

**STETSON UNIVERSITY COLLEGE OF LAW  
Gulfport, 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: FOUR HOURS**

**SPECIAL INSTRUCTIONS**

1. This is a LIMITED OPEN BOOK examination. You have previously been advised as to which materials you may use during the examination. You may bring to the exam the required books for the course, any handouts distributed as part of the class, your class notes and any outlines you prepared yourself or in conjunction with others. You may not bring any of my past exams or answers with you to the exam.
2. This examination consists of fourteen (14) pages. You should check now that you have all pages. You will have four hours to complete the exam.
3. The examination is in two Sections:
  - Section I of the examination requires you to provide essay answers. The Section contains two (2) questions. **YOU MUST ANSWER BOTH QUESTIONS IN**

**SECTION I.** Section I is worth a total of 79 points. My suggestion is that you allot a total of approximately three hours and fifteen minutes to Section I. The point breakdowns and suggested times for the two essay questions are as follows: Question #1: 54 points; Suggested Time: Two Hours and Fifteen Minutes; Question #2: 25 points; Suggested Time: One Hour.

- Section II of the examination consists of seven (7) multiple choice questions. **YOU MUST ANSWER ALL QUESTIONS IN SECTION II.** Each multiple choice question is worth three (3) points. Therefore, in total Section II is worth twenty-four (21) points. I suggest you allot approximately Forty-Five (45) Minutes to Section II.
4. Please use a blue/white exam book or books or a computer to answer the essay questions in Section I. Make sure to write or type your exam number on your answer, including each blue/white exam book you use. You may use as many exams books or type as many pages as you would like.
  5. Please use the answer sheet attached as the last page of this examination 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. I would not suggest that you use this challenge option often because it takes time away from the rest of the exam.
  6. Each multiple choice question has five possible answers designated A through E. Make sure you consider all possible choices. Thus, you should ensure that you determine whether the question and its potential answers are on more than one page of the examination.
  7. You should assume that every lawsuit referred to in the exam has been filed in a United States District Court (*i.e.*, a federal court) unless otherwise noted.

**END OF INSTRUCTIONS – GOOD LUCK!!**

**HAVE A GREAT BREAK. YOU HAVE EARNED IT.**

**Section I: Total Points = 79; Total Suggested Time = Three Hours and Fifteen Minutes**

**Question #1: (Points = 54; Suggested Time = Two Hours and Fifteen Minutes)**

Donald and Carolyn are business associates. Donald is a citizen of New York State. Carolyn is a citizen of Illinois. From time to time Donald and Carolyn purchase property together and then develop it so that it can be resold usually for a handsome profit. During a recent trip to Chicago, Illinois Donald met Carolyn and together they purchased a piece of property they thought held the strong potential for a profitable resale. The property was totally undeveloped when purchased. Donald and Carolyn owned the property jointly.

After purchasing the property, Donald and Carolyn jointly entered into a contract with Sam's Construction Company ("Sam"), a corporation organized under Delaware law with its principal place of business in Chicago, Illinois. The terms of the contract required Sam to build a mansion on the property. Among other things, the contract provided that the mansion would include a basement built to certain specifications set forth in the contract. In exchange for building the mansion, Donald and Carolyn agreed to pay Sam \$300,000. The contract also provided that in addition to the cash payment Donald and Carolyn would convey to Sam a 10% ownership interest in the property upon completion of the project. In this way, Sam would benefit from any resale of the developed property.

Donald and Carolyn also entered into a contract with Amy's Pools, Inc. ("Amy"), a corporation organized under Illinois law with a principal place of business in Chicago, Illinois, to build a pool on the property. Under this contract, Amy was to build a state-of-the-art swimming pool. Amy was to receive \$80,000 in exchange for building the swimming pool. Sam was not so happy to have Amy involved in the project. He was engaged in an on-going dispute with Amy concerning payments that Sam claimed Amy owed him on other projects. Luckily for Sam, the mansion project did not require Sam and Amy to work together in any respect.

Sam was very excited about this project. He immediately started planning for the construction of the mansion. One of the first things he did was enter into sub-contracts to complete certain portions of the project. One such contract was with Excavation by Troy and Bill ("Troy & Bill"). Troy & Bill was a partnership with its principal place of business in eastern Illinois. Troy and Bill themselves were citizens of the State of Indiana. Sam was a bit hesitant to hire Troy & Bill because Sam and Troy & Bill were also currently in a dispute involving another property. It seems that Troy & Bill did some work for Sam and, at the end of that project, took some of Sam's equipment worth \$75,000. Sam thinks he might eventually have to sue Troy & Bill to get it back. He decided to use Troy & Bill on this project because Troy & Bill was the only excavation organization that could meet the Donald/Carolyn schedule. Under the Sam/Troy & Bill contract, Troy & Bill was to dig the basement for the mansion in exchange for a monetary payment. Troy & Bill had no contractual relationship with either Donald or Carolyn.

