

STUDENT ID:

FALL EXAM 2019

IN-HOUSE EXAM INFORMATION		
Instructor: Stephen E. Sachs		
Course Name: Civil Procedure	Course #: 110_04	
COMMENTS:		
Exam date and time	Date: 12/10/2019	Time: 08:30 a.m.
Type of exam	UNBLOCKED	
Number of Essay Questions	4	
Number of multiple choice/true or false	1	
Exam information/materials allowed (check as many as applicable)	<input type="checkbox"/> None <input type="checkbox"/> Access to Internet <input checked="" type="checkbox"/> Textbook <input checked="" type="checkbox"/> Textbook Supplement <input checked="" type="checkbox"/> Course Syllabus <input checked="" type="checkbox"/> Student's Own Outline and/or Notes <input checked="" type="checkbox"/> Calculator <input checked="" type="checkbox"/> Other Material (see comments)	All additional digital and paper materials are approved for use on the exam, but you are not permitted to consult with anyone or to access the Internet.
Number of hours for exam	4.5	
Qualifying LLM students may receive extra time	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	Amount of extra time: 1.5 hr
International students may refer to a hard copy English translation dictionary.	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	
INSTRUCTOR'S EXAM INFORMATION		

Please see attached instructions.

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Civil Procedure: Final Exam

STEPHEN E. SACHS
Duke University

Course 110.04

December 10, 2019
8:30 a.m.

OVERVIEW

You have **four and a half hours** to complete this exam. It consists of **four essay questions** and **one multiple-choice question**.

Your submission is limited to **3500 words**. This is a strict limit; additional words will not be read. But brevity is appreciated, and you are *not* required to write this much. Make sure to watch your word count, so that you don't find yourself making substantial cuts in the last few minutes.

The exam software should be in "**UNBLOCKED**" mode. Please use the software to **separate your answers** to different questions. Each question will be separately graded and each pile of answers separately randomized, so please don't make any cross-reference to your earlier answers in later ones.

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

This exam is **open-book** and **open-note**. All additional digital and paper materials are approved for use on the exam unless specifically forbidden by the Registrar. Feel free to use any electronic or print materials you like: the textbook, the coursepack, your notes, other people's notes, commercial outlines, etc.

That said, your exam must be **entirely your own work**. You are not permitted to consult with anyone or to access the Internet during the exam. **As a result,**

you must bring paper or electronic copies of the Federal Rules of Civil Procedure, as well as of the statutes and other rule provisions (of Appellate Procedure, Evidence, etc.) that are included in your coursepack.

ANONYMITY

To preserve anonymity, please don't include your name or other identifying information on the exam, except for your student ID number. Should anything untoward occur during the exam—computer error, sudden illness, monster attack, etc.—please notify the proctor and/or the Registrar.

You may not discuss the exam with me or with your fellow students, including by email, until I've confirmed to all of you that all students have taken the exam. (Some might be taking it at a different time.)

SUGGESTIONS

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

- (1) *Make sure that you read each question carefully.* I suggest that you take twenty minutes at the beginning to read the whole thing and reserve 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 or statutes can be useful, but chapter-and-verse citations are unnecessary and may be counterproductive; it's more important to state the substance correctly. The same goes for relevant cases. 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) *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 or brief presents the best available arguments for its position; and so on.

- (4) *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. Don't try to invent new and helpful facts or law not mentioned in the exam. 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.
- (5) *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 recent amendments to the Federal Rules.
- (6) **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!

**STOP! DO NOT TURN THIS PAGE
UNTIL INSTRUCTED TO DO SO!**

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EXAM QUESTIONS

— START OF EXAM —

Q.1: Land whale (49 pts, 2 hr, up to ≈1700 words)

In the 1970s, the United States military initiated a secret research program in Gakona, Alaska, later renamed the High Frequency Active Auroral Research Program (HAARP). The ionospheric beams produced by the Program's facilities, intended for ordinary purposes such as weather alteration and mind control, were unexpectedly reflected into the North Pacific. This resulted in the rapid evolution of peaceful humpback whales (*Megaptera novaeangliae*) into a new species, the carnivorous land whale (*Megaptera horribilis*).



Fig. 1. A carnivorous land whale attacking a helpless passerby.
Source: <https://bit.ly/20zcUUQ> (used per 17 U.S.C. § 107)

The military quickly arranged for the University of Alaska Juneau, now the University of Alaska Southeast (UAS), to choose the humpback whale as its mascot. The one known photograph of a land whale consuming its prey (Fig. 1) was posted to the UAS website as depicting the humorous “Spike the Whale.” Students attend UAS believing that Spike is merely a mascot, unaware of the actual land whales still roaming the campus by night.

