Law 205 - Litigation and Dispute Resolution Theory
(Fall 2025)
Bruce Kobayashi

Course Schedule:
MW - 1:50PM 3:15PM - Room TBA

This syllabus is subject to change (last updated July 7, 2025). We may deviate from the syllabus for reasons including current events, new cases, scheduling, *et cetera*.

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.

Course Requirements:

***Class Participation & Attendance*:**

- Class attendance and participation are required.
- *Students are expected to come to class prepared and ready to discuss the assigned readings.* Your grade is subject to a discretionary class participation adjustment of 1/3rd of a grade in either direction.
- The course adheres to the attendance policy as outlined in AR 4-1. Students 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.

Grading:

- This course follows the grading policies outlined in Academic Regulations (AR) 4-5.7, which may be found at ACADEMIC REGULATIONS, https://www.law.gmu.edu/academics/regulations.
- The basis for the semester grade is as follows:
    - A final exam will be administered in class on December 3, 2025 at noon (there is no make-up exam) and will count for **100 percent** of your grade. The final exam is open book & notes (internet blocked). It will consist of short answer questions.

Reading Assignments:

- Up to date reading assignments can be found by clicking on the Syllabus link on the CANVAS course 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.

Honor Code:

- Students are expected to adhere to the Scalia Law HONOR CODE, which may be found at https://www.law.gmu.edu/academics/honor_code.

Intellectual Property:

- I own all course content that is created (*e.g.*, slides), regardless of format (electronic, print, audio, video).
- You are forbidden to use them with, or distribute them to, anyone other than your classmates in this course.

Texts:

- Bone, Civil Procedure: The Economics of Civil Procedure (Bone) (Text is out of print and not available at the bookstore. Copies of the book are 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 30, 2025):
Students are responsible for checking CANVAS site for current reading assignment.

** - Required, * - Recommended

I. Basic Structure of the Course & Overview

General Background:

**Bone, Chapter 1.

Class #1 - August 18

**Kobayashi, The Economics of Litigation, available online at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2613145.

*Cornell, "The Incentive to Sue: An Option Pricing Approach," 19 J. Legal Stud. 173 (1990) (article available on JSTOR https://www.jstor.org/stable/724416?seq=1)

Class #2 - August 20

**Miller, "The Damages Dilemma in the Bet-the-Company Case," 17 Litigation No. 2, p. 12. (article available on JSTOR https://www.jstor.org/stable/29759447?seq=1)

II. Judge and Jury Decisionmaking

Class #3 - August 25

Peremptory Challenges, Jury Size and Ex-Post Controls over the Jury

**Lempert, "Jury Size and the Peremptory Challenge" (CF)

**Tanner v. U.S. 483 U.S. 107 (1987).

*Warger v. Shauers, 135 S. Ct. 521 (2014).

Class #4 - August 27

Judge versus Jury Decisionmaking.

**Kalven and Ziesel, The American Jury, (1966) (excerpts from CF, Chp 5, posted on CANVAS).

*Clermont and Eisenberg, "Trial by Jury or Judge: Transcending Empiricism," 77 Cornell L. Rev. 1124 (1992), available at https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1252&context=facpub

JMOL

Gelbach, Jonah B. and Kobayashi, Bruce H., Legal Sufficiency of Statistical Evidence (August 14, 2018). George Mason Legal Studies Research Paper No. LS 18-29. Available at SSRN: https://ssrn.com/abstract=3238793

III. Game Theory and Trial Expenditures

General Background

**Dixit & Nalebuff, (TS) Chapters 1-4.

Class #5 - September 3

Application I: The Prisoner's Dilemma

***Page v. U.S., 884 F.2d 300 (1989).*

***U.S. v. Singleton, 144 F.3d 1343 (1998), vacated*

***U.S. v. Singleton, 165 F.3d. 1297 (1999).*

Class #6 - September 8

Application II: Lawyers and Litigation Expenditures

**Gilson and Mnookin, "Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation," 94 Colum. L. Rev. 509 (1994), available at https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1055&context=faculty_scholarship

**Trubek, et al., "The Costs of Ordinary Litigation," 31 UCLA L. Rev. 72 (1983) (copy posted on CANVAS).

IV. The Decision to Litigate versus Settle

Class #7 - September 10

Models of the Litigation/Settlement Decision:

