**Law 200F, Section 1 -- Civil Procedure -- Fall 2012 -- Syllabus**

Professor David B. Oppenheimer

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**Class Meeting Times:** 10:00-11:05, Tues, Wed, Thurs, Fri

Room 110

**Office Hours:** Tuesdays and Wednesdays 3:30-5:00 (or by appointment)

498 Simon Hall

**Required Books:**

Hazard, Tait, Fletcher & Bundy, Pleading & Procedure: State and Federal Cases and Materials (10th edition 2009) Foundation Press.

2012-13 Supplement to Hazard, Tait, Fletcher & Bundy.

Any 2012-13 edition of the Federal Rules of Civil Procedure.

Gerald Stern, The Buffalo Creek Disaster (Vintage). (There are several paperback editions, any of which are fine.)

You will also be assigned to view video recordings, as listed in this syllabus or announced in class.

**Recommended Reading:** The following books give a good picture of the litigation process.

A Civil Action

Jonathan Harr

Publisher: Vintage Press

ISBN-10: 0679772677; ISBN-13: 978-0679772675

Class Action: The Story of Lois Jenson and the Landmark Case That Changed Sexual Harassment Law

Clara Bingham& Laura Leedy Gansler

Publisher: Anchor

ISBN-10: 0385496133; ISBN-13: 978-0385496131

The Power of Procedure: The Litigation of Jones v. Clinton

Nan D. Hunter

Publisher: Aspen Publishers

ISBN-10: 073552825X; ISBN-13: 978-0735528253

**Assessment Criteria I:**

At the end of the semester, I encourage you to assess the success of this course by addressing the following questions.

1. Do you understand the core concepts of civil procedure in the following areas: personal jurisdiction, federal subject matter jurisdiction, theories of notice and fact pleading in state and federal court, joinder of parties and claims, pre-trial discovery, pre-trial and trial motions, right to civil jury, jury selection, post-trial motions, preclusion, choice of law in federal court adjudications of state law claims, and alternatives to civil litigation as a method of dispute resolution?

2. Can you read a newspaper article or professional journal article about a procedural dispute in a civil case, or a civil procedure law reform proposal, and understand: the basic dispute, the interest groups who will gain or lose from the outcome, the persuasiveness of the arguments of the parties, and the arguments which are missing from the article?

3. If you are asked in a summer job following your 1L year to conduct research on a civil procedure problem, by a lawyer who has reasonably good communications skills and a reasonably good understanding of civil procedure, will you be able to understand the assignment?

4. Have you experienced the beauty of the poetry embedded in the Federal Rules of Civil Procedure?

**Assessment Criteria II:**

I will assess your understanding of civil procedure by testing you on the core concepts of civil procedure, as set forth briefly above and more thoroughly below. I’ll test your knowledge and understanding through a mid-term examination (tentatively set for October 5), which will consist of 15 multiple choice questions and will count for 15% of your final grade; a final examination (tentatively set for December \_\_), with a multiple choice section which will consist of twenty-five questions which will count for 25% of your grade, and an essay question which will count for 50% of your grade. The last 10% of your grade will be determined by your successfully completing a brief paper describing a court visit, and by completing nine advocacy exercises, which will be graded “pass” (1 point) or “please re-write” (1 point if re-written, 0 points if not re-written), as more fully explained below.

**Assessment Criteria III:**

In assessing the success of this class, you may want to consider the recent research conducted here at Berkeley Law on the essential factors of lawyer effectiveness, in order to assess whether the skills you’re learning are likely to be useful in a legal career. Through a fascinating empirical study, which can be found at http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=1353554, Shultz and Zedeck have identified 26 factors that contribute to effective lawyering. They are:

©Marjorie Shultz and Sheldon Zedeck

26 LAWYERING EFFECTIVENESS FACTORS

1. Analysis and Reasoning: Uses analytical skills, logic, and reasoning to approach problems and to formulate conclusions and advice.

