

ExamID: _____

Law School of Harvard University / 2023–2024

*Section 1
Fall 2023*

Civil Procedure: Final Exam

STEPHEN E. SACHS
Harvard Law School

Exam type: IN-CLASS
Exam mode: OPEN + NETWORK
Exam time: 2–5 p.m. on Friday, December 8, 2023

This exam is 7 pages long. Please check to see that you have all 7 pages.

MATERIALS

This exam is completely open-book and open-note; you may consult any digital or paper materials or devices that you find helpful. (That said, the Registrar doesn't allow access to cell phones during in-class exams. Also, Exam4 won't let you copy-and-paste text from other documents or exit the software during the exam.) **You must not consult anyone, employ AI, or access new information on the Internet during the exam (that is, information beyond what's on the course website or your own textbook or notes which you have stored on the cloud).** *Your exam must be entirely your own work.*

By submitting your exam answer(s), you acknowledge the above instructions and certify that the work you are submitting is your own, that you have not received unauthorized assistance on the exam, including unauthorized use of AI (such as ChatGPT and other large language models), and that you have followed applicable rules, including rules for accessing reference and other materials during the exam.

2023.12.05.1831 REV

CIVIL PROCEDURE, SECTION 1 • PAGE 1 OF 7

© 2023–2024 by the President and Fellows of Harvard College

ANONYMITY

Exam4 will automatically print your anonymous ID and word count on the exam copy. Because the exam may be administered to some students at different times, please don't discuss its contents with anyone until after the exam period ends or I've notified you that all exams have been submitted.

To assist with the anonymous grading of separate questions, *please use the "Answer Separator" function* to distinguish one question from another.

Harvard's rules prohibit student contact with faculty before, during, and after the exam regarding the personal scheduling or administration of an exam for that student until the student's grade is posted. Such contact is prohibited even if the anonymity of the student's exam is preserved; this policy extends to communications to the full class. To maintain anonymity and to ensure compliance by students with this policy, I've been asked not to communicate in any way, including through email or the course website, with individual students or the class as a whole regarding the exam while the exam is in progress or until the posting of the students' grades after the exam. If a student contacts me, I'm not to respond but to contact the Registrar's Office instead. (I will, however, be thinking about you guys!) In case of emergencies, *contact the Registrar's Office directly*.

CONTENTS

This exam consists of **three essay or short-answer questions**. Your answers are limited to **2500 words** in total. This is a strict limit, and additional words won't be read—not as a penalty, but as a uniform way of ensuring fairness to students who stayed within the limit.

Brevity is appreciated, and you aren't required to write that much. Make sure to watch your word count, so that you don't find yourself making substantial cuts in the last few minutes.

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.

SUGGESTIONS

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

- (1) *Make sure that you read each question carefully.* Pay attention to the point values: they signal how important each question will be. I suggest that you reserve twenty minutes at the beginning for reading the whole thing, as well as ten minutes at the end for proofreading. (The recommended time allocations assume that you’ll do this.) Separately, I’d encourage you to spend up to one-third of your time just sketching out answers 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 one 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, statutes, or cases can sometimes serve as useful shorthand, but chapter-and-verse citations are a waste of time. In the words of the now-repealed Rule 84, the model exams available on the course website “illustrate the simplicity and brevity that the rules contemplate.”
- (3) *State the substance accurately.* 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 provision we haven’t addressed at length—or, indeed, at all.
- (4) *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 newly effective amendments to the Federal Rules.
- (5) *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, brief, or response presents the best available arguments for its position; and so on. Don’t try to invent new and helpful facts or law not mentioned in the exam.
- (6) *If there are issues that seem inconclusive or that require more information, you should say so.* Some of them may be intentional. If one answer to an unclear issue seems better than another, but not conclusively so, you

should say that too. Likewise, not every issue suggested by the fact pattern is actually relevant to the question asked; discussing irrelevancies will only cost you time.

- (7) **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 the syllabus and with Harvard's grading policies.

* * *

Good luck!