**Bone, Chapter 2.

**Kobayashi, The Economics of Litigation, (assigned week 1) available online at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2613145

**Chayes, "The Role of the Judge in Public Law Litigation" (CF)

**Fiss, "Against Settlement," 93 Yale L.J. 1073 (1984), available at https://openyls.law.yale.edu/bitstream/handle/20.500.13051/16276/56_93YaleLJ1073_May1984_.pdf?sequence=2&isAllowed=y

Class #8 - September 15

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 on CANVAS)

*Gross and Syverud, "Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial," 90 Mich. L. Rev. 319 (1991), available at https://repository.law.umich.edu/cgi/viewcontent.cgi?article=2611&context=articles

V. Predictability, Mixed Strategies, Credibility and Rule 11

Class #9 – September 17

**Dixit & Nalebuff, (TS) Chapter 7.

General Theory of Procedure

*Posner, "An Economic Approach to Legal Procedure and Judicial Administration," 2 J. Legal Stud. 399 (1973). (CF)

Craswell and Calfee, "Deterrence and Uncertain Legal Standards," 2 J.L. Econ. & Org. 279 (1986), available on JSTOR at https://www.jstor.org/stable/765053

**Calfee and Craswell, "Some Effects of Uncertainty on Compliance with Legal Standards," 70 Va. L. Rev. 965 (1984), available on JSTOR at https://www.jstor.org/stable/1072946?origin=crossref

Credibility

Schelling, The Strategy of Conflict, Chapter 2 & 5 (1960).

Bebchuk, "Suing Solely to Extract a Settlement Offer," 17 J. Legal Stud. 437 (1988).

**Bebchuk, "A New Theory Concerning the Credibility and Success of Threats to Sue," 25 J. Legal Stud. 1 (1996), available on JSTOR at https://www.jstor.org/stable/724519

Nalebuff, "Credible Pretrial Negotiation," 18 RAND J. Econ. 198 (1987).

Class #10 – September 22

Frivolous Suits and Noerr-Pennington Immunity

*Klein, "Strategic Sham Litigation: Economic Incentives in the Context of the Case Law," 6 Int'l Rev. L. & Econ.241 (1986) (Reading is posted on CANVAS).

*Klein, "Predation in the Courts: Legal Versus Economic Analysis in Sham Litigation Cases," 10 Int'l Rev. L. & Econ. 29 (1990).

**Professional Real Estate Investors, Inc., v. Columbia Pictures 113 S.Ct. 1920 (1993).

**Grip-Pak Inc. v. Illinois Tool Works., 694 F.2d 466 (1982), cert denied, 461 U.S. 958 (1983).

Sanctions

**FRCP Rule 11

**Cooter and Gell v. Hartmarx Corp., 496 U.S. 384 (1990).

**Willy v. Coastal Corp., 112 S.Ct. 1076 (1992).

**Kobayashi and Parker, "No Armistice at 11: A Comment on the Proposed Amendments to Rule 11 of the Federal Rules of Civil Procedure," 3 Sup. Ct. Econ. Rev. 93 (1993), available on JSTOR at https://www.jstor.org/stable/1147066.

VI. The Incentive Effects of Attorney Fee Structures

Class #11 – September 24

Legal Fees as Contract

Smith and Cox, "The Pricing of Legal Services: A Contractual Solution to the Problem of Bilateral Opportunism," 14 J. Legal Stud. 167 (1985).

Contingent Fees

**Miller, "Some Agency Problems in Settlement," 16 J. Legal Stud. 189 (1987), available on JSTOR at https://www.jstor.org/stable/724478.

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

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

*Hay, "Optimal Contingent Fees in a World of Settlement," 26 J. Legal Stud. 259 (1997).

Class #12 – September 29

Fee Shifting and Rule 68

*Shavell, "Suit, Settlement, and Trial: A Theoretical Analysis under Alternative Methods for the Allocation of Legal Costs," 11 J. Legal Stud. 55 (1982), Available on JSTOR at https://www.jstor.org/stable/724155.

**Tetzlaff, "Opening Statement: The English Rule from the English Perspective," 18 Litigation No. 4, p. 1. (Available on JSTOR at https://www.jstor.org/stable/29759551?seq=1).

