

Sections 5/6 & 7/8  
Fall 2020

# Civil Procedure: Final Exam

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Courses 110.04, 110.05  
December 1, 2020

This is a **4.5-hour** exam. You may begin it at any point during a 24-hour window, which opens at **8 a.m. Eastern time on Tuesday, December 1**, and closes at 7:59 a.m. Eastern time on Wednesday, December 2. Your 4.5-hour clock starts when you obtain the exam from <https://sakai.duke.edu> and runs until you submit your answers via email to [examdeposit@law.duke.edu](mailto:examdeposit@law.duke.edu) (or until the submission window closes).

## **MECHANICS**

Before the exam, download the exam template from the course website ([Resources/K. Exam/ xxxxxxxx\\_110-04-05\\_CivilProcedure\\_Sachs\\_Fall2020.docx](#)), or save the copy that has been emailed to you along with these instructions. Replace the `xxxxxx`'s with your Student ID number, both in the filename and in the header that appears on each page.

I'll be grading all the answers to each question separately, randomizing the order each time. To make this easier, please **start each separate answer on a separate page**. Also, to ensure anonymity across questions, please don't alter the default typeface or spacing in the template (or include any other identifying information in your submission).

## CONTENTS

The exam consists of **four essay or short-answer questions**. Your answers are limited to **3000 words** in total. This is a strict limit; additional words will not be read. Brevity is appreciated, though; you are *not* required to write that much. Make sure to watch your word count, so that you don't find yourself making substantial cuts in the last few minutes.

Each question is accompanied by a point value, a recommended time allocation, and a recommended word limit. These are only recommendations! Allocate your time and words in whichever way seems best to you.

## MATERIALS

The exam is completely **open-book and open-note**; you may use any digital or paper materials you find helpful. That said, you are instructed not to consult anyone else or to do new research on the Internet during the exam. *Your exam must be entirely your own work.*

## COMMUNICATIONS

Per Duke policy, students may not communicate with faculty members about problems during or after an exam. In case of emergencies, *contact the Registrar's Office instead*, at [registrar\\_office@law.duke.edu](mailto:registrar_office@law.duke.edu).

Also, because the exam is being administered to some students at different times, you may not discuss its contents with anyone until after the exam period ends, or until I've notified you that all exams have been submitted.

## SUGGESTIONS

In general, please follow the advice given in John H. Langbein's *Writing Law Examinations*, available on the website. A few specific recommendations:

- (1) *Make sure that you read each question carefully.* Pay attention to the point values: they signal how important each question will be. I suggest that you reserve twenty minutes at the beginning for reading the whole thing, as well as ten minutes at the end for proofreading. (The recommended time allocations assume that you do this.) Separately, I'd encourage you to spend

up to one-third of your time on each question just sketching out the answer with pencil and paper before starting to type. If you just dive in, you'll get lost halfway.

- (2) *Organize your answers clearly.* You don't need to follow any particular format with rigor (IRAC, etc.), but it greatly helps to identify an applicable legal standard before applying it. Stating your conclusions clearly will also be helpful to me when grading. Mentioning individual rules, statutes, or cases can sometimes serve as useful shorthand, but chapter-and-verse citations are a waste of time. In the words of the now-repealed Rule 84, the model exams available on the course website "illustrate the simplicity and brevity that these [instructions] contemplate."
- (3) *State the substance accurately.* If a particular legal standard hasn't received any substantial attention either in the book or in my lectures, it's unlikely to be tested. That said, the exam is open-book and could require close parsing of a particular rule or statute that we haven't addressed at length—or, indeed, at all.
- (4) *Apply the law as it stands today.* As noted on the syllabus, the exam doesn't ask things like "how would this case have been decided in 1872?" It only tests on the law as it stands on the date of the exam, including any newly effective amendments to the Federal Rules.
- (5) *Unless you're given specific details to the contrary, you may assume:* that every party is properly served; that every pleading is properly pleaded; that all filings are timely; that every motion, brief, or response presents the best available arguments for its position; and so on. Don't try to invent new and helpful facts or law not mentioned in the exam.
- (6) *If there are issues that seem inconclusive or that require more information, you should say so.* Some of them may be intentional. Likewise, not every issue suggested by the fact pattern is actually relevant to the question asked; discussing irrelevancies will only cost you time.
- (7) **This one is very important:** *When listing reasons why a particular result would be legally correct, don't give just one; give as many as are correct, even if just one of them would be enough to win or lose on that issue. Don't assume that I'll know you know the basics; show me that you do!*

## **GRADING**

Answers will be graded on your understanding and analysis, as well as on clarity of exposition. Individual questions will be curved, to reward those who do well on harder questions, and then the exam as a whole will be curved. Final grades will be calculated in compliance with Duke's grading policies.

