

**UNIVERSITY OF MARYLAND SCHOOL OF LAW
INTRODUCTION TO CIVIL PROCEDURE**

Section A

(Two Hours)

Day Division

Thursday, December 16, 2010

Professor Robert J. Condlin

1:30 P.M. - 3:30 P.M.

No. _____

Signature: _____

Print Name: _____

Submitted Electronically Yes _____ **No** _____

INSTRUCTIONS:

1. Honor Code. Student conduct, during examinations and at all other times, is governed by the Student Honor Code.

2. Your Name, Examination Number, and Submission. Sign and print your name in the blanks above. Put the examination number, course title and instructor name on the examination envelope. Indicate whether you are submitting the examination electronically. Submit the examination questions at the conclusion of the examination. Do **not** put the questions in the examination envelope.

3. Time. Submit your examination answers within the announced time for the examination. If you submit your answers late you will be subject to a penalty.

4. Computer Exams. You may take the examination by computer. This is an *Option 2 – Open Mode – access to Exam4 and student computer-based notes – no Internet Access – “drag and drop” prohibited, examination.*

If you use a computer you must use the Exam4 examination-taking software provided by the Law School. You must provide your own computer and must download a copy of the Fall 2010 version of the Exam4 software to your computer, test the software, and have the computer in working order before the date of this examination.

At the end of the examination, choose the "Submit Electronically" function in the Exam4 software. The software will request your Exam ID (Examination Number). Put the course name on your answers as instructed in the handout, but **do not put your name anywhere on your answers.** Submit your answers within the time limits for the examination. After submitting your answers electronically, return to the examination

room promptly and turn in (but do not seal) the examination envelope, with a notation on the envelope stating "Submitted Electronically." At the same time, turn in your examination questions to the proctor.

Technological Problems: If you experience a technological problem during the examination, consider the amount of time remaining and decide whether you should continue (or restart) the examination in Blue Books. No additional time will be provided for technological problems. Responsibility for submitting your answers on time electronically lies entirely with you. The Information Technology (IT) Department will assist in retrieving examination files from your computer, and the Office of Registration & Enrollment will accept an IT-certified copy of an examination file retrieved from your computer as a timely submission, as long as there is no evidence of tampering with either your computer, or the examination file.

5. Handwritten Exams. If you submit handwritten answers to the examination, put the number found above on each of your Blue Book answers to the examination. Both the envelope and your answers should contain your examination number, the course name, and the instructor's name. **Do not put your own name anywhere on the envelope, or on the Blue Book answers.**

Upon completion of the examination, put your answers in the envelope, fasten the flap, and hand in the envelope to the examination proctor. Be sure to enclose all of your answers in the envelope — you will be graded on only what is inside the envelope. Do not put the examination questions in the envelope. Hand in the questions separately to the examination proctor. You are responsible for ensuring that all of your completed answers and questions are handed in to the examination proctor.

6. Exam Question Clarity. If you believe there is an ambiguity, error, or inconsistency in any of the questions, identify this issue in your answer, specify the assumptions you are making in answering the question, and then answer the question. You should use this approach with caution. The assertion of an ambiguity, error, or inconsistency, if not reasonable, particularly if intended to avoid difficult issues in the examination, will not excuse the failure to address such issues.

7. Special Instructions. The examination consists of two questions and each question counts for a different percentage of the overall grade. Allocate your time accordingly. Be sure to explain your answers fully. The reasons for answers usually will be more important than the conclusions reached. Analyze the issues presented by the fact pattern; no credit will be given for long descriptive statements about law or fact in the abstract.

You may bring any study materials you like into the examination with you but you may not use electronic communication devices of any kind (except for the Exam4 software) in completing the examination.