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

**Bone, Chapter 5.

**Marek v. Chesny, 720 F.2d 474 (1985), Rev'd 473 U.S. 1 (1985).

**Snyder and Hughes, "The English Rule for Allocating Legal Costs," 6 J.L. Econ. & Org. 439 (1990), available on JSTOR at https://www.jstor.org/stable/764782

James W. Hughes and Edward A. Snyder, Litigation and Settlement under the English and American Rules: Theory and Evidence, 38 J. L. & Econ. 225 (1995), available on JSTOR at https://www.jstor.org/stable/725822.

VII. Information, Work Product, and Attorney Client Privilege

Class #13 - October 1.

A Theory of Information

*Hirshleifer, "The Private and Social Value of Information," 61 Am. Econ. Rev. 561 (1971).

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

**Kaplow and Shavell, "Legal Advice about Information to Present in Litigation: Its Effects and Social Desirability," 102 Harv. L. Rev. 565 (1989), available on JSTOR at https://www.jstor.org/stable/1341371.

Work Product

**Allen, Grady, Polsby, and Yashko, "A Positive Theory of Attorney-Client Privilege and the Work Product Doctrine," 19 J. Legal Stud. 359 (1990), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2940737 (section on Work Product)

*Easterbrook, "Insider Trading, Secret Agents, Evidentiary Privilege, and the Production of Information," 1981 Sup. Ct. Rev. 309, available on JSTOR at https://www.jstor.org/stable/3109548.

Class #14 – October 6

Attorney Client Privilege

**Allen, Grady, Polsby, and Yashko, "A Positive Theory of Attorney-Client Privilege and the Work Product Doctrine," 19 J. Legal Stud. 359 (1990). (section on Attorney Client Privilege)

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

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

**Upjohn v. U.S. 449 U.S. 383 (1981).

VIII. Pleading and Discovery Rules

Class #15 - October 8

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), available at https://www.pennstatelawreview.org/115/1/115%20Penn%20St.%20L.%20Rev.%201.pdf.

**Choi, et al, "The Screening Effect of the Private Securities Litigation Reform Act," 6 *Journal of Empirical Legal Studies* 35 (Issue 1, March 2014), available at https://repository.law.umich.edu/cgi/viewcontent.cgi?article=2577&context=articles.

**Gelbach, Johah B. "Can the Dark Arts of the Dismal Science Shed Light on the Empirical Reality of Civil Procedure?" 2 *Stanford Journal of Complex Litigation* 223 (2014) available at: https://law.stanford.edu/wp-content/uploads/2018/05/gelbach.pdf.

Class #16 – October 15

Legal Discovery

**ABA, Litigation Manual, pp. 178-83 (article by Lundquist), posted on CANVAS.

**Kobayashi, "Law's Information Revolution as Procedural Reform: Predictive Search as a Solution to the *In Terrorem* Effect of Externalized Discovery Costs," 2014 *University of Illinois Law Review* 1473 (2014), available at https://illinoislawreview.org/wp-content/ilr-content/articles/2014/5/Kobayashi.pdf.

*Cooter and Rubinfeld, "An Economic Model of Legal Discovery," 23 J. Legal Stud. 435 (1994), available on JSTOR at https://www.jstor.org/stable/724329.

Discovery Reform

**Bone, Chapter 7.

**Gelbach and Kobayashi, "The Law and Economics of Proportionality in Discovery," 50 *Georgia Law Review* 1093 (2016), available at https://scholarship.law.upenn.edu/faculty_scholarship/1521/.*

*Redish, Martin H. and McNamara, Colleen, Back to the Future: Discovery Cost Allocation and Modern Procedural Theory, 79 Geo. Wash. L. Rev. 773 (2011).

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

*Bell, Varner and Gottschalk, "Automatic Disclosure in Discovery-The Rush to Reform," 27 Ga. L. Rev. 1 (1992).

*Schwarzer, "The Federal Rules, The Adversary Process, and Discovery Reform," 50 U. Pitt. L. Rev. 703 (1989).

IX. Standards of Proof and the Economic Analysis of Evidence

Class #17 - October 20

Standards of Proof

**Burtis, Gelbach, & Kobayashi, Error Costs, Legal Standards of Proof and Statistical Significance, 25 Sup. Ct. Econ. Rev 1 (2017), available on JSTOR at https://www.jstor.org/stable/26909329.

