Civil Procedure for LLM Students

Spring 2021 Syllabus (Version December 8, 2020)

Berkeley Law

Professor David B. Oppenheimer

**Course Description:**

Civil Procedure for LLM Students is the study of our civil (non-criminal) dispute resolution system, with an emphasis on litigation in the federal courts, as regulated by the Federal Rules of Civil Procedure (FRCP). We will cover pleadings, subject matter jurisdiction, personal jurisdiction, joinder of parties and claims (including class actions), discovery, dispositive pre-trial and trial motions, the preclusive effect of prior litigation, settlement of disputes, and alternatives to civil litigation.

At the surface, this is a survey of the U.S. litigation system, and will introduce students to many of the civil procedure issues tested on the New York, California, and Multi-State bar exams. At a deeper level, this is a comparative law class that compares multiple systems of dispute resolution, with much of the material supplied by the students from their experiences studying and practicing in many disparate legal systems. And for many students (and the instructor) it is an exploration of how common law lawyers and judges apply a common law approach to reading a code.

To place the course material in context, and provide opportunities for formative assessment, we will follow a simulated case over the course of the semester, and will conduct several advocacy exercises.

There will be two take-home mid-term exams, and a take-home final exam.

The class meets remotely (using Zoom) on Tuesdays and Thursdays from 6:25 to 7:40 PM Pacific Time. The time was selected to make attendance convenient as a morning class in Asia and Australia/Oceana, and an evening class in North and South America. Students in Europe and Africa will find the class meeting time inconvenient, and will usually chose to watch the class recording, which will be uploaded to the course website on b-Courses the day after the class meeting. Students outside North America should note that the United States moves from standard time to Daylight Savings time part-way through the semester, on March 14.

[Open office hours will be held on Wednesdays from 5:00-6:00 PM Pacific Time (on Zoom)](https://www.google.com/url?q=https://berkeley.zoom.us/j/91204997385&sa=D&source=calendar&ust=1607285715995000&usg=AOvVaw3ldvENtZEEJ9E22vcD_U4S).

Private office hours appointments may be made on the b-courses calendar for Fridays from 3:00-5:00 PM. I will also meet with students at other times by appointment.

**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 U.S. civil procedure in the following areas: theories of notice and fact pleading in state and federal court, federal subject matter jurisdiction, personal jurisdiction, joinder of parties and claims, pre-trial and trial motions, pre-trial discovery, the right to a civil jury, post-trial motions, preclusion of issues and claims because of prior litigation, 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 U.S. civil case, or a U.S. 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, the likely impact on access to justice, and the arguments that are missing from the article?

3. 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 U.S. civil procedure by testing you on the core concepts of U.S. civil procedure, as set forth briefly above and more thoroughly below. I’ll test your knowledge and understanding through:

* **A three-hour take-home mid-term examination, set for** **Friday March 5 – Sunday March 7** **(available beginning at 9:00 am Friday; due by Sunday at 9:00 pm**). The exam will consist of a single essay question, with a 600 word limit, and will count for 15% of your final grade.
* **A two-hour take home mid-term multiple choice examination, set for Friday March 12 and/or Saturday March 13** (available beginning at 9:00 am Friday; due by Sunday at 9:00 am).The exam will consist of ten multiple-choice questions, and will count for 10% of your grade.
* **A five-hour take-home final examination**, with a multiple-choice section which will consist of fifteen multiple choice questions which will count for 30% of your grade, and an essay question with a 1,500-word limit which will count for 45% of your grade.

**Assessment Criteria III:**

In assessing the success of this class, you may want to consider the recent research conducted by Professors Marjorie Shultz and Sheldon Zedeck here at Berkeley Law on the essential factors of lawyer effectiveness, 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:

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: Establishes 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, and goals of others.

©Marjorie Shultz and Sheldon Zedeck

These Shultz/Zedeck criteria may help you assess whether the skills you’re learning are likely to be useful in your legal career.

Assessment Criteria IV:

The following topics within civil procedure are tested on the multi-state bar exam. We will cover most of them in this class. They will be at the heart of my assessment of your understanding of U.S. civil procedure, and should also be at the heart of your assessment of the success of the course.

