

# Civil Procedure

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## Final Exam

**Professor Davies**

**Fall 2008**

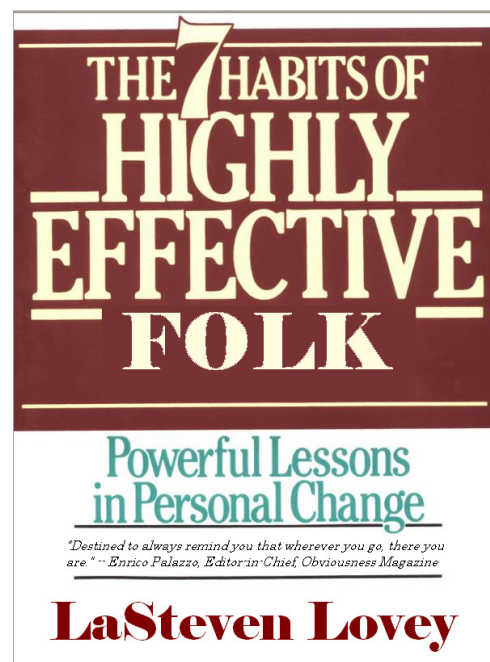
N.B. Multiple-choice questions omitted herein; only the essay and short-answer portions of the exam are included.

**Part I – Essay Question (100 points)**

LaSteven Lovey, a lifelong resident of Provo, Utah, is CEO and majority shareholder in a personal time management company that he founded, Paine Lovey, Inc. (“Paine Lovey”), a Delaware corporation that has national retail outlets in suburban malls across the country but its corporate headquarters and chief manufacturing facility in West Valley, Utah. At a retail level, Paine Lovey sells calendars, daily planners, weekly planners, monthly planners, yearly planners, decadal planners, centurial planners, millennial planners, inspirational posters, and various other time management and self-help books. Mr. Lovey and a virtual army of inspirational speakers / time management experts that he has recruited over the years also provide personal management and “motivational consulting” services to companies in every state in the Union, Italy, France, Greece, Zanzibar, Macao, and various other countries in Central America and South America.



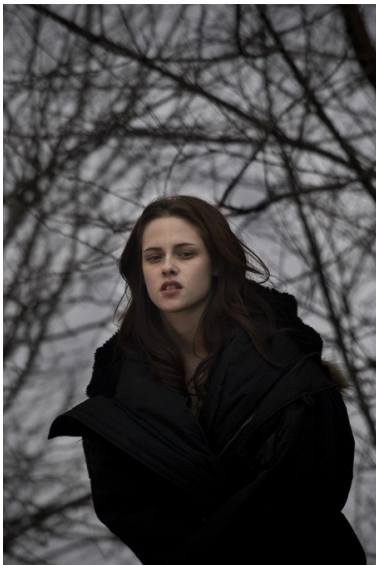
*LaSteven Lovey*



*Lovey's Masterpiece*

One of the self-help books that Paine Lovey markets and that, in fact, has long been a key moneymaker for the company, a foundation of its corporate ethos even, is Lovey's own *Seven Habits of Highly Effective Folk* (“*Seven Habits*”). Lovey wrote the book during one of his many “quarterly soul-searching sessions,” periods in which he recedes into the wilderness with nothing but bison jerky, sunglasses, and a copy of Hardy's *Tess of the d'Urbervilles*. *Seven Habits* arose out of such a session, prior to Paine Lovey's formation, in which Mr. Lovey was camping in the desert around Phoenix, Arizona (and in which he left home *Tess* and took instead a copy of Keillor's *Lake Wobegon Days*). Among its other products, Paine Lovey sells numerous items based on *Seven Habits*, including t-shirts emblazoned with slogans such as “I'm effective. Are you?”; postcards featuring pictures of West Valley's skyline and the label “Where Effectiveness Is Innate”; and “talking” cereal bowls that, each time one is moved, the bowl declares in a movie preview-like voice, “Effective people eat bran, not Lucky Charms or Cocoa Puffs.”

