SYLLABUS for Professor Parker’s CIVIL PROCEDURE (Law 112, § 1 ), Spring 2012

Introduction

The civil procedure course introduces law students to the body of legal thought known as "procedure" or "process." While those terms sound technical and formalistic, in fact procedure is the most profound of all legal subjects. Whereas the "substantive" law you have studied in other courses is concerned predominately with defining rules and principles of law for enabling or regulating the primary conduct of individuals or entities as among themselves, the concern of "procedure"--or, as it is sometimes called, "adjective" law--is to define how those substantive rules of law are established, applied, and enforced. As such, Civil Procedure is only the first and most fundamental of a family of courses--including Constitutional Law, Administrative Law, Criminal Procedure, Conflict of Laws, Evidence, Remedies, and others--that are concerned with regulating the law-making and law-applying institutions themselves. In essence, procedure is "the law of law." The basic course in Civil Procedure provides a model of how to regulate legal institutions, beginning in the context of legal dispute resolution processes known as "adjudication." As you will find as you proceed through law school, this model of adjudication provides a baseline for comparison of virtually all legal processes. It also illustrates one important application of the legal method to the practical problems of governance.

Course Materials and TWEN site

The required course materials are: (1) Friedenthal, Miller, Sexton & Hershkoff, Civil Procedure: Cases and Materials (10th edition 2009: Thomson Reuters/West) (ISBN 978-0-314-18402-3) (cited below as "CB"); and (2) Friedenthal, Miller, Sexton & Hershkoff, 2011-12 Civil Procedure Supplement (2011: Thompson Reuters/West) (ISBN 978-0-314-27514-1) (cited below as "CB Supp."). Additional required and optional materials occasionally will be posted to the course’s TWEN site (required materials are cited below as “TWEN Supp.”). For this reason among others, registration at the TWEN site is required of all enrolled students.

The bookstore also carries various optional texts on Civil Procedure. For the instructor’s recommendations concerning the use of optional texts and other study aids, see Part 2 of the Introductory Lecture, to be posted in the “Lecture Notes” section of the course TWEN site. The use of such materials, even those recommended by the instructor, is not required.

Class Meetings

Classes will meet on Tuesdays and Thursdays, in Hazel Hall Room 332, at 2:00 to 3:50 P.M. Each meeting will consist of two separate 50-minute sessions, with a 10-minute break in between. Student participation in class discussions, primarily through Socratic dialog with the instructor, will be stressed. A seating chart will be distributed at the first class meeting, and will be used as the definitive indicator of students’ presence and location throughout the semester. Students should bear in mind that this is a 4-hour course, involving two class hours at each meeting date, and the reading assignments set forth below have been constructed accordingly.
Reading Assignments, Class Discussions, and the Objectives of the Course

The following reading assignments are allocated to tentative dates for class discussion. Experience teaches that there will be ineluctable slippage in the pace of class discussions. However, unless otherwise announced, the reading assignments are unaffected by the pace of class discussion, and it shall be the responsibility of the student to remain adequately prepared until the materials are reached, just as lawyers in court must wait until the judge reaches their case.

Unlike most other first-year courses, Civil Procedure makes extensive use of legislative and statutory material (constitutions, statutes, rules, and regulations). The student must make a habit of finding and considering such material in connection with any problem. Therefore, the pertinent rules and statutes in the Casebook Supplement should be studied in connection with reading assignments in the casebook, whether or not the casebook materials make specific reference to such rules or statutes, though in most instances the Casebook will make such reference. Assignments given explicitly to pages in the Casebook Supplement are in addition to this general admonition, and may include assignments of supplemental cases decided after the main casebook was completed, or to materials such as local rules or forms that are being assigned for study in themselves. There also will be some mandatory assignments to supplementary materials posted in the “Course Materials” section of the TWEN site.

The Federal Rules of Civil Procedure will serve as our primary model of a civil procedural system, though we also will consider the comparative state provisions reproduced in the Casebook Supplement (please note that there is an index to such provisions in CB Supp.). We will not study Virginia practice as such. There is a separate course for that purpose. However, Virginia practitioners confront the same basic problems of procedure as do practitioners elsewhere.

