

**STETSON UNIVERSITY COLLEGE OF LAW
St. Petersburg, Florida**

GENERAL INSTRUCTIONS

I DIRECT THE ATTENTION OF ALL STUDENTS TO THE FOLLOWING:

1. The answers and the pledge are to be identified by examination number only.
2. During the course of the examination, the examination and answers may not be removed from the rooms prescribed for taking the examination.
3. This examination ends at the expiration of the time allotted, or when the examination is turned in, whichever comes first.
4. The instructor will be permitted to grade only answers that have been submitted during the examination, in the manner indicated by the instructor.
5. From the conclusion of the time prescribed for the examination, students are forbidden from communicating with the instructor with reference to this examination until grades have been turned into the Registrar's Office except that students may communicate with the instructor at any time concerning matters related to the Code of Student Professional Responsibility.

TIME FOR EXAMINATION: THREE AND ONE-HALF HOURS

SPECIAL INSTRUCTIONS

1. This is a LIMITED OPEN BOOK examination. You previously have been told which materials you may use during the examination. If you had a question about whether a particular item was allowed in the examination, you should have raised that question before the examination. If you are in doubt, do not bring the item to the exam.
2. This examination consists of fourteen (14) pages. You should check now that you have all pages.
3. The examination is in three Sections.
 - Section I of the examination requires you to provide answers to three (3) essay questions based on a single hypothetical fact situation. Section I is worth a total of sixty (60) points. You must answer all of the questions raised in Section I. My

suggestion is that you allot two hours and fifteen minutes to Section I.

- Section II of the examination consists of seven (7) multiple choice questions. Each multiple choice question is worth four (4) points for a total value of twenty-eight (28) points in Section II. You must answer all of the questions set forth in Section II. I suggest you allot forty-five minutes to Section II.
 - Section III requires you to select one of three essay questions to answer. You should answer **ONLY ONE** of the questions in Section III. Your answer to the question you choose in Section III will be worth twelve (12) points. My suggestion is that you allot thirty (30) minutes to Section III.
4. Please use a blue book or blue books or a computer to answer the essay questions in Sections I and III. Write your exam number on each blue book you use. Please put your answer to Section III in its own blue book or begin it on a new page if you are using a computer.
 5. Please use the answer sheet provided with your examination materials to answer the multiple choice questions in Section II. Make sure to write your examination number on the answer sheet. If you believe that any of the multiple choice questions are ambiguous or you perceive a mistake or flaw in the question, you should still answer the question. Then, explain concisely on the back of the answer sheet why you think the question is flawed. If you use this challenge option, please mark the appropriate box on the front of the answer sheet to ensure that I will review what you have written on the back of the page. I do not suggest that you use this challenge option often because it takes time away from the rest of the exam.

END OF INSTRUCTIONS – GOOD LUCK!!

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PART I (Suggested Time: Two Hours and Fifteen Minutes)

ANSWER ALL QUESTIONS IN PART I.

George W. Bush is the President of the United States. He lives in the White House at 1600 Pennsylvania Avenue in Washington, the District of Columbia. Mr. Bush has been properly served with a complaint filed against him in the Superior Court for the District of Columbia. Mr. Bush is the only defendant in the case. You should assume that the District of Columbia is treated for all purposes relevant to this examination as if it were a state. You should also assume that the Washington, D.C. long arm statute reads in relevant part as provided in Attachment A to this examination.

The plaintiff in the case against the President is Lydia Fall, a citizen of Washington, D.C. Ms. Fall knew Mr. Bush when he lived in Texas. As you probably know, Mr. Bush loves Texas. Indeed, the press and the White House Communications Office refer to the President's ranch near Waco, Texas as the "Western White House." Before his election, Bush spent the last 30 years in Texas including stints in the oil business and baseball. He also spent six years as the governor of Texas.

Ms. Fall makes two claims against Mr. Bush. The first claim ("Count I") is for breach of contract and concerns the time Mr. Bush spent as the Chief Executive Officer of the Texas Rangers baseball team. The Texas Rangers baseball team is a corporation organized under Texas law with its principal place of business in Austin, Texas. Ms. Fall claims that the Texas Rangers hired her as its publicity agent in the Washington, D.C. area. The contract allegedly provided that Ms. Fall would attempt to publicize the team in Washington on the radio in exchange for \$50,000. In particular, the contract provided that Ms. Fall would "use her best efforts to obtain radio publicity for the Rangers." Ms. Fall claims that she did her job but that the Rangers did not pay her.

