Law 205 - Litigation and Dispute Resolution Theory
(Fall 2016)
Bruce Kobayashi

Course Schedule:
Monday 8:00p-10:30p

This syllabus is subject to change (last updated 7/27/2016)

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 assignment due dates are listed on the syllabus and posted on the Writing Assignments link.
• Length guideline for writing assignments (1000 - 1500 words).
• All assignments must be submitted as a pdf file using the TWEN assignment
Drop box. Other formats, E-mailed copies, or hard copies will not be accepted.

**Term paper**
- Term Paper must use economic analysis to analyze some aspect of litigation, e.g., a legal case, legal rule or statute, or proposed rule or statute.
- Paper should be 25-30 pages in length.
- The due dates for Preliminary topics and outlines and references are listed on the syllabus below and posted on the Writing Assignments link. Preliminary topics and outlines must be submitted as a PDF file using the TWEN Assignment Drop Box. Other formats, E-mailed copies or hard copies will not be accepted.
- The due date for Final Papers is posted on the writing assignments link. Final papers must be submitted as a pdf file using the TWEN assignment drop box. Other formats, E-mailed copies or hard copies will not be accepted.

**Texts:**
- Bone, Civil Procedure: The Economics of Civil Procedure (Bone)
- Cover and Fiss, The Structure of Procedure (CF)
- Dixit & Nalebuff, Thinking Strategically (TS)
**Preliminary Reading Assignments** (last updated June 27, 2016):

Students are responsible for checking TWEN site for current reading assignment.

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

August 22, 2016 - Class #1.

**Basic Structure of the Course & Overview**

**General Background:**
- Bone, Chapter 1.

August 29, 2016 - 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 12, 2016 - 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**

September 19, 2016 - Class #4

**ASSIGNMENT 1 DUE.**

**The Decision to Litigate versus Settle**

**Models of the Litigation/Settlement Decision:**
- Bone, Chapter 2.
  - Chayes, "The Role of the Judge in Public Law Litigation" (CF)

September 26, 2016 - Class #5.

**Settlement, Plea Bargaining and Negotiation**

**** Dixit & Nalebuff (TS), Chapters 5 & 6.

Settlement Negotiation

Credibility

October 03, 2016 - Class #6.
Predictability, Mixed Strategies and Rule 11
**Dist & Nalebuff, (TS) Chapter 7.
General Theory of Procedure

Frivolous Suits and Noerr-Pennington Immunity

Sanctioning FRCP Rule 11

TUESDAY October 11, 2016 - Class #7.
PAPER TOPICS DUE.
The Incentive Effects of Attorney Fee Structures
Legal Fees as Contract

Contingent Fees

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)
**Bone, Chapter 5.
**Snyder and Hughes, "The English Rule for Allocating Legal Costs," 6 J.L. Econ. & Org. 439 (1990).**

**October 17, 2016 - Class #8.**

**Information, Work Product, and Attorney Client Privilege**

**A Theory of Information**

*Kitch, "The Law and Economics of Rights in Valuable Information, 9 J. Legal Stud. 683 (1980)."

**Work Product and Attorney Client Privilege**


**Kaplow and Shavell, "Legal Advice about Information to Present in Litigation: Its Effects and Social Desirability," 102 Harv. L. Rev. 565 (1989).**

**Hickman v. Taylor, 329 U.S. 495 (1947).**


**Swidler and Berlin and James Hamilton v. U.S., 118 S. Ct. 2081 (1998).**

**October 24, 2016 - Class #9.**

**ASSIGNMENT 2 DUE.**

**Pleading and Discovery Rules**

**Pleading**

**Bone, Chapter 4**

**Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).**

*Ashcroft v. Iqbal, 556 U.S. ___129 S.Ct. 1937 (2009).**

**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**

**Bone, Chapter 7.**


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


**October 31, 2016 - Class #10**
Economic Analysis of Evidence (PROFESSOR PARKER)


Expert Testimony

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

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

**Parker, "Daubert's Debut: The Supreme Court, the Economics of Scientific Evidence, and the Adversarial System," 4 Sup. Ct. Econ. Rev. 1 (1994).**


Character Evidence

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

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

November 7, 2016 - Class #11
OUTLINE AND REFERENCES DUE

Multiple Litigants and External Effects I

Multiple Defendants, Prisoners' Dilemmas

**ABA, Litigation Manual, pp. 891-900, 1076-91, 1163-76 (articles by Dewey, McSweeney & Brody, Wiener, Grayson & Dodd, and Brown). (Articles are posted in Course materials Section).**


Contribution and Setoff Rules


**McDermott v. Amclyde, 114 S.Ct. 1461 (1994).**


November 14, 2016 - Class #12.

Multiple Litigants II - Multiple Plaintiffs and Class Actions

Counterclaims and Joinder

**McInemey, "Counterclaims as Self-Inflicted Wounds," 18 Litigation No. 3, p. 17.**

**Landes, "Counterclaims: An Economic Analysis," 14 Int'l Rev. L. & Econ. 235 (1995).**

**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


**Bone, Chapter 8**

**Parklane Hosiery v. Shore, 439 U.S. 322 (1979).**

**Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation 402 U.S. 313 (1972).**

**Hay, "Some Settlement Effects of Preclusion" 1993 U. Ill. L. Rev. 21 (1993).**


Vacatur

**Fisch, Rewriting History: The Propriety of Eradicating Prior Decisional Law Throught Settlement and Vacatur, 76 Cornell L. Rev. 589 (1991).**

**U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership 115 S.Ct. 386 (1994).**

*U.S. v. Munsingwear, Inc. 340 U.S. 36 (1950).*

November 21, 2016 - Class #13.
ASSIGNMENT 3 DUE.
Punitive Damages and Penalty Structure


November 28, 2016 – Class #14

Class Actions

** Bone, Chapter 9.