Because sales of *Seven Habits* and *Seven Habits*-related merchandise is so critical to Paine Lovey's profitability, the company is extremely protective of the book's—and the book's philosophy's—commercial value. Mr. Lovey holds the copyright to the book, but ten years ago granted Paine Lovey an exclusive license to market and reproduce the book and any materials based upon it or its copyright. Under the provisions of the licensing agreement, the contract is governed by California law. To help ensure that the book's value is guarded scrupulously enough, Marie McTwilly, Paine Lovey's General Counsel and Senior Vice President for Legal Affairs, has in her employment contract a provision that specifically ties her annual compensation to a complex metric gauging the extent to which *Seven Habits*' value has been diluted in any given year. Facing this clear incentive, Ms. McTwilly recently hired a new in-house lawyer working under her direction, Xander Lighttooth. The sole purpose of Lighttooth's position is to focus on protecting *Seven Habits*' value.



*Marie McTwilly*



*Xander Lighttooth*

During a recent internet search, Mr. Lighttooth discovered an off-Broadway play currently running in New York City: *An Evening with Dr. Faith— 7 ½ Habits of Highly Effective Mistresses* (“*Evening with Dr. Faith*” or “*Evening*”). The play was written and is performed by Lisa Marie Faith, a Harvard alum who lives in Syracuse, New York, works in New York City, and previously won numerous critical accolades for a prior play, *The College-Dude Revue*.



*Dr. Faith*



*A Performance of Evening*

That play, the *Revue*, repeatedly sold out various theaters not only in New York but throughout the Northeast. *Evening with Dr. Faith* thus far, however, has run only in New York City, though its production company, Fine Art Events, Inc. (“FAEI”), which is based and incorporated in New Jersey, has been heavily advertising *Evening* also in Boston; Connecticut; New Jersey; Philadelphia; Washington, D.C.; and Portland, Maine. FAEI hopes to launch a lengthy run of the play in the Days Inn in Atlantic City, New Jersey sometime next year and currently is negotiating with the hotel over this possibility. The play also has an official internet site, [www.7andahalfhabits.com](http://www.7andahalfhabits.com), owned and run by FAEI and through which patrons can purchase both *Evening*-related merchandise (e.g., t-shirts, posters, soundtrack recordings) and tickets to see the play in New York City. The site describes the play this way:

*7 1/2 HABITS OF HIGHLY EFFECTIVE MISTRESSES* hilariously explores our quest for romance, love and security. Using the format of a self-help lecture by Dr. Faith, the play takes us through the entertaining habits, using witty original songs, comic graphs and charts, maracas and a riding crop to punctuate her outrageously funny observations. Drawing on her colorful experiences, including working as a stripper to pay her way through graduate school . . . , Faith weaves humor and songs – including the original crowd-pleasing “How to Be a Bad Girl” and “Cheating Men Deserve What They Get” – into a clever, thought-provoking and ultimately touching show. Part comedy, part cabaret, part one-woman theater piece, it all adds up to an evening of sophisticated, fun entertainment.

Finding the very notion of *Evening with Dr. Faith* not only highly offensive and inconsistent with Paine Lovey’s worldview but also obviously dilutive of *Seven Habits*’ commercial value, Lightooth rushes into McTwilly’s office ready to sue. McTwilly is extremely pleased with Lightooth’s finding; neither Mr. Lovey nor Paine Lovey had ever heard of Dr. Faith or FAEI, so with Lightooth’s discovery of this play, McTwilly’s hiring of this young lawyer is now looking more and more like a stroke of genius. McTwilly, indeed, agrees with Lightooth’s assessment of what they should do and, after receiving necessary approvals from corporate brass, they file suit the next week on behalf of both Paine Lovey and Mr. Lovey in the United States District Court for the District of Utah.

The suit names Dr. Faith and FAEI as defendants. It seeks \$3 million in compensatory damages, \$10 million in punitive damages, and an injunction that would (a) forever bar performances of *Evening*, (b) require complete dismantling of the play’s website, and (c) forbid both Faith and FAEI from selling any further *Evening*-related merchandise. As basis for this requested relief, the complaint lodges four causes of action: trademark infringement under 15 U.S.C. §§ 1051 et seq., copyright violation under 17 U.S.C. §§ 501 et seq., intentional interference with business relations under the New York code, and false advertising under Utah law. The complaint is served on FAEI’s official service agent in New York City and personally on Dr. Faith as she is walking to her dressing room in New York City following a performance of *Evening*. Upon filing and service of the suit, Paine Lovey issues the following press release:

