

**Civil Procedure Final Exam**  
**Professor Sternlight**  
**December 15, 2006**

**Exam # \_\_\_\_\_**

**INSTRUCTIONS**

This is an open book exam. You may consult any notes, commercial or personal outlines, hornbooks, etc. However, you may not share your materials with any other person during the exam nor access substantive information on a computer or from a live person.

Please check this exam for completeness at this time. It should be seven pages long. Please write your Exam number on this exam and make sure the Exam number also appears on any blue book or printed exam answer you turn in. Please also number the blue books if you use more than one.

Read (don't skim) each of the questions carefully before drafting your answers. Also, be sure to provide me with the reasoning underlying your answers. That is, tell me why you came to the conclusions you did. If you consider but ultimately reject certain options or arguments, please explain why. In general you should not add or make up any facts. However, if you find a particular question is ambiguous, or if you believe that I have omitted essential information then explain any such ambiguity or problem and supply any additional information or assumptions you believe to be necessary to permit you to answer the question.

Put all of your answers in a blue book or in your printed exam answer . I will not give credit for information written on the exam itself. Also, I ask that you write only on one side of the page. You may use abbreviations so long as they are obvious or you define them. I will look at outlines if you ask me to. However, it is difficult to thoroughly set forth reasoning in an outline.

Please use only your Exam number to identify yourself. Do not attempt to identify yourself by, for example, referring to personal characteristics or to remarks made in class. Also, please refrain from including any personal notes in your exam.

You have three hours to complete the exam. I have indicated the point value for each question and you should allocate your time accordingly. Given my scoring system you will be sharply penalized for failing to thoroughly address any portion of the essay questions.

**Question 1 True false questions** (36 points total; 3 points each)

With respect to each of the following propositions, state whether the proposition is true or false. Then, explain in one or two sentences why you believe the proposition is either true or false. You will receive no credit at all unless you provide an explanation for why the statement is true or false. You will also receive no credit unless you come to a conclusion as to whether the statement is true or false. Finally, I will not read any material in excess of two sentences. You will also do yourself a disservice by writing extremely long “sentences” because these questions are each only worth three points each.

A. The Nirvana Nuts, a major league baseball team, sold 70,000 tickets to Game 1 of the World Series. Each ticket cost at least \$300. Unfortunately, two days in advance of Game 1 Nuts management realized that the stadium only holds 50,000 people, and that 20,000 tickets had been oversold to the game. Nuts management notified 20,000 ticket holders that their tickets would not be honored, but that all ticket holders would be refunded the face value of the ticket. Fred Fanatic was one of the 20,000 fans who learned that he no longer had a valid ticket to Game 1. He is very mad because he had already booked nonrefundable air travel and made special entertainment and other arrangements for himself and three business colleagues for whom he had purchased tickets. Fred would like to bring a class action in federal court on behalf of himself and all of the 20,000 ticket holders to recover damages for breach of contract. Assume that Fred can establish that the federal court has jurisdiction to hear his claim. While this lawsuit seems plausible, as a class action, Fred will have to pay the substantial cost of notifying all the absent class members should he decide to proceed with this class action.

B. While parties are generally free to settle disputes, pre-litigation, under terms of their own choosing, judges must approve settlements reached after a lawsuit has been filed.

C. Cindy Citizen, a resident of Las Vegas, was severely injured when a Las Vegas Police Officer, Kyle Kopp, shot her with his taser (stun gun) in the Boulevard Mall. Officer Kopp apparently believed Cindy was shoplifting and that she had failed to heed his order to stop. Cindy has brought a lawsuit in federal court against the Las Vegas Police Department (“LVPD”) for negligence and violation of her federal civil rights. She claims, in particular, that the LVPD has not given appropriate training to its officers in the use of tasers. The LVPD has filed a motion to implead Officer Kopp, arguing he failed to follow the instructions he had been given by the LVPD re: proper use of the taser, and that the injury to Cindy occurred as a result of Kopp’s improper actions, rather than as a result of the LVPD’s allegedly improper training. The proposed impleader is improper and LVPD would need to plead differently to accomplish this impleader.

D. Assume that in the prior hypo, 1(C), the LVPD is permitted to implead Officer Kopp. In bringing such impleader the LVPD can also bring a claim against Taser International, so long as the claim by LVPD against Taser International arises out of the same transaction and occurrence

as the claim by LVPD against Officer Kopp.

E. In federal court a court must grant a Plaintiff's motion for summary judgment against a Defendant, as to an entire cause of action, so long as Plaintiff can show that even viewing the facts in the light most favorable to the Defendant, the reasonable jury would have to find for Plaintiff on all elements of her claim.

F. In her talk at UNLV Judge Dorothy Nelson, Senior Judge on the United States Court of Appeals for the Ninth Circuit, urged that lawyers can often best assist their clients by investigating, mediating or arbitrating rather than by litigating all disputes. Nonetheless, the Due Process clause of the U.S. Constitution ensures that parties and their lawyers can only participate in such alternatives to litigation voluntarily, and that neither federal nor state court judges have the power to order parties to alternative dispute resolution.