Question Number One
(60%)

DANIEL J. TRIERWEILER, Plaintiff,
v.
MACHOL, DAVIS & MICHAEL, Defendant.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Croxton & Trench Holding Company (C&T), asked Daniel Trierweiler to lend it \$1.2 million to fund a new subsidiary. C&T is a Colorado corporation with its principal place of business in Denver. Trierweiler manages his own venture capital fund and is a resident of Detroit, Michigan. C&T offered to have the Dublin Osaka Group, Inc. (Dublin), also a Colorado corporation with its principal place of business in Denver, guarantee the loan. Dublin would repay the entire \$1.2 million if C&T defaulted. The guarantee was to be secured with Government National Mortgage Association Bonds owned by Dublin (GNMA Bonds). (GNMA Bonds are a preferred security because they are backed by the full faith and credit of the United States Treasury.) C&T first broached the possibility of a loan at a meeting with Trierweiler in his Detroit office, and the parties discussed terms of a possible agreement in a series of emails, faxes, and phone conversations between Denver and Detroit.

Trierweiler liked the C&T proposal but insisted that Dublin provide him with a legal opinion establishing its capacity under Colorado law to act as a guarantor, and its ownership of the GNMA Bonds, before he would lend the money. In response, Dublin retained the Denver law firm of Machol, Davis & Michael (MDM) to write an opinion letter providing Trierweiler with the requested assurances. MDM prepared the letter and gave it to Dublin, Dublin gave it to C&T, and C&T sent it to Trierweiler in Detroit. Shortly thereafter, Trierweiler wired the money to C&T in Denver. C&T subsequently defaulted on the loan and Dublin failed to honor its guarantee. After the default, Trierweiler learned that Dublin did not own the GNMA Bonds in question (and never had), and that his supposed security interest was worthless. Dublin now is in bankruptcy.

Trierweiler filed the present action against MDM in the United States District Court for the Western District of Michigan, alleging that the Firm's failure to confirm Dublin's ownership of the GNMA Bonds, and its failure to advise him about the need to confirm such ownership, was professional malpractice. MDM moved to dismiss the Michigan action for lack of personal jurisdiction or, in the alternative, to transfer it to the United States District Court for the District of Colorado. The Michigan Court expressed doubts about its personal jurisdiction over MDM, but rather than grant the Firm's motion to dismiss, it transferred the case to the Colorado District Court. It did not say whether it ordered the transfer under 28 U.S.C. § 1404(a) or 28 U.S.C. 1406(a). It simply wrote "Granted" on the motion to transfer.

The Michigan long arm statute provides for personal jurisdiction over an out of state defendant to the extent permitted by the Due Process Clause of the United States Constitution. MDM has branch offices in Aspen, Colorado and Park City, Utah, but no offices, agents, or employees in Michigan. It does not advertize in Michigan, or hold itself out in any other way as doing business in the State. Over ninety percent of its business comes from and is conducted in Colorado, Nebraska, Utah, and Wyoming. The Firm's website is accessible in Michigan but it is not possible to transact business over the website. During the time period of the C&T loan, MDM provided legal representation to twenty-four Michigan residents, on one hundred and four separate matters, all from its Denver office, and all involving questions about the meaning and application of Colorado law. This work constituted less than one percent of the Firm's total business during the same time period. In the C&T transaction MDM dealt only with Dublin and had no direct contact with Trierweiler, though it understood that its opinion letter would be given to Trierweiler in Michigan, and that he would rely on it there.

Colorado and Michigan malpractice law differ in a way that could be central to the disposition of this lawsuit. Colorado has a Certificate of Review Statute that governs in professional malpractice actions and Michigan does not. The Colorado Statute requires a plaintiff in a malpractice action to certify, within sixty days of the filing of a complaint, that an expert has examined the claim and found it to have "substantial merit." The certification must be submitted on a form provided by the Court and signed by the certifying expert. Failure to file the Certificate results in the mandatory dismissal of the lawsuit on the merits, and precludes the suit from being filed again in any court. Trierweiler does not deny that he failed to file a Certificate of Review, he did not think he had to. (Assume that under Colorado choice of laws rules Colorado law would govern the dispute, and that under Michigan choice of laws rules Michigan law would govern.)