In this course, one of our goals is to acquaint the student with the basic problems of civil procedure in any American jurisdiction, with particular attention to federal practice and procedure, both for its own significance and as a general model. But topical coverage is not the only goal of the course, and perhaps not the most important one.

Another goal is to assist the student in integrating all of the first-year courses into a unified view of the legal system in action. To that end, the student should take the opportunity of considering the substantive law background of each procedural case, as a means of reviewing subjects already studied or previewing subjects not yet studied in depth. On occasion, our class discussions will go into such subjects: these are not digressions from the course’s goals, but rather an opportunity to advance the goal of providing an integrated legal education. Very few practitioners in any field of law—and none in procedural law—are so specialized that they can afford to ignore other subjects. Students are well-advised to develop their curiosity about the seemingly “tangential” at an early stage of their career; often the apparently tangential turns out to be decisive in actual cases.

Another goal of the course is to expose the student to the give-and-take of adversarial
presentation that characterizes both our litigation procedures and the American legal process in general. This will be one important feature of our classroom discussions.

**Reading Assignments:**

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<thead>
<tr>
<th>Topic and Assignment</th>
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<tr>
<td><strong>I. Introduction to Procedure:</strong></td>
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<tr>
<td>A. Overview of the Process: CB 1-44 and CB Supp. vi-vii</td>
<td>1/10</td>
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<tr>
<td>B. Illustrative Cases and Principal Topics: CB44-70; Introductory Lecture (TWEN supp.)</td>
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**PART ONE: STRUCTURE (JURISDICTION AND JUDGMENTS)**

**II. Jurisdiction to Adjudicate**

A. Jurisdiction Over Persons and Property

1. Power:

   a. The Basics: CB71-91 1/17(1)

   b. Long-Arm Statutes and Due Process:
      - CB91-117 1/17(2)
      - CB117-38 1/19(1)

   c. General versus “Specific” Jurisdiction, and Recent Cases
      - CB Supp.550-64 (Nicastro); CB138-49; CB Supp. 532-37 (Goodyear) 1/19(2)

   d. The Internet: CB150-57 1/24(1)

   e. In rem and quasi-in rem: CB158-75; review CB71-78 (Pennoyer) 1/24(1)

   f. Continuing viability of traditional grounds: CB175-91 1/24(2)

   g. The Federal Courts and Rule 4: CB191-95 1/24(2)

1 The parenthetical numbers refer to the first and second hours of each class day. In a few instances (e.g., 1/24, 2/7), more than one topic may be assigned within a single class hour.
II. Jurisdiction to Decide (Process of Adjudication)

B. Jurisdiction Over the Subject Matter

1. The Basic Concept and its Roots in the Justiciability Doctrine:
   CB266-72; CB Supp.516-29 (Camreta); review CB26-27 (Capron) 1/26(2)

2. Federal Court Jurisdiction
      CB350-62; CB Supp.529-32 (Carlsbad) 2/7(2)

3. Challenges to Subject Matter Jurisdiction (Rules 8 & 12):
   CB362-68; CB596-99 (Espinosa); review CB67-70 (Des Moines) 2/7(2)

C. Venue, Transfer, and Forum Non Conveniens

III. Jurisdiction to Prescribe (Applicable Law)

A. The "Vertical" Problem: Choosing Federal or State Law (28 U.S.C. § 1652)

1. The Basic Erie Doctrine: Swift v. Tyson (TWEN Supp.); CB404-30 2/14(1)

2. Complications in the Erie Doctrine:
   -CB431-54 2/14(2)
   -CB454-66; CB Supp.576-88 (Shady Grove) 2/16(1)

3. Federal Common Law: CB476-594 2/16(2)

4. The "Flip Side": Federal Law in State Courts:
   CB494-500; Felder v. Casey (TWEN Supp.) 2/21(1)
B. The "Horizontal" Problem: Choosing Among States