For Immediate Release – Paine Lovey today filed suit against Lisa Marie Faith and her production company for blatantly violating Paine Lovey’s intellectual property rights. The company is confident that its rights will be vindicated in court and is seeking damages in excess of \$10 million for Dr. Faith’s illegal acts. Marie McTwilly,

Paine Lovey's general counsel, stated, "Paine Lovey will not tolerate the theft or dilution of its intellectual property under any circumstance. Mark this suit as the first of many cedar wood stakes to come; we will hunt down like vampires anyone who tries to unfairly capitalize on our hard work and creativity, especially when such acts take the form of rubbish so patently bad, vile, and icky as this so-called 'play.' Really, *Evening with Dr. Faith* is the most offensive drivel attempting to pass as art and/or entertainment ever seen. 'Bad' doesn't even begin to describe the depths of its putridity."

Rather than answering the complaint, Faith and FAEI respond by jointly filing a Rule 12 motion. The motion asserts three arguments, namely, that the court lacks personal jurisdiction, that the forum is improper, and that even if the forum is proper, the suit should be dismissed on grounds of forum non conveniens. The district court, however, denies Faith's and FAEI's motion.

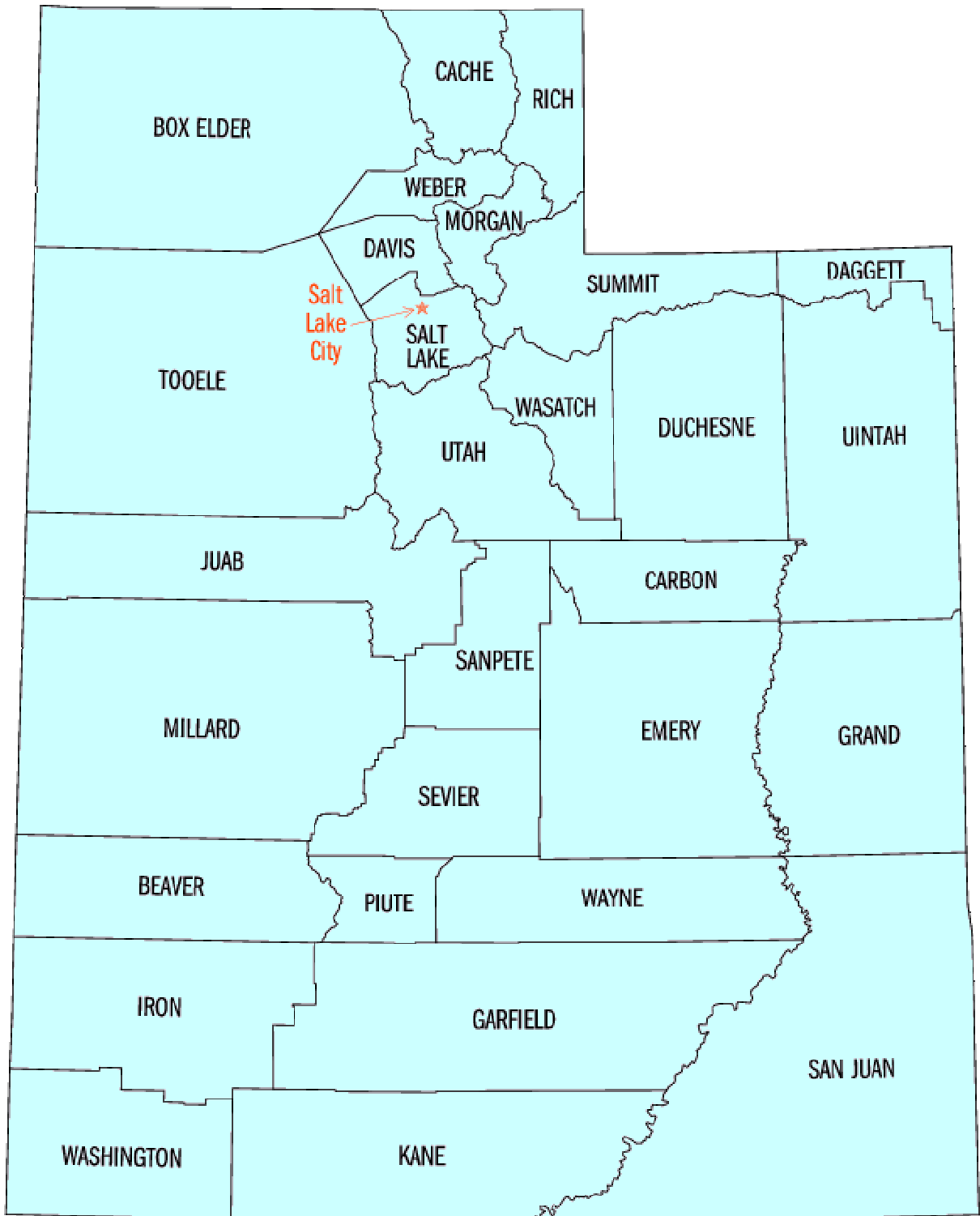
Faith and FAEI thus answer the complaint. Faith also counterclaims in libel and slander for Paine Lovey's and McTwilly's statements about *Evening* in the press release quoted above. In yet another defeat for Faith, the district court grants Paine Lovey's motion to dismiss this counterclaim, a motion Paine Lovey founded in (a) a theory of res judicata and (b) an argument that joinder of the counterclaim would be not only improper but highly distracting and a waste of judicial resources. Given the court's granting of this motion, the case thus proceeds to trial, and the jury enters a verdict of \$3 million in compensatory damages and \$12 million in punitive damages in favor of Paine Lovey. The district court then enters final judgment on the verdict. That judgment also grants the injunction sought by plaintiffs, on the exact terms the complaint requested.