I. Jurisdiction and venue

A. Federal subject matter jurisdiction (federal question, diversity, supplemental, and removal)

B. Personal jurisdiction

C. Service of process and notice

D. Venue, forum non conveniens, and transfer

II. Law applied by federal courts A. State law in federal court B. Federal common law

III. Pretrial procedures

A. Preliminary injunctions and temporary restraining orders

B. Pleadings and amended and supplemental pleadings

C. Rule11

D. Joinder of parties and claims (including class actions)

E. Discovery (including e-discovery), disclosure, and sanctions

F. Adjudication without a trial

G. Pretrial conference and order

IV. Jury trials

A. Right to jury Trial

B. Selection and composition of juries

C. Requests for and objections to jury instructions

V. Motions

A. Pretrial motions, including motions addressed to face of pleadings, motions to dismiss and summary judgment motions

B. Motions for judgments as a matter of law (directed verdicts and judgments

notwithstanding the verdict)

 C. Post-trial motions including motions for relief from judgment and new trial

VI. Verdicts and judgments

A. Defaults and involuntary dismissals

B. Jury verdicts- types and challenges

C. Judicial findings and conclusions

D. Effect; claim and issue preclusion

VII. Appealability and review

A. Availability of interlocutory review

B. Final judgment rule

C. Scope of review for judge and jury

**Expectations:**

The reading assignments for this course average just 40-60 pages a week. 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:**

Over the course of the semester you will be asked to complete 3 advocacy exercises from the *Patt v. Donner* casefile. These exercises have been designed to help you learn civil procedure by actually drafting parts of documents used in civil practice in federal courts. For the first two exercises, you will work in rotating teams of two or three. You will be assigned to complete partially drafted documents, based on templates and models contained in the Patt v. Donner materials, which I drafted with three of my prior student assistants, Rebecca Schonberg (’12), Molly Leiwant (’13), and Sam Wheeler (’13). I will review the exercises, but they will not be graded. However, failure to turn in your exercise will result in a reduction of 5 points from your final grade.

**Capstone Advocacy Project:**

The final advocacy exercise will be a negotiation exercise in which you will attempt to negotiate a settlement of the *Patt v. Donner* case. You will work in teams of two. You will receive the exercise materials on Tuesday April 20. You must meet with opposing counsel at least once to complete the assignment, and must turn in your settlement agreement (or a description of the final offer and demand) by Wednesday, April 28 at 10:00 am.

**Power Point Slides**

In most classes I will be projecting Power Point slides on the board. I will usually post the slides before class on the b-Course site if you’d like to download them and follow along, or use them later for review.

**Class Recordings:**

I will record all of our classes and post them to the b-course web page. The lectures/discussions are my copyrighted intellectual property. You may review them as a substitute for attending class (though I urge you to attend class unless it is a hardship) and to improve your understanding of the course material, but you may not re-post them, distribute them, and/or use them for any commercial purpose. (Thank you.)

**Accommodations:**

Student Services oversees all requests for accommodations. I will work with them to make sure that all students have full and equal access to this course. Student Services schedules all exams, including accommodated exams, as the law school is committed to anonymous grading.   Any student who seeks an accommodated exam, or a rescheduled exam (for medical reasons or for religious observance) should contact Student Services Director Kyle Valenti at kvalenti@law.berkeley.edu.

Required Books:

* *Federal Rules of Civil Procedure*
I recommend the following edition, but you may select any up-to-date version

Berkeley Law Womxn of Color Collective
Edition: 2019-2020 Edition
ISBN: 9781798049945

* *Patt v. Donner: A Simulated Casefile for Learning Civil Procedure*
Oppenheimer, Leiwant & Wheeler
Edition: Second Edition (2019)
Publisher: Foundation Press
ISBN: 9781683288886
* *Pleading & Procedure (Casebook)*
Hazard, Fletcher, Bundy & Bradt
Edition: 12th/2020
ISBN: 9781609301811
* *The Buffalo Creek Disaster*
Gerald M Stern
Edition: 2008
Publisher: Vintage
ISBN: 9781642427622

Reading Assignments:

**Winter Break:**

Read *The Buffalo Creek Disaster*

Buffalo Creek is a river in West Virginia.  In 1972 a series of dams at the source of the river failed, causing a massive flood that destroyed several towns and killed over 125 people.  A group of survivors that eventually exceeded 600 people brought a civil lawsuit in federal court against a coal mining company.  Their lead lawyer, Gerald Stern, wrote a brief but revealing book about the lawsuit.  We will begin the semester by discussing his book, and will return to it frequently.  The book is available through the bookstore, [or through Amazon](https://www.amazon.com/s?k=the+buffalo+creek+disaster&gclid=Cj0KCQiAno_uBRC1ARIsAB496IVJVKua1BZCJyRN09vvZjOJq29FByzB_kREAQX1JrAC-o0vdlLZNVwaAghiEALw_wcB&hvadid=241605092811&hvdev=c&hvlocphy=1013585&hvnetw=g&hvpos=1t1&hvqmt=e&hvrand=4474653331003472773&hvtargid=kwd-131495002&hydadcr=22566_10355099&tag=googhydr-20&ref=pd_sl_3l4u7swz2n_e). I’d like you to read the book during the winter break.

