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Exam No. _____

**512-001/002 Civil Procedure I
Spring 2010**

UNM School of Law

**Professors T. Occhialino &
A. Sedillo Lopez**

**Final Examination
Three Credits**

**M: May 3, 2010
8:30-11:30 a.m. (3 hrs)**

Examination Format: Essay

Professor's Instructions

This is a **three hour** examination. The suggested times for each of the two questions reflects their relative importance for grading purposes.

This is a **Limited Open Book** exam. You may bring to the examination your Federal Rules of Civil Procedure Supplement. **No** other materials may be brought to the examination.

If you write your examination, please

Write on only every other line in the bluebook

Write on only one side of each page

Write as neatly as possible under the circumstances.

Essay Instructions

Bluebooks for writing: using black or blue ink only, write on every-other line and only on the front side of each page. On the front cover of each bluebook record the class name, professor's name, date of exam, and your examination number. Make sure to number each bluebook in order. **DO NOT WRITE YOUR NAME ON BLUEBOOKS.**

Laptop for typing:

1. Log off all programs that you are currently running or have opened!
2. Make sure you are connected to Lobo-Sec and have authenticated (entered your NetID and password).
3. Start the Exam4 program.
4. Make sure "**Prepare to start new exam**" is marked and click, "**Next.**"
5. Enter your "**Exam ID**" number and confirm it.

6. Click the drop box next to “**Course**” and select your course and professor and confirm. Click, “**Next**”.
7. Optional choices screen: If you choose to change these options please do so. If not, click “**Next**”.
8. Notice you should not turn off or restart your computer before contacting a proctor. Check the box marked “**Got it**” and click, “**Next**”.
9. Type “**Closed**” for exam mode, check the box below that to confirm and click, “**Next**”
10. At this point Exam4 will indicate “**Wait!**” in the lower right side of the screen.
WAIT!
11. The proctor will tell you when to click “**Begin Exam.**”
12. A “**Security Check**” to scan your computer will run. Please be patient. It should disappear within a short period of time. If not, please exit the room and see a proctor.
13. Use the Tools menu above and select “**Insert Answer Separation**” for a page break.

ALL EXAM TAKERS

If you have any questions or feel the need to explain/clarify your interpretation/understanding of the question being posed by the professor, please write them on the exam and do not sign your name.

If you have an emergency, procedural question, or issue that may occur during this exam period, **do not contact the professor**, please contact the Proctor or the Registrar’s Office (William or Ernest) at 277-2146/2147 or jackson@law.unm.edu or tafoya@law.unm.edu

You may not make/keep a copy of this exam! You are required to return this exam with your answer.

A five-minute warning will be given prior to the conclusion of the examination. When time is called, **STOP** immediately.

Bluebook (Writers): At this point immediately stop writing, close all blue books, and gather up any materials. If you have not already filled out the exam receipt, exit the room and fill out the receipt at the table(s) provided near the proctor(s), then proceed to the exam check-in table.

Laptop (Typers): At this point immediately stop typing and proceed to save the exam. Select **End Exam, End Exam Now** from the menu bar. Confirm that you want to end the exam. Select **Submit Electronically** and follow either the Mac or Windows user directions below:

Mac users only:

- Wait for the airport icon to indicate you have reconnected to the wireless network.
 - If the “Check Network Connection” screen displays, select OK.
 - Use your Airport to reconnect to Lobo-Sec.
 - Reauthenticate using your browser.
- Return to Exam4 and select **Exam4 Save Options**, then **Submit Electronically**.
- You will receive a confirmation that your exam has been saved successfully. Click **I understand** and **OK**.

- Exit the exam by selecting **Exam4 Save Options, Exit**.
- If the exam **did not submit electronically**, reconnect to the Lobo-Sec network, making sure you authenticate (open a browser and put in your NetID).
 - Start Exam4 again. Choose **Select existing exam**, highlight the exam name, and click **Submit Electronically**. Click OK to accept the default Start Code.
 - Click **Quit** to exit Exam4.
 - If the exam still did not submit electronically, contact an IT proctor

If you have not already filled out the exam receipt, exit the room and fill out the receipt at the table(s) provided near the proctor(s), then proceed to the exam check-in table.