You have been retained by Dr. Faith and FAEI, who are extremely displeased with the result procured from the litigation in Utah. They have asked you to provide your advice on (1) whether they can appeal the judgment rendered by the district court, (2) if they can appeal, to what court they would appeal, (3) if they can appeal, the grounds upon which they might do so, and (4) if you believe that they can appeal, on which grounds, if any, you think they in fact *should* appeal and why.

Assume for purposes of this question that all potential grounds for appeal were properly preserved in the trial court. Assume also that New York's long-arm statute is identical to California's, and that New Jersey's is identical to Utah's. Some maps that may or may not be of use are appended hereto.



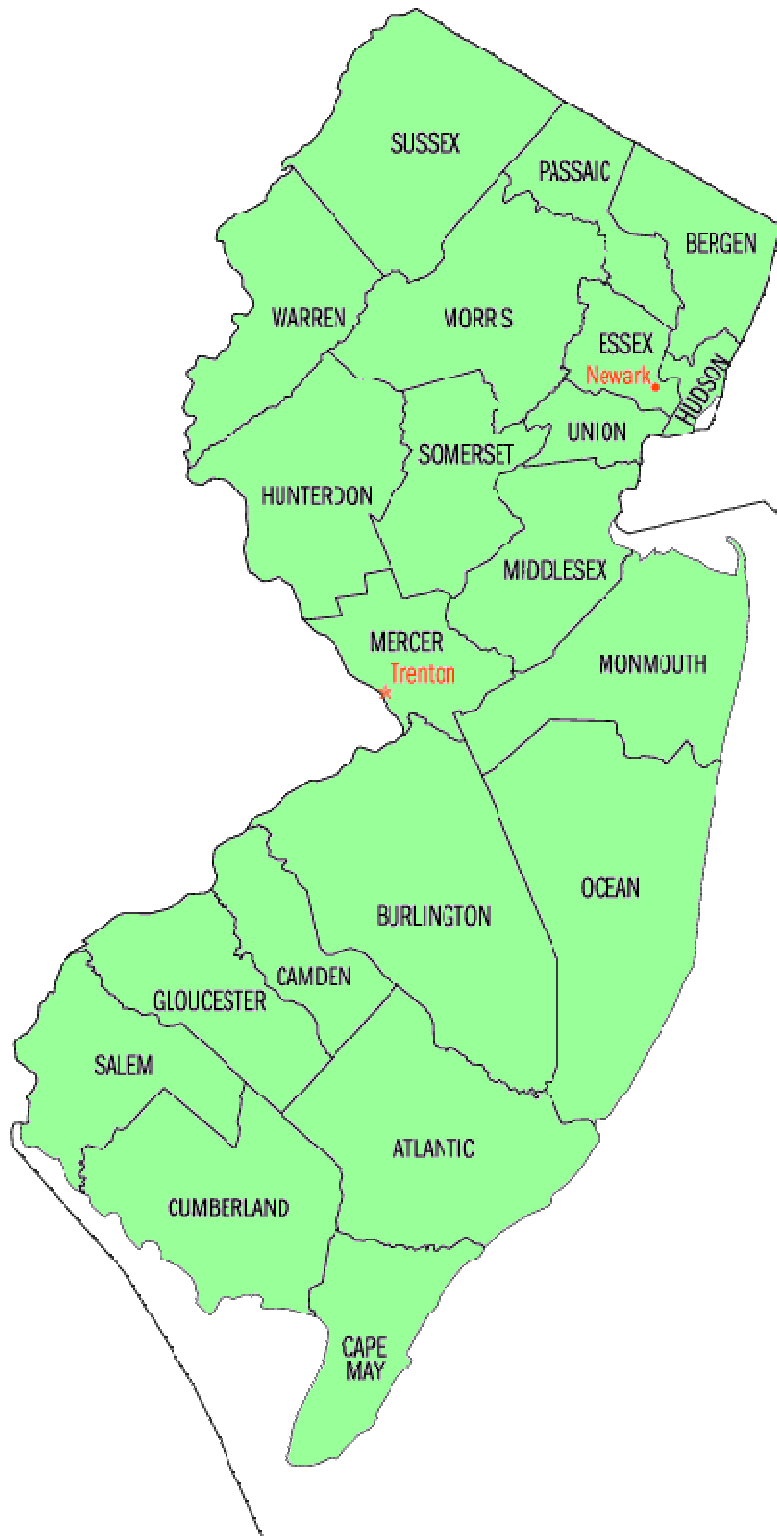
Federal District Court(s) in Utah



Federal District Court(s) in New York



Federal District Court(s) in New Jersey



**Part III – Short Answer (25 points)**

On December 12, 2008, the *Salt Lake Tribune* reported the following (text of the article is quoted in full and verbatim except where demarcated otherwise):

**New Uses for Viagra >>** Britain's *The Sun* reported in November that Calvin Muteesa, [age 20], of [New Haven, Connecticut], has been forced to take Viagra four times a day since he was 3 months old to stave off a potentially fatal case of pulmonary arterial hypertension. And Bentley, a 7-year-old springer spaniel, has apparently recovered from a potentially fatal lungworm attack on his chronically weak heart via a Viagra regimen at a clinic in Highgate, England. (And last year, Argentinean researchers discovered that hamsters fed Viagra endured the rigors of jet lag about 50 percent better than hamsters fed a placebo.)