Rule 11 of the Federal Rules of Civil Procedure establishes the certification requirements for filing a civil action in federal court. Under the Rule, a lawyer must certify that a lawsuit is not presented for any improper purpose; contains claims that are either warranted by existing law or by an argument for a change in the law; and makes factual allegations that have or are likely to have evidentiary support. This is the sum total of the Rule's requirements. It does not require a Certificate of Review. Both Rule 11 and the Colorado Statute are designed to weed out frivolous claims from the legal system at an early stage, to spare parties the cost and inconvenience of having to defend against them and courts the time and expense of having to adjudicate them. The Colorado Statute applies only to lawsuits against licensed professionals, and provides for sanctions against both lawyers and parties. Rule 11 applies to all civil actions and provides for sanctions against only lawyers. MDM has moved to dismiss the Trierweiler action for failure to file a Certificate of Review.

**How should the Colorado District Court rule on the MDM Motion to Dismiss?
[Be sure to discuss all subsidiary issues necessary to decide the Motion]**

**Question Number Two
(40%)**

**NSI INTERNATIONAL, INC., Plaintiff,
v.
MONA MUSTAFA, Defendant.**

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

NSI International, Inc. (NSI) filed the present breach of contract action against Mona Mustafa (Mustafa), in New York State Court. NSI is a limited liability partnership engaged in the sale of children's craft activity kits and science products. It is organized under the law of New York and has its principal place of business in Buffalo, New York. Three of its partners are biological individuals and citizens of Maryland. The fourth is a corporation organized under the laws of Delaware, with its principal place of business in Farmingdale, New York. Mustafa worked for NSI as Director of Marketing from June 6, 2007 until December 12, 2008, when she was terminated for what the Company described as poor work performance. Her employment contract provided for an annual base salary of \$150,000, six months severance pay if separated without cause, and an annual bonus package of up to \$80,000 if she and the company met all sales targets for the year.

Mustafa had lived in Chicago, Illinois all of her life before taking the job with NSI, and planned to relocate permanently to New York once she settled into the new job. She listed an apartment in Buffalo as her address with NSI, and also with her car and medical insurance companies, but she did not change her voter registration from Chicago to Buffalo (even though she hadn't voted in over a decade – she is a libertarian and thinks that voting is just another oppressive government intrusion into private life), or rent out her Chicago house. She filed her 2007 federal income tax return using her Chicago address (mostly to corroborate her claim for Illinois residency on her New York State returns – she would have had to pay higher New York State taxes if she was a New York resident). She viewed herself as a New York resident during the time she worked for NSI, however, and had planned (until she was fired) to change her address to New York on her 2008 federal and state income tax returns.

After she was fired, Mustafa wrote to NSI asking for the severance pay due under her contract. At first NSI refused to pay, claiming that Mustafa was not entitled to the pay because she had been fired for cause. After extended negotiations, however, the parties agreed orally that NSI would pay Mustafa \$16,000 severance pay and provide her with a neutral letter of recommendation in return for Mustafa releasing all legal claims she might have against the Company. When the formal document embodying the agreement was sent to Mustafa for signature, however, she changed her mind and decided not to sign it. Instead, she filed a complaint against NSI with the Illinois Department of Human Rights and the

United States Equal Opportunity Employment Commission, alleging that her termination violated the employment discrimination provisions of the Illinois Human Rights Act and the United States Americans With Disabilities Act. She had moved back to Chicago by the time she filed the actions and described herself as a resident of Illinois in both complaints.

NSI then filed the present lawsuit asking for a declaration that its oral settlement agreement with Mustafa was a valid and binding contract and that under the terms of that contract Mustafa had waived her right to file a legal claim of any kind against NSI in any federal or state administrative agency or court. In a second count, NSI asked for a declaration that Mustafa's termination was based on cause and not the result of unlawful employment discrimination. Mustafa removed the NSI action to this Court and NSI moved to remand to New York State court for lack of subject matter jurisdiction. That motion is now before the Court for decision.

**How should the New York District Court rule on the NSI Motion to Remand?
[Explain your answer fully]**