**DO NOT TURN TO THE NEXT PAGE
UNTIL THE PROCTOR TELLS YOU TO BEGIN**

— START OF EXAM —

Q.1. “Salem, Maffachufetts”: (60 pts, ≈1 hr 30 min, up to ≈1500 words)

During a major storm, *E* was killed in her hometown of Salem, Mass., by wind-blown debris which *D* had allegedly failed to secure. *W*, a citizen of Oregon and *E*’s sister and next-of-kin, filed a wrongful death action against *D* in the U.S. District Court for the District of Massachusetts.

D’s answer stated that she was unconscious at the time of the incident and has no memory of what happened in the storm. Her answer also asserted a counterclaim for false imprisonment and conversion, alleging that *W* tried to kidnap her shortly after *E*’s death and to steal her footwear.

D’s counterclaim invoked the Salem Municipal Witchcraft Ordinance, enacted in 1693 and still in force, which provides for treble damages for torts committed by witches. Under the Ordinance, whether a person is a witch must be determined through an “Ordeal by Water.” If the accused, being submerged, is repelled by the water and floats, she is conclusively presumed to be a witch. Accordingly, *D* moved for this ordeal to be held as a physical examination under Rule 35. Over *W*’s objections (which were based, in part, on the federal courts’ long practice of factfinding by testimony and evidence rather than physical ordeal), the district court granted *D*’s motion. *W* appealed from this order and, in the alternative, petitioned for a writ of mandamus. *D* opposed the petition and moved to dismiss the appeal for lack of jurisdiction; the ordeal has been stayed until the appeals court rules.

A few days after serving her answer, *D* served an amended answer which added several new affirmative defenses. These included incapacity and failure to state a claim, as to which she cited another clause of the Municipal Witchcraft Ordinance:

Thou shalt not suffer a Witch to live, nor to bring any fuit whatsoever as Plaintiff, nor to state nor pleade any Claime for wrongful Deathe under the Lawes of this or any other of His Majestie’s Provinces.

D’s other new defenses were insufficient service and the three-year Massachusetts statute of limitations. *W* had sent a waiver form by first-class mail to *D*’s home address, but *D* didn’t return from her vacation in Australia to

her home in Kansas and return the signed form until just after the three-year period ended. However, *W*'s process server had previously delivered a copy of the complaint and summons to the concierge of *D*'s Australian hotel, though only after *W* summarized the complaint in skywriting outside *D*'s window, as Australian law prescribes.



W beginning her skywriting. © 1939 Metro-Goldwyn-Mayer, used per 17 U.S.C. § 107

W moved to strike the amended answer as untimely and its new defenses as insufficient. She answered the counterclaim with a general denial of all its allegations and moved for judgment on the pleadings.

Six days later *S* moved to intervene in the action. He sought to bring claims against *W* for intentional infliction of emotional distress, on behalf of himself and a class of all other persons who saw the skywriting and were put in great fear thereby. In addition, *S*'s proposed complaint asserted an individual claim for battery, alleging that *W* attempted to set him on fire. *S* also moved to certify the class. *W* opposed *S*'s motions, asserting (*inter alia*) a lack of subject-matter or personal jurisdiction.

How should each court rule on the pending matters before it, and why? (Address each pending motion, petition, etc., independently and in the order in which it's mentioned above, without considering the effect that one might have on another. But if there would be a relevant effect, just say so. And if you need more information, just say that too.)

Q.2. “Tell me why”: (20 pts, ≈30 min, up to ≈500 words)

Please explain the following:

- (a) Why would the refusal, and not just the grant, of a preliminary injunction have been made appealable under 28 U.S.C. § 1292(a)(1)?
- (b) How does a motion for summary judgment (MSJ) resemble a renewed motion for judgment as a matter of law (RJMO), and how do the two motions differ?
- (c) Why must a judgment be on the merits to result in claim preclusion, but not to result in issue preclusion?

Q.3. “Abolishing venue”: (20 pts, ≈30 min, up to ≈500 words)

Suppose 28 U.S.C. § 1391 were revised to provide that “A plaintiff may lay venue in any district.” **Would this be a good idea? If it were adopted, which other changes to the law would then become appropriate? Defend your answers.**

(Your answers, in total, should not exceed 2500 words.)

— END OF EXAM —