

It is understood by the student whose Student Number is entered below that this examination is given and the student's response is made and submitted pursuant to the conditions of the Honor Code.

Student Exam No. \_\_\_\_\_

UNIVERSITY OF MISSOURI-KANSAS CITY  
SCHOOL OF LAW

Law #513  
Defamation, Privacy, Relational & Emotional Torts

Professor Levit  
Winter Semester, 2005

**FINAL EXAMINATION**

(3 hours)

**Instructions**

1. Read each question carefully and pay close attention to the facts and to what the question is asking you to do. Discuss all issues presented by a question. Remember to argue issues both ways. Do not engage in a discussion of issues not raised.
2. I have included all of the facts I think you will need to answer the questions. If a necessary fact is missing, please identify it in your answer and explain how it affects your conclusion.
3. Nothing is intentionally ambiguous. If anything about a question appears to be ambiguous, decide what you think is meant, tell me what you think is meant, and answer the question accordingly. No reasonable resolution of an ambiguity will be penalized.
4. Please write legibly, because I can only give credit if I understand what you write. I can also only give credit for answers that are written in the bluebook.
5. Think before you write. Organize your answer. You get extra points for clarity and succinctness. You are penalized for an answer that is disorganized and confusing.
6. **Materials that may be used during examination: None. This is a closed book examination.** Unless otherwise specified, the applicable law is the law of this State, the State of Grace, which consists of all cases in your casebook and any cases discussed in class.
7. This exam consists of 12 pages. **TURN IN THIS EXAMINATION WITH YOUR BLUE BOOKS.** It is an Honor Code Violation to fail to turn in the examination itself or to copy it in whole or in part.

**Good luck!**

**DIRECTIONS: Write the letter of the single best answer in your Blue Books.**

**Multiple Choice**

(20%)

**Essay Question 1**

(60%)

Miles Jones has been a doctor in Grace since 1995. He is licensed to practice medicine in 27 other states as well. He is board certified in forensic pathology. Jones owns and operates Consultative and Diagnostic Pathology and serves as its part-time medical director. Between 1995 and 1997, he also served as an emergency room physician. Approximately 75 percent of Jones's current practice consists of performing autopsies, 15 percent is devoted to being a laboratory director, 5 percent involves medical-legal consultation, and the remaining 5 percent involves the practice of Internet medicine. The time he spends on each area of his practice is roughly proportionate to the percentage.

Since 1998 Jones has served as a staff physician for the Virtual Medical Group (VMG), which operates a website, net-dr.com. VMG uses a physician-designed web site to collect patient information and medical history relevant to prescribing certain prescription drugs. It uses a questionnaire or information form on the web site for this purpose. The way the web site works is that a prospective patient seeking one of six FDA-approved, non-narcotic medications must read through a patient information sheet that contains information on how the medicine works, directions, side effects, precautions, and drug interaction, and click to indicate the patient has read the information. The drugs available from Net Doctor include Celebrex, a painkiller, Cipro, an antibiotic, Viagra, for erectile dysfunction, Xenical, a weight loss drug, Propecia, a hair-growth drug, and Vaniqa, a drug to slow the growth of unwanted hair. The production information sheet for each drug contains the disclaimer: "The above information is intended to supplement, not substitute for, the expertise and judgment of your physician, pharmacist, or other healthcare professional. It should not be construed to indicate that the use of the product is safe, appropriate, or effective for you." Then the patient completes a detailed on-line questionnaire. Company staff screens the questionnaire. The questionnaire, which Jones helped develop, includes certain clinical questions to detect whether the cyber-patient is a liar, an addict, or someone with hypochondria (someone who suffers from imaginary illnesses). If the questionnaire has been completed appropriately, it is forwarded to Jones, if the patient is in one of the 27 states in which he is licensed, for review and possible issuance of a prescription of one of the medications. Jones then reviews the questionnaire and determines whether to prescribe and, if so, how much to prescribe to the patient. Occasionally, a follow-up telephone call to the patient is required to secure further information.

In the beginning Jones used to call the majority of the prospective patients; however, in recent years, he has not found a personal call to be necessary in the vast majority of cases. He has found that the internet forms are complete and usually provided all of the essential information necessary to make an informed medical decision. Further, Jones thinks that phone calls, when unnecessary, delay responsiveness to patient needs. In 2004, Jones approved approximately 15,000 prescriptions. The prescriptions are transmitted electronically with the

electronic signature and electronic instructions directly from the prescriber to the pharmacy designated by the patient, as long as the pharmacy is on a Net Doctor-approved list of pharmacies. Jones is paid on a per-patient basis.