The contract came to be after Ms. Fall made an unscheduled visit to the Texas Rangers' main office in Austin, Texas. She was so persuasive and so willing to bend over backwards for the business (for example, even agreeing to open an account at Austin National Bank for purposes of receiving payments) that the Rangers agreed on the spot to hire her. This hiring is even more impressive when you consider that the Rangers had not considered seeking publicity in Washington before the meeting. After all, Washington does not have a baseball team. The closest the Rangers come to playing in Washington is when they play in Baltimore, Maryland.

Both the Texas Rangers and Mr. Bush are parties to the contract. Mr. Bush agreed in the contract that he would guarantee the Texas Rangers' payments under the agreement. Ms. Fall sought this guarantee because the Rangers were in financial trouble at the time the contract was executed.

The second claim ("Count II") concerns an entirely separate contract, this one between Ms. Fall and only Mr. Bush. Ms. Fall claims that Mr. Bush agreed to sell her a rare baseball, one

that Abner Doubleday used in the first baseball game, for \$35,000. Ms. Fall claims she paid the money but never got the ball.

Ms. Fall filed the lawsuit on January 15, 2002. Mr. Bush thought that he would fare better in federal court than in the D.C. Superior Court. Therefore, Mr. Bush removed the case from the D.C. Superior Court to the United States District Court for the District of Columbia. The removal took place on March 1, 2002 and the notice of removal was filed on that date. On April 15, 2002 Ms. Fall filed a motion to remand the action. Ms. Fall made the following three arguments in support of her motion to remand: First, the federal court lacks subject matter jurisdiction over the action because the requisite amount in controversy is lacking. Second, the federal court lacks subject matter jurisdiction over the action because there is no diversity of citizenship between Ms. Fall, a citizen of Washington, D.C. and Mr. Bush, also a citizen of Washington, D.C. due to his status as the President and his residence in the White House. Third, Mr. Bush's notice of removal was defective in that Mr. Bush removed the case more than 30 days after the lawsuit was filed.

For the purposes of all questions set forth below, please assume that there are no special rules in place based on Mr. Bush being the President of the United States. In other words, he should be treated as any other citizen.

Question 1
(15 points)

You are a lawyer for Mr. Bush. Please respond to each argument Ms. Fall has raised in her motion to remand the lawsuit to the Superior Court of the District of Columbia.

Question 2
(35 points)

Assume for the purpose of this question that the case remains in the United States District Court for the District of Columbia. You should also assume that Mr. Bush will not assert a counterclaim against Ms. Fall in the litigation. You are still a lawyer for Mr. Bush. He wants to sue the Texas Rangers in the lawsuit with respect to Count I. Please first advise Mr. Bush on his options to make the Texas Rangers a party under the Federal Rules of Civil Procedure. You should mention every way you think joinder of the Rangers might be obtained under the Rules given the facts. You should also advise the President as to whether joinder in this situation is consistent with the United States Code, the United States Constitution, and any relevant law of the District of Columbia. Be sure to address each of these areas even if you should conclude that one or more of them would be dispositive in your analysis.

Question 3

(10 points)

Again assume that the case has remained in the United States District Court for the District of Columbia. This time, however, assume that you are the judge to whom the case has been assigned. Mr. Bush has moved for summary judgment on Count I of the Complaint, the one concerning advertising for the Texas Rangers.

The court has already ruled that the substantive law that applies to this case provides that in order to prevail on a breach of contract claim, Ms. Fall must prove: (1) the existence of a contract; (2) a breach of the contract and (3) damage as a result of the breach.

