

Civil Procedure: Course Requirements and Syllabus

Professor Lonny Hoffman (Fall 2012)

Welcome to Civil Procedure. This document contains a course description, list of required reading materials, class schedule and policy on grading, attendance and participation, my contact information and office hours, and a syllabus of assignments.

Course Description

This is a course about litigation—that is, about the disputes that are brought, usually for money damages, in publicly-funded courts. Lots of disputes are resolved outside of courtrooms and we'll also talk about these other (formal and informal) modes of dispute resolution, but our main focus will be on civil lawsuits. Even more precisely and narrowly, we will mostly be concerned lawsuits filed in federal courts. We cover a range of subjects relating to the procedures that govern federal civil cases, including jurisdiction, pleadings, discovery, dispositive motions and trial procedure. In addition to covering the subject matter, we will also address professional ethical questions as they arise. Finally, the course will introduce you some of the analytic and practical skills necessary for applying your study of procedure to the actual practice of law.

Course Materials

We will be using material from three different sources. First, we will use the course materials I have prepared (listed as “CM” in the syllabus). They will be available from the copy center in the law school basement (713-743-2193). If you have any problem locating the materials, contact my assistant, Vanessa Fonte (vfonte@central.uh.edu).

Second, we will be studying the rules of civil procedure and statutes that govern procedural law in the federal courts. One option for you is to buy the rulebook that I've reserved in the UH bookstore. They will have book published by West Publishing: FEDERAL RULES OF CIVIL PROCEDURE, 2012-2013 EDUCATIONAL EDITION, ISBN No. 9780314949868. Other published versions of rulebooks will also do if you find those elsewhere for less. Just be sure to get a book with the current version of the rules and statutes. This means your book must be current at least as of December 2011 (a number of significant statutory changes were enacted, effective on this date). An alternative to buying any book (used or new) is to just access the rules and relevant statutes from the internet. There are several sites that have the current rules, such as <http://www.law.cornell.edu/rules/frcp/>. A .pdf version of the current rules is available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/2011%20Rules/Civil%20Procedure.pdf>. Currently enacted statutes can be found in numerous places, such as www.law.cornell.edu/uscode/text. Another good site to use to read statutes is <http://uscode.house.gov/search/prevcode.shtml> because it provides links both to the current version of the U.S. Code, as well as to prior enacted versions (which is helpful when one is comparing changes made over time).

Third and finally, we will be using an excellent secondary source: RICHARD D. FREER, CIVIL PROCEDURE (3d Edition 2012, Aspen Publishers-paperback only; ISBN-978-1-4548-0222-8). This new edition is substantially different from earlier editions because it takes into account recent statutory changes and judicial decisions. Unfortunately, these recent developments are significant enough that it will make it hard for you to use earlier editions of the book. I will reserve copies of the Third Edition with the UH bookstore, though you are certainly welcome to buy it on line if you can get it for less (when I last checked, you could buy it directly from the publisher for just under \$80 at <http://store.wolterskluwerlb.com>). One final note: do not purchase by mistake the somewhat similarly titled casebook edited by Freer, Perdue and Collins, CIVIL PROCEDURE: CASES, MATERIALS AND QUESTIONS that Aspen also publishes.

Class Schedule

This class meets Tuesdays at 9:00-10:20, Wednesdays and Fridays at 10:30-11:50 a.m.

Grades, Attendance and Participation

There is one final examination. It will be an in-class, open book examination comprised of three medium length essay questions. Most of my past exams are available through a link on my webpage (<http://www.law.uh.edu/faculty/main.asp?PID=179>). I will give you more details about the exam during the semester.

The school's academic rules and I require that you attend at least 80% of the classes. I may lower a final grade or take other appropriate disciplinary action if it is determined that a student is absent from more than 20% of the classes. I will sometimes call on students; at other times I ask for volunteers. School rules permit to improve a student's grade by one-third of a letter grade based on class performance. Typically, a handful of students will earn this participation increase (depending on the year, between 4-10). On rare occasions, I've reduced a student's grade for failure to attend or participate.

