave at once for her parents' home in Buffalo Gap, South Dakota to have the baby and expressed her confidence that Michael would immediately return to the United States to marry her. Florence sent the letter to the same address as the earlier ones. Michael responded in late March, 0002. He sent the letter to Florence's Albuquerque address and the post office forwarded

it to Florence at her parents' home in Buffalo Gap. In the letter, he explained that he was not in love with Florence, and offered to pay Florence \$5,000 for her medical and hospital expenses although he expressed doubt that he was the father of the child. Michael also stated that he was about to join the indigenous forces as an undercover operative in San Selmo and that he would not be in contact with anyone from the States until the American mission was complete. He pointed out that the President had announced that the United States' mission in San Selmo might continue for several years.

Florence received the letter, forwarded from Albuquerque, at her parents' home in Buffalo Gap. She read it, cried and then vowed to see a lawyer after the birth of her child in September in order to obtain child support. On September 15, 0002, Florence gave birth in the Buffalo Gap General Hospital to Selma. Florence decided to make her permanent home in Buffalo Gap so that she could raise Selma with the help of her parents.

On October 15, 0002, Florence engaged an Albuquerque attorney to file a paternity suit, seeking a declaration of paternity, and child support from Michael. She also asked the lawyer to sue Michael for the tort of intentional infliction of mental distress (IIED) based upon the "Dear John" letter she received in Buffalo Gap and her reaction upon reading it. IIED is a tort in New Mexico and in South Dakota.

On October 20, 0002 the lawyer filed the suit in the State District Court for the Second Judicial District in Albuquerque, New Mexico. The body of the complaint simply stated that

"Michael did entice Florence into engaging in sex with Michael and exactly nine months later Florence did give birth to their daughter, Selma. Moreover, Michael did send Florence a "Dear John" letter which, when she read it on the banks of the Buffalo Gap River, caused her great and grievous mental distress exactly as Michael intended."

The complaint sought the following relief: 1) a declaration of paternity, 2) a judgment that Michael be obligated to pay \$500 per month for the support of Selma until she reached the age of eighteen and 3) a judgment for \$175,000 for intentional infliction of mental distress caused by the "Dear John" letter.

Florence's lawyer petitioned the court for permission to notify Michael of the lawsuit by publication and detailed in an affidavit to the court the reasons that Michael could not be served personally, or at his usual place of abode or by "mail and nail." The affidavit detailed Michael's undercover role in San Selmo. The district court entered an order authorizing service by publication and the requirements of the publication statute were complied with in every detail by publication in the Albuquerque Journal and, pursuant to court order, the notice was also published in "CIA STATS & CHATS", a publication aimed at CIA employees.

Michael neither answered, nor filed a motion nor entered an appearance in the time required by the New Mexico Rules of Civil Procedure. The clerk of the court duly entered a notice of default and the judge then summarily entered a default judgment in favor of Florence. The judgment provided a declaratory judgment that Michael was the father of Selma, awarded \$750 per month in child support and awarded \$175,000 as requested for the intentional infliction of mental distress. The default judgment was entered on November 30, 0002.

Though Florence had not yet received a penny from Michael in satisfaction of the judgment, relying on the judgment, she bought a home in Buffalo Gap for \$85,000 with a down payment of \$10,000 borrowed from her parents. The negotiation and closing on the house occurred between December 7 and December 15, 0002.

On December 2, 0002, Michael was wounded in an ambush in San Selmo. He was evacuated to Puerto Rico to recuperate and on December 4, 0002, he was reading a back issue of

“CIA CHATS & STATS” when he saw the published notice of the lawsuit filed against him by Florence. He vowed to hire a lawyer to fight the lawsuit, but did not get around to doing so until December 31, 0002 because he decided first to tour Puerto Rico.

On December 31, 0002, Michael contacted a law firm. He recounted his tale, reconfirmed that he believed that he is not the father of Selma and asked for assistance in overturning the judgment entered against him, so that he might defend on the merits of the case.

