Law 205 - Litigation and Dispute Resolution Theory
(Fall 2012)
Bruce Kobayashi

Course Schedule:
Section 001 W 9:30a-12noon, ROOM 224
Section 002 W 8:00p-10:30p, ROOM 224

This syllabus is preliminary and is subject to change (last updated on July 25, 2012)

Law 205. Litigation and Dispute Resolution Theory Course Description

3 Credit Hours

Provides the cornerstone of the Litigation Law track. It introduces the theory and practice of litigation and other forms of dispute resolution, and draws upon the basic tools of decision theory, game theory, and economic analysis to address some of the key features of the litigation process and its institutions. Among the topics addressed are the decision to commence litigation and whether to settle or go to trial; settlement negotiations; strategic behavior as affecting decision making by both private actors and the courts; economic analyses of litigation; agency or moral hazard problems presented by both lawyers and courts; the impact of attorney’s fee arrangements, fee-shifting rules, and court-imposed sanctions; party versus court control of proceedings; and the effect of enforcement costs on competing substantive legal rules.

Course Requirements:

TWEN Registration is Mandatory
Classroom Meetings:
• Class attendance and participation are required.
• Students must certify attendance by signing the roll sheet. Students that do not sign the roll sheet will be considered absent.
• Persons absent for more than 20% of the classroom meetings (more than two classes) will not receive a passing grade.

Office Hours:
• Room 422
• Office Hours by appointment (sign up on TWEN).

Grading
• The basis for the final grade is as follows:
  Term Paper (50%), 3 Writing Assignments (50%).
• All requirements and assignments are subject to change.

Reading Assignments:
• Up to date reading assignments can be found by clicking on the Reading Assignments link on the course TWEN page. A preliminary reading list for the entire semester has been attached below. However, this preliminary list is subject to change, and students are responsible to check each week for any updates.

Writing Assignments:
• Writing assignments will be posted one week before the due date, and can be found by clicking on the Writing Assignments link on the course TWEN page. There will be 3 assignments, each worth 1/6 of the final grade. The assignments will be due on 9/12, 10/10, and 11/14.
• Length guideline for writing assignments (1000 - 1500 words).
• All assignments must be submitted using the TWEN assignment drop box. E-mailed copies or hard copies will not be accepted.

**Term paper**

• Term Paper must use economic analysis to analyze a legal case, legal rule, or proposed rule.
• Paper should be 25-30 pages in length
• Preliminary topics are due on 10/03.
• Final Papers are due on 12/19. Final papers must be submitted using the TWEN assignment drop box. E-mailed copies or hard copies will not be accepted.

**Texts:**

• Cover and Fiss, The Structure of Procedure (CF)
• Dixit & Nalebuff, Thinking Strategically (TS)
Preliminary Reading Assignments (last updated July 25, 2012):
Students are responsible for checking TWEN site for current reading assignment.

** - Required, * - Recommended, (R) Readings not available on LEXIS/WESTLAW.

August 22, 2012 - Class #1.
Basic Structure of the Course & Overview

General Background:
- Posner, EAL, Chapter 1, 2.

Introduction to Decision Theory (Readings available at http://mason.gmu.edu/~bkobayas/litchp1.doc)

August 29, 2012 - Class #2.
Judge and Jury Decisionmaking

Overview
- Frontline Video - Inside the Jury Room (to be shown in class).
- Peremptory Challenges, Jury Size and Ex-Post Controls over the Jury
  - Lempert, "Jury Size and the Peremptory Challenge" (CF)

Judge versus Jury Decisionmaking

September 05, 2012 - Class #3.
Game Theory and Trial Expenditures

Application I: The Prisoner's Dilemma
- U.S. v. Singleton, 144 F.3d 1343 (1998), vacated

Application II: Lawyers and Litigation Expenditures
- Posner (EAL) Chapter 21, Section 10.