The Teaching Assistant Program for this Course

I use a unique teaching assistant program in this class that many students find to be very helpful. We are fortunate to have several student teaching assistants who will be working with us this semester. I will introduce all of them to you and discuss the teaching assistant program in depth when we meet on the first class day.

Contact Information and Office Hours

My office is in the faculty suites on the second floor of TUII. I hope you will feel welcome to stop by during my office hours (Wednesdays and Fridays, 9:30-10:30 am) or by calling/emailing in advance to schedule an appointment at another convenient time. My office phone is (713) 743-5206. My UH email is lhoffman@uh.edu.

Course Syllabus

Below is the detailed course outline and syllabus. You can use it as a roadmap for where we will be going during the semester. The dates in brackets are estimates of when we will get to this material. Assignments **in bold** are heavier-than-usual reading loads.

I. Introduction to Civil Procedure

A. Introduction to the Course and Overview of Course Themes [Aug 28 class].

1. Read in advance of Aug 28 class: Freer, pp. 1-35
2. Read in advance of Aug 28 class: My essay *A Parting Reprise*. You can access the full text of the essay through the Social Science Research Network website, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=898240, by clicking on that link and then downloading the document.

B. Continue with Introduction and Overview [Aug 29 class]

Read in advance of Aug 29 class: Excerpt from Charles Adams, *World-Wide Volkswagen v. Woodson – The Rest of the Story*, 72 Neb. L. Rev. 1122 (1993) (CM, pp. 1-11)

C. Finish Introduction and Overview [Aug 31 class]

No additional reading assigned for this class. We will continue to discuss prior materials.

II. The Civil Lawsuit

A. Notice Pleading [Sept 4, 5, 7 and 11 classes]

1. Read in advance of Sept 4 class: Questions to Think About in Advance of Discussion of Notice Pleading (CM, p. 9)
2. Read in advance of Sept 4 class: Federal Rules of Civil Procedure (“FRCP”) 8 and 9, as well as Form 11 in the Appendix of Forms following the Federal Rules of Civil Procedure (rulebook)
3. Read in advance of Sept 4 class: Freer, pp. 305-324 (top)

4. Read in advance of Sept 4 class: *Swierkiewicz*, Complaint (CM, pp. 13-28)
5. Read in advance of Sept 4 class: Tony Mauro, Made to Be Broken, *The American Lawyer*, March 12, 2002 (CM p. 10-11)
6. **Read in advance of Sept 5 class: Freer, pp. 324-331 (top half of page)**
7. **Read in advance of Sept 5 class: *Bell Atlantic v. Twombly* (CM, pp. 29-38)**
8. **Read in advance of Sept 5 class: *Ashcroft v. Iqbal* (CM, pp. 39-56)**

(Note: we will discuss *Twombly* and *Iqbal* on Sept 5 and Sept 7. There is no additional reading assigned for the Sept 7 class but because we are going to be talking about both cases starting on Sept 5, you have to read both cases before the Sept 5 class. Because the cases are long and not easy to read, I bolded the assignment to give you a heads up about it)

10. Notice Pleading [Sept 11 class]

Prepare in advance of Sept 11 class the Practice Problem in CM, p.57. You will turn in your answer to your teaching assistant before the class discussion of the problem on Sept 11. (Note: this is the first of many practice problems we will do over the semester. They are meant to (i) improve comprehension of the subject matter; and (ii) give you practice answering the kind of questions that you will be given on the final exam)

11. Optional additional reading (Note: throughout the semester, I will make suggestions of optional additional reading. They are meant to help deepen understanding of the subject for anyone who thinks they might want/need more; but, as described, they are not required):
 - a. Arthur Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L. J. 1 (2010), available at <http://scholarship.law.duke.edu/dlj/vol60/iss1/1/>