Windows users only:

- If the Status” window indicates a problem with submitting electronically (usually Error 12: No response), close the window with the Red X and select File and Save Options. Select Exit (don’t worry...the completed exam is saved to your hard drive). Check Network Connection” screen displays, select OK.
 - Exit the exam by selecting **File and Save Options, Exit**.
 - Reconnect to the Lobo-Sec network, making sure you authenticate (open a browser and put in your NetID).
 - Start Exam4 again. Choose **Select existing exam**, highlight the exam name, and click **Submit Electronically**. Click OK to accept the default Start Code.
 - Click **Quit** to exit Exam4.
- Click the verification options and/or OK until you return to Exam4. Select **File and Save Options, Exit**.
- If the exam still did not submit electronically, contact an IT proctor.

If you have not already filled out the exam receipt, exit the room and fill out the receipt at the table(s) provided near the proctor(s), then proceed to the exam check-in table.

[Exam begins on the next page]

Question One
Suggested Time: Two Hours

MEMORANDUM

From: Professor Occhialino and Professor Sedillo Lopez
To: Tammy Tudor (Civ. Pro I Tutor)
Re: Possible Final Examination Question

We get tired of trying to make up new exam questions each year. So this year we wrote to Professor Marshall at Yale Law School, and asked her if she would send us a fact pattern she had used on one of her prior exams that we might adopt for use here in New Mexico. Professor Marshall sent us this federal court fact pattern that follows, but she sent us neither the questions she asked nor the grading outline she used.

We have a task for you:

Read the fact pattern (We've already substituted New Mexico and Texas locations for those used by Professor Marshall and also added New Mexico Rule 1-004);

Identify as many issues as you can find that might be the legitimate subject of Civil Procedure I questions that arise in the fact pattern;

As to each separately- identified issue, please tell us concisely but completely the following:

- a) what the issue is;*
- b) what the arguments are on each side as to each issue;*
- c) what the result should be as to each issue; and*
- d) the reasons supporting your proposed conclusion.*

Based on your responses, we will make a decision whether to use this fact pattern on our final exam and, if so, your responses will help us to frame the questions for the students and also aid us in preparation of a grading outline.

Thank you.

Patricia and Paul Orton live in Sunland Park , New Mexico. Dr. Rita Sena is dentist who lives and practices dentistry in El Paso, Texas.

Mr. Orton is a member of the United States Border Patrol. He and his wife had been domiciled in Brownsville, Texas for twelve years before Orton was transferred to Sunland Park, New Mexico effective January 1, 0001. In late December of 0000 the Ortons left Brownsville and moved to Sunland Park, where they arrived on December 20, 0000. Because they had trouble selling their home in Brownsville, the Ortons left the Brownsville home in the care of their real estate broker, and moved into a furnished apartment in Sunland Park, which they rented on a month-to-month basis beginning on December 24, 0000.

On January 1, 0001, while watching football bowl games at their Sunland Park apartment, Patricia Orton broke a tooth on an avocado pit that she had left in the guacamole she was eating. Patricia called her new neighbor, Nina Nathan, and asked for a recommendation for a dentist to care for Patricia. Nathan recommended Dr. Sena, in El Paso, telling Patricia that Dr. Sena cared for many persons in Sunland Park and even gave a 10% discount to Sunland Park residents whom Sena treated in her El Paso office. On January 2, 0001, Patricia called Dr. Sena's office from her apartment, left a message on the answering machine with her New Mexico phone number (with a 505 area code) , and twenty minutes later received a return call from Dr. Sena who promptly arranged an appointment for the following day. Dr. Sena then sent Patricia the e-mail she always sends to new patients living in Sunland Park, providing directions from Sunland Park to Dr. Sena's office in El Paso, a distance of 8.1 miles.

On January 3, 0001, Patricia kept her appointment with Dr. Sena, received a temporary cap for the tooth and a prescription for penicillin to fight any possible infection from the procedure. Sena did not ask if Patricia was allergic to penicillin nor did she tell Patricia that the prescription was for penicillin.

Patricia is allergic to penicillin. That same day, Patricia filled the prescription at the local pharmacy, and took the medication as directed. She had a severe allergic reaction, fainted in her apartment, hit her head in a fall and suffered serious personal injuries as a result.

