THE IMPORTANCE OF CIVIL PROCEDURE

"The history of American freedom is, in no small measure, the history of procedure."

*Malinski v. New York, 324 U.S. 401, 414 (1945) (Frankfurter, J concurring)*

"[I]t is procedure that marks much of the difference between rule by law and rule by fiat."

*Wisconsin v. Constantineau, 400 U.S. 433, 436 (1971)*

"I'll let you write the substance . . . you let me write the procedure, and I'll screw you every time."


INTRODUCTION AND OVERVIEW:
As you already learned last semester, Civil Procedure is the “how” of law—how the substantive legal rights & duties you learn in other classes (ie, Contracts, Torts, Property, etc) get enforced or put into practice in the US Federal court system. Civil Procedure is
“Civil” in the sense of law which is directed by “the people” (L = civilis). So, we study legal actions which are “non-criminal”—actions typically brought by individuals or corporations.

“Procedure” in the sense of the process / way / rules / method—of bringing a civil “proceeding” (the old word for lawsuit).

As we have also discussed, the rules of Civil Procedure represent a set of choices or possibilities for a lawyer to make in the process of running a case.

This semester our focus is on the Federal Rules of Civil Procedure (FRCP), the “instructions” for filing and running a lawsuit in the US Federal Courts. We will follow the order of the litigation process itself, incorporating the basics of jurisdiction, venue, joinder, etc., which we learned last semester. You should treat learning the FRCP and their application as the major part of your study. The case law this semester will primarily serve as examples of rule application rather than provide the source of the law. Where cases provide an important rule, it will be noted in this syllabus and/or in class. Note that we do not study actual trial procedures in this class; that is covered in the Evidence course. Civil Procedure questions may appear on Bar Exams.

We have noted that mastery of the rules of procedure is a key means by which the lawyer can exercise skill and control over the outcome of a dispute. Without the ability to use the principles and rules of procedure to your advantage, all the substantive law in the world will do you no practical good. Cases are often won or lost based upon procedural advantages or mistakes. (See the Dingell quotation above.) As with last semester, you should concentrate on how to distinguish substantive from procedural law and learn the ways in which substantive law influences or informs the options available through procedure. Civil Procedure can be technical but rewards strategic thinking and mastery of its basic principles.

**COURSE GOALS:**
This class will introduce you to the key requirements of the Federal Rules of Civil Procedure (FRCP) which govern how to initiate and run a civil action and litigate in Federal Court, roughly in the order of their consideration in a lawsuit.

As discussed in Semester 1, the class is framed around the four (4) fundamental principles underpinning the rules of US federal Civil Procedure:

1. the needs of the adversary system,
2. the requirements of due process,
3. the need for judicial efficiency, and
4. the requirements of the US Constitution.

We will discuss these principles and how the rules you learn put these principles into operation. Understanding these principles and how they relate to each other will help you reason through the rules’ operation and strengthen arguments by considering a rule’s underlying purpose. By the close of the year, this class should enable you to recognize,
understand, and apply the basic requirements and procedures of a civil action in Federal Court, except for the conduct of a trial, as noted above.

**STUDENT LEARNING OBJECTIVES:**
At the completion of this course, students should be able to:

1. Identify civil procedure issues raised by a given set of facts.
2. Identify the Federal Rule of Civil Procedure (FRCP), federal statute, and/or relevant case law rule(s) most applicable to solving a hypothetical;
3. State the relevant FRCP, statute, and/or court decisional authority when solving a problem based on a given set of facts.
4. Identify the facts relevant to resolution of a procedural issue and in support of an argument for a particular outcome to a problem presented,
5. Apply the relevant Constitutional provision, FRCP, federal statute, and/or case law rule(s) to the relevant facts to solve or analyze a problem;
6. Organize the relevant facts to logically support the analysis required to argue for a particular outcome to a problem;
7. State a well-supported conclusion to a legal analysis of given facts;
8. Distinguish between the appropriate legal standards to apply for a motion to dismiss, a motion for summary judgment, and a motion for judgment as a matter of law;
9. Evaluate the legal adequacy of a Complaint;
10. Draft pleadings, discovery requests, discovery responses, and a motion, consistent with the relevant FRCP, for a given factual problem;

Note that knowledge and understanding of law is measured by the ability to apply and use it, not simply to state rules or facts.

**ATTENDANCE**
Regular and punctual class attendance is required, consistent with JMLS and ABA policy. Missing class is also likely to affect your understanding and facility with the material. Students will sign an attendance sheet during every class, and a student who misses more than five (5) classes per semester—regardless of the reason—will receive a grade of W/F (withdrawn/failing). Signing in for a student who is not present is an act of academic dishonesty carrying serious consequences. In addition, students who arrive late or leave early are considered to have missed at least ½ a class period. You may email me for questions about your attendance status during the semester.