Despite all of the actors' hopes, dreams, and expectations, things do not work out as planned. Amy had incredible troubles with the swimming pool. Indeed, she was behind schedule and eventually stopped work completely.

Sam appeared to be doing much better. After Troy & Bill completed work on the basement, Sam was able to complete the remainder of the work on the mansion on schedule. He then informed Donald and Carolyn that the project was complete. Donald's inspection, however, proved otherwise, at least to Donald. Donald claimed that the basement was built entirely incorrectly. Donald rejected Sam's tender of completion of the property and refused to pay him or convey the 10% interest in the property.

Needless to say, Sam was not happy with this turn of events. In addition to believing Donald was wrong in rejecting the work, Sam was beginning to suspect that there might be more going on here than meets the eye. Specifically, Sam believed that Donald either has breached the contract or has committed fraud in getting Sam to do the work on the mansion without ever intending to live up to the deal.

Donald filed suit against both Sam and Amy in a federal court in Chicago, Illinois (the Northern District of Illinois). With respect to Sam, Donald claimed that Sam had breached the contract by failing to complete the contract to the terms specified, namely the construction of the mansion to include a basement with certain requirements. Donald sought specific performance of the contract, thus requiring Sam to "redo" the mansion to conform to the specifications. In the alternative, Donald sought monetary damages for the claimed breach. In terms of Amy, Donald claimed that Amy breached the contract by failing to complete the swimming pool on the timetable set out in the contract. You should assume that the claims asserted by Donald have been adequately pled under substantive law. You should also assume that Sam and Amy agreed to waive service of process.

You are a lawyer working in Illinois. Sam has hired your law firm to represent him in connection with Donald's lawsuit. Sam has asked you to write him a memorandum addressing his options to respond to Donald's suit. In particular, Sam mentioned the following issues when you had your initial meeting with him about this case:

- Sam's preferred outcome would be to get Donald's suit against him thrown out of court.
- Sam thinks that having Amy in the suit, if it must go forward, is not good for him. It turns out that Amy is not well-liked in the community principally because she has a reputation for shoddy work and generally being an untrustworthy person. Sam does not want to be associated with her.
- Failing getting the case thrown out of court, Sam wants to do whatever he can to assert all his possible claims against Donald, Troy & Bill, and Amy.

One additional piece of information may be important to you. The relevant law allows a transfer of ownership of jointly held property so long as one of the joint owners signs the deed and the other joint owner is deemed “unavailable.”

Your assignment is to prepare a memorandum to Sam discussing his possible courses of action in the lawsuit both offensively and defensively. You should be as comprehensive as possible within the confines of the factual situation presented. You should also strive to be organized in your memorandum. Make sure that you consider subject matter jurisdiction to the extent you deem appropriate. If you do so, make sure you identify the best means of jurisdiction in each case if more than one basis for subject matter jurisdiction exists.

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**Question #2: (Points = 25; Suggested Time = One Hour)**

Stan Abbott (“Abbott”) is a professional comedian. Abbott lives in New York City and has performed his comedy act solely in New York and New Jersey for his entire career. Abbott’s agent was Mr. Foxx (“Foxx”), also a lifelong resident of New York City. Abbott and Foxx had a good relationship.

In January 2004, Foxx sold his agency to Costello Enterprises, Inc. (“Costello”), a corporation organized under California law with its principal place of business in Los Angeles, California. Foxx became an employee of Costello but continued to work with his clients as Costello’s representative.

As far as Foxx’s clients could see, there was only one change in the agency relationship after Costello’s acquisition: Costello required all of Foxx’s clients to sign a contract in order to continue in the agency relationship. The contract came to Abbott as an attachment to an email sent from Costello’s California headquarters. The email indicated that any questions concerning the contract or requests for amendments should be directed to Costello via a reply to the email.

The relevant portions of the contract Abbott received are as follows:

**Agency Agreement**

This Agreement is made as of the 1<sup>st</sup> Day of February, 2004 between Costello Enterprises, Inc. (“Costello”), a California corporation, and Stan Abbott (“Abbott”), a citizen of New York State. The parties agree as follows:

1. Costello will serve as Abbott’s agent. As such, Costello will use its best efforts to secure comedy engagements for Abbott.
2. Abbott agrees that he will pay to Costello twenty-five percent (25%) of his payments for each engagement resulting from Costello’s efforts. Abbott shall

make such payments by sending the twenty-five percent (25%) payment due hereunder to Mr. J. Foxx, agent for Costello, at 121 Park Avenue, New York, New York 12011. Payments are due within seven (7) days after Abbott receives payment for the engagement.