2. The Wonders of Federalism: CB466-76; Ferens v. John Deere Co. (TWEN Supp.); review CB388-400 2/23

IV. Judgments: Preclusive Effect

A. The Basic Elements of Res Judicata (Claim Preclusion) and Collateral Estoppel (Issue Preclusion):

1. Claim and Defense Preclusion: CB1249-72 2/28(1)

2. Issue Preclusion: CB1272-92; The Evergreens (TWEN Supp.) 2/28(2)

3. The Required Quality of Judgment: CB1292-1304 3/1(1)

4. Relief from Judgment (Rule 60): CB1152-59; CB Supp.537-49 (Horne); review CB66-70, CB195-99 & CB362-68 and CB Supp. 596-99 (Espinosa) 3/1(2)

B. Parties and Mutuality: CB1305-32 3/6(1)

C. Who Owns Finality? Interjurisdictional Preclusion and Vacatur:


2. Federal to State and Administrative Preclusion: CB1347-56 3/8(1)


Spring Break: no classes on 3/13 and 3/15
PART TWO: PROCESS

V. Defining the Dispute

A. Pleading

1. Historical Background: TWEN Supp. (as background) --

2. Stating a Claim-in general (Rules 8-10):
   b. The Twombly-Iqbal Revolution: CB567-79; CB Supp.492-505 (Iqbal)
      For reference--CB Supp.449-90 (complaints in Twombly, Iqbal, and Erickson) 3/20(2)

3. Stating a Claim-special pleading rules (Rule 9 & the PSLRA), and pleading damages and other relief (Rules 8(a)(3) and 54(c)):
   CB586-94; Matrixx Initiatives (TWEN supp.); CB594-602 3/22(1)

4. Responses and Replies (Rules 7, 8, 12, & 13): CB602-26 3/22(2)

5. Amendments & Supplemental Pleadings (Rule 15):
   CB627-36; CB Supp.564–70 (Krupski) 3/27(1)


B. Parties and Joinder

1. Joinder of Claims (Rules 13 and 18): CB652-74 3/27(2)

2. Proper Parties and Joinder of Parties (Rules 17, 19-21): CB674-704 3/29(1)

3. Special Joinder Devices:


VI. Developing the Dispute

A. Discovery (Rules 26-37, 45)

1. Scope and Limits of Discovery and “Disclosure” (Rules 26, 29, & 37):
## Topic and Assignment

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<tr>
<th>Topic</th>
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<tbody>
<tr>
<td>a. Scope of Discovery:</td>
<td>CB826-48</td>
<td>4/3(1)</td>
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<tr>
<td>b. &quot;Disclosure&quot;:</td>
<td>CB848-54</td>
<td>4/3(2)</td>
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<tr>
<td>c. The Work Product Doctrine and Related Problems:</td>
<td>CB896-920</td>
<td>4/3(2)</td>
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<td>- CB854-78</td>
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<td>4/5(1)</td>
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<td>- CB878-96</td>
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<td>4/5(2)</td>
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<td>B. Pretrial (Rules 16, 26, 53):</td>
<td>CB927–31</td>
<td>4/5(2)</td>
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### VII. Deciding the Dispute

#### A. Adjudication without Trial

1. Summary Judgment (Rule 56): CB958-87     | 4/10(1)   |

2. Dismissal and Default (Rules 12, 41, and 55): CB987-96   | 4/10(2)   |

#### B. Trial


2. Trial Procedure, Evidence, and Proof (Rules 42-44, 50, 52, 59, 60): CB1070-95 | 4/17(1) |


1. Appealability under the Final Judgment Rule: CB1187-1208; CB Supp.571-76 (*Mohawk Industries*) | 4/17(2) |

2. Interlocutory Appeals: CB1208-21 | 4/19(1) |

3. Scope of Review: CB1224-41 | 4/19(2) |
Academic Policies

1. Class attendance is required in order to earn academic credit, in accordance with the academic policies of the School. Under those policies, excessive absences may result in denial of residence credit and/or reduction of the course grade. Under the School’s Academic Regulations, students are required to certify, subject to the Honor Code, their own attendance record. Accordingly, no attendance roster will be passed around. Moreover, it is neither necessary nor desirable to notify the instructor regarding inability to attend, either before or after class. Absences from class will be deemed excused by the instructor to the maximum extent possible for purposes of the School’s attendance policies; good cause will be presumed. However, such absence, whether or not excused, may affect the student’s class participation grade.