2. Creativity/Innovation: Thinks “outside the box,” develops innovative approaches and solutions.

3. Problem Solving: Effectively identifies problems and derives appropriate solutions.

4. Practical Judgment: Determines effective and realistic approaches to problems.

5. Providing Advice & Counsel & Building Relationships with Clients: Able to develop relationships with clients that address client’s needs.

6. Fact Finding: Able to identify relevant facts and issues in case.

7. Researching the Law: Utilizes appropriate sources and strategies to identify issues and derive solutions.

8. Speaking: Orally communicates issues in an articulate manner consistent with issue and audience being addressed.

9. Writing: Writes clearly, efficiently and persuasively.

10. Listening: Accurately perceives what is being said both directly and subtly.

11. Influencing & Advocating: Persuades others of position and wins support.

12. Questioning & Interviewing: Obtains needed information from others to pursue issue/case.

13. Negotiation Skills: Resolves disputes to the satisfaction of all concerned.

14. Strategic Planning: Plans and strategizes to address present and future issues and goals.

15. Organizing and Managing (Own) Work: Generates well-organized methods and work products.

16. Organizing and Managing Others (Staff/Colleagues): Organizes and manages others’ work to accomplish goals.

17. Evaluation, Development, and Mentoring: Manages, trains and instructs others to realize their full potential.

18. Developing Relationships within the Legal Profession: Establish quality relationships with others to work toward goals.

19. Networking and Business Development: Develops productive business relationships and helps meet the unit’s financial goals.

20. Community Involvement and Service: Contributes legal skills to the community.

21. Integrity & Honesty: Has core values and beliefs; acts with integrity and honesty.

22. Stress Management: Effectively manages pressure or stress.

23. Passion & Engagement: Demonstrates interest in law for its own merits.

24. Diligence: Committed to and responsible in achieving goals and completing tasks.

25. Self-Development: Attends to and initiates self-development.

26. Able to See the World through the Eyes of Others: Understands positions, views, objectives, and goals of others.

**Expectations:**

The reading assignments for this course average just 15-20 pages a night. They require, however, very careful preparation. I know that life is filled with distractions, some of which we cannot avoid, and some of which we cannot resist. But if you’re not well prepared for class, you won’t really understand the material. If you are well prepared for class, it’s my responsibility to be sure that you do understand the material. I promise to do my best to fully meet that responsibility; I ask you to do the same.

**Advocacy exercises:**

These exercises will be designed to help you learn civil procedure by actually drafting parts of documents used in civil practice in federal courts. You will work in rotating teams of three, with each group assigned to one of our three teaching assistants. You will be assigned to complete partially drafted documents, based on templates and models drafted by me and Rebecca Schonberg (’12), Molly Leiwant (’13), Sam Wheeler (’13) and Gabriella Ahdoot (’14). All exercises will be graded on a pass/do-over basis. Advocacy exercises are due (subject to change) on:

1. August 28
2. September 4
3. September 11
4. September 18
5. September 25
6. October 17
7. October 24
8. October 31
9. November 6 (court visit report)
10. November 19

**Teaching Assistants:**

We will be assisted by three upper division law student teaching assistants. They are:

Molly Leiwant, [mleiwant@gmail.com](mailto:mleiwant@gmail.com)

Gabriella Ahoot, [gahoot@gmail.com](mailto:gahoot@gmail.com)

Sam Wheeler, [swheeler@berkeley.edu](mailto:swheeler@berkeley.edu)

Their primary responsibility is to help read the advocacy exercises, but they have all kindly agreed to be available by e-mail to answer questions and discuss the beauty of civil procedure with you. I am also available by e-mail, nearly anytime, at [doppenheimer@law.berkeley.edu](mailto:doppenheimer@law.berkeley.edu).

**Video Reviews/Previews:**

After most classes I will record a brief (2-5 minute) video recording in which I will review the lessons you should have taken away from that day’s class, and preview the material we’ll be discussing in our next class. They will be posted to B-Space, usually by Noon. This is a new experiment, which I hope will help give more structure to your study of civil procedure. We’ll see how it goes.