Please Answer the Questions FULLY but concisely.

Mandatory Question: Suggested Time: Sixty minutes

Did the New Mexico State District Court have personal jurisdiction over Michael in Florence’s action against Michael for paternity, child support and intentional infliction of emotional distress? [The New Mexico long arm statute is attached as an Appendix to this question].

Remaining Questions: Answer any SIX of these Ten Questions: Suggested Time: Twenty Minutes Each

Question One Did Michael receive valid notice of the action brought by Florence for paternity, child support and IIED? [Relevant Portions of New Mexico Rule 1-004 are attached as an Appendix to this question]

Question Two Assume for this sub-question only that the trial court had personal jurisdiction and that service on Michael was valid.

Did the trial court properly enter the default judgment against Michael?

Question Three What ground for opening the default judgment is most likely to be successful; what defenses to the motion, other than those discussed in the Mandatory Question or relevant to Question One, above, are likely to be raised by Florence; and how is the court likely to rule on the Motion, apart from the issues raised in the Mandatory Question and Question One above?

Question Four After Michael filed the motion to reopen the judgment in State District Court in Bernalillo County, Florence filed a motion for a change of venue to the Federal District Court in South Dakota or, alternatively for a forum non conveniens dismissal so that the motion could be refiled in state court in South Dakota. Decide the motions. [see Appendix for South Dakota Long Arm Statute].

Additional Facts

Assume for all questions that follow that on February 28, 0003, the State District Court in Bernalillo County denied the motion for change of venue or forum non conveniens, granted the motion to reopen the default judgment, vacated the default judgment for improper service of process (without addressing the claim of lack of personal jurisdiction) and dismissed the case without prejudice. Furthermore, assume that thereafter Florence filed a new action against Michael on March 15, 0003, again in New Mexico State District Court for the Second Judicial District in Albuquerque, New Mexico, alleging the same claims, in the same language as she alleged in the original action and she had Michael served in hand in Nevada when he was visiting friends there. Assume further that the statute of limitations has not run on any of the claims in the original complaint.

Question Five Michael's attorney is preparing to respond to the complaint. Michael admitted to her that he had intercourse with Florence as alleged in the complaint but does not think he is the father because he was using a condom manufactured by Trojan, Inc. at the time. The attorney is considering the following course of action:

“The firm should file an answer, denying that personal jurisdiction exists; should assert that the complaint should be dismissed for lack of specificity, which makes it difficult to frame an answer; should then deny that intercourse occurred; and should plead in the alternative that if intercourse occurred, Michael is not the father; or alternatively that if he is the father he is entitled to indemnity from the Trojan, Inc., whom we should simultaneously add as a third party defendant pursuant to Rule 14.”

Please advise the attorney whether this plan is sound and appropriate.

Additional Facts The trial court denied Michael's motion to dismiss for lack of jurisdiction or for failure to state a claim for relief and that his attorney did not implead Trojan, Inc. under Rule 14. Discovery began.

Question Six Michael sent Florence an interrogatory asking her to identify each person with whom she had sexual intercourse during the two weeks before and the two weeks after the date that she alleges she had intercourse with Michael. Florence responded by asserting her Fifth Amendment right to remain silent, citing New Mexico Statutes Annotated Section 30-9-2 (see Appendix) as the basis for her claim. Michael filed a motion to compel Florence to answer the question.

How should the judge resolve the motion?

Question Seven Florence remains at her permanent home in Buffalo Gap, South Dakota. Michael wants to depose Florence but does not want to travel to Buffalo Gap to do so because of

the expense involved. Michael's attorney asks you whether it would be wise to conduct the deposition of Florence pursuant to Rule 31 and if not, why not, and to provide alternative suggestions that would not entail the significant expense involved in traveling to South Dakota.

Advice Michael's lawyer.

