

Examination Number _____

UNIVERSITY OF MISSOURI - SCHOOL OF LAW

Professor Carl H. Esbeck

Spring Semester 2013

Civil Procedure II, 5015L - Section 1

Directions to Part I - Essay
(1 hour)

Place your examination number in the upper right-hand corner of this examination. When finished, return these essay examination questions and submit your essay answers.

Answer only the questions asked. Do not raise or answer questions not asked.

Arrange your answers in sequential order. That is, put your answer to Question 1 first, then your answer to Question 2, and etc. If you want to skip over a question and come back to it later, leave a blank page and begin the next question.

You may bring with you into the examination room your casebook (including TWEN downloads), your current federal rules supplement, and your own classroom notes (not borrowed notes). You may also bring a course outline provided it is entirely your own work product. It is an Honor Code violation to have any other materials with you during the examination.

You may use your laptop to complete this Part I.

If you do not use your laptop, write your answer in the bluebook provided. Use a pen with blue or black ink. Write on only one side of each page. Do not write in the left-hand margin. Do not tear pages out of the bluebook.

*** * * Part I begins on the Next Page * * ***

PART I (one hour)

Question 1 (25 minutes): Philippa operates a speed boat on Big Sky Lake in Montana and so does Dan. The boats collide. Philippa sues Dan in Montana state court alleging negligence and seeking \$300,000 in damages for her personal injuries. Montana has no compulsory counterclaim rule. Montana has not adopted comparative negligence. Dan denies he was negligent and also pleads Philippa's contributory negligence.

The case is tried without a jury. At the close of all the evidence the judge finds that Dan was negligent but that Philippa was also negligent. Accordingly, judgment is entered in favor of Dan. There is no appeal.

Six months later Dan sues Philippa in a diversity claim in Idaho federal district court alleging negligence and seeking \$250,000 in damages for his personal injuries. Philippa pleads Dan's contributory negligence.

(A) Philippa asserts res judicata. How should the federal court rule and why?

(B) Both parties assert issue preclusion. How should the federal court rule and why?

Question 2 (10 minutes): A key witness for plaintiff is a member of Mt. Sinai Temple, a synagogue. The federal judge assigned to the diversity case which is to be tried before a jury is a member of the same synagogue. The breach of contract claim will largely depend on whether this witness is believed. Must the judge recuse herself? Explain.

Question 3 (15 minutes): Recall the case of *EEOC v. Original Honey Baked Ham* (D. Colo. 2012) [a TWEN download]. Assume one of the plaintiffs had kept a daily diary that she never disclosed to anyone. The diary was an "app" on plaintiff's smartphone which she kept in her purse and, hence, with her at all times when not in use. Are the entries in the diary subject to discovery for the period January 1, 2009, to the present? Explain.

Question 4 (10 minutes): In *Schlagenhauf v. Holder*, casebook p. 508, the driver of a Greyhound bus (Schlagenhauf) was sued for negligence. He conceded that perhaps a plaintiff does waive the doctor-patient privilege when voluntarily filing a tort claim that puts at issue plaintiff's personal injuries. However, as involuntary parties, Schlagenhauf argued that defendants could not be deemed to have waived their privacy. Specifically, Schlagenhauf argued he did not waive his doctor-patient privilege.

The Supreme Court ruled that Schlagenhauf was subject to FRCP 35, and thus he had to submit to physical and mental examinations under the Rule. But the Court also held that an insufficient showing had been made below to compel Schlagenhauf to submit to examination by an internist, ophthalmologist, neurologist, and psychiatrist. The Court rejected the waiver-of-privilege theory as to both plaintiffs and defendants. What was the Court's rationale for rejecting the waiver theory?

* * * END OF PART I * * *

Turn in both these examination Questions and your Answers.

After a 10-minute break, all students will begin Part II together.