Law 205 - Litigation and Dispute Resolution Theory
(Fall 2020)
Bruce Kobayashi

Course Schedule:
Tuesday 6:05-9:00pm
Online only for Fall 2020 (Zoom)

This syllabus is subject to change (last updated July 30, 2020)

Law 205. Litigation and Dispute Resolution Theory Course Description

3 Credit Hours

Class 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.

Learning Outcomes:

Upon completing this course, students will be able to analyze key features of the litigation process and rules of civil procedure and evidence using economics, decision theory and game theory.

Students will complete a term paper applying the tools of economics to analyze the effects of rules, laws, and strategy upon litigation outcomes.

Course Requirements:

TWEN Registration is Mandatory

Classroom Meetings:
- Class attendance and participation are required.
- Class attendance will be based on Zoom attendance reports.
- Students are required to have their first and last names and current profile pictures set up on their Zoom account.
- Persons absent for more than 20% of the classroom meetings (three classes or more) will not receive a passing grade.

Office Hours:
- Room 450G or Zoom if in person meetings are not allowed or feasible.
- Office Hours by appointment (sign up on TWEN).

Grading
The basis for the semester grade is as follows:
  o  Term Paper (50%)
  o  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 and times 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) (Text is out of print and not available at the bookstore. Is available used at Amazon for under $10.)
• Cover and Fiss, The Structure of Procedure (CF)
• Dixit & Nalebuff, Thinking Strategically (TS)
Preliminary Reading Assignments (last updated June 27, 2017):
Students are responsible for checking TWEN site for current reading assignment.

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

August 25, 2020 - Class #1.
Basic Structure of the Course & Overview
General Background:

**Bone, Chapter 1.

September 1, 2020 - Class #2.
Judge and Jury Decisionmaking
Peremptory Challenges, Jury Size and Ex-Post Controls over the Jury
**Lempert, "Jury Size and the Peremptory Challenge" (CF)
Judge versus Jury Decisionmaking.

JMOL

September 8, 2020 - Class #3.
Game Theory and Trial Expenditures
**Dixit & Nalebuff, (TS) Chapters 1-4.
Application I: The Prisoner's Dilemma
** U.S. v. Singleton, 144 F.3d 1343 (1998), vacated
Application II: Lawyers and Litigation Expenditures

September 15, 2020 - 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)
Settlement Negotiation
** Dixit & Nalebuff (TS), Chapters 5 & 6.
**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 22, 2020 - Class #5.
**Predictability, Mixed Strategies and Rule 11**
**Dixit & Nalebuff, (TS) Chapter 7.
General Theory of Procedure

Frivolous Suits and Noerr-Pennington Immunity

Sanctions
**FRCP Rule 11

September 29, 2020 - Class #6.
**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.
October 6, 2020 - Class #7.

PAPER TOPICS DUE.

Information, Work Product, and Attorney Client Privilege

A Theory of Information

Work Product and Attorney Client Privilege

October 13 – FALL RECESS.

October 20, 2020 - Class #8.

Pleading and Discovery Rules

Pleading
** Bone, Chapter 4

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

Discovery Reform
** Bone, Chapter 7.

October 27, 2020 - Class #9

ASSIGNMENT 2 DUE

Economic Analysis of Evidence

Standards of Proof

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 3, 2020 - Class #10
Multiple Defendants 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. Amcyle, 114 S.Ct. 1461 (1994).**

November 10, 2020 - Class #11.
OUTLINE AND REFERENCES DUE
Multiple Litigants II - Multiple Plaintiffs
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
**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).**
Spurr, "Collateral Estoppel." 11 Intl Rev. L. & Econ. 47 (1991).**

Vacatur
**Fisch, Rewriting History: The Propriety of Eradicating Prior Decisional Law Throught Settlement and Vacatur, 76 Cornell L. Rev. 589 (1991).**
*U.S. v. Munsingwear, Inc. 340 U.S. 36 (1950).**
November 17, 2020 - Class #12.
Class Actions
Dewees, Prichard and Trebilcock, "An Economic Analysis of Cost and Fee Rules for Class
**Bone, Chapter 9.
**Saks and Blank, "Justice Improved: The Unrecognized Benefits of Aggregation and

November 24, 2020 - Class #13.
ASSIGNMENT 3 DUE.
Punitive Damages and Penalty Structure
**Polinsky and Shavell, Punitive Damages: An Economic Analysis, 111 Harv. L. Rev. 869
(1998)
*Eisenberg, Goerdt, Ostrom, Rottman and Wells, "The Predictability of Punitive Damages."
Polinsky and Che, "Decoupling Liability: Optimal Incentives for Care and Litigation," 22