G. Plaintiff sues Defendant in federal district court. Defendant fails to bring a counterclaim against Plaintiff, although the counterclaim falls within the definition of a "compulsory" counterclaim. Defendant would potentially be able to bring such a claim in state court, but only if the Defendant files and wins a motion in federal court permitting the pursuit of simultaneous state litigation.

H. The biggest advantage of doing discovery informally, rather than under the Federal Rules of Civil Procedure, is that the products of informal discovery are protected by the work product doctrine and thus need not be shared with the opposing party.

I. Nirvana Nuts outfielder David Durango has filed a breach of contract claim against the Nuts, in federal court, alleging that the Nuts failed to pay him a \$200,000 bonus to which he was entitled given his performance during the season. You represent the Nuts, and in interviewing management have learned that: (1) the Nuts claim that they are not required to pay Durango the disputed bonus, because Durango was allegedly taking steroids during the season, in violation of his contract; (2) the Nuts claim that by taking steroids Durango harmed the Nuts' ticket sales; (3) the Nuts also claim that Durango painted offensive graffiti throughout the Nuts locker room one evening. Assuming that all these claims are worth making and assuming that the federal court would have jurisdiction over all these claims, it would be proper for the Nuts to include to include claims 2 & 3 but not claim 1 as counterclaims.

J. Reforms made to the Federal Rules of Civil Procedure covering discovery, over the last fifteen years, have required litigants to provide certain information to the opposing party, even if no discovery is requested, but have also narrowed the kind and amount of discovery that can be requested from an opposing litigant.

K. Plaintiff Percival has filed a claim for breach of contract in federal court, and seeks compensatory damages, injunctive relief, and punitive damages. Defendant Doris has answered the Complaint. A few months later, while discovery is proceeding, Doris researches the law of the relevant jurisdiction (NY) and determines that even if P prevails on his claims, the law makes

clear that punitive damages are not an appropriate remedy in a breach of contract case. D can best make this argument by filing a motion to dismiss for failure to state a claim under R. 12.

L. Plaintiff Pablo files a Complaint against Defendant Daniel in federal court. Defendant files a pre-answer motion to dismiss the Complaint, under R. 12(b)(6), for failing to state claim upon which relief can be granted. A few days later D realizes he should also have filed a motion to dismiss for lack of personal jurisdiction. D's best recourse to state this defense is to file a motion, under R. 15, to amend its prior motion to also ask that the Complaint be dismissed for lack of personal jurisdiction.

## **Question 2** (45 points)

Mayor Mabel Geraldini, in the city of Metropolis, U.S.A. is very popular and very powerful. The Mayor also has some definite ideas on what should and should not be permitted in her city. She is extremely upset that the Metropolis Museum of Art has decided to host a show that the Mayor finds offensive and believes will tarnish the reputation of her fair city. The show in question, entitled Artful Animals, features work of several avant garde British artists. While the works are all pictures and statues of animals, they are a bit unusual. Three works offend the Mayor particularly: a picture of a giraffe smeared with actual animal feces; a "statue" in a glass case containing a dissected sheep; and a statue of a blue elephant with the head of a human somewhat resembling President George W. Bush. The show is scheduled to open in five days.

The Metropolis Museum of Art has financial ties to the City of Metropolis. Specifically, it receives approximately 20% of its operating costs from Metropolis. The remainder of its funding comes from private funding (40%), federal and state grants (20%) and self-generated funding from admissions and the gift shop (20%). The Museum also leases its facility from the City of Metropolis on an annual basis. The lease terminates at the end of December, 2007.

At a televised press conference, yesterday, Mayor Geraldini announced that unless the museum would remove the three offensive works of "art," she would not permit the exhibit to open next Wednesday. Specifically, calling the exhibit a health threat and a nuisance she threatened to use city police officers to block the entrance and prevent visitors from coming to the museum. the Mayor also threatened not to renew the lease of the Museum when it expires at the end of December, 2007.

You have been retained by the Executive Director of the Metropolis Museum, Bob Artis, to represent the Museum in this matter. Artis informs you that he is extremely concerned about the Mayor's threats, for a variety of reasons, and that he will not under any circumstances remove the three "offensive" works of art. First, as a matter of principle he feels quite strongly that what the Mayor is doing is both unconstitutional and wrong, as a matter of policy. Calling the Mayor's threats "censorship," Artis explains that he believes the Mayor is violating the First Amendment of the U.S. Constitution by seeking to prevent the museum from making unpopular

statements, through its art. Artis fears that if the Mayor is not stopped, his threats will encourage other governmental figures to similarly censor art they or their constituents find unpopular. Second, from a practical standpoint, Artis notes that the Museum has spent a great deal of money publicizing this exhibit. If it does not open, on time next Wednesday, he is concerned that the Museum will lose admissions and sales. Third, he is worried that the Mayor's remarks will sully the reputation of the Museum, thereby threatening future grants from the state and federal government, as well as private contributions. Fourth, Artis states that he cannot back down both because he believes he would lose substantial private contributions if he caved in to the Mayor's demands, and because he fears the Museum might be sued by the artists if it refused to show their works, as it contracted to do.