3. The Agreement may be terminated by either party on six months notice.
4. The parties agree that California law will govern the interpretation and enforcement of this Agreement.
5. The parties agree that they have had the opportunity to consult with an attorney in connection with the execution of this Agreement.

**[End of the Agreement]**

After Abbott received the Agreement he tried to get the commission rate reduced from twenty-five percent (25%) to fifteen percent (15%). He did so through repeated email exchanges with Costello's corporate counsel at the California office. Costello would not budge. Abbott eventually signed the Agreement in the same form as he received it.

The Abbott/Costello relationship appeared to be going quite well for most of 2004. Abbott would send a twenty-five percent cut from his Costello initiated performances to Foxx in New York. Abbott never dealt with anyone at Costello other than Foxx after the contract negotiations. However, starting in late 2004 the relationship between Abbott and Foxx began to sour. The problem arose because Abbott started to get a number of offers to perform without Costello's intervention. Abbott did not pay Costello commissions for these performances. Costello was suspicious of this turn of events, believing that Abbott was cheating the company out of commissions.

Costello filed a breach of contract lawsuit against Abbott in federal court in the Central District of California. Abbott has filed a motion to dismiss Costello's complaint claiming that he is not subject to personal jurisdiction in California. You are the United States District Judge assigned to the case. How do you rule on the motion to dismiss? Make sure to explain your reasons for either granting or denying the motion. You may wish to know that the California long-arm statute provides as follows: "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of the United States."

**END OF SECTION I**

**SECTION II BEGINS ON THE NEXT PAGE**

**Section II: Total Points = 21 Pts. (3 pts. per question); Total Suggested Time = 45 Minutes**

**Facts For Questions 1-4**

George and John were business partners in a political consulting firm. They entered into a written partnership agreement that was to govern their relationship. While their venture began with high hopes of a blissful relationship, the reality is that the two former politicians should never have tried to work together. Tensions began to rise as the business partners argued about everything from the logo for the firm to which clients they should represent. Soon, it seemed as if the partners were engaged in all out warfare. George and John decided to terminate their relationship.

Unfortunately, the termination process itself did not go well. The parties distrusted one another and were soon fighting over the division of everything from the paperclips to the serious partnership assets. Finally, George had enough and filed a lawsuit in a federal court in Massachusetts against John for breach of contract. George's one count complaint accused John of breach of contract. In particular, George claimed that John had breached the partnership agreement's provision that required the parties to "work in good faith to divide partnership assets should the partners decide to terminate the business." George sought monetary damages for John's alleged breach of the agreement.

**Question #1**

George formally served John with the complaint under the terms of Rule 4. George accomplished service by having a United States Marshall deliver a copy of the summons and complaint to John's house. The Marshall gave these documents to John's six-year old daughter. You may want to know that the Massachusetts state court rule on service of a complaint on an individual mirrors that set forth in Federal Rule of Civil Procedure 4(e)(2). The service was accomplished on March 1, 2004. On March 15, 2004, John moved for a more definite statement under Rule 12(e). The court denied the motion and notified the parties of its action on March 21, 2004. Which of the following statements is MOST ACCURATE given this factual scenario?

- A. John should be successful in having the complaint dismissed for improper service of process. George's service was improper because the summons and complaint was left with John's daughter who was not a "person of suitable age and discretion."
- B. George may not amend his complaint to add a second claim against John concerning a traffic accident between John and George because that claim does not arise out of the same transaction or occurrence as the claim George asserted in the original complaint. You should assume that there is no issue concerning the statute of limitations on the car accident claim.

- C. George may not amend his complaint to add a second claim against John concerning a traffic accident between John and George without the permission of the Court or John's consent because John has already made an initial response to the complaint through the motion for a more definite statement. You should assume that there is no issue concerning the statute of limitations on the car accident claim.
- D. John has waived his affirmative defense of "release" because he did not raise that matter in his initial response to the complaint, his motion under Rule 12(e).
- E. None of the above statements is accurate.

### **Question #2**

Assume that John files an answer to the complaint in which John asserts a counterclaim against George for violations of a federal law, the Act to Prevent Undue Influence of Public Officials (the "Act"). John's theory is that George actually brought the suit to intimidate John into getting out of the political consulting business. Since John advises public officials in his business, he figures that George was indirectly trying to unduly influence those officials. The problem is that the United State Supreme Court clearly and unanimously held only last year that such an "indirect influence" argument is not tenable under the Act. Given this situation, which of the following statement is MOST ACCURATE?

