



CIVIL PROCEDURE II SYLLABUS

January Start 1L--Summer 2015 M, T, Th 11am-12:35pm

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Mon, Tue, Th: 12:35-1:45pm

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or

by prior appointment

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."

Hearing on H.R. 2327, before the Subcomm. on Admin. Law and Gov'tl Regs of the House Comm. on the Judiciary, 98th Cong. 312 (1983) (Rep. John Dingell)

INTRODUCTION AND OVERVIEW:

Over two semesters, this course covers the foundations of US federal civil procedure and rules, as they form the basis of practice in the federal court system. (Most state systems follow similar procedures.) In this sense, Civil Procedure serves as your introduction to "lawyering." 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. 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. As with last semester, our legal rules will come chiefly from US Supreme Court case law and the Federal Rules of Civil Procedure (**FRCP**).

This semester we will continue to follow the order of the litigation process itself, after the pleading phase of trial with the basics of jurisdiction, venue, joinder, etc., which we learned last semester. An understanding of Civil Procedure is naturally cumulative, and, while the focus of our class will be the material we cover this semester, we will refer to and build upon material from last semester. You should treat learning the FRCP and their application as the major part of your study. Much of the time, 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.

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. Civil procedure is an examinable subject on the Georgia Bar Exam and will become a graded part of the MBE in 2015. You should consider this class an introduction to procedural issues, concepts and reasoning which you will later build on in other classes, through work experience, and in bar preparation.

COURSE GOALS:

This class is designed to broadly introduce you to the basic principles and 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 semester, 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, a motion for judgment as a matter of law, and a motion for new trial;
 9. *Evaluate* the legal adequacy of a Complaint;
 10. *Draft* discovery requests, discovery responses, and a motion and motion response, consistent with the relevant FRCP, for a given factual problem;
 11. *Use* a given set of facts and evidence in litigating a hypothetical case.
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Note **that knowledge and understanding of law is measured by the ability to apply and use it**, not simply to state rules or facts. However, you must learn the rules in order to be able to apply them.

CLASS POLICIES:

ATTENDANCE:

Regular and punctual class attendance is required, consistent with JMLS and ABA policy. Students will sign an attendance sheet during every class, and a **student who misses more than four (4) classes—regardless of the reason--**will receive a grade of W (withdrawn). 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 may be considered to have missed ½ a class period. You may email me if you have questions about your attendance status during the semester.

CLASS PREPAREDNESS AND PARTICIPATION:

You are expected to prepare by having thoroughly read and thoughtfully considered the assigned material before each class. Assigned material will include Notes and Problems as well as cases and statutes. For each Unit of the course, there is a set of **Focus Questions on TWEN which you should read first**, to guide you in your reading and class preparation. As part of your preparation, **you should**

brief all cases in the assigned reading,¹ unless otherwise noted. Every student should **anticipate being called upon** and should be able to intelligently discuss the assignment and issues it raises in both class-wide and small group discussion. **There are also three (3) written group assignments** per semester. These assignments will be considered as part of your class participation grade. (See below).

You are ultimately responsible for learning how to recognize, analyze, and apply procedural issues. My job is to guide you in developing skills of reading, stating, and applying the law for yourself, rather than to “present” information that you latter parrot back. (Although, we will certainly do some drilling as well.) As a professional, you must become the expert, and that process begins now.

Note that the quality of your class participation may affect your grade. (See “Grading” below.) Each student may use one “free pass” (to decline being called upon) when unprepared for class, *provided that you tell me before (not at the beginning of) class*. Otherwise, being unprepared will affect your class participation grade.

LAPTOP COMPUTERS, CELL PHONES, E-READERS (and other electronic goodies):

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.

WEBSITE / TWEN:

The West Education Network (TWEN) hosts a website for this class. Our TWEN site includes announcements, supplemental materials, web links, and a Discussion forum where you may ask questions and discuss class material. You are responsible to check TWEN twice weekly for any class updates. To log on to TWEN, go to www.lawschool.westlaw.com, click on TWEN and then click on course link.