**Power Point ™ Slides**

In most classes I will be projecting Power Point ™ slides on the board. A version of the slides will be available before class on B-Space if you’d like to download them and follow along. The full slide show will be available after class, and may be useful for review purposes.

**Class cancelations and make-up classes:**

We meet every Tuesday, Wednesday, Thursday and Friday from August 22 – November 21, except for Wednesday, September 26 (Yom Kippur) and Friday, October 5 (mid-term exam). We will hold make-up classes at 10:00 am in our regular room (room 110) on Monday September 24, Monday October 15, and Monday November 19. I have cancelled our last class of the semester, which would have been on Tuesday, November 27. Thus, our final class will be held on Wednesday, November 21 (the day before Thanksgiving). See the list of reading assignments below for a virtual calendar.

Reading Assignments:

Week 1

1. Wednesday 8/22

Introduction – The Buffalo Creek Disaster as a roadmap to civil procedure.

The chronology of a civil lawsuit as the organizing principle for this course.

Read Casebook pp. 1-15 and begin reading “The Buffalo Creek Disaster.”

In class, we will observe and conduct the initial interview of Plaintiff Paula Patt.

2. Thursday 8/23

Introduction to the Federal Rules of Civil Procedure (“FRCP”)

Continue reading “The Buffalo Creek Disaster.”

Read FRCP Rules 1, 2 & 3.

3. Friday 8/24

Notice Pleading (also known as “Rule” Pleading) compared with Fact Pleading (also known as “Code” Pleading).

FRCP Rules 7 & 8

Casebook pp. 585-586, 606-617

Read the Claybrooks v. ABC complaint, available on B-Space.

Week 2

4. Tuesday 8/28

Notice pleading, specificity, and *Twombly*

Casebook 617-633

Advocacy Exercise 1 is due today. Complete the complaint in Patt v. Donner. See B-Space for a copy of the incomplete complaint, and for further details.

5. Wednesday 8/29

Notice pleading, specificity, and *Iqbal*

Read *Ashcroft v. Iqbal* in the Supplement.

Watch video of argument in House v. Napolitano, 11cv10852-DJC (D. Mass.) (Motion to dismiss) at: <http://www.uscourts.gov/Multimedia/Cameras/DistrictofMassachusetts.aspx?video_uuid=zxq3f221&categoryId=35967>

This case was brought by David House, a member of the Bradley Manning support network. (Manning is the U.S. soldier charged with providing classified documents to WikiLeaks.) Mr. House was stopped when returning to the U.S. from Mexico; his laptop, USB drive and camera were seized by U.S. border agents. He is asserting a violation of his First and Fourth Amendment rights. The defendants (the U.S. Secretary of Homeland Security and several other government agents) have moved to dismiss and, in the alternative, for summary judgment. Note that this is an hour-long argument. I know that’s a lot to absorb, but I think you’ll find it very interesting. Please make sure to leave (find, create) time to watch it.

(The judge’s opinion, ruling on the motion, can be found at: <http://scholar.google.com/scholar_case?case=6613285297312229534&hl=en&as_sdt=2&as_vis=1&oi=scholarr>.)

6. Thursday 8/30

Ethical constraints on pleading

FRCP Rule 11

Casebook 661-670, 678-684

In class, we will observe and conduct an initial interview of Defendant Dan Donner

7. Friday 8/31

Motions challenging the complaint

FRCP Rule 12 (b-f)

Casebook 684-685

Week 3

8. Tuesday 9/4

A brief examination of legal and equitable remedies, including Temporary Restraining Orders and Preliminary Injunctions.

Casebook pp. 35-46.

Advocacy Exercise 2 is due today. Complete the motion to dismiss for failure to state a claim upon which relief can be granted, for Defendant Dan Donner.