**CLASS PREPAREDNESS AND PARTICIPATION:**
You are expected to be prepared for each class by having not only read, but also thoughtfully considered the assigned material before class, sufficiently so that you are comfortable discussing the assignment and issues it raises during class. Every student is expected to participate in both class-wide and small group discussion and written assignments and should anticipate being called upon. You are ultimately responsible for learning how to analyze, discuss, and apply procedural issues. My job is to guide you in that process. Use the Focus Questions on TWEN to guide your reading.
The quality of your class participation will affect your grade. (See “Grading” below.) You are expected to contribute to class discussion through volunteering, when called upon, and through the group litigation assignments. Each student may use one “free pass” (to decline being called upon) when unprepared, provided that you tell me before class. Otherwise, being unprepared will affect your class participation grade.

PLEASE, ask questions if you do not understand. You may see me during my office hours (posted above), email me for an appointment, or post a query on TWEN.

**LAPTOP COMPUTERS, CELL PHONES, E-READERS (& OTHER GOODIES):**
You may bring laptop computers to class **only for classroom purposes**, (eg. taking notes, viewing class materials, etc). You may bring laptop computers to class **only for classroom purposes**, (e.g. taking notes, viewing class materials, etc). Use of laptops during class for non-class purposes is subject to being treated as an absence or poor class participation at my sole discretion. As a professional courtesy, please turn off cell phones, pagers, iPods, etc before class—just as you would have to do in a courtroom.

**CLASS WEBSITE / TWEN:**
The West Education Network (TWEN) hosts a website for this class. Our TWEN site will include supplemental materials, an email function, and the discussion forum where you may ask questions and discuss the class material. You are responsible to check TWEN at least twice weekly for any class updates. To log on to TWEN, go to [www.lawschool.westlaw.com](http://www.lawschool.westlaw.com), click on TWEN and then click on the link for this course.

You are encouraged to assist other students with queries—doing so will be considered an advantage to your class participation grade. I will check our TWEN site 2-3 times a week to respond or comment on the discussion fora. Being a fan of “discovery learning,” sometimes my “answers” may take the form of further questions to you or suggestions on how to find the answer yourself. If so, I want to hear back on how you went or if I need to provide further guidance. If a particular query requires a very long or detailed answer, those are often best delivered in a face-to-face or phone conversation, so I may suggest a conference or take up the matter in class. In the event you are still confused, email me for an appointment.

**GRADING:**

*Exam*
Your grade will be based on one closed book, comprehensive final examination at the end of the semester, worth 100% of the grade, although your final grade is subject to adjustment based on class participation, as explained below. For my exams, you should concentrate mostly on analysis and working closely with the facts of the problems given. I am most concerned to see your legal thought process. Exam marks are based on careful consideration of anonymous written exam answers in the context of the class. As such, changing grades afterward based on students’ perception of their own answers or
the consequences attaching to a poor mark is not appropriate. Although I will not negotiate grades, I am happy to discuss the reasons for a grade on any exam question after the exams are marked. Just make an appointment after reading my comments on the exam.

**Class Participation**
The final grade for the class (based on the exams as stated above) **may be adjusted up or down by one-third (1/3) grade** (e.g., B to B- or C to C+, etc.) based on appropriate class preparedness and participation (or lack thereof)—as determined by my academic judgment. Participation and evidence of preparedness in all aspects of class will be taken into account—responding to questions, engaging in class or group discussion, submitting written group assignments (see below), or assisting other students with TWEN queries. Note that the Student Handbook prohibits failing grades from being “bumped up” to a pass by class participation.

**Litigation Assignments**
As part of your class participation, **in addition to preparation and oral participation in class, you are required to participate in four (4) written group litigation assignments which put the FRCP you have learned into practice.** Instructions will be given out separately on these assignments which will be due approximately bi-weekly. (See Assignments Syllabus). These group litigation assignments are adversarial—your Firm will be litigating against another Firm. **Grades focus principally on compliance with the relevant FRCP requirements learned in class and additionally on evidence of creative and strategic litigation by your law firms.** Litigation assignments are marked, as last semester, as high pass, pass, insufficient, or fail and will also include written comments and suggestions. Assignments should include the names of all students in the firm who helped to participate in the assignment. Due Dates will be announced in class and posted on TWEN.

**REQUIRED TEXTS:**


I will also post additional required material or cases on TWEN which are not in the casebook. You will be notified of such required materials on this syllabus, in class, or on TWEN.

**Recommended Texts for further reading if desired:**
There are many good texts and casebooks available on federal civil procedure, but the gold standard, quoted by professors and courts alike, is Wright & Miller, *Federal*
Practice & Procedure, available on Westlaw (the FPP database). A very good student resource for further explanation, clarification or examples is Friedenthal, Kane and Miller, Civil Procedure (West Hornbook Series 4th ed 2005), ISBN 0-314-23363-6. This book is in the JMLS library. Note, however, that this edition is not up-to-date and will require use of pocket parts or other supplements. The study books by Joseph Glannon may be helpful, although they, too, are out of date and must be used with caution. I DO NOT recommend the use of most commercial outlines, such as Gilbert’s or Emmanuel’s.