On November 1, 0003, before the Ortons filed suit, their counsel, William Conestoga, called Dr. Sena's husband, attorney Daniel Graber, to discuss the Ortons' claims against Dr. Sena. As a result Conestoga sent Graber a fax

indicating that Conestoga would outline the claims in a letter to which Graber would respond. Conestoga sent the letter directly to Dr. Sena who forwarded it to her husband. Graber responded by letter denying the merits of the Ortons' claims. On December 3, 0003, exactly one month before the three year statute of limitations would run on the Ortons' tort claims, Patricia and Paul Orton filed an action against Dr. Rita Sena in Federal District Court in Las Cruces, New Mexico. The Ortons alleged that Dr. Sena was negligent in failing to inquire whether Patricia was allergic to penicillin and that as a proximate result Patricia fell in her apartment and suffered serious injury. Patricia Orton asked for \$500,000 in damages and Paul Orton asked for \$100,000 for his loss of consortium.

On December 13, 0003, Conestoga sent a certified letter to Dr. Sena at her home with the summons and complaint inside. Dr. Sena was not home, so Graber signed for the letter on December 14 and Conestoga received the return receipt signed by Gruber.

On January 10, 0004, Conestoga filed an amended complaint with the Federal District Court. The amended complaint repeated verbatim the allegations against Dr. Sena, but added as a defendant "Sena Smiles, Inc.", the corporate entity that Dr. Sena technically works for. Sena Smiles, Inc. is incorporated in Texas and has its principal place of business in El Paso. Dr. Sena, is the president of the corporation and the sole shareholder. Sena Smiles, Inc. is the owner of the very upscale El Paso office building in which Dr. Sena's office is located. The Ortons sought the same damages (\$500,000 and \$100,000) from Sena Smiles, Inc.

On January 12, 0004, Conestoga's process server attempted to serve Dr. Sena and Sena Smiles, Inc. in Dr. Sena's office but she was not in. Instead he hand-delivered the amended complaint to Dr. Sena's receptionist, Ramona Conception, at the office of Dr. Sena and then mailed a copy to Dr. Sena at her home address. The return of service was filed on January 14, 0004, and stated that process was served on Dr. Sena and Sena Smiles Inc. by delivering a copy of the summons and complaint to the office of Dr. Sena, serving it on Ramona Conception and mailing a copy to Dr. Sena at her home address.

On January 22, 0004, Graber wrote to Conestoga, informing him that he was aware that suit had been filed against the two defendants, but that neither Dr. Sena nor Sena Smiles, Inc. had been served properly. That day, Graber filed an entry of appearance in the lawsuit on behalf of Dr. Sena and Sena Smiles, Inc.

Nothing further transpired until February 28, 0004, when the Ortons filed a motion for default judgment. Accompanying the motion was the December 14, 0003 return receipt signed by Graber upon receipt of the certified letter and the January 14, 0004 return of service following service on Ramona Conception.

The motion for default judgment was accompanied by a clerk's certificate as to the state of the record indicating that a complaint had been filed and that no answer or other pleading had been timely filed in the clerk's office by Dr. Sena or Sena Smiles, Inc.

The February 28, 0004 motion for default judgment was granted by the federal court on March 2, 0004. The Court entered a judgment finding liability on the part of Dr. Sena and Sena Smiles, Inc. and set a date for a hearing on damages on March 4, 0004. On March 4, 0004, the Ortons were the only parties present at the hearing on damages and they presented evidence of their damages. After a two hour hearing the trial court awarded Patricia Orton \$700,000 and Paul Orton \$100,000 against Dr. Sena and Sena Smiles, Inc. and entered final judgments for that amount against each defendant.

On March 7, 0004, Dr. Sena and Sena Smiles, Inc. filed motions pursuant to Rule 55(c) for relief from the default judgment, asserting good cause for relief in that the judgment was void and otherwise invalid.

Accompanying the motions was Dr. Sena's proposed answer, denying malpractice, and containing a counterclaim for defamation. The counterclaim alleged that on February 1, 0004, Plaintiffs Paul and Patricia Orton had written a letter to the editor of the Albuquerque Journal falsely asserting the Dr. Sena had been disbarred from practice in Maine after which she moved to Texas, falsified her records, and thereby was granted a license to practice in Texas through fraud. Dr. Sena demanded damages of \$50,000 in the counterclaim.