9. Wednesday 9/5

The subject matter jurisdiction of the federal courts: “federal question” jurisdiction and the “well pleaded complaint” rule. – *Mottley.* (Also, I will say a few words about *Mims v. Arrow* *financial*, \_\_\_ U.S. \_\_\_ (1/18/2012).

FRCP Rule 12(b)(1)

28 USC § 1331

Casebook 371-379

10. Thursday 9/6

Federal question jurisdiction continued. Can a “state-created claim” state a federal question, thus establishing federal subject matter jurisdiction? – *Grable*

FRCP Rule 12(b)(1)

28 USC § 1331

Casebook 389-397

11. Friday 9/7

The subject matter jurisdiction of the federal courts: “Diversity” jurisdiction. – *Mas v. Perry*

FRCP Rule 12(b)(1)

28 USC § 1332(a-c)

Casebook 397-409

Court Visits.

During September or October, I’d like you to visit and observe a civil trial court (state or federal). In making your visit, try to see yourselves as anthropologists observing a distant culture. What do you see? Can you identify the judge? How? What is his/her role/status? Can you identify the lawyers? How? What are their roles/status? Can you identify the parties? How? How did they interact with the lawyers and the judge? Were you invited to interact with the subjects you are observing? By whom? How did they view you? Please turn in a brief (1-2 page) paper reflecting on these observations, by November 6.

Week 4

12. Tuesday 9/11

The subject matter jurisdiction of the federal courts: Pendant jurisdiction (jurisdiction over a state law claim based on its relationship to a claim over which the court is exercising original federal question jurisdiction). *UMW v. Gibbs*

FRCP Rule 12(b)(1)

Casebook 409-420

Advocacy Exercise 3 is due today. On behalf of Plaintiff Paula Patt, complete the opposition to Defendant’s motion to dismiss.

13. Wednesday 9/12

The subject matter jurisdiction of the federal courts: Supplemental jurisdiction (jurisdiction over a state law claim based on its relationship to a claim over which the court is exercising original jurisdiction). – *Exxon Mobile*

FRCP Rule 12(b)(1)

28 USC § 1367

Casebook 420-436

14. Thursday 9/13

The subject matter jurisdiction of the federal courts: Removal jurisdiction (jurisdiction over a case filed in state court when “removed” by the defendant(s) to federal court). – *Caterpillar*

FRCP Rule 12(b)(1)

28 USC § 1441

Casebook 437-447

15. Friday 9/14

Personal (“territorial”) Jurisdiction: *Pennoyer v. Neff* and the Constitutional limits on the reach of the state courts.

FRCP Rule 12(b)(2)

Casebook 158-171

Please note: One of the most common errors that 1L students make is to confuse personal (or territorial) jurisdiction with subject matter jurisdiction. Classes 9-14 were concerned with the subject matter jurisdiction of the federal courts. That is, is this the kind of case that a federal court is permitted to hear? As we’ve now learned, a federal court has subject matter jurisdiction over the case if there is a statute passed by the Congress that authorizes jurisdiction, and if the Congress had Constitutional authority under Article III to permit jurisdiction in such cases. Classes 15-22 will be concerned with a court’s personal jurisdiction – its jurisdictional power over the defendant. A court must have BOTH subject matter jurisdiction over the claim/case, and personal jurisdiction over the defendant.

Week 5

16. Tuesday 9/18

Personal (“territorial”) Jurisdiction: *Pennoyer v. Neff* reconsidered, *International Shoe v. Washington*.

FRCP Rule 12(b)(2)

Casebook 176-189

Exercise 4 due on Tuesday: Motion to dismiss for lack of Personal Jurisdiction, based on *Pennoyer*. (Pre-Shoe)

17. Wednesday 9/19

Personal (“territorial”) Jurisdiction: International Shoe applied; *World-Wide Volkswagen & Goodyear Dunlop Tires v. Brown*

FRCP Rule 12(b)(2)

Casebook 189-201

Please read the *Goodyear* decision in the supplement.