Kim Prowse, a 37 year-old woman, suffers from the eating disorder anorexia nervosa, a disease in which people desperately try to become thin and voluntarily starve themselves to do so. She completed the Net Doctor questionnaire, listing her height as 5'4" and her weight as 146. In actuality, Prowse is 5'4", but weighs only 106 pounds. She sought a prescription for the anti-obesity drug Xenical, which works in obese people by limiting how much fat is absorbed in their bodies. Ev Graham, a 20 year-old clinician who worked on staff for Net Doctor, reviewed her questionnaire. Graham, who had recently graduated cum laude with an online bachelor's degree in health sciences from Florida Coastal University, had been trained by Net Doctor to look for certain red flags, depending on the type of prescription requested. For Xenical, Graham was supposed to do a body mass index (BMI) calculation based on the patient's height and weight, and look at the answers to a few brief questions regarding whether the patient had a healthy relationship to food (e.g., "I am terrified of gaining weight" and "I feel that food controls my life"). Since the weight Prowse listed placed her in the overweight, but not obese, category for her height, according to the BMI calculation, and because Prowse's answers on the eating disorder screening questions were appropriate, Graham passed Prowse's questionnaire along to Jones. He says he reviewed the medical history she provided, and sent her a standard diet and exercise plan and an explanation of warnings for the drug he was prescribing, and then e-mailed a prescription for Xenical for Prowse to an approved pharmacy.

Prowse used the drug Xenical for over three months, at which point her weight was a dangerously low 89 pounds. As a result of her dieting and excessively low body weight, Prowse suffered a heart attack. Prowse recuperated from the heart attack, and with therapy, is slowly gaining weight, but she has had extreme self-esteem problems and fears that she will suffer another heart attack.

Some weeks after Prowse's heart attack, and entirely unaware of it, Graham was developing some concerns about Dr. Jones. She wrote an e-mail to her supervisor, Sue Vizar, one of the directors of Net Doctor, in which she expressed her worries that Dr. Jones was processing prescriptions so quickly, he was a "one man scrip mill" and "couldn't be taking enough time to check the patients' histories." Graham commented that of all the physicians to whom she referred prescription requests, "Dr. J. never seems to want me to make any inquiries with the docs the patients list to verify any info." She concluded by saying, "I don't mean to call him a 'quack' or anything, but I just think it is something you should look into. For all I know, he could be prescribing Viagra to some teenager who has a credit card." As a result of this e-mail, and after reviewing Jones' prescribing history, Vizar set a limit of 100 prescription requests that would be referred to Jones per day and sent him an e-mail explaining her concerns about the volume of processing that he was doing.

**DIRECTIONS:** (1) Evaluate this situation using only tort theories we have covered this semester. (2) Caption each tort. (3) Sue only parties or entities that have been named in the facts. (4) Please omit any claims by or against the pharmacies that dispense the medications. (5) Please

omit any privacy claims that Kim Prowse might raise. (6) Be sure to include possible defenses or responses that any defendant might raise.

### **Essay Question 2**

(20%)

The Achievement Foundation is a state-owned corporation operated out of the Grace Division of Criminal Justice. As one of its services, the Foundation runs a wilderness program for troubled teenagers. The program includes challenging outdoor experiences conducted in the mountains, and as part of misdemeanor diversion programs, juveniles can participate in this wilderness program with the Foundation while paying a \$200 fee.

The Executive Director of the Criminal Justice Division, Moses Alou, gave the Director of the Foundation, Leyla Brown, authority to negotiate deals, subject to his approval, that might bring extra revenue into the Division. He has been searching for ways to bring extra monies into the Division to help supplement the painfully low salaries for state workers.

On behalf of the Foundation, Brown approached Gerard Scarano, an entrepreneur and outdoor adventure financier and marketer, with a proposal to expand and market the Foundation's wilderness program in the private sector, in exchange for Scarano getting some of the fees that the extra customer base would generate. Brown thinks that marketing a wilderness program to the private sector will provide a potential base of new customers (troubled teens who have not formally been charged with any misdemeanors but whose parents are looking for activities for them). To evaluate the program with a view toward making a deal to market it, Scarano agreed to visit and evaluate the Foundation's wilderness facilities and participate in one of its nature hike adventures.

Although Scarano was an experienced hiker, the Foundation agreed to provide him with the proper equipment while he was on the adventure and to pay his expenses for the trip. In exchange, Scarano promised to evaluate the Foundation's program and provide suggestions for improvement and then to discuss his experiences with Brown so that negotiations between Scarano and the Foundation could go forward.

The hike was planned to take place at night and was going to be guided by one of the Foundation's employees, Preston Hendrix. During the drive to the hike starting point, a small mountainous area of land owned by the State of Grace, Hendrix became upset following a cell phone conversation with his girlfriend. As soon as the truck dropped off the hikers and drove away, Hendrix angrily walked off into the wilderness, leaving Scarano and a handful of teenagers behind. Concerned about being alone with the teenagers in an unfamiliar area, Scarano hurriedly followed the guide along the trail and in the dim light he smacked his head into a rock ledge overhanging the trail and suffered serious head wounds.

**DIRECTIONS:** Scarano has approached you to inquire about the possibilities of a tort suit. (1) Consider only claims that you might file on behalf of Scarano. (2) Evaluate this situation using only tort theories we have covered this semester. (3) Caption each tort. (4) Sue only parties

or entities that have been named in the facts. (5) Be sure to include possible defenses or responses that any defendant might raise.

**END OF EXAMINATION**