Also accompanying the motions was Sena Smiles, Inc.'s proposed answer which denied that Dr. Sena was negligent and also asserted as an affirmative defense that the statute of limitations had run on the Ortons' lawsuit against Sena Smiles, Inc.

The district court denied the motions to set aside the default judgments. The court made no findings of fact. However, at the hearing on the motion to set aside default judgment, the court stated:

I see no reason to reopen the default judgment. Rule 55(c) controls and that Rule certainly allows for relief from judgments on the ground that a judgment is void, but this judgment is not void because it is clear that Dr. Sena and Sena Smiles, Inc. had actual notice of the lawsuit as did Dr. Sena's lawyer-husband. I'm going to uphold the default judgments in their entirety and I dismiss Dr. Sena's counterclaim with prejudice for lack of subject matter jurisdiction.

**END OF QUESTION ONE
APPENDIX TO QUESTION ONE FOLLOWS**

Appendix to Question One

New Mexico RULE 1-004 PROCESS

....

C. Service of process; return.

Service of process shall be made with reasonable diligence, and the original summons with proof of service shall be filed with the court. . . .

D. Process; by whom served. Process shall be served as follows:

Service may be made by any person who is over the age of eighteen (18) years and not a party to the action;

E. Process; how served; generally.

(1) Process shall be served in a manner 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.

....

(3) Service may be made by mail or commercial courier service provided that the envelope is addressed to the named defendant and further provided that the defendant or a person authorized by appointment, by law or by this rule to accept service of process upon the defendant signs a receipt for the envelope or package containing the summons and complaint, writ or other process. Service by mail or commercial courier service shall be complete on the date the receipt is signed as provided by this subparagraph. . . .

F. Process; personal service upon an individual. Personal service of process shall be made upon an individual by delivering a copy of a summons and complaint or other process:

(1)

(a) to the individual personally; or if the individual refuses to accept service, by leaving the process 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; or

(b) by mail or commercial courier service as provided in Subparagraph (3) of Paragraph E of this rule.

(2) If, after the plaintiff attempts service of process by either of the methods of service provided by Subparagraph (1) of this paragraph, the defendant has not signed for or accepted service, service may be made by delivering a copy of the process to some person residing at the usual place of abode of the defendant who is over the age of fifteen (15) years and mailing by first class mail to the defendant at the defendant's last known mailing address a copy of the process; or

(3) If service is not accomplished in accordance with Subparagraphs (1) and (2), then service of process may be made by delivering a copy of the process at the actual place of business or employment of the defendant to the person apparently in charge thereof and by mailing a copy of the summons and complaint by first class mail to the defendant at the defendant's last known mailing address and at the defendant's actual place of business or employment.

G. Process; service on corporation or other business entity.

(1) Service may be made upon:

(a) a corporation by serving a copy of the process to an officer, a managing or a general agent or to any other agent authorized by appointment, by law or by this rule to receive service of process.

(2) If a person described in Subparagraph (a) of this subparagraph refuses to accept the process, tendering service as provided in this paragraph 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.

....

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

....

End of Appendix to Question One

Question Two
Suggested Time: One Hour

All events occur in New Mexico. Mary Madre is married to Michael Madre, though they have been estranged and live apart. Peter Padre is married to Pia Padre though they have been estranged and live apart. In New Mexico, adultery is a crime.

Mary Madre gave birth to a full-term baby girl, Nina, on September 25, 0001. The almost-certain possible dates for conception are December 26 to December 30, 0000.

Additional Facts and Question One:

Peter Padre learned from an acquaintance that Madre was planning to file a paternity action charging him with fathering Nina. Padre is an acquaintance of Madre, and Madre told him that she kept a personal hand-written diary at her home in which she recorded, among other things, any sexual relations she may have had. Padre believes that this diary will contain entries showing that Madre engaged in sexual relations with other men during the time when she would have gotten pregnant and thus will cast doubt on Madre's claim that he fathered Nina.

Question One :

You are a clerk in the law firm that Padre has hired to represent him in this matter. Your senior partner sends you the following: "I fear that the diary will 'disappear' before we get to read it if the diary contains support for Padre's defense as he insists. A) One associate suggested a Rule 27 motion and another suggested a TRO. Explain the requirements and workings of each to me and tell me which one is preferable to assure that we preserve the diary before Madre sues and why; and B) What can we do if Madre were to admit that she had the diary, but that she destroyed it at the end of the year 0000, as she does annually with her diary for each year?"