You are encouraged to assist other students by responding appropriately to queries posted on TWEN in the “Discussion” or “Civil Procedure News” fora—doing so is an advantage to your class participation grade. I will check TWEN usually twice weekly to respond or comment on discussion. Being a fan of “discovery learning,” sometimes my “answers” may take the form of further questions to you or suggestions on how to find an answer yourself. If so, I want to hear back on how you went or if you need further guidance. If a particular query requires a long or detailed answer, I may suggest a phone conference or take up the matter in class. In the event you are still confused, drop by my office hours or 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**

¹ Case briefs are not handed in or directly graded, but you are expected to be able to analyze the relevant legal information in a case and to discuss such information in class. Thus, failing to prepare by briefing the cases can negatively impact your class participation grade. Advice on writing case briefs is posted on TWEN under Course Materials.

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 one-third (1/3) grade** (e.g., B to B+ or C to C-, etc.) based on your class preparedness and participation (or lack thereof) over the course of the semester, 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.

Written Group Assignments

You will be placed in ‘law firms’ of 3 - 5 persons. Your ‘firm’ will work together to solve problems and will “litigate” against another firm in the class throughout the year. Your ‘firm’ will produce 3 written group litigation assignments, using procedural concepts from class in a practical litigation problem. Grading of the group assignments is High Pass/Pass/Insufficient/Fail, based on **litigation strategy, participation, good effort, and demonstration of procedural concepts, especially conformance to the requirements of the FRCP**, NOT on format (unless part of the FRCP). 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. Assignments are handed out in class and are **part of your class participation grade**.

REQUIRED TEXTS:

Casebook: Rowe, Sherry and Tidmarsh, *Civil Procedure* (3d ed 2012), ISBN: 978-1609300470. (Designated here as “CB”).

Statutory Supplement: Rowe, Sherry and Tidmarsh, *Civil Procedure 2014 Supplement* (2014). (Designated here as “Supp”). Federal Rules of Civil Procedure in the Supp are herein referred to as “FRCP”. ****Earlier editions are not acceptable, because the rules change.**

Additional required materials or cases are also posted on TWEN in the Course Materials folder which are not available in the casebook or supplement. You will be notified of such required materials either on this syllabus, in class, or on TWEN.

Recommended Texts for further reading if desired:

There are several good texts and casebooks available on federal civil procedure, but note that some sources may be out of date. For specific issues and/or greater detail, the following may be helpful references:

Wright & Miller, *Federal Practice and Procedure*, is the Gold Standard for Civ Pro, relied on by the Supreme Court. It is accessible in Westlaw online. There are also two Restatements dealing with some Civil Procedure issues (Conflict of Laws and Judgments) both available on Westlaw. Also useful is Erwin Chemerinsky's *Federal Jurisdiction*.

Some students find the study materials by Prof. Joseph W. Glannon useful: Joseph W. Glannon, *Examples & Explanations: Civil Procedure* (Aspen 7th ed. 2013), ISBN 978-1454815488; Joseph W. Glannon, *The Glannon Guide to Civil Procedure: Learning Civil Procedure Through Multiple Choice Questions and Analysis* (Aspen 3d ed 2013) ISBN 978-1454827467. Some CALI lessons are also made available for you on the TWEN site, but I cannot make any representation on their quality or timeliness.

I DO NOT recommend the use of commercial outlines, such as Gilbert's, Emmanuel's, or Bar Prep materials.

THE ASSIGNMENTS SYLLABUS FOLLOWS:

Assignments are broken down by Week (usually covering 3 classes). *However, **the 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. Remember to read the Focus Questions before beginning your reading and try to answer them as you read. Think about how each rule you learn reflects the principles of either the adversary system, due process, judicial efficiency, or the limits of the US Constitution.

NOTE THAT DUE TO THE BREVITY OF THE SUMMER SEMESTER, THE PACE OF READING MAY BE GREATER THAN THE PRIOR 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 CIV PRO I, 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.

