

REMEDIES FINAL EXAM
Professor Sophie Sparrow – Spring 2008

**Please first read the instructions, then put your exam number below.
I have read and understand the instructions.**

EXAM NO. _____

General Instructions

This exam is **9 pages long** (including 2 pages of directions). Make sure you have all of the pages. You have 180 minutes to complete the exam. This is an open-book, open-everything exam.

IF you use bluebooks,

- Put your exam number on the front of each bluebook.
- Write on only **one side** of each page of the bluebook.
- Write on **every other line**.

IF you are typing your exam on a laptop,

- Be sure to have your exam number on the document.
- Write your exam in a word document.
- Please use double-spaced lines, 12 point Times New Roman type.
- Email your exam as a word document to the registrar as instructed.

This exam is worth 100 points. This exam consists of 3 questions, each of which have a number of subparts.

- Question 1 is worth 15 points.
- Question 2 is worth 20 points.
- Question 3 is worth 65 points.

I will not answer any questions during the exam.

Because some of your classmates may be taking the exam at a different time, **do not discuss the exam until you are authorized to do so. You are responsible** for ensuring that no information about this exam is heard or made known to any student who has not yet taken this exam and fully completed it.

You must return all 9 pages of this exam as well as all scrap paper used.

Use **only** your assigned **Exam Number** for this exam. **Do not** use your name or Social Security Number anywhere. **Do not** provide any identifying information anywhere on the exam. **Providing any identifying information on or after the exam and before the exam is returned is a violation of the Pierce Law conduct code.**

"Tips" for taking this exam:

- Read the "call of the question" and the specific instructions first. Determine the specific relevant legal issues before reading through the entire fact pattern.
- **Read the questions carefully before** beginning to write your response. The facts are critical to analyzing the questions asked.
- For an essay question, **map out or outline** your response. Often there will be multiple parts – elements, factors – that require you to address many different points. Having a sense of how many different points you need to address will help you allocate the time you spend on each.
- State any assumptions you make.
- Use **headings**. They make a big difference and will help you organize your thoughts. Headings by elements and factors are very helpful.

Remember that I can assess your knowledge and abilities only by what I see and can understand in your written responses; **EXPLICITLY show the steps in your reasoning.**

Criteria for evaluating exam responses	
1. Identifies basic legal issues and ambiguities in legal issues	<input type="checkbox"/> Identifies major kinds of remedies available <input type="checkbox"/> Identifies which remedies are definitely available <input type="checkbox"/> Identifies which remedies <i>may</i> be available <input type="checkbox"/> Accurately uses terms recognized by legal sources
2. Uses law and reasoning	<input type="checkbox"/> For major kinds of remedies available, identifies and analyzes tests, rules and authorities <input type="checkbox"/> Explains basics about designing or measuring remedies <input type="checkbox"/> Explains other considerations in designing remedies, such as identifies weaknesses in the analysis
3. Applies facts from problem	<input type="checkbox"/> Identifies and applies key facts <input type="checkbox"/> Draws reasonable inferences from facts <input type="checkbox"/> Names assumed facts
4. Responsiveness to questions asked and organization	<input type="checkbox"/> Responds to assigned task <input type="checkbox"/> Organizes writing so easy to follow <input type="checkbox"/> In beginning of memo, provides a coherent and accurate summary <input type="checkbox"/> Uses headings and subheadings to help the reader follow content <input type="checkbox"/> Clear and precise prose

**Relax, breathe and do your best.
 I believe that each one of you can be a successful lawyer!
 It has been a true pleasure working with all of you.**

For all three questions:

- All three problems take place in Montshire, a fictional US State.
- Assume, unless given otherwise that there are no applicable relevant laws, ordinances or statutes which would change the analysis.
- Assume the material written is accurate and reliable.
- Do not** include an analysis of punitive damages.
- Do not** include an analysis of attorneys' fees.
- Do not** include an analysis of present value, taxes or interest.

Question 1 – Paula v. Dell (15 points) (25 minutes)



Pair of Newfoundland dogs, Newfoundland puppies

Paula owned a valuable female Newfoundland known as Nelly. Nelly came from a line of award-winning Newfoundlands, and Paula had a wait list for Nelly's puppies because of Nelly's pedigree, gentle temperament, lack of genetic problems, desirable coloring, and excellent hip and elbow certification (all important attributes of top quality Newfoundlands).