Please respond fully but concisely.

Additional Facts and Question Two:

On October 15, 0001 Madre filed a paternity action against Padre, in the State District Court in New Mexico, seeking a declaration that Padre is the father of Nina and that he is obligated to pay child support. In his answer,

Padre asserted that he could not be the father because he had a vasectomy performed by Dr. Doolittle in mid-0000 at Bigtown Hospital.

Madre has heard rumors that Dr. Doolittle had his hospital privileges suspended for a time after the Bigtown Hospital Review Board investigated Dr. Doolittle's performance of vasectomies in 0000 and found an alarming rate of failures. Madre has reasonable grounds to suspect that the Board reviewed Doolittle's operation on Padre and she would like to establish that the Board found that he failed to perform that operation correctly so that it was unsuccessful, thus supporting her claim that Padre is the father.

The New Mexico Legislature passed a statute (NMSA 41-9-1 to 7—The Hospital Review Process Organization Act) to encourage hospitals to investigate the competence of doctors with staff privileges and to assure good care in their facilities.

Section 41-9-5 of the act provides:

All data and information acquired by a review organization in the exercise of its duties and functions shall be held in confidence and shall not be disclosed to anyone except to the extent necessary to carry out remedial measures within the hospital. In all other cases, no person shall disclose what transpired at a meeting of a review organization or what findings it made or what measures it took in response to the findings.

Madre has sent a notice to depose Dr. Benjamin, the Chair of Bigtown Hospital's Review Board and issued a subpoena (you may assume it is in proper form) pursuant to Rule 45(a)(1)(A)(iii) to compel Dr. Benjamin to bring all documents related to the Board's investigation of Dr. Doolittle to the deposition so that Madre can inspect them and copy them.

Question Two:

You represent Bigtown Hospital. What can you do to seek to prevent the deposition and the disclosure of the documents? What arguments can you make and what is the likelihood that they will succeed?

Please respond fully but concisely.

Additional Facts and Question Three:

Having failed to obtain Madre's diary, Padre sent interrogatories to Madre. Interrogatory 12 asked Madre: "Please state all the persons you had sexual relations with from the period December 15, 0000 to January 5,0001." In Madre's answer to Interrogatory 12, Madre responded:

“I object to that question on two grounds. First, the matter is invades my privacy rights; Second, if the question is otherwise proper, I decline to answer on the ground that to do so would violate my constitutional right to remain silent and not incriminate myself.”

Question Three: You are Padre’s lawyer. What will you do to seek to obtain an answer to the question and will you be successful in your attempt to do so?

Please answer concisely but fully.

Additional Facts and Question Four:

Paternity must be established in New Mexico by clear and convincing evidence.

Madre made a motion for summary judgment in proper form. She asserted that there was no material issue of fact in dispute about who was the father of Nina and it was Peter Padre.

The following are the only matters presented to the court in conjunction with the motion:

In support of the motion, Madre presented the affidavit of Dr. Xavier Egbert, a renowned expert in the field of DNA testing. Dr. Egbert’s affidavit stated his qualifications (which are impeccable), stated that he received a sample of Nina’s DNA and a sample of Padre’s DNA (which Padre provided to Madre when asked to do so in discovery) and stated that Dr. Egbert had reached an opinion as to the likelihood that Padre was the father. Dr. Egbert stated that based on his analysis, Padre cannot be excluded as the father and the probability of his being the father based on the allele marker matches is 99.9 percent.

In opposition to the motion, Padre presented:

- a. His own affidavit that he did not have sexual relations with Madre after July, 0000;
- b. The affidavit of Dr. Doolittle, who swore that he performed a vasectomy on Peter Padre in mid-0000; and
- c. The affidavit of Padre’s best friend, Sam Solon, who is in the Armed Forces and now stationed in Iraq. Solon’s affidavit states that he is an adult and has first-hand

knowledge of the whereabouts of Padre during the period from December 20, 0000 to January 10, 0001 and that Padre was visiting Solon in Germany during that time while Solon was on temporary relief from duty in Iraq.

Question Four

You are the judge. Resolve the motion for summary judgment. Explain your reasoning concisely but fully.

End of Question Two
End of Examination