18. Thursday 9/20

Personal (“territorial”) Jurisdiction: *International Shoe* reformulated I; *Burger King*

FRCP Rule 12(b)(2)

Casebook 209-225

19. Friday 9/21

Personal (“territorial”) Jurisdiction: *International Shoe* reformulated II; *Asahi* & *J. McIntyre Machinery, Ltd v. Nicastro*.

FRCP Rule 12(b)(2)

Casebook 225-242

Please read the *Nicastro* decision in the supplement.

Week 6

20. Monday 9/24 (make-up class for Wednesday 9/26)

10:00-11:05, room 110

Personal (“territorial”) Jurisdiction: *Pennoyer* re-applied; *Shaffer v. Heitner*

FRCP Rule 12(b)(2)

Casebook 265-281

21. Tuesday 9/25

Personal (“territorial”) Jurisdiction: *Shaffer* reconsidered; *Burnham v. Superior Court*

FRCP Rule 12(b)(2)

Casebook 281-296

Exercise Number 5: Draft an answer to my 2011 exam question, part 1 (exam question will be posted on B-space)

Wednesday 9/26

Class cancelled: Yom Kippur

22. Thursday 9/27

Personal (“territorial”) Jurisdiction: *Pennoyer* reapplied; consent

FRCP Rule 12(b)(2)

Casebook 327-341

Wendy Collins Perdue, What’s “Sovereignty” Got to Do with It? Due Process, Personal Jurisdiction, and the Supreme Court.

http://sclawreview.org/Data/Sites/1/uploads/symposium/2011/63.3%2813%29perdue.pdf

23. Friday 9/28

Venue and transfer of venue

FRCP Rule 12(b)(3)

28 USC §§ 1391(a-d), 1404

Casebook 449-451, 455-472

Week 7

24. Tuesday 10/2

The common law alternative to § 1404; *forum non conveniens* – Piper Aircraft

FRCP Rule 12(b)(3)

Casebook 472-486

25. Wednesday 10/3

Notice and service of process – Mullane

FRCP Rules 12(b)(4) and 12(b)(5)

Casebook 296-308

26. Thursday 10/6

Notice and service of process – Jones v. Flowers

FRCP Rules 12(b)(4) and 12(b)(5),

Casebook 308-327

26. Friday 10/7

Mid-Term Exam, covering classes 1-24

The mid-term will be a forty-five minute exam, consisting of fifteen multiple choice questions, and will count for 15% of your final grade.

Week 8

27. Tuesday 10/9

Answering the complaint **–** Zielinski

FRCP Rules 8(b) and 8[c)

Casebook 686-694

28. Wednesday 10/10

Amending the pleadings **–** Worthington

FRCP Rule 15,

Casebook 694-706

Read the note on *Krupski v. Costa Crociere*, 130 S. Ct. 2485 (2010) in the supplement

29. Thursday 10/11

Joinder of claims

FRCP Rules 18(a), 13(a), 13(b) and 13(g)

Casebook 707-728

30. Friday 10/12

Permissive joinder of parties

FRCP Rule 20(a)

Casebook 728-743

Week 9

31. Monday 10/15 (make-up for October 5)

Impleader

FRCP Rule 14

Casebook 755-765

32. Tuesday 10/16

Intervention by non-parties

FRCP Rule 24

Casebook 765-766, 776-783

(For an interesting student note on intervention, see: Joanne Villanueva, The Power of Procedure: The Critical Role of Minority Intervention in the Wake of Ricci v. DeStefano, 99:4 California Law Review \_\_\_ (2011).

33. Wednesday 10/17

Class action overview

FRCP Rule 23

Casebook 794-813

Advocacy exercise 6 is due today. Please complete the memo in support of the motion to intervene by Fair Housing for Families, Inc.