Paula paid **\$1,300** for Nelly three years ago, when she was a puppy. Because Nelly has since won several dog show awards and had one successful litter, she now has an estimated market value of **\$9,000**, which is what Paula has insured her for. As a high-quality breeder, Paula follows American Kennel Club rules for breeding Newfoundlands. This means that Paula only let Nelly give birth after she was two years old, would retire Nelly from breeding after her seventh birthday and allows Nelly to have puppies only once a year (six litters in total). Because of Nelly's qualities and Paula's reputation as a high-quality Newfoundland breeder, Paula sold Nelly's first litter of ten puppies for **\$1500** each, for a total value of **\$15,000**. Paula estimated that she would get at least **\$1500** per puppy for Nelly's remaining five litters.

Paula calculated that her current and future cost of breeding Nelly, including veterinary fees and tests, grooming, feeding and stud fees were **\$3,000** per year, regardless of the size of Nelly's future litters of puppies (Newfoundlands generally average 8-10 puppies per litter).

While Paula was recently showing Nelly at a dog show, Dell knowingly and intentionally stole Nelly. Paula searched hard for Nelly, did not know Dell had her, and eventually began looking for another female Newfoundland of the same quality as Nelly, which she could breed.

Paula was unable to find the same quality of Newfoundland dog as Nelly. Instead she located a high-quality three-year-old Newfoundland female dog in Canada (Dido), which she purchased for **\$12,000** (US dollars). Because Dido's pedigree, genetic background and coloring

were not as desirable as Nelly's, Paula figured that she would sell Dido's puppies at \$1000 each. Paula's costs to breed Dido would average the same as with Nelly, \$3,000 per year. Given Dido's age, Paula would breed her four times. Dido is expected to have an average of 9 puppies per litter, which is consistent with Dido's last two litters.

After Paula bought and bred Dido, she learned that Dell, a Newfoundland breeder with many assets, was the one who stole Nelly. Ironically, Nelly died a few weeks after Dell stole her. Dell claims he took Nelly on loan and by agreement, but Paula insists that this is untrue and that such a loan would be contrary to the custom of dog breeding and showing communities around the country. Paula wants to sue Dell for stealing Nelly.

Lou Green, representing Dell, recently contacted us, Paula's attorneys, about settling the case. Although Dell will not admit the theft, he will settle for a reasonable sum.

To prepare for further negotiations, please prepare a memo detailing how we would measure Paula's monetary damages for Dell's taking Nelly. Assume that Paula would receive \$800 for each of Dido's puppies for the remaining four litters and that Paula's costs would be \$3,000 per year.

- 1(a) Using facts, law and policy, explain your reasoning for a reasonable settlement – how would you arrive at a number?
- 1(b) Explain how you would **prove** the amount of damages- what evidence would you use?

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Question 2 – Phil v. Diane (20 points) (30 minutes)



Phil's land - people from Diane's sessions recreating on Phil's land

Phil owns 25 acres of undeveloped land in the northern woods of the state of Montshire. A 12-mile network of hiking trails threads through the land. Phil and his family only use the land a few weeks out of the year for recreational purposes.

Diane, Phil's neighbor, has lived adjacent to his land for 5 years. When Phil and Diane met, they realized they shared a love of nature and pristine wild places. Phil raved about the abundant wildlife and pristine beauty of his land, and invited Diane to enjoy walking and hiking his land when he wasn't using it. Diane's property was much smaller, with the area around her home being mostly fields so she appreciated Phil's offer to allow her to hike, walk and run on his property. They both agreed that any use of Phil's land should be limited to foot traffic; motorized vehicles and bikes would destroy the land in a way that foot traffic didn't. Diane offered to let Phil know if she ever saw bikes or vehicles on his property. When Phil and his family used the land, Diane also always invited them to use her outdoor water spigot to get fresh water, there being no fresh water source on Phil's land.