Mr. Artis asks you to counsel him regarding the legal steps the Museum can take to protect its interests. He tells you that if court action is taken, he would rather be in federal court than state court, where the popular Mayor has numerous political allies.

What possible courses of action would you discuss with Mr. Artis? With respect to each possible course of action discuss the pros and cons of engaging in that course of action, including the likelihood of success given expected responses from the City. I know that you are not experts with respect to Constitutional law and do not expect you to set out knowledge of the First Amendment in your answer. To the extent you would need to do additional research, explain what that research would be.

### **Question 3** (19 points)

On January 2, 2006 plaintiff Barb Root filed a putative class action suit against the city of Denver in the United States District Court for the District of Colorado on behalf of herself and all other girls living in the City of Denver between the ages of 10 and 12. Root's suit alleges that she and the other similarly situated girls have been denied their rights to equal protection under the U.S. and Colorado Constitutions in that Denver has issued rules permitting only boys and not girls to play Midget Little League baseball (ages 10-12). Ms. Root seeks an injunction requiring Denver to open its Midget League to girls.

On March 2, 2006, the court certified the class action, under FRCP R. 23(b)(2). The court has set a discovery cut-off of January 1, 2007, and has tentatively set the trial date for March 1, 2007.

Although Denver does provide an alternative softball league for girls ages 10-12, Barb argues: an inherent right to play baseball as well as softball; some girls find baseball more fun, fast and exciting than softball; the city provides better fields, uniforms, equipment and coaching for baseball than for softball; at ages 10-12 many girls are as athletically talented or more talented than boys the same age; given that the Midget League currently provides all boys who express an interest with the right to play, ability should not be an issue.

The City of Denver, in its Answer, has denied that the policy is discriminatory, arguing that the sex limitation is legitimate based on: the availability of softball for girls; girls' weaker physiques; girls' generally poorer athletic abilities; and severe funding limitations. Denver contends that were girls allowed to play baseball, some boys would have to be denied that opportunity, given the funding limits.

Since the lawsuit was filed, on January 2, 2006, the parties have engaged in some discovery. Following the court's ruling in plaintiffs' favor on a motion to compel, plaintiffs have obtained extensive budgetary and other information discussing the resources provided to baseball and softball. Plaintiffs have also obtained statistical information regarding the number of boys and girls who have signed up to play baseball and softball in the last five years. Defendant has taken the depositions of Barb Root and of her designated expert on sports physiology, Dr. Bones. Plaintiff also plans to call three other experts regarding childrens' sports; future sports opportunities; and budgetary matters. Defendant has not revealed who it intends to call as witnesses and plaintiffs have taken no depositions.

On August 11, 2006, plaintiffs sent a set of interrogatories to defendant Denver including the following:

(7) With respect to each girl who played Denver-sponsored Princess League softball from January 1, 2000 to the present, who was between the ages of 10 and 12 at the time she played, please provide the following information: name, year(s) in which she played, last known address, last known phone number.

(8) With respect to each boy who played Denver-sponsored Midget League baseball from January 1, 2000 to the present, who was between the ages of 10 and 12 at the time he played, please provide the following information: name, year(s) in which he played, last known address, last known phone number.

(9) With respect to each person who coached Denver-sponsored Midget League baseball or Princess League softball from January 1, 2000 to the present, please provide the following information: name; identify team coached including whether it was baseball or softball; state year in which he/she coached team; provide last known address; provide last known phone number.

The City of Denver failed to answer these interrogatories by September 11, 2006, and also did not seek a protective order. When the attorney for Barb Root called the attorney for Denver, and attempted to work out the dispute informally, Denver's attorney told Root's attorney to "take a hike." When Barb Root subsequently filed a motion to compel, Denver filed a response stating that much of the information sought was not sufficiently relevant to Root's claims, and that producing the information would be unduly burdensome.

The court heard oral argument on Root's motion to compel discovery on October 26,

2006. At the hearing the court ordered the parties to try to resolve the matter informally. When the parties failed to resolve the matter informally the court issued the following order, on November 9, 2006:

By no later than November 30, 2006 the City of Denver shall answer interrogatories 7, 8 & 9 with respect to the time period January 1, 2003 to the present.

However, as of today (December 15, 2006) City of Denver has failed to file any response to the interrogatories.

You are an associate in the firm representing Barb Root and the class in this matter. The partner for whom you work has assigned you to draft a memorandum in support of a motion for sanctions against Denver for its failure to comply with the court's order. The partner has asked that you seek, as a sanction, both that Denver's Answer be stricken and that Barb Root be awarded all attorney fees and costs she incurred as a result of Denver's failure to respond to the disputed interrogatories. If you believe that other sanctions would also be appropriate you may also explain your thinking in a separate note to the partner, at the conclusion of your memorandum.