Assume that Muteesa subsequently discovers that his Viagra regimen, while protecting his arteries, has caused what appears to be a permanent deformity in his foot. Accordingly, he retains counsel, Anna A. Adams, to file suit in federal district court in Connecticut against the Viagra's manufacturer, Makin' Drugs, Inc. During the course of the litigation, Muteesa meets with Adams in her office to discuss discovery requests they have received from Makin' Drugs concerning Muteesa's health. The following conversation ensues:

Adams: "How are you feeling, Calvin?"

Muteesa: "Oh, you know."

Adams: "That bad, huh?"

Muteesa: "Well, actually, it's bad some days - my foot is a little sore when I walk - but most days it's OK. Frankly, I feel like my foot is slowly getting better, even though I'm still on the Viagra. Maybe the drug really isn't that bad after all."

Later on, you are defending Muteesa in Makin' Drug's deposition of him. The deposition is almost over when the following exchange occurs (the excerpt is from the deposition transcript):

Counsel to Makin' Drugs: "Mr. Muteesa, have you had any conversations about your foot with Ms. Adams?"

Muteesa: "Sure, yeah."

Counsel to Makin' Drugs: "Mr. Muteesa, I'd like to remind you, for clarity of the record, please answer each of my questions 'yes' or 'no.'"

Muteesa: "Yes. The answer to your question is yes."

Counsel to Makin' Drugs: "OK, thank you. What did you say in those conversations?"

Please draft, in no more than four sentences, what the next line in the deposition transcript should be. Assume that jurisdiction and venue are proper.