September 12, 2012 - Class #4.
The Decision to litigate versus settle

Models of the Litigation/Settlement Decision:
- Posner (EAL), Chapter 21, Section 4-7
- Chayes, "The Role of the Judge in Public Law Litigation" (CF)

September 19, 2012 - Class #5.
Settlement, Plea Bargaining and Negotiation

Settlement Negotiation
- ABA, Litigation Manual, pp. 858-90, 918-25 (articles by Sullivan, Nolan, Lynch, Wallach, and Madden). (These readings are posted in course materials section)
Credibility


September 26, 2012 - Class #6.
Predictability, Mixed Strategies and Rule 11

General Theory of Procedure

*Posner (EAL) Chapter 20, Chapter 21, Section 1-3, 11.


Sanctioning FRCP Rule 11


October 03, 2012 - Class #7

Information, Work Product, and Attorney Client Privilege

A Theory of Information


Work Product and Attorney Client Privilege


October 10, 2012 - Class #8.

Pleading and Discovery Rules

Pleading


**Allen, Ronald J. and Guy, Alan E., “Conley as a Special Case of Twombly and Iqbal: Exploring the Intersection of Evidence and Procedure and the Nature of Rules” 115 Penn St. L. Rev. 1 (2010).**

Legal Discovery
**ABA, Litigation Manual, pp. 178-83 (article by Lundquist). (R)**


Discovery Reform

*Easterbrook, Frank H., Discovery as Abuse, 69 B. U. L. Rev. 635, 638 (1989).*


**2000 Amendments to the Federal Rules of Civil Procedure (posted in the Course Materials Section).**

October 17, 2012 - Class #9.

**Economic Analysis of Evidence**


Expert Testimony
**Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S.Ct. 2786 (1993).**

**Federal Rules of Evidence, Rules 403, 702, 703, 706.**


Character Evidence
**Federal Rules of Evidence 404, 412, 413, 414, 415.**

**Schrager and Scotchmer, Crime and Prejudice: The Use of Character Evidence in Criminal Trials," 10 J.L. Econ. & Org. 319 (1994).**

October 24, 2012 - Class #10.

**The Incentive effects of attorney fee structures**

Legal Fees as Contract


Contingent Fees
**Miller, "Some Agency Problems in Settlement," 16 J. Legal Stud. 189 (1987).** (Article is posted in course materials section)

**City of Burlington v. Dague, 112 S.Ct. 2638 (1992).**

**Evans v. Jeff D. 475 U.S. 717 (1986).**


Fee Shifting and Rule 68


**Tetzlaff, "Opening Statement: The English Rule from the English Perspective," 18 Litigation No. 4, p. 1. The Tetzlaff article is on Westlaw --type in 18 in the volume box and 1 in the page box after clicking on the link on the course home page.**

**ABA, Litigation Manual, pp. 1119-33 (article by Lutz).** (Article is now posted in course materials section)

**Posner (EAL) Chapter 21, Section 12.**


**Snyder and Hughes, "The English Rule for Allocating Legal Costs," 6 J.L. Econ. & Org. 439 (1990).**
October 31, 2012 - Class #11.
Multiple Litigants and External Effects I
  Multiple Defendants, Prisoners' Dilemmas

Contribution and Setoff Rules

November 07, 2012 - Class #12
Multiple Litigants II - Multiple Plaintiffs and Class Actions
  Counterclaims and Joinder
**McInerney, "Counterclaims as Self-Inflicted Wounds," 18 Litigation No. 3, p. 17.
Braverman, Janus was not a God of Justice: Relainment of Parties in Diversity Jurisdiction, 68 N.Y.U. L. Rev. 1072 (1993).

Capitalization of Litigation and Multiple Plaintiffs

Vacatur

November 14, 2012 - Class #14.
Class Actions and Punitive Damages
  Class Actions

Punitive Damages and Penalty Structure
**Polinsky and Shavell, Punitive Damages: An Economic Analysis, 111 Harv. L. Rev. 869 (1998)**


November 28, 2012 - Class #14

Term Paper Conferences (Signup dates on TWEN)