- b. Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. 849 (2010), available at http://nd.edu/~ndlrev/archive_public/85ndlr3/Bone.pdf
- c. Lonny Hoffman, *Rulemaking in the Age of Twombly and Iqbal* (new article, forthcoming 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2123325

B. Motions, Answers and Affirmative Defenses [Sept 12, 14 classes]

- 1. Defendant's Answer and (some) Rule 12 Motions: Rule 12(b)(6), 12(c) and Rule 12(e) [Sept 12 class]
 - a. Read in advance of Sept 12 class: Freer, pp. 331-52 (top)
 - b. Read in advance of Sept 12 class: Rules 8(b) and 8(c), 12(b)(6), 12(c) and 12(e)
 - c. Prepare in advance of Sept 12 class: Exercise on timing and waiver issues (CM, p.60). You do not need to turn anything in. Prepare only for class discussion purposes.
- 2. Rule 11: Certifications and Sanctions [Sept 14 class]
 - a. Read in advance of Sept 14 class: Questions to Think About in Advance of Discussion of Rule 11 (CM, p 61)
 - b. Read in advance of Sept 14 class: Freer, pp. 378-84
 - c. Read in advance of Sept 14 class: FRCP 11 and also read text of advisory committee notes accompanying 1983 and 1993 amendments
 - d. Optional reading: Lonny Hoffman, The Case Against the Lawsuit Abuse Reduction Act of 2011 (Houston Law Review (2011), full text available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=180712

C. Amendments [September 18, 19 classes]

- 1. Read in advance of Sept 18 class: FRCP 15
- 2. Read in advance of Sept 18 class: Freer, pp. 367-70 and 374-78

3. Read in advance of Sept 18 class: *Swartz v. Gold Dust Casino* (CM, pp.62-65)
4. Read in advance of Sept 18 class: *Kimmel v. Gallaudet University* (CM, pp. 67-68)
5. Read in advance of Sept 18 class: *Krupski v. Costa Crociere S. P. A.* (CM, pp. 69-73)
6. Prepare in advance of Sept 19 class the Practice Exercise on CM, pp. 74-75. You will turn in your answer to your teaching assistant before the class discussion of the problem on Sept 19.

D. Joinder of Claims and Parties [Sept 21 class]

1. Read in advance of Sept 21 class: Freer, pp. 653-56 (top), 661-63 (skip the short discussion on subject matter jurisdiction on pages 663-64), 664-72
2. Read in advance of Sept 21 class: FRCP 18, 20 and 23

E. Counterclaims, Cross-Claims and Necessary and Indispensable Parties [Sept 25 class]

1. Read in advance of Sept 25 class: FRCP 13 , 14 and 19
2. Read in advance of Sept 26 class: Freer, pp. 676-84 and 687-90
3. Skim in advance of Sept 26 class: Freer, pp. 693-714 (Note: I say “skim” rather than “read.” We have not yet gotten to a number of the doctrines that are related to this rule (e.g., jurisdiction) and so I only want to introduce the idea here that a defendant can override a plaintiff’s party joinder choices via Rule 19. We will return to the subject later after we have covered the other doctrines.

(Note: because of the Jewish holiday Yom Kippur, we will not have class on Wednesday, Sept 26)