ASSIGNMENTS SYLLABUS* (see note previous page):

ASSIGNMENT 1: (Week of May 26) REVIEW, OVERVIEW & DISCOVERY I

CB: pp 113-134

Supp, FRCP 26, 30, 31, 33, 34, 35, 36, 37, 45

TWEN: *Steffan v Cheney*, 920 F.2d 74 (D.C.Cir. 1990)

Davis v Precoat Metals, 2002 WL 1759828 (N.D.Ill. 2002)

ASSIGNMENT 2: (Week of June 1) DISCOVERY II: Tools & Disputes

CB: pp 134-175

Supp, FRCP 26, 30, 31, 33, 34, 35, 36, 37, 45

TWEN: *Zubulake v UBS*, 220 FRD 212

Key Case: *Hickman v Taylor*

ASSIGNMENT 3: (Week of June 8) DISPOSITION WITHOUT TRIAL I: Dismissal & Default

CB: pp 43-62 & 217-235

Supp, FRCP 12, 41, 55

TWEN: *Betts v Shearman*, ___ F.3d ___. 2014 WL 1717091 (2d Cir. 2014)

Key cases: *AT&T v Conception*, *Twombly* & *Iqbal* again ...

ASSIGNMENT 4: (Week of June 15) DISPOSITION WITHOUT TRIAL II: SJ/

CB: pp 203-216 & 236-256

Supp, FRCP 16, 56, 68

TWEN: *Hunt v Cromartie*, 526 US 541 (1999)

Anderson v Liberty Lobby, 477 US 242 (1986)

Williams v KFC Nat'l Mgt, 391 F.3d 411 (2d Cir. 2004)

Bias v Advantage Int'l, 905 F.2d 1558 (D.C. Cir. 1990).

Key cases: *Anderson*, *Celotex*; *Scott v Harris*, *Bias*

ASSIGNMENT 5: (Week of June 22) TRIAL, JUDGMENT & APPEAL

CB: pp 256-266, 281-301 & 304-321

Supp: *US Cons'n*, Amend 7; FRCP 38, 49, 50, 51, 54, 58, 59, 60, 61,
28 USC ss 1291& 1292, Fed R App P 3 & 4

TWEN: *PA RR v Chamberlain*, 288 US 333 (1933)

Lavender v Kurn, 327 US 645 (1946)

Lind v Schenley Indus, 278 F.2d 79 (3d Cir. 1960)

Liberty Mutual v Wetzell, 424 US 737 (1976)

Mitchell v Forsyth, 472 US 511 (1985) (edited)

Lauro Lines v Chasser, 490 US 495 (1989)

Anderson v Bessemer City, 470 US 564 (1985)

Mohawk Indus. v Carpenter, 558 US 100 (2009)

Key Cases: *Reeves*, *Lavender v Kurn*; *Liberty Mutual*, *Anderson v Bessemer City*

ASSIGNMENT 6: (Week of June 29) RES JUDICATA I: Claim Preclusion

CB: pp 322-338

Supp: *US Cons'n*, Art IV, s 1

TWEN: *Frier v City of Vandalia*, 770 F.2d 699 (7th Cir. 1985)

Martino v McDonalds, 598 F.2d 1079 (7th Cir. 1979)

Searle Bros. v Searle, 588 P.2d 689 (Utah 1978).

Gargallo v Merrill Lynch, 918F2d 658 (6th Cir. 1990)

ASSIGNMENT 7: (Week of July 6) RES JUDICATA II: Issue Preclusion

CB: pp 338-356

TWEN: *Ill. Gulf Central RR v Parks*, 390 NE2d 1078 (Ill. App. 1979)

State Farm Fire & Cas v Century Home Components, 550 P2d 1185 (Or 1976)

Durfee v Duke, 375 US 106 (1963)

Key Case: *Parklane Hosiery*

ASSIGNMENT 8: (Week of July 13) ERIE DOCTRINE

CB: pp 595-650

Supp: *US Cons'n*, Art IV, s 1 & Art VI, s 2; 28 U.S.C. ss 1652 & 2072

TWEN: *Byrd v Blue Ridge Rural Electric Cooperative*, 356 US 525 (1958)

Gasperini v Center for Humanities, 514 US 415 (1996) (excerpt)

Shady Grove Orthopedic Assoc. v Allstate Ins. Co., 130 S.Ct. 1431 (2010) (edited)

Key Cases: *Erie*, *Hanna*, *Gasperini*, *Shady Grove*

ASSIGNMENT 9: (July 20) REVIEW

Prepare Civ Pro II Final 2014.

Exam: TBA (Closed Book, 100% of final grade, subj. to adjustment as noted above)