\* \* \*

Good luck!

## EXAM QUESTIONS

— START OF EXAM —

**Q.1: “Good Evening”** (28 pts, 1 hr 5 min, up to ~850 words)

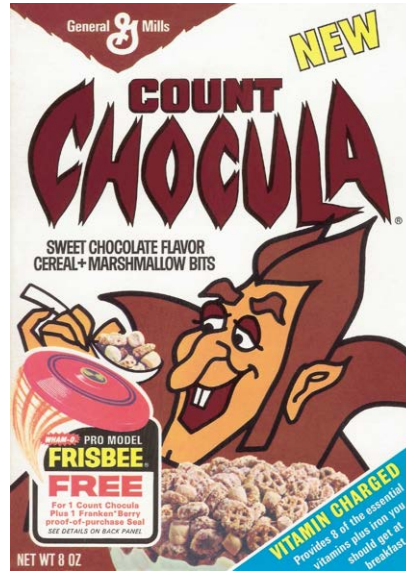
This past summer, an e-commerce service operated by Print Syndicate, Inc., delivered a coffee mug to a customer in central North Carolina. That mug, depicted below, bears a mildly humorous image comprising two bats, a cat drawn in the style of a vampire, and the label “Count Chonkula.”



Fig. 1. The mug. Illustration © Print Syndicate, Inc. Used per 17 U.S.C. § 107.

The mug was designed by Print Syndicate in Columbus, Ohio. It was manufactured in Indonesia by PT Consumer Products, under license from Kobayashi Porcelain of Japan.

After the mug achieved fame on the Internet, a number of parties threatened to sue Print Syndicate for copyright infringement. General Mills, Inc., the manufacturer of “Count Chocula” breakfast cereal, sent a strongly worded cease-and-desist letter to Print Syndicate—as did an association of ninety-eight American descendants of Vlad III Dracula, the fifteenth-century *voivode* of Wallachia whose cruelty inspired the famous character.



Figs. 2–3. Count Chocula and his eponym. © General Mills (used per 17 U.S.C. § 107) / Public domain.

Print Syndicate initiated a lawsuit against General Mills and each of the individual descendants in the U.S. District Court for the Middle District of North Carolina, seeking a declaratory judgment that neither the descendants nor General Mills enjoy any copyright protections that would entitle them to enjoin the coffee mug’s distribution. Each defendant timely answered the complaint.

In discovery, Print Syndicate sent a document production request to General Mills asking for “any and all internal communications relating to Count Chocula cereal or associated monster cereals.” General Mills objected to the request on multiple grounds. Nonetheless, its response to a different discovery request included a text message from outside counsel to the assistant manager of its Monster Cereals Division, stating that “yeah, we have no case against the mug company, let’s just hope we can scare them away.” General Mills asked Print Syndicate to destroy its copy of the message and filed a motion for a protective order requiring such destruction.

With this motion pending, and with two weeks left before the scheduling order’s discovery deadline, Print Syndicate moved for partial summary

judgment. Its motion included as an exhibit an authenticated copy of a judgment of the U.S. District Court for the District of Minnesota, concerning a class-action lawsuit brought by one of the descendants (on the others' behalf) against General Mills and against the heir of Bram Stoker, author of the 1897 Gothic horror novel *Dracula*. That action, too, sought declaratory relief under the Copyright Act, but the individual class members were never notified of its existence. The case ended in a victory for the defendants, with the court agreeing that the character of Count Dracula was in the public domain and free for all to use.

In response to Print Syndicate's motion, General Mills and the descendants note (among other objections) that the District of Minnesota's judgment is currently on appeal to the U.S. Court of Appeals for the Eighth Circuit, which will hear oral argument in three weeks. They have also filed a cross-motion for summary judgment, asking for Print Syndicate's action to be dismissed for lack of subject-matter and personal jurisdiction.