III. Personal Jurisdiction and Related Issues

A. Introduction to Personal Jurisdiction and the Traditional Conception of Personal Jurisdiction [Sept 28 class]

1. Read in advance of Sept 28 class: Questions to Think About in Advance of Reading *Pennoyer v. Neff* (CM, p. 76)

2. Read in advance of Sept 28 class: *Pennoyer v. Neff* (CM, pp. 77-82)
 3. Read in advance of Sept 28 class: Freer, pp. 37-49 (top) and 52-65 (top)
- B. The Modern Conception of Personal Jurisdiction [Oct 2 class]
1. Read in advance of Oct 2 class: *International Shoe v. Washington* (CM, pp. 83-87)
 2. Read in advance of Oct 2 class: Freer, pp. 65-78, 268-70
 3. Optional suggested reading: (excerpt from): Lonny Hoffman, *The Case Against Vicarious Jurisdiction*, 152 U. PA. L. REV. 1023 (2004), full text available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=893652, at pp. 1042-45
- B. Long-Arm Statutes and other Non-Constitutional Limits on Judicial Jurisdiction [Oct 3 class]
1. Read in advance of Oct 3 class: *Gray v. American Radiator* (CM, pp. 89-94)
 2. Read in advance of Oct 3 class: Ohio Long Arm Statute, (CM, p.120)
 3. Read in advance of Oct 3 class: Federal Rule of Civil Procedure 4(k)(1)(a)
 4. Read in advance of Oct 3 class: Freer, pp. 118-28
- D. Minimum Contacts Analysis in Operation [Oct 5-12 classes]
1. General Jurisdiction [Oct 5 class]
 - a. Read in advance of Oct 5 class: *Goodyear v. Brown* (CM, pp. 97-110) (Note: the Freer reading also relates to the *Helicopteros* case, which we do not read in class; instead we read, as noted, the Court's recent *Goodyear* decision, which Freer also discusses)
 - b. Read in advance of Oct 5 class: Freer, pp. 107-12

2. Intentional Wrongs (and more) [Oct 9 class]
 - a. Read in advance of Oct 9 class: *Calder v. Jones* (CM, pp. 111-13) and *Burger King v. Rudzewicz* (CM, pp. 114-25)
 - b. Read in advance of Oct 9 class: Freer, pp. 90-94 and 103-07 (top)
 - c. Read in advance of Oct 9 class (skimming here is adequate): *Burnham v. Superior Court of California* (CM, pp. 126-39)

3. Products Liability [Oct 10, 12 and 16 classes]
 - a. Read in advance of Oct 10 class: *World-Wide Volkswagen case v. Robinson* (CM, pp.141-51)
 - b. Read in advance of Oct 10 class: Freer, pp. 86-90
 - c. Read in advance of Oct 12 class: Questions to Think About in Advance of Reading *McIntyre* (CM, p. 152)
 - d. Read in advance of Oct 12 class: *McIntyre v. Nicastro* (CM, pp. 153-75)
 - e. Read in advance of Oct 12 class: Freer, pp. 86-90, 95-103 and 107 (just the Recap section) (Note: Freer also discusses the *Asahi* case, which we do not read; instead we read, as noted, the Court's recent *McIntyre* decision which Freer also covers)
 - f. Read in advance of Oct 16 class: Freer, pp. 112-18 and 128-34
 - g. Prepare in advance of Oct 16 class: Practice Exercise (CM, pp. 177-78). You will turn in your answer to your teaching assistant before the class discussion of the problem on Oct 12.

F. Notice [Oct 17 class]

1. Read in advance of Oct 17 class: *Jones v. Flowers* (CM, pp.179-96)
2. Read in advance of Oct 17 class: Freer, pp. 135-42 and just skim 143-58 (top)
3. Read in advance of Oct 17 class: Federal Rule of Civil Procedure 4

4. Prepare in advance of Oct 17 class: Practice Problem (Fall 2007 exam question) (CM, p. 197). You do not need to turn anything in. Prepare only for class discussion purposes.

G. Venue [Oct 19 class]

1. Read in advance of Oct 19 class: Freer, pp. 251-64
2. Read in advance of Oct 19 class: 28 U.S.C. § 1391
3. Prepare in advance of Oct 19 class: Venue Exercise (CM, p. 198). You do not need to turn anything in. Prepare only for class discussion purposes.