Mr. Bush's argument in his summary judgment motion is that Ms. Fall cannot prove that she performed under the contract. In other words, the President is claiming that Ms. Fall must lose because she cannot establish that there has been a breach of the agreement to pay. The obligation to pay never arose because she never performed. He does not contest the existence of the contract or the fact that damages would be present if there were a breach. To support the motion, Mr. Bush submitted a number of affidavits. The first affidavit was of Ms. Fall's business partner who claims that Ms. Fall did no work for the Rangers during the relevant period. He says he knows this is the case because he and Ms. Fall spent all their time working on another client during that time. A second affidavit came from the other client referred to in Ms. Fall's partner's affidavit. This other client has testified in the affidavit that Ms. Fall spent all her time working on his account during the relevant period of time. In fact, the affidavit also recounted that Ms. Fall bragged about the fact that she was taking the baseball team's money and doing no work. The remaining affidavits were of the advertising managers of every radio station in the Washington, D.C. area. Each affidavit confirmed that Ms. Fall did not approach their radio station concerning the Rangers during the relevant period.

In response to Mr. Bush's summary judgment motion, Ms. Fall submitted only her own affidavit in which she said that she did perform work for the Rangers by trying to line up radio advertisements. She admits, however, that she has no documents to show the extent of her efforts.

As the judge, how do you rule on the summary judgment motion? State the reasons for your decision.

END OF PART I - TURN PAGE FOR PART II

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PART II (Suggested Time: 45 minutes; 4 points per question (28 total points))

ANSWER ALL QUESTIONS IN PART II

Facts for Questions 1 & 2

Paul entered into a contract with John and George. Under the contract, John and George agreed to perform in a band with Paul two times per month. When the first time to perform came, John and George did not show up. As a result of the breach, Paul has lost a number of engagements and his stature as a musician has been damaged. Paul has sued John and George in federal court for breach of contract.

Question 1

Paul served the complaint on both John and George without seeking a waiver of service of summons under Rule 4 of the Federal Rules of Civil Procedure. John was served with the complaint on February 1, 2002, when a 15 year old girl handed it to John on the street. On February 20, 2002, John filed a motion claiming that the court lacked personal jurisdiction over him. The court denied the motion on March 1, 2002.

On March 10, 2002, John filed his answer to the complaint. Which of the following answers sets forth the MOST INCLUSIVE list of matters John may properly raise in his answer?

- A. Only that the court lacks subject matter jurisdiction in the case.
- B. Only that venue is improper in the case.
- C. Only that service of the complaint by a 15 year old was not proper.
- D. Only that Paul's complaint fails to state a claim on which relief can be granted.
- E. Only that Paul has failed to join a party under Rule 19.
- F. None of the above matters may properly be raised in this answer under the circumstances.
- G. Only lack of subject matter jurisdiction and that Paul failed to join a Rule 19 party may properly be raised.
[Further options on next page]
- H. Only lack of subject matter jurisdiction and that service of process was not proper may properly be raised.

- I. Only lack of subject matter jurisdiction, that Paul failed to join a Rule 19 party, and that venue is improper may properly be raised.
- J. Only lack of subject matter jurisdiction, that Paul failed to join a Rule 19 party, and that the complaint does not state a claim upon which relief can be granted may properly be raised.

Question 2

George did not respond to the complaint in any way. What is the BEST advice you can give Paul as to how to proceed, assuming that Paul wishes to obtain some recovery from George?

- A. Paul should immediately move for summary judgment.
- B. Paul should seek a default judgment by filing a motion with the judge seeking the entry of default by George on the docket.
- C. Paul should seek to have the clerk enter George's default on the docket. Thereafter, Paul should request a default judgment from the clerk.
- D. Paul should seek to have the clerk enter George's default on the docket. Thereafter, Paul should request a default judgment from the judge.
- E. Paul will need to wait to proceed against George until he is able to prevail on his claim against John based on the operation of the final judgment rule.

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Facts for Questions 3, 4 and 5

Harry and Ron, both citizens of the United States, attend Pigblemish Academy, a private boarding school specializing in training magicians. As with many magicians, Harry and Ron jealously guard their secrets. One day after attending class, Harry returned to his room to find Ron going through Harry's book of tricks. Harry kicked Ron out. Harry also immediately brought suit against Ron in a United States District Court claiming that Ron stole Harry's intellectual property, in other words, the tricks. You should assume that the requirements for federal court jurisdiction have been met.

Harry made a proper request of Ron under Fed. R. Civ. P. 4(d) to waive service of process. Harry sent his request for waiver of service to Ron on March 1. On March 10, Ron timely returned the executed waiver in conformance with the rules. On April 15, Ron moved to dismiss the complaint for failure to state a claim.