- A. John's lawyer has likely violated Rule 11(b)(2). Both John and his lawyer may be sanctioned for that violation, assuming the procedural requirements of Rule 11 are followed.
- B. John's lawyer has likely violated Rule 11(b)(2). Only John's lawyer, and not John himself, may be sanctioned for the violation, assuming the procedural requirements of Rule 11 are followed.
- C. John's lawyer has likely not violated Rule 11(b)(2) assuming that the legal contentions in the counterclaim were specifically identified as likely to have evidentiary support after a reasonable opportunity for further investigation and discovery.
- D. If George wishes to raise the Rule 11 issue he should do so clearly as part of his motion to dismiss the counterclaim under Rule 12(b)(6) for failure to state a claim upon which relief may be granted.
- E. If George does not raise the Rule 11 issue, the district judge in the case will have no means by which to address the fact that the claim under the Act may not have been pled in compliance with Rule 11.

### Question #3

Assume for the purposes of this question that *George v. John* proceeds based only on George's claim of breach of contract. After making all the required disclosures, the parties began discovery. As part of discovery, John properly noticed George's deposition. On the day scheduled for George's deposition the parties appeared at the appointed place at the appointed time and the questioning began. The questioning eventually turned to George's new political consulting business and, in particular, the strategy that had been devised for Dick, George's principal client, concerning Dick's run for the White House. Needless to say, this information was highly confidential, although not privileged. In addition, George believed it was entirely irrelevant to the claim he was asserting against John or any of John's defenses to the claim. Given this state of affairs, and assuming George does not move for a protective order, which of the following statements is MOST ACCURATE?

- A. George's attorney may object to the questions on the grounds of relevance and confidentiality but he may not properly direct the witness not to answer the questions based on those grounds.
- B. George's attorney may object to the questions on the grounds of relevance and confidentiality and he may properly direct the witness not to answer the questions based on both of those grounds.
- C. George's attorney may object to the questions on the grounds of relevance and confidentiality. He may not properly direct the witness not to answer the questions based on the relevancy objection, but he may properly do so based on the confidentiality objection.
- D. George's attorney may object to the questions on the grounds of relevance and confidentiality. He may not properly direct the witness not to answer the questions based on the confidentiality objection, but he may properly do so based on the relevance objection.
- E. George's attorney may not object to the questions on either ground.

### Question 4

Assume for the purposes of this question that *George v. John* proceeds based on the single claim asserted by George against John concerning John's alleged breach of contract. You should assume that George has the burdens of production and persuasion on this claim. Assume John moved for summary judgment on the claim after only two weeks of a four month long discovery period. John claimed in his motion that there is no material fact in dispute concerning John's good faith with respect to the partnership assets. Which of these statements concerning John's summary judgment motion is MOST ACCURATE?

- A. John's motion is inappropriate and will be denied because it has been filed before the end of the discovery period.
- B. The court will address the motion by assuming that the allegations in George's complaint are true and base its decision on that assumption.
- C. John may carry his burden as the movant only by submitting affirmative proof of his good faith in the division of partnership assets.
- D. John may carry his burden as the movant only by showing that there is an absence of record evidence that he did not act in good faith in the division of partnership assets.
- E. John may carry his burden as the movant either by submitting affirmative proof of his good faith in the division of partnership assets or by showing that there is an absence of record evidence that he did not act in good faith in the division of partnership assets.

### **Facts for Questions 5-7**

Acme Tool Manufacturing Company ("Acme") makes, among other things, chainsaws. Its best selling model chainsaw is the Ripper, which is a gasoline-powered device. Myron had always wanted to get the Ripper, but the time never seemed quite right. This year, however, he decided to use his tax refund to finally get his saw, which he did at the local hardware store.

After getting the saw home, Myron could not wait to try and use it. He took it out back and started to fill it up with gas. He had a fair amount of trouble because the gas tank opening was positioned in such a way that in order to get the tank full he ended up spilling gas on the saw, the ground, and his hands. After cleaning up the spill (or so he thought) Myron began to use the saw. At this point, things took a turn for the worse.

After using the saw for a few minutes, Myron put it down on the ground to get a drink of water. As soon as the saw touched the ground it set the leaves on fire as a result, Myron claims, of the gas that spilled when he was filling up the saw. Myron was badly burned in the resulting fire.