34. Thursday 10/18

Class actions – *Wal-Mart* and beyond

Casebook 821-824, 860-863

Read *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 795 (2011) in Supplement

35. Friday 10/19

Discovery I -- Discovery methods

FRCP Rules 26, 30, 32, 33, 34, 35, and 37

Casebook 882-889, 901-907

Observe deposition of Paula Patt

Week 10

36. Tuesday 10/23

Discovery II – Discovery protective orders, motions to compel, and sanctions

FRCP Rules 26(c), 37

Casebook 946-958, 976-979

1. Wednesday 10/24

Discovery III – Discovery Privileges and Immunities

FRCP Rule 26(b)(3 and 5)

Advocacy exercise 7 is due today. Please complete the memo in support of the motion to compel answers to deposition questions.

38. Thursday 10/25

Summary Judgment I – Adickes; Celotex

FRCP Rule 56

Casebook 980-1006

39. Friday 10/26

Summary Judgment II – Scott v. Harris

FRCP Rule 56

Casebook 1011-1030

Youtube videos of Scott v. Harris chase

http://www.youtube.com/watch?v=IdZn4LvsLHQ

http://www.youtube.com/watch?v=JATVLUOjzvM

Week 11

40. Tuesday 10/30

Constitutional Right to Civil Jury – Beacon Theaters; Dairy Queen

United States Constitution, Amendment VII

Casebook 1057-1065, 1069-1082

Arthur R. Miller, McIntyre in Context: A Very Personal Perspective

http://sclawreview.org/Data/Sites/1/uploads/symposium/2011/63.3%282%29miller.pdf

41. Wednesday 10/31

Jury selection and instruction – Edmonson

FRCP Rule 51

1121-1122, 1136-1146, 1175-1179

Advocacy exercise number 8. Draft five voir dire questions, for either side, in *Patt v. Donner*. For each question, briefly explain why you would ask this question. We will post all of your questions and explanations on B-space.

42. Thursday 11/1

Judgment as a Matter of Law (JML) I – “Directed Verdict and JNOV”

FRCP Rule 50

Casebook 1162-1171

43. Friday 11/2

Judgment as a Matter of Law (JML) II – “JNOV and New Trial”

FRCP Rule 50

Casebook 1179-1181, 1189-1196

Week 12

44. Tuesday 11/6

New Trial and Conditional New Trial

Casebook 1194-1196 (re-read), 1196-1205

Advocacy assignment 9: Your court visit report is due today.

45. Wednesday 11/7

Preclusion I

Casebook 1223-1242

46. Thursday 11/8

Preclusion II

Casebook 1254-1263

Replace with: 1248-1249, 1254-1256, 1260-1279.

47. Friday 11/9

Preclusion III – Parklane

Casebook 1279-1296

Week 13

48. Tuesday 11/ 13

Choice of Law I – Swift v. Tyson

Rules of Decision Act (RDA) -- 28 USC § 1652

Rules Enabling Act (REA) – 28 USC § 2072

Casebook 487-493

49. Wednesday 11/14

Choice of Law II – Erie

Rules Enabling Act (REA) – 28 USC § 2072

Casebook 493-503

50. Tuesday 11/15

Choice of Law III – Guaranty Trust

Casebook 503-511

51. Wednesday 11/16

Choice of Law IV – Hanna

Rules Enabling Act (REA) – 28 USC § 2072

Casebook 517-529

Advocacy exercise #10 must be conducted this weekend, with the results due Monday at 10:00. The results will be discussed in class on Wednesday November 21.

Week 14

52. Monday 11/19 (make-up class for November 27)

Alternatives to litigation as a means of dispute resolution (“ADR”) – Settlement and Mediation

Casebook 1030-1043

Advocacy exercise 10 results are due today at 10:00 am.

53. Tuesday 11/20

Alternatives to litigation as a means of dispute resolution (“ADR”) –Arbitration

AT&T Mobility LLC v. Concepcion, \_\_\_ S. Ct. \_\_\_ (2011) in supplement.

Casebook 1043-1056

54. Wednesday 11/21

Last class.

Discussion of the settlement negotiation exercise results turned in on Monday.

December -- Final Exam

The final exam will consist of 25 multiple choice question worth 1 point each and one essay question worth 50 points.