For the past 2 years, Diane has been leading groups of exercisers on Phil's land. Diane, a former fitness instructor, initially invited a friend or two to come and hike with her on Phil's land on Saturday mornings. Diane started adding other exercises to the work-outs and the friends loved the outdoor "boot camp" sessions, both for Diane's teaching and the pristine setting. Word spread, and soon strangers were showing up for Diane's sessions. Over the past 2 years, Diane has regularly led 1-hour "boot camp" sessions 5 times a week on Phil's land. Because of the seasonal limitations, Diane leads these sessions only from May through October – six months out of the year. Diane averages about 8 people per session, or 40 people per week. Each person gives Diane \$10 per session (\$400 per week). Using these figures, Phil has accurately calculated that over the past two years, Diane has received **\$10,400 each** year for her exercise sessions on his land. Because of personal circumstances, Phil has been unable to take the time to come and use his land for the past two years.

Nothing on Phil's land has been damaged from Diane's exercise sessions. Participants in Diane's sessions always park on Diane's property and walk to Phil's land. The 12 miles of trails are old and well established; foot traffic has not harmed any of them. Diane is very careful that all participants at her sessions stay on trails and leave only footprints behind. The one hour sessions have also not affected any of the plants or wildlife and no one has littered or in any way reduced the value of the land or impaired its use or enjoyment. In fact, Diane has spent hours ensuring that the trails are open and useable. For the past three Aprils she has spent several days

working on Phil's land, removing fallen branches, discreetly trimming plants that interfere with the trails, diverted heavy streams to prevent erosion, and, in short, maintained the trails in the condition that they were when Phil was last on the land. If Diane had not been doing trail maintenance the last three Aprils, the value of Phil's land would be slightly lower, and Phil would have had to either hire someone to clear the trails or would have had to spend hours himself to make the trails passable.

Having recently learned of Diane's fitness sessions from another neighbor, Phil is frustrated. Diane received a letter from Phil on May 1, 2008, asking her to stop using his land and saying that he is considering legal action for her unauthorized use of his land. Diane has come to you, her lawyer, for advice. She wants to know what Phil may be able to recover from her. Diane loves where she is living and wants to keep a harmonious relationship with Phil.

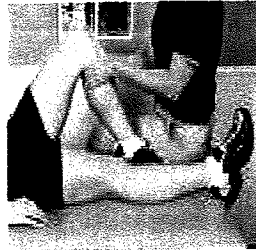
Please prepare a letter for Diane. In this letter:

- 2 (a) Explain the monetary amounts Phil could recover from Diane and the basis for those amounts.
- 2 (b) Explain the consequences for Diane if she does not stop using Phil's land.
- 2 (c) Advise Diane about other steps she might consider taking to resolve this conflict with Phil.

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Question 3 – Prime Massage, Inc. v. Doug (65 points) (120 minutes)



Prime Massage, Inc.

Massage Therapists

Five Seasons Healing

Background on the Parties

Doug is a licensed massage therapist. From September 1, 1997 until December 31, 2007 he worked exclusively for Prime Massage, Inc. (Prime) as one of its 4 massage therapists. Prime has one location and only offers on-site massages. Doug owns his own home about 5 miles from Prime.

Doug was expected to develop client loyalty and generate goodwill for Prime by providing excellent customer service and by developing friendly client relationships. Many people are reluctant to have a massage the first time. They are concerned that the experience will be awkward, embarrassing and unprofessional. Few people are willing to schedule an appointment for a massage from an ad in the paper or through the yellow pages; the vast majority of new appointments are generated through word-of-mouth and professional referrals. Referrals help assure new massage clients that the experience with the recommended massage therapist will be ethical and professional.

Facts about massage work

Experts estimate that upwards of ninety percent of disease is stress related. Massage has been proven to reduce and help manage stress. The Montshire medical community actively embraces massage; many Montshire hospitals refer patients for massage treatments to treat post-surgery or pain patients as part of the recovery process. Montshire physicians have noted that patients who receive massage are less anxious, sleep better, have more energy and have improved concentration.

Specifically, researchers have found that:

- Arthritis sufferers note fewer aches and less stiffness and pain.
- Asthmatic children show better pulmonary function and increased peak air flow.
- High blood pressure patients demonstrate lower diastolic blood pressure, anxiety, and stress hormones.

Prime received new business as a result of referrals from other Montshire professionals, including physicians, nutritionists, physical therapists, and counselors.