Myron filed a lawsuit in federal court against Acme. Myron asserts only a single claim against Acme in the suit. Specifically, he claims that Acme negligently designed the Ripper's gas tank and that the poor design caused his injuries. Myron seeks substantial monetary damages in the suit. Acme responded to the complaint by filing an answer in which it denied the plaintiff's central allegations. Acme did not assert any counterclaims against Myron.

### **Question #5**

Assume for this question that Acme has consulted you concerning what material it needs to disclose as part of its required disclosures under the Federal Rules of Civil Procedure. The documents at issue are the following:

- the design packet for the Ripper showing the extensive testing the product’s design went through before it was sold to the public (the “design packet”);
- a report prepared by an Acme employee at the time of the design warning of a potential fire hazard due to spilled gas (the “report”). Acme has told you that it took no action in response to the report; and
- a document prepared by a non-lawyer (and not at the direction of any lawyer or in anticipation of any litigation) listing complaints received by Acme concerning problems with the Ripper’s gas tank (the “complaint listing”). Acme has told you that it took no action in response to the complaints;.

Which of the following statements MOST ACCURATELY describes which of these documents, if any, Acme should disclose to the plaintiff as part of its required disclosures?

- A. None of the documents should be disclosed.
- B. All of the documents should be disclosed.
- C. Only the design packet should be disclosed.
- D. Only the design packet and the report should be disclosed.
- E. Only the report and the complaint listing should be disclosed.

#### **Question #6**

For purposes of this question only, assume that none of the three documents referred to in Question #5 had been disclosed. Further assume that after the required disclosures have been made by all parties, Myron serves a document request on Acme seeking “All documents related to Myron’s accident, including but not limited to documents concerning the design of the Ripper and any complaints concerning the Ripper’s gas tank.” Which of the following statements MOST ACCURATELY describes which of these documents, if any, Acme should produce in response to Myron’s document request?

- A. None of the documents should be produced.
- B. All of the documents should be produced.
- C. Only the design packet should be produced.

- D. Only the design packet and the report should be produced.
- E. One cannot answer this question without knowing whether Myron has exceeded the number of document requests allowed under the Federal Rules of Civil Procedure.

### **Question #7**

Assume that *Myron v. Acme* proceeds to a jury trial on the negligent design claim. In order to prevail on the claim, Myron must establish that Acme owed him a duty of care, that Acme breached that duty, and that Acme's breach caused Myron's injuries. As relevant to this question, Myron introduced evidence on his claim concerning Acme as follows:

- He described how he purchased the Ripper and how he filled the gas tank.
- He testified as to what happened when the fire started. He also presented testimony from his treating doctor as to the extent of his injuries.
- He put into evidence documentation of his medical expenses and lost wages.
- He presented evidence that other manufacturers had a significantly different design for their gas tanks.

After Myron rested his case, Acme moved for judgment as a matter of law. That motion was denied. Thereafter, Acme put on its case which included, among other things, evidence of its design process and testimony from an expert that Acme's design was superior to that of other manufacturers.

Acme rested. Acme and Myron gave their closing arguments and the judge instructed the jury. The jury returned a verdict in favor of Myron and awarded him \$150,000. After the verdict Acme made a renewed motion for judgment as a matter of law and a motion for a new trial. Which of the following statements is **MOST ACCURATE** concerning these two motions?

- A. Acme was incorrect to make both of these motions. Under the rules it was required to choose one motion or the other. Thus, both motions are likely to be denied.
- B. Both motions are likely to be granted. There is no evidence on which a rationally functioning jury could have found for Myron and, therefore, Acme is entitled to judgment as a matter of law. In addition, even if a rationally functioning jury could have found for Myron, the verdict is against the great weight of the evidence.
- C. Both motions are likely to be denied because Acme did not make the appropriate motion at the close of all the evidence.
- D. The renewed motion for judgment as a matter of law should be denied on these

facts. The motion for a new trial is likely to be granted because the verdict is against the great weight of the evidence.

- E. None of these statements is accurate.

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

**EXAM NO. \_\_\_\_\_**

**END OF EXAMINATION!!**

**MULTIPLE CHOICE ANSWER SHEET**  
**CIVIL PROCEDURE FINAL EXAMINATION – FALL 2004**

**EXAMINATION #: \_\_\_\_\_**

**QUESTION #1**

**A            B            C            D            E**

**QUESTION #2**

**A            B            C            D            E**

**QUESTION #3**

**A            B            C            D            E**

**QUESTION #4**

**A            B            C            D            E**

**QUESTION #5**

**A            B            C            D            E**

**QUESTION #6**

**A            B            C            D            E**

**QUESTION #7**

**A            B            C            D            E**