H. Transfer of Venue and Forum Non Conveniens [Oct 23, 24 classes]

1. Read in advance of Oct 23 class: Questions to Think About in Advance of *Piper Aircraft v. Reyno* (CM, p. 199)
2. Read in advance of Oct 23 class: 28 U.S.C. §§ 1404, 1406
3. Read in advance of Oct 23 class: Freer, pp. 265-82
4. Read in advance of Oct 23 class: *Piper Aircraft* (CM, pp. 200-07)
5. Prepare in advance of Oct 24 class: Practice Question: FNC Hypothetical (CM, p. 208). You will turn in your answer to your teaching assistant before the class discussion of the problem on Oct 24.
6. Optional suggested reading: (excerpt from): Lonny Hoffman, "Forum Non Conveniens in Federal Statutory Cases," available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=898854, pp. 1143-1160.

IV. Subject-Matter Jurisdiction and Related Issues

A. Diversity of Citizenship [Oct 26 class]

1. **Read in advance of Oct 26 class: *Mas v. Perry* (CM, p. 209-11)**
2. **Read in advance of Oct 26 class: Freer, pp. 165-201 (top) and 204-08 (top)**
3. **Read in advance of Oct 26 class: U.S. Const. Article III, §2; 28 U.S.C. §1332**

B. Federal Question [Oct 30, 31 and Nov 6 classes] (note: we will not have class on Nov 2)

1. Read in advance of Oct 30 class: *Louisville & Nashville R.R. Co. v. Mottley* (CM, pp. 212-13)
2. Read in advance of Oct 30 class: Freer, pp. 208-16 (top)
3. Read in advance of Oct 31 class: *Grable v. Darue Eng.* (CM, pp. 214-25)
4. Read in advance of Oct 30 class: Freer, pp. 216-22
5. Prepare in advance of Nov 6 class: Practice Question (Short Answer Question No. 2 from Fall 2005 Final Exam) (CM, p.226). You will turn in your answer to your teaching assistant before the class discussion of the problem on Nov 6.
6. Optional suggested reading: (excerpt from): Lonny Hoffman, *Intersections of State and Federal Power: State Judges, Federal Law and the "Reliance Principle"*, 81 TUL. L. REV. 283 (2006), full text available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=886725, pages 9-21.

B. Supplemental Jurisdiction [Nov 7 and 9 classes]

1. Read in advance of Nov 7 class: Questions to Think About in Advance of Discussing Supplemental Jurisdiction (CM, p. 227)
2. Read in advance of Nov 7 class: *Gibbs* case (CM, pp. 228-30)
3. Read in advance of Nov 7 class: *Kroger* case (CM, pp. 231-35)
4. Read in advance of Nov 7 class: Freer, pp. 222-37
5. Read in advance of Nov 7 class: 28 U.S.C. §1367
6. Read in advance of Nov 9 class: *Exxon Mobil Corp. v. Allapattah Services, Inc* (CM, pp. 236-48)
7. Prepare in advance of Nov 9 class: Practice Problem on Supplemental Jurisdiction (to be distributed). You do not need to turn anything in. Prepare only for class discussion purposes.

C. Removal [Nov 13 class]

1. Read in advance of Nov 13 class: Freer, pp. 237-49
2. Read in advance of Nov 13 class: 28 U.S.C. §§ 1441, 1446
3. Read in advance of Nov 13 class: *Martin v. Franklin Capital* (CM, pp. 249-53)

V. The Choice of Law Problem in Federal Court: Federal or State Law [Nov 14 class]

- A. **Read in advance of Nov 14 class: *Erie Railroad v. Tompkins* (CM, pp. 254-59)**
- B. **Read in advance of Nov 14 class: Freer, pp. 507-24 and 564-67**
- C. **Read in advance of Nov 14 class: 28 U.S.C. §§ 1652, 2071, 2072**