Question 3

The date is now April 25. Harry wants to amend his complaint to add a claim that Ron slashed the tires on Harry's car in retaliation for the filing of this lawsuit. You are Harry's lawyer. What is the **BEST** advice to Harry about the amendment?

- A. Harry may file the amended complaint without any doubt.
- B. While Harry may file the amended complaint without any doubt, he should also seek a default against Ron for failure to respond to the original complaint within the proper time.
- C. Harry may seek leave to file the amended complaint. The court should grant leave to file in this situation because "justice so requires."
- D. Harry may seek leave from the court to file the amended complaint. The court should grant leave to file the amended complaint if it determines that the tire slashing "arose out of the conduct, transaction or occurrence" alleged in the original complaint.
- E. Harry will not be able to amend his complaint under the federal rules. Therefore, Harry should focus his efforts on the original complaint.

Question 4

Assume for the purpose of this question and question 5 below that Ron's motion to dismiss is denied and that the case proceeds on Harry's amended complaint. After Ron answered the amended complaint, the parties engaged in the required disclosure process set forth in Rule 26(a). Thereafter, Ron sought to gain evidence that Harry's tricks were not, in fact, secret. He sought such evidence by serving a subpoena on the head magician at Pigblemish Academy, Dr. Dore. The subpoena required Dr. Dore to attend a deposition. You should assume that the subpoena was proper in form and complied with the Federal Rules in all relevant respects.

You are the lawyer for Dr. Dore. You and he arrive at the deposition and questioning begins. Fairly soon, Ron's lawyer asks Dr. Dore to describe how certain magic tricks are done. Ron believes the information will show that some of Harvey's tricks are common knowledge, a defense to Harry's claim. Dr. Dore does not want to answer these questions. The tricks are confidential and, after all, magicians never tell how they do tricks. As Dr. Dore's lawyer, which of the following options BEST states a proper course of action for you to take under the Federal Rules of Civil Procedure.

- A. You may instruct Dr. Dore not to answer the questions on the ground that they call for confidential information that is arguably not even relevant to the case.
- B. You may move to strike any testimony that Dr. Dore gives concerning the magic trick in order to protect your client's legitimate business interests.
- C. You may end the deposition because by being abusive Ron has forfeited his privilege to burden a non-party with discovery.
- D. You may end the deposition and immediately seek a court order to limit the questioning at the deposition based on Dr. Dore's legitimate business interests.
- E. You may not interfere in the deposition questioning nor may you stop the deposition once it has begun, so long as the deposition lasts no more than seven hours.

[Please turn page for question 5]

Question 5

Ron now seeks to depose Harry. The deposition is scheduled for a day on which Harry is supposed to be on vacation. On the day of the deposition, Harry fails to show up. Which of the following statements is MOST ACCURATE concerning the consequences of Harry's action?

- A. Harry may be required to pay Ron's costs, including attorney's fees, in bringing a motion related to the failure to attend. More severe sanctions, however, must await Harry's defiance of a court order.
- B. The court in its discretion may dismiss Harry's complaint.
- C. The court must dismiss Harry's complaint if Ron requests this sanction.
- D. Harry may avoid sanctions if, after he realizes he has missed the deposition, he moves for a protective order on the ground that Ron purposefully scheduled the deposition during Harry's vacation so as to annoy and unduly burden Harry.
- E. Harry may be held in contempt of court based in his failure to attend the deposition.

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[Please turn page for the remainder of Section II]

Facts for Questions 6 and 7

Bert and Ernie are business partners who jointly own a dry cleaning business. Telly owns a book store next to Bert and Ernie's dry cleaning shop. The neighbors got along quite well for many years. Things began to go downhill last year when Telly found out that his basement was contaminated with chemicals used in dry cleaning. You should assume that Telly will prevail at trial if he proves that the chemicals came from Bert and Ernie's shop and that he suffered damages as a result of those chemicals.

After finding out about the chemicals, Telly filed suit against Bert and Ernie in a United States Federal District Court. You should assume that the case is properly in federal court.