Zoe, a high school sophomore in St. Louis, takes part in a debate tournament at Hickman High School in Columbia, Mo. While there, she notices a UAS recruiting pamphlet that had been sent to the school's college counselor, who pinned it to a bulletin board. The pamphlet extols the university's academic resources and beautiful campus, and it dismisses naysaying reports of carnivorous cetaceans ("a popular urban legend") or unusual disappearances of students or livestock ("statistically indistinguishable from background rates").

Zoe and her parents schedule a video chat in their home with a UAS admissions representative, who encourages them to visit campus. Zoe travels to Juneau for a campus tour along with her parents and her classmate Mark. Walking back to their hotel one evening, she and Mark are set upon by a land whale. Both are seriously injured, Mark desperately so. He remains unconscious after his medical evacuation to St. Louis, and neither his parents nor Zoe's believe her story.

Zoe initiates a \$1 million lawsuit—on Mark's behalf as well as on her own—in the U.S. District Court for the Eastern District of Missouri, which includes St. Louis. She asserts one count against the counselor of college-counseling negligence, a Missouri tort; one count against the admissions representative of common-law fraud; and one count against UAS under Missouri's unfair trade practices act, which offers a cause of action for violations of section 5(a) of the Federal Trade Commission Act (prohibiting "unfair or deceptive acts or practices in or affecting commerce"). Given the pamphlet's claims and the whales' presence on campus, Zoe alleges, each defendant must have had the requisite knowledge of the danger.

The defendants move to dismiss, citing a lack of personal jurisdiction, improper parties, Zoe's tender age, pleading defects, and a novel argument that the FTC Act violates the First Amendment. (In the alternative, they seek transfer to the Western District of Missouri, where Columbia lies.) Their motion is denied. After the close of pleading and discovery, Zoe seeks summary judgment on all counts, based solely on an extensive affidavit which she submits as an exhibit to her motion. Over the defendants' opposition, the district court grants her motion in full. The damages issues are eventually resolved, and the court enters judgment.

The defendants timely appeal to the U.S. Court of Appeals for the Eighth Circuit. Their briefs reiterate their previous arguments and add new objections to the district court's subject-matter jurisdiction. Zoe is content with the judgment and has not cross-appealed. She has asked you to assess her chances of success. Looking only at the procedural questions involved, **how would you expect the court to rule on the various issues presented, assuming that it reaches them? Why?** (If you're unsure or need more information, just say so.)

Q.2: joindr (17 pts, 40 min, up to ≈600 words)

Terrence, Grace, and Marie are law students and former programmers. They form a company to develop hi-tech solutions to the problems of mass litigation. The company goes nowhere, and Terrence buys out the others' shares. Right after graduation, though, he releases "joindr," an app that helps potential plaintiffs find each other by swiping left and right through a series of draft complaints. The app revolutionizes legal practice, and Terrence becomes a millionaire.



Grace criticizes Terrence in the media, alleging that she and Marie helped to write the software and that Terrence induced them to sell their shares by deceit. Marie declines to comment. (Unbeknownst to her law school classmates, she was secretly Marie of Gharov, princess of Ruritania; having since been crowned Queen, she has other business to attend to.) Terrence sues Grace for defamation. She defends her assertions and suggests that he suffered no losses thereby. The jury, by special verdict, finds her statements false but awards no damages.

Grace then decides to pursue her share of the profits. Marie assigns any interest she possesses in the company to Grace, who sues Terrence to rescind the sale of shares. Terrence seeks summary judgment, citing the prior lawsuit. Grace responds, *inter alia*, that previously she had been prevented from asserting her claims by the Queen's sovereign immunity. Celebrated screenwriter Aaron Sorkin moves to intervene, asserting copyright infringement as to a portion of Terrence's answer ("If these guys were the inventors of joindr, they would have invented joindr!"), which plagiarizes a well-known line about Facebook from his 2010 film *The Social Network*.

What ruling on these motions, and why? (Again, if you're unsure or need more information, just say so.)

Q.3: Things we have not studied (17 pts, 40 min, up to ≈600 words)

Below are listed several provisions that we never discussed at any length in class. Read them again. Then **explain, based on what you've already learned, what you think these provisions are for.** (For instance, what do they do? When might they be used, and by whom? Why do they say what they say, and not something else? What difference do they make to the legal system? Etc.) Remember that you are not permitted to use the Internet.

- (a) Rule 11(c)(5)(A).
- (b) Rule 52(a)(2).
- (c) Rule 81(c)(2)(C).

Q.4: Ten words (17 pts, 40 min, up to ≈600 words)

A whimsical genie will let you add up to ten words to a single provision of the Federal Rules or of Title 9 or 28 of the U.S. Code. But its generosity only extends to provisions *not already addressed on this exam*. **Which words would you add, and where? Defend your answer.**

Q.5: True or false (1 pt, 0 min, 0 words)

I am aware that my essays, in total, are subject to a limit of 3500 words.

- (a) True
- (b) False

(Hint: The correct answer is "True.")

— END OF EXAM —