2. Making audio, video, photographic, or other automated recordings of class sessions is prohibited, and will not be considered as a substitute for attendance. Both the class presentations and the instructor’s writings as posted on the TWEN site, including lecture notes, are subject to the author’s copyright, and are licensed to students solely for their own personal educational use, and are not to be copied for any other purpose or disseminated to non-students.

3. A seating chart will be distributed at the first class meeting. Subscription of the seating chart is mandatory, and students are required to remain in their assigned seats. Students are responsible for assuring that their actual location corresponds with the information on the seating chart. Absence from that location will be considered absence from class.

4. Students also are required to complete index cards which will be used when calling upon students in class and recording their class performance marks. Failure to submit a completed card will be considered unsatisfactory performance for the semester. Selection of students usually is by random draw in class, with replacement on an undisclosed algorithm. There are no “passes” granted for any reason, but, as explained below, students have no incentive to absent themselves from class due to lack of preparation.

5. Student participation in class discussions is mandatory when called upon the instructor, and will be graded based upon the instructor’s contemporaneous judgment. Failure to respond when called upon (whether due to absence or other reasons), lack of preparation, or simply poor performance, will result in negative evaluations, though of course not equally negative. For this reason, students should not be concerned about isolated instances of being called upon when absent for good cause, as this will usually result in raising the probability of being called upon another time. Evaluations of class performance may be considered in assigning final grades for the course. The relative weighting of class marks and written examination grades will be determined by the instructor at the end of the semester, and may vary by student, depending upon the nature and quality of class performance or lack thereof. In accordance with the School’s regulations, the instructor reserves the right to adjust the student’s grade by more than one gradation, up or down.
6. There is a TWEN site for the course, accessible to all students having a Westlaw password and an email address, which should be all students. Registration on the TWEN site is mandatory for all students, as it permits email notices to be sent to all students simultaneously and provides a mechanism for announcing changes to the schedule, the syllabus, or other materials. Both mandatory and optional materials will be made available to students through the TWEN site. Students should assure that the email address they register on the TWEN site is correct and the associated mailbox is operative and available to receive messages. Registering an email address set to “auto-reply” or to a mailbox over quota are not acceptable practices, as they impose unnecessary burdens on others.

7. The instructor's office is Room 421. Office hours will be posted on the home page of the course TWEN site. If visits outside of office hours are necessary, please email (jparke3@gmu.edu) in advance to arrange an appointment. When emailing, please indicate what days and hours would be convenient, and give telephone numbers where you may be reached both day and evening.

8. The course TWEN site includes a discussion forum, the use of which is optional. However, students are encouraged to use this forum to post questions about the course content. Experience has shown that many students share the same questions and concerns, and limited class time makes it impossible to consider all student questions in class.

9. There will be a final examination, which may consist of essay questions, short-answer questions, or multiple-choice questions, or any combination thereof. While the instructor reserves the right to give either an open-book or closed-book examination, in fact this instructor has never given a closed-book examination, and any examination will require students to bring and use the Casebook Supplement (the 2011-12 edition, for which previous editions are not adequate substitutes) with them. If the examination contains any questions calling for narrative answers, students will be permitted to write those answers with a PC in the “secure” mode, meaning that they may not use the PC as an information-retrieval device and therefore must print their notes, outlines, or other electronic materials for use during the examination. Students will not be permitted during the examination period to use (1) another person, (2) a communications device, or (3) a PDA or any other electronic information storage, retrieval, or recording device, except for PC’s in the secure writing mode.

10. The regular final examination is scheduled for Tuesday, May 8, 2012, at 12:00 noon. Students should bring any examination scheduling conflicts first to the attention of the Records Office, and then to the attention of the instructor, at the earliest possible time. Un-excused absence from the final examination will result in a failing grade. Absence from the final examination excused by the instructor will result in the administration of a make-up examination that may differ substantially from the regular examination, in both format and content.