Question 6

The discovery in the case was quite acrimonious. After discovery closed on April 1, Telly moved for partial summary judgment on the issue of whether the dry cleaning chemicals in the basement came from Bert and Ernie's shop. Telly's lawyer claims that Bert and Ernie cannot establish after discovery that the chemicals did not come from their shop. Recognizing that Telly's lawyer has moved for summary judgment on an erroneous legal standard (see Celotex), Bert and Ernie filed a Rule 11 motion with the court on April 21.

Which of the following statements is the MOST ACCURATE statement of the court's likely ruling on the Rule 11 motion?

- A. The court should deny the motion without question on these facts.
- B. The court should deny the motion if Telly's lawyer proves that he acted in good faith in making the summary judgment argument.
- C. The court should deny the motion because Rule 11 applies only to pleadings and not motions.
- D. The court should grant the motion without question based on the violation of Rule 11(b)(2).
- E. The court should grant the motion if Bert and Ernie prove that Telly's lawyer acted in bad faith in making the summary judgment argument.

Question 7

Assume for the purposes of this question that the court denies Telly's summary judgment motion and that the case goes to trial by jury. After trial, the jury returns a verdict in favor of Telly. Which of the following statements is NOT correct concerning a Motion for a New Trial filed by Bert and Ernie?

- A. Even if Bert and Ernie had not made the Motion for a New Trial, the trial judge could have made the motion herself.
- B. The trial judge may grant Bert and Ernie's motion if she finds that the jury's verdict is against the great weight of the evidence.
- C. The judge must deny Bert & Ernie's motion if they did not make a Motion for Judgment as a Matter of Law at the close of all the evidence. This is true even if Bert & Ernie made the Motion for Judgment as a Matter of Law at the close of Telly's case.
- D. If the trial judge grants the Motion for a New Trial, Telly most likely will not be able to appeal that order immediately.
- E. If Bert & Ernie have also made a Renewed Motion for Judgment as a Matter of Law, the trial judge should still rule on the Motion for New Trial even if she grants the Renewed Motion for Judgment as a Matter of Law.

END OF PART II - TURN PAGE FOR PART III

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PART III (Suggested Time: 30 minutes; 12 points)

ANSWER ONLY ONE OF THE FOLLOWING QUESTIONS.

Your assignment is to select one of the following statements and explain why you agree or disagree with the statement.

1. The rule in International Shoe needs to be changed to address the realities of the new Internet age.

2. The Federal Rules of Civil Procedure have lived up to the aspirations embodied in Rule 1 "to secure the just, speedy, and inexpensive determination of every action."

3. Federal Rule of Civil Procedure 9(b) should be deleted and all claims should be subject to the general notice pleading standard embodied in Rule 8.

**ON MY HONOR, I HAVE
NEITHER GIVEN NOR
RECEIVED AID ON THIS
EXAMINATION.**

EXAM NO. _____

END OF EXAM

HAVE A WONDERFUL SUMMER

ATTACHMENT "A" BEGINS ON NEXT PAGE

ATTACHMENT A

District of Columbia General Laws

Section 1: Acts subjecting person to jurisdiction of courts of the District of Columbia (the "District").

(1) Any person, whether or not a citizen or resident of the District, who personally or through an agent does any of the acts enumerated in this subsection thereby submits himself or herself and, if he or she is a natural person, his or her personal representative to the jurisdiction of the courts of the District for any cause of action arising from the doing of any of the following acts:

(a) Operating, conducting, engaging in, or carrying on a business or business venture in the District or having an office or agency in the District.

(b) Committing a tortious act within the District.

(c) Owning, using, possessing, or holding a mortgage or other lien on any real property within the District.

(d) Contracting to insure any person, property, or risk located within the District at the time of contracting.

(e) Causing injury to persons or property within the District arising out of an act or omission by the defendant outside the District, if, at or about the time of the injury, either:

1. The defendant was engaged in solicitation or service activities within the District; or

2. Products, materials, or things processed, serviced, or manufactured by the defendant anywhere were used or consumed within the District in the ordinary course of commerce, trade, or use.

(f) Breaching a contract in the District by failing to perform acts required by the contract to be performed in the District.

(2) A defendant who is engaged in substantial and not isolated activity within the District, whether such activity is wholly interstate, intrastate, or otherwise, is subject to the jurisdiction of the courts of the District, whether or not the claim arises from that activity.

END OF ATTACHMENT A