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) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1069923.

*Langbein, "The German Advantage in Civil Procedure," 52 U. Chi. L. Rev. 823 (1985).

Class #18 – October 22

Evidence

**Parker and Kobayashi, Evidence, in the Encyclopedia of Law and Economics (2000), available online at http://mason.gmu.edu/~bkobayas/KobayashiParker7900book.pdf.

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), available on JSTOR at https://www.jstor.org/stable/764970.

X. Multiple Litigants and External Effects I

Class #19 - October 27

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 on CANVAS)

**Bernstein and Klerman, "An Economic Analysis of Mary Carter Settlement Agreements," 83 Geo. L.J. 2215 (1995), available at https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=8353&context=journal_articles.

Class # 20 – October 29

Contribution and Setoff Rules

**Klerman, Dan, Settling Multidefendant Lawsuits: The Advantage of Conditional Setoff Rules, 25 J. Legal Stud. 445 (1996), available at https://gould.usc.edu/assets/docs/Klerman_Settling_Multidefendant.pdf.

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

*Landes and Posner, "Joint and Multiple Tortfeasors: An Economic Analysis," 9 J. Legal Stud. 517 (1980).

XI. Multiple Litigants II - Multiple Plaintiffs

Class # 21 - November 3

Counterclaims and Joinder

**McInerney, "Counterclaims as Self-Inflicted Wounds," 18 Litigation No. 3, p. 17 (1992), available on JSTOR at https://www.jstor.org/stable/29759536.

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

Braverman, Janus was not a God of Justice: Realignment of Parties in Diversity Jurisdiction, 68 N.Y.U. L. Rev. 1072 (1993).

Class #22 – November 5.

Capitalization of Litigation and Multiple Plaintiffs

*Landes and Posner, "The Economics of Anticipatory Adjudication," 23 J. Legal Stud. 683 (1994).

**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 Int'l Rev. L. & Econ. 47 (1991).

Vacatur

**Fisch, Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur, 76 Cornell L. Rev. 589 (1991), available at https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=3493&context=clr.

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

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

XII. Class Actions, Statistical Adjudication, and Trial by Formula

Class #23 - November 10

Bernstein, "Judicial Economy and Class Actions," 7 J. Legal Stud. 349 (1978).

Dewees, Prichard and Trebilcock, "An Economic Analysis of Cost and Fee Rules for Class Actions," 10 J. Legal Stud. 155 (1981).

**Bone, Chapter 9.

**Phillips Petroleum v. Shutts, 472 U.S. 797 (1985).

**Friedman, "More Justice for Less Money," 39 J.L. & Econ. 211 (1996), available at https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1570&context=facpubs.

**Saks and Blank, "Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts," 44 Stan. L. Rev. 815 (1992), available on JSTOR at https://www.jstor.org/stable/1229001.

*Cimino, et al. v. Raymark Industries, Inc., et al., 751 F.Supp. 649.

Class # 24 November 12

**Bone, Tyson Foods and the Future of Statistical Adjudication, 95 N. Car. L. Rev. 607 (2017).

**Wal Mart v. Dukes, 564 U.S. 338 (2011).

**Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036 (2016)

XIII. Punitive Damages and Penalty Structure, Review

Class #25 – November 17

*Becker, "Crime and Punishment: An Economic Approach," 76 J. Pol. Econ. 169 (1968).

**State Farm Mut. Auto. Ins. Co. v. Campbell 123 S.Ct. 1513 (2003).

**BMW of North America, Inc. v. Gore, 116 S.Ct. 1589 (1996).

***Philip Morris USA v. Williams, 127 S.Ct. 1057* (2007).

***Exxon* Shipping Co. v. *Baker* 128 S.Ct. 2605 (2008).

**Polinsky and Shavell, Punitive Damages: An Economic Analysis, 111 Harv. L. Rev. 869 (1998), available on JSTOR at https://www.jstor.org/stable/1342009.

Class #26 – November 19

*Eisenberg, Goerdt, Ostrom, Rottman and Wells, "The Predictability of Punitive Damages," 26 J. Legal Stud. 623 (1997)

Polinsky and Che, "Decoupling Liability: Optimal Incentives for Care and Litigation," 22 RAND J. Econ. 562 (1991).