VI. Discovery

- A. Introduction to Discovery and to Formal and Informal Options; Mandatory Disclosures [Nov 19 class] (note: we will not have class on Nov 16; instead, we will have class on Nov 19 at a time/place to be announced)
 1. Introduction to Discovery: Scope of Permissible Discovery
 2. Formal and Informal Presuit Discovery
 - a. Read in advance of Nov 19 class: Lonny Hoffman, Using Presuit Discovery to Overcome Barriers to the Courthouse, 34 LITIGATION 31 (2008) (CM, pp. 260-64)
 - b. Read in advance of Nov 19 class: FRCP 27
 - c. Optional suggested reading: Access to Information, Access to Justice: The Role of Presuit Investigatory Discovery, 40 UNIV. MICH. J. L. REF. 217 (2007), full text available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=885820 pages 9-29.
- B. Overview of Formal, Post-filing Discovery Mechanisms in the Federal Rules [Nov 20 class]
 1. Read in advance of Nov 20 class: Freer, pp. 361-84 (top), 403-07 and 431-36 (top)

2. Read in advance of Nov 20 class: (in this order) FRCP 26(a)(1), (a)(2) and (a)(3), and 16(b); then read the rest of Rule 26 and Rules 27, 30, 31, 33, 34, 35, 36, and 37
 3. Read in advance of Nov 20 class: Freer, pp. 385-408
- C. Attorney-Client Communications and Work Product Privilege, and Experts [Nov 27 class]
1. Read in advance of Nov 27 class: Questions to Think About in Advance of *Hickman v. Taylor* and *Upjohn* cases (CM, p. 265)
 2. Read in advance of Nov 27 class: *Hickman v. Taylor* (CM, pp. 266-71)
 4. Read in advance of Nov 27 class: *Upjohn v. United States* (CM, pp. 272-80)
 5. Read in advance of Nov 27 class: Freer, pp. 413-20 (top)
 6. Read in advance of Nov 27 class: FRCP 26(b)(3) and (b)(4)
- D. Focus on Electronic Discovery; and Examining Use, Management and Control of Discovery by the Courts [Nov 28 class]
1. Read in advance of Nov 28 class: Freer, pp. 409-13 (top), 420-26 (top), and 429-31
 2. Read in advance of Nov 28 class: CM, pp. 283-99
 3. Read in advance of Nov 28 class: Lee & Willging, *Defining the Problem of Cost in Federal Civil Litigation* (CM, pp. 300-324)
 4. Optional, suggested reading: Lonny Hoffman, *The Case Against LARA* 2011, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1807123, pp. 13-20 and 29-31
- E. Discovery Practice Exercise [Nov 30 class]
- Prepare in advance of Nov 30 class: Practice Review Question (CM, pp. 281-82) for class discussion and you will turn in a draft answer to your teaching assistant.

VII. Judgment As a Matter of Law [Dec 4, 5, and 7 classes]

A. Summary Judgment

1. Read in advance of Dec 4 class: *Celotex v. Catrett* (CM, pp. 324-331)
2. Read in advance of Dec 4 class: *Scott v. Harris* (CM, pp. 332-40)
3. Read in advance of Dec 4 class: Freer, pp. 472-85
2. Read in advance of Dec 4 class: FRCP 56
3. Prepare in advance of Dec 5 class: Practice Question on Summary Judgment (to be distributed)

B. Voluntary Dismissals, Involuntary Dismissals, Directed Verdicts/Judgment as a Matter of Law/JNOV

1. Read in advance of Dec 7 class: Freer, pp. 454-63
2. Read in advance of Dec 7 class: FRCP 50

Review

We will also have a review session equal to the length of two class sessions on Friday, Dec 14. The reason to do this is that your first final exam is in Torts on Dec 12. Holding the review session after your Torts final gives you a better opportunity to use it productively to prepare for the Civil Procedure final. Note: these two review classes will also make up for the two classes we are missing during the semester (Oct 26th Yom Kippur cancellation; and Nov 2 class cancellation).