The Assignments Syllabus, by Week, follows on the next pages. Remember to read the Focus Questions and Key Terms before beginning your reading and try to answer them as you read.

NOTE THAT DUE TO THE AMOUNT OF MATERIAL THAT MUST BE COVERED THIS SEMESTER, THE AMOUNT AND PACE OF READING IS GREATER THAN IN FIRST SEMESTER. BE SURE TO KEEP UP WITH THE READING OR YOU WILL FALL DANGEROUSLY BEHIND. THIS INCLUDES READING ALL FRCP OR STATUTES ASSIGNED.

ALSO NOTE THAT, AS WE DISCUSSED IN SEMESTER 1, WHEN READING A STATUTE OR RULE, IT IS IMPORTANT TO READ THE ENTIRE STATUTE OR RULE IN ORDER TO HAVE AN UNDERSTANDING OF ITS BASIC PARTS AND OPERATION.
**CP II 2013 Assignments Syllabus:**
The assignments following are broken down by week (covering 2 classes). This syllabus is a guide only, not a contract, and is subject to change. Modifications to the syllabus will be announced in class or posted on TWEN. Yeazell casebook = “CB”, FRCP and Statute Supplement = “Supp”.

**Assignment 1:** (Week of Jan 14) **Pleading Basics: The Complaint & Service**
CB, pp 365-413
Supp, FRCP 1, 2, 3, 4, 5, 7, 8, 9, 10; see also Appendix of Forms
TWEN: *Bell Atlantic v. Twombly*
Key cases: *Twombly & Iqbal*

**Assignment 2:** (Week of Jan 21) **Pleading Part 2: Responsive Pleading and Amendment**
CB, pp 413-450
Supp, FRCP 6, 7, 8, 9, 10, 11, 12, 13, 15; see also Appendix of Forms
TWEN: *Krupski v Costa Crociere*
Key cases: *Twombly & Iqbal; Krupski v Costa Crociere*
Assignment 1 (Complaint) Due for P attys

**Assignment 3:** (Week of Jan 28) **Joinder, Part 2: Complex Joinder & Class Actions**
CB, pp 839-893
Supp, FRCP 21, 22, 23, 24, 25, 42, & 28 USC s1335*
Key case: *Wal-Mart v Dukes*
(* Note ss 28 USC 1397 & 2361 provide procedures for statutory interpleader but we will not study them).
Assignment 1 (Answer) Due for D attys

**Assignment 4:** (Week of Feb 4) **Discovery, Part 1: Overview, Relevance, Process**
CB, pp. 457-485
Supp, FRCP 26, 30, 33, 34, 36

**Assignment 5:** (Week of Feb 11) **Discovery, Part 2: Tools, Techniques & Tips**
CB, pp 487-522
Supp, FRCP 26, 31, 35, 37, 45
Assignment 2 (Discovery Requests) Due

**Assignment 6:** (Week of Feb 18) **Mid-Semester Consolidation**
In-class Oral Midterm (ungraded)
**Guest Speaker**
**Group Exercises**

**Assignment 7:** (Week of Feb 25) **Disposition Without Trial I: Default & Dismissal**
CB, pp 523-533 & 555-574
Supp, FRCP 12, 41, 55
Key cases: *AT&T v Concepcion & Iqbal again . . .*
Assignment 3 (Discovery Responses) Due
Assignment 8: (Week of Mar 4) Disposition Without Trial II: Summary Judgment
   CB: pp 581-596
   Supp, FRCP 16, 56, 68
   TWEN: Scott v Harris
   Key cases: Celotex; Scott v Harris; Bias

March 11-15 Spring Break

Assignment 9: (Week of Mar 18) Trial & Judgment
   CB, pp. 597- 615, 643-671
   Supp, FRCP 38, 49, 50, 51, 54, 58, 59, 60, 61

Assignment 10: (Week of Mar 25) Appeal
   CB, pp 673-713
   Supp, 28 USC 1291, Fed R App P 3 & 4
   *Assignment 4 (Motion) Due

Assignment 11: (Week of April 1) Res Judicata I: Overview & Claim Preclusion
   CB, pp 715-748

Assignment 12: (Week of April 8) Res Judicata II: Issue Preclusion & Future Rights
   CB, pp 749-772
   **CB, pp 772-790
   Key Case: Parklane Hosiery

Assignment 13: (Week of April 15) Incentives to Litigate
   **CB, pp 279-363

Assignment 14: (Week of April 22)
   Catch-up and Review

Exam: TBA,
(Closed Book, 100% of final grade, subject to class participation adjustment as noted herein)

** This material may be condensed or dispensed with in the event more time is needed in other areas.