Non-compete agreement

When Doug started working at Prime, he signed a valid and enforceable non-compete agreement. This agreement was validly renewed every year.

The relevant portion of the non-compete agreement stated that **for 12 months** from the date in which he left Prime, Doug

- Would not contact or solicit or perform services for any of Prime Massage, Inc.'s current clients with whom Doug had contact during the 12 months before leaving Prime Massage Inc., or
- Perform the same or similar services for any Prime Massage, Inc. competitor located **within 15 miles** of Prime Massage, Inc., 89 Broad Street, Silverwood, Montshire.

Doug's earnings, clients and background on changing jobs

Doug left Prime on December 31, 2007. When Doug left Prime he earned \$50,000 per year in salary from Prime, excluding tips, which generally averaged about \$30,000 per year. For the past 8 years, he had provided massages to 35-40 clients per week, excluding vacations and holiday weeks. Almost all of Doug's business in the past few years has been from regular clients and word-of-mouth referrals. Doug has a reputation for being an excellent massage therapist and his services are highly sought after by many people in the area.

In the year before Doug left Prime, the majority (80%) of Doug's time was filled with clients who had regularly scheduled weekly massage sessions. Other appointments consisted of former clients who wanted monthly or less frequent massage treatments (15%) and new clients who had been referred to Doug by current or former clients (5%). The wait list for appointments with Doug for new clients was three months. Other Prime massage therapists also had regular clients, but no one had as long a wait list.

Doug's new job at Five Seasons

For years Doug had known that his very good friend Heather wanted to start her own business. In August, 2007, Heather opened her new business, **Five Seasons Healing Arts**, (Five Seasons) which provides a range of therapeutic treatments, including massages. Five Seasons is located 10 miles from Prime, and 5 miles from Doug's home.

Doug wanted to work with Heather and help her business succeed; they agreed that Doug would start on January 7, 2008. Doug and Heather arranged that Doug's income would be based on a percentage of the revenue generated from his massage clients, excluding tips. Doug calculated that this would increase his annual salary to \$70,000, excluding tips.

Beginning in early December, 2007 Doug told all his massage clients at Prime that he was leaving Prime. When asked, as almost all of his clients did, Doug said they were welcome to schedule appointments at Five Seasons. Doug never said anything bad about Prime or pressured

his clients to leave. Doug gave Prime two weeks' notice before he left. Doug told Prime that he was leaving to work with his friend Heather at Five Seasons. When Doug started working at Five Seasons in January 2008, he was already booked for 40 massage therapy sessions per week for the following three weeks. All of the appointments were with former clients of Prime.

Legal action

On May 5, 2008, Prime filed a complaint against Doug for violating the non-competition agreement he signed with Prime. In the complaint, Prime sought a temporary restraining order, a preliminary injunction, a permanent injunction and damages. Before he was served with the complaint, Doug had no contact with Prime – he had received no phone calls, letters, emails, text messages or any other form of communication.

Doug's working at Five Seasons **clearly violated the valid non-compete agreement he signed with Prime.** Even though Montshire, like most states, disfavors restraints on competition, Montshire permits reasonable non-compete agreements. The one between Prime and Doug is reasonable under Montshire law. **The only question is what remedies are available to Prime.**

For a variety of reasons, Prime did not lose any income between January 1 – March 31, 2008. In fact, Prime's revenues increased slightly during that same period. Prime has not yet calculated its profits or losses from April 1, 2008 until the present.

Assume that you work for lawyers representing Doug. Assume too that a court could and would schedule hearings relatively quickly. A trial would not likely be scheduled sooner than 6 months. Prepare a memo for your supervising attorney as follows.

- 3(a) Identify and explain **Prime's strongest arguments** for obtaining each of the three forms of injunctive relief – the temporary restraining order, a preliminary injunction, and a permanent injunction. (20 points)
- 3(b) Evaluate the relative **strengths** of each of the three forms of injunctive relief. **Which one is a judge most likely to grant and why?** (15 points)
- 3(c) Identify and explain Doug's **best arguments** against Prime's argument for a preliminary injunction. (10 points)
- 3(d) Assuming that a judge would grant some form of injunctive relief, **draft the order (not the reasoning) enjoining Doug.** (20 points)

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