Question Eight Michael wants to show that Florence has had sexual intercourse with other persons around the time that he is alleged to have had intercourse with her. Through private investigators, he learns that Bill, Bob and Barry each claim that they had sexual relations with her within the relevant time frame. Michael properly sent notices to take the deposition of each of them. Florence moves for a protective order, claiming that the deposition questioning cannot delve into her past sexual conduct, nor can it address any opinions Bill Bob and Berry may have of her reputation concerning sexual conduct. She cites New Mexico Statutes Ann. Sec. 30-9-16 (see Appendix) in support of her motion. Resolve the motion.

Additional Facts

After discovery was complete, Florence moved for summary judgment on the paternity claim. She attached to the motion lab results showing her child's DNA, lab results showing Michael's DNA and the affidavit of John Edgar, director of the Central Testing Laboratory. Mr. Edgar's affidavit described his qualifications in detail, including the fact that he is the former director of the FBI laboratory in Washington, D.C and stated that he had run the lab tests of the DNA samples of the child and Michael and was of the opinion that there was a 99.8% likelihood that Michael was the father of Florence's child. In describing his qualifications in the affidavit, Mr. Edgar acknowledged that he had been removed as director of the FBI laboratory after cross examination of Mr. Edgar in the high profile case of an ex-football player charged with murder revealed that the FBI laboratory sometimes mislabeled or mixed up the DNA samples and

sometimes failed to run the complete set of tests that are customary when running DNA tests. In his affidavit, Mr. Edgar states that those problems do not exist at Central Testing Laboratory.

Question Nine Michael's lawyer asks you whether it is absolutely essential that she respond to the motion for summary judgment in order to prevent summary judgment from being granted in favor of Florence on the paternity claim. Please respond.

Assume that instead of not responding to Florence's motion for summary judgment on the paternity claim, Michael both responds to her motion and files his own motion for summary judgment. In support of both, he submits an affidavit from Colonel Richard Otto, an Army doctor who was and is assigned to the undercover mission in San Selmo that Michael was part of. Dr. Otto is unreachable because of his role in the San Selmo operation. His affidavit states that he does not ordinarily perform sperm count tests on CIA personnel who are undercover, but that at the request of his good friend, Michael, Dr. Otto did a sperm count test on Michael in early April, 0002 shortly after Michael received Florence's letter stating that she was pregnant. Dr. Otto's affidavit details his considerable qualifications, states that the sperm count test was done in the appropriate fashion, that a San Selmo lab that analyzed the results stated in its report that Michael's sperm count was so low that the chance that Michael could father a child was only one in a thousand and that this condition almost certainly existed in December of 0001 when Florence alleges that she became pregnant. The affidavit goes on to state that Michael's condition was a temporary one and that testing now or in the future might demonstrate that his count when later tested was normal, but that such subsequent testing would not be inconsistent with the earlier result.

Question Ten Is the affidavit properly usable in these cross motions for summary judgment? Should the court grant summary judgment for Florence or Michael or neither?

Appendix

New Mexico Statutes 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

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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;

.....

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 [is authorized]

....
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.

South Dakota Statutes Annotated Section 12-108.7

The courts of South Dakota may exercise jurisdiction of the person and property to the full extent authorized by the United States Constitution.

New Mexico Statutes Annotated Section 30-9-2

Prostitution

Prostitution consists of knowingly engaging in or offering to engage in a sexual act for hire. . . .

Whoever commits prostitution is guilty of a petty misdemeanor, unless such crime is a second or subsequent conviction, in which case such person is guilty of a misdemeanor.

New Mexico Statutes Annotated Section 30-9-16

Testimony; limitations. . . .

A. evidence of the victim's past sexual conduct, opinion evidence of the victim's past sexual conduct or of reputation for past sexual conduct, shall not be admitted [at trial]. . . .

End of Essay Question

END OF EXAMINATION