**How should the district court rule on the pending motions?** Explain your answer. (Address the motions independently—*i.e.*, without assuming the court's response to any other motions—and in the order in which they were filed. If you're not sure about something, just say so.)

**Q.2: Studio 54(b)** (40 pts, 1 hr 35 min, up to ≈1200 words)

In the late 1970s, Charles Alan Wright and Arthur Miller opened an exclusive New York nightclub known as “Studio 54(b).” Frequented by celebrities such as Judge Abner Mikva and Liza Minelli, the club became notorious in December 1977, after a raucous November 30 overnight party to celebrate the midnight effective date of the Civil Rules amendments.



Fig. 4. A photograph of the club during the Civil Rules party. © Dustin Pittman; used per 17 U.S.C. § 107.

The Studio shut down soon after and passed into New York legend. Forty years later, on December 1, 2017, it became the subject of a lawsuit filed in the U.S. District Court for the Southern District of New York. New Jersey resident Waylon Livorno, who had inherited all the rights and liabilities of the club’s owners, sued Ana O’Shea, his longtime Manhattan-based rival in the promotion business. Without further elaboration, he alleged that O’Shea “had failed to use her best efforts, as she had contractually agreed, to advertise the Studio to potential clubgoers in 1977–1978, leading to its eventual demise and at least \$100,000 in damages.” His complaint included a copy of the contract as an exhibit. O’Shea responded with a Rule 12(b)(6) motion, on which the Court postponed decision.

O’Shea timely answered in late December, denying all liability and asserting a \$80,000 counterclaim for negligence. (At the Civil Rules party, she



had been badly injured when she slipped on pages of the U.S. Reports, which fell like snowflakes from the ceiling sometime around midnight—neither party is certain when.) Livorno moved to dismiss the counterclaim on statute-of-limitations grounds.

Four weeks later, while this motion to dismiss was pending, O’Shea moved in late January 2018 for leave to file an amended answer. The proposed pleading repeated her counterclaim against Livorno and included two additional claims against the New Jersey event planner Robert Lindell. Lindell had arranged for the U.S. Reports pages to fall during the Civil Rules party, and allegedly he had also defamed O’Shea in front of other clubgoers six months beforehand. (Livorno opposed this motion for leave, citing misjoinder, subject-matter jurisdiction, and the statute of limitations, among other relevant grounds.) O’Shea accompanied her motion for leave with a motion for a more definite statement, asking Livorno to clarify his breach-of-contract accusations.

New York is the only state in the nation with a generous forty-year statute of limitations for nightclub-related claims. Its statutes provide that any counterclaim, including any related claim against a jointly liable party, is timely made if it would have been timely on the date the complaint was filed. Federal courts generally apply this principle too, but only if the counterclaim is mandatory, and only as to claims against the original plaintiffs. New York also has statutory provisions on amended pleadings, treating them (for limitations purposes) as if they had been included in the original pleading if they satisfy standards similar to those found in the Federal Rules.

The Court stayed proceedings in the case and has been pondering the matter for years. It now plans to address all the unresolved motions at once. **How should it rule on the motions?** Explain your answer. (Again, address the motions independently—*i.e.*, without assuming the court’s response to other motions—and in the order of their filing. And if you’re not sure about something, just say so.)

**Q.3: Why?** (12 pts, 30 min, up to ≈350 words)

Civil procedure contains many mysteries, some of which we have not studied in detail. **Please explain the following:**

- (a) Why would Rule 12(h)(1)(B)(ii) make reference to amendments allowed by Rule 15(a)(1)?
- (b) Why would Rule 59(a)(2) include the phrase “take additional testimony,” when 59(a)(1) does not?
- (c) Why would 9 U.S.C. § 16(b) list different items than § 16(a)(1)?

**Q.4: Brobnax’s Truth-Telling Serum** (20 pts, 50 min, up to ≈600 words)

Dr. Janet Brobnax has recently won accolades for inventing “Brobnax’s Truth-Telling Serum.” After a single dose, the drinker will briefly be unable to lie or to dissemble: for the next ten minutes, he will honestly report what he believes. Unfortunately, one dose of the serum costs \$50,000, and the drinker is left with painful headaches for fifteen minutes or so.

**How should federal civil procedure respond to this development? Should the Rules be amended, and if so, how?** Explain your answer.

(Reminder: Your answers, in total, should not exceed 3000 words.)

— END OF EXAM —