I don’t expect you to memorize any of the legal rules described in the book, or to read it the way you’d read a case or a statute. Read it as if you were reading it at the beach, simply as a good (if tragic) story.

**Class 1: 1/19**

Introduction to U.S. procedure; notice pleading

FRCP Rules 1, 2, 3, 8(a), 8(d), 12(b)(6)

Casebook pp 475-477, 507-517 (13 pages)

**Class 2: 1/21**

Notice pleading and fact pleading

FRCP Rules 8(a), 8(d), 12(b)(6)

Patt v. Donner pp. 1-36

Casebook pp. 517-546 (29 pages)

Show Will Walters interview in class (or assign as homework)

Advocacy exercise #1: Working with a partner, please complete advocacy exercise #1 (completing the draft of a civil complaint) from the Patt v. Donner casefile. On or before January 21 I will post a Word document on our b-course page for you to complete. You should turn in the completed complaint by 6:00 pm on Tuesday January 26.

**Class 3: 1/26**

Notice pleading and fact pleading

FRCP Rules 8(a), 8(d), 12(b)(6)

Casebook pp. 587-590 (3 pages plus the 8 page Citibank case)

*Swanson v. Citibank*, 614 F.3d 400 (2010) <https://www.courtlistener.com/opinion/151889/swanson-v-citibank-na/>

**Class 4: 1/28**

The requirement that pleadings have a basis in fact and law

FRCP Rule 11

Casebook pp. 560-571, 579-586 (21 pages)

Advocacy exercise #2: Working with a partner, please complete advocacy exercise #2 (completing the draft of a motion to dismiss) from the Patt v. Donner casefile. On or before January 28 I will post a Word document on our b-course page for you to complete. You should turn in the completed complaint by 6:00 pm on Tuesday February 2.

**Class 5: 2/2**

The subject matter jurisdiction of the federal courts I

Federal Question Jurisdiction

FRCP Rule 12(b)(1)

28 United States Code (USC) S 1331

Casebook pp. 233-252 (through note 3) (19 pages)

**Class 6: 2/4**

The subject matter jurisdiction of the federal courts II

Diversity Jurisdiction

FRCP Rule 12(b)(1)

28 USC S 1332

Casebook pp. 254-274 (20 pages)

**Class 7: 2/9**

The subject matter jurisdiction of the federal courts III

Supplemental and removal Jurisdiction

FRCP Rule 12(b)(1)

28 USC S 1367, 1441

Casebook pp. 274-278, 285-302 (21 pages)

**Class 8: 2/11**

Personal (“territorial”) Jurisdiction I

FRCP Rule 12(b)(2)

Casebook pp. 39-41, 49-52, 58-70 (18 pages)

**Class 9: 2/16**

Personal (“territorial”) Jurisdiction II

FRCP Rule 12(b)(2)

Casebook pp. 70-89 (19 pages)

**Class 10: 2/18**

Personal (“territorial”) Jurisdiction III

FRCP Rule 12(b)(2)

Casebook pp. 89 (note 4)-112 (23 pages)

**Class 11: 2/23**

Personal (“territorial”) Jurisdiction IV

FRCP Rule 12(b)(2)

Casebook pp. 113-135 (22 pages)

Please read my Fall 2014 Mid-Term II exam question, which is posted on the B-Course site. We will discuss it in class.

**Class 12: 2/25**

Personal (“territorial”) Jurisdiction V

FRCP Rule 12(b)(2)

Casebook pp. 143-146, 160-176, 202-216 (33 pages)

**Class 13: 3/2**

FRCP Rule 12(b)(3); 28 USC S 1391, 1404 and 1406

Venue, Change of Venue, and Forum Non Conveniens

Casebook pp. 350-363 (13 pages)

**Class 14: 3/5**

FRCP Rules 8(b), 8(c) and 15

Answering the Complaint and Amending the Pleadings

Casebook pp. 590-601, 606-611 (16 pages)

Mid-term Exam #1

* **A three-hour take-home mid-term examination, set for** **Friday March 5 - Sunday March 7** (available beginning at 9:00 am Friday; due by Sunday at 9:00 pm). The exam will consist of a single essay question, with a 600 word limit, and will count for 15% of your final grade.

**Class 15: 3/9**

Joinder of Claims

FRCP Rules 13 and 18

Casebook pp. 613-634 (21 pages)

**Class 16: 3/11**

Joinder of Parties

FRCP Rules 14, 20, and 24

Casebook pp. 638-647, 659-670, 680-691 (31 pages)

**Class 17: 3/16**

Class Actions I

FRCP Rule 23

Casebook pp. 702-705, 716-723, 753-759 (16 pages)

**Class 18: 3/18**

Class Actions II

FRCP Rule 23

Casebook pp. 759-776 (17 pages)

Read: David Streitfield, Court Rejects Deal on Hiring in Silicon Valley, NY Times, August 8, 2014.

<http://www.nytimes.com/2014/08/09/technology/settlement-rejected-in-silicon-valley-hiring-case.html?emc=eta1&_r=0>

Read: This article regarding the settlement of a class action challenging a very disturbing practice of strip searches of women held in the LA County Jail. <https://www.latimes.com/local/lanow/la-me-ln-lasd-womens-jail-settlement-20190716-story.html>

***SPRING BREAK! No class on March 23 or 25***

**Class 19: 3/30**

Discovery I

FRCP Rules 26(a), 26b(1), 26(b)(2), 30, 33 and 34

Casebook pp. 777-790, 803-816 (17 pages)

Observe deposition of Paula Patt in class.

**Class 20: 4/1**

Discovery II

FRCP Rules 26(b)(4)

Casebook pp. 841-859 (18 pages)

Observe recorded deposition of Will Walters at home.

 <http://www.kaltura.com/tiny/52b5g>

In-Class Discovery Sanctions Exercise

Mid-Term Exam #2

**A two-hour take home mid-term multiple choice examination, set for Friday April 2 – Sunday April 4** (available beginning at 9:00 am Friday; due by Sunday at 9:00 pm).The exam will consist of ten multiple-choice questions, and will count for 10% of your grade.

**Class 21: 4/6**

Summary Judgment

FRCP Rule 56

Casebook pp. 887-891, 915-939 (28 pages)

Watch this podcast about the Tolan case:

 <http://thisiscriminal.com/episode-18-695bgk/>

Get Home Safely: Ten Rules of Survival, SALT Project: <https://vimeo.com/116706870>

In-Class Summary Judgment Exercise

**Class 22: 4/8**

Right to a Civil Jury Trial

U.S. Constitution – Amendment 7

Casebook pp. 989-993, 1017-1028, 1033-1038 (20 pages)

**Class 23: 4/13**

Trial Motions – Judgment as a Matter of Law

FRCP Rule 50

Casebook pp. 1099-1108 (9 pages)

**Class 24: 4/15**

Post-Trial Motions – Renewed Judgment as a Matter of Law and New Trial

FRCP Rule 50

Casebook pp. 1118-1137 (19 pages)

**Class 25: 4/20**

Arbitration and Settlement

Casebook pp. 970-987 (17 pages)

Settlement Exercise Distributed

**Capstone Advocacy Project:**

The final advocacy exercise will be a negotiation exercise in which you will attempt to negotiate a settlement of the *Patt v. Donner* case. You will receive the exercise materials on Tuesday April 20. **You must meet with opposing counsel at least twice to complete the assignment, and must turn in your settlement agreement (or a description of the final offer and demand) by Wednesday, April 28 at 10:00 am.**

Read *Patt v. Donner* pages 277-282 plus your special confidential instructions, which will be different for teams representing plaintiffs than for teams representing defendants.

Read: these NY Times articles on mandatory arbitration:

<http://nyti.ms/1MyX60l>

<http://nyti.ms/1N4UNfI>

**Class 26: 4/22**

Preclusion I

Casebook pp. 1163-1189 (26 pages)

**Class 27: 4/27**

Preclusion II

Casebook pp. 1189-1204, 1208-1223 (30 pages)

Settlement Exercise is Due on Wednesday April 28 at 10:00 am

**Class 28: 4/29 (last class)**

Alternatives to Trial in Resolving Disputes (ADR)

No reading assignment

Final Exam:

* **A five-hour take-home final examination**, with a multiple-choice section which will consist of fifteen multiple choice questions which will count for 30% of your grade, and an essay question with a 1,500-word limit which will count for 45% of your grade.