

## Course Syllabus: Civil Procedure I (Section C1)

### Fall 2021 Semester

Class Meets: **Tuesday and Thursday: 9:30 – 10:45 AM**

Office Hours: **Tuesday and Thursday: 11:00 – 12:20 (On Bricks or Zoom)**

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Civil Procedure is not the course that brought you to law school. I get that. If you say otherwise, I will not trust anything you say all semester. It certainly did not bring me to law school. But it is one of the most important classes you will take in law school. It is not important simply because there are these things we call “rules,” which really are rules – like real rules. I mean, there is this thing called the Federal *Rules* of Civil Procedure, right? That sounds official. And they are, and this class is important because you will become acquainted with the rules that govern litigation. But beyond this, Civil Procedure presents us with an opportunity to think about how we have designed a system of civil (as opposed to criminal) dispute resolution. In your torts, contracts and lawyering classes, civil procedure is everywhere, and nowhere. Civil procedure is the taken-for-granted context in which the injured come to court seeking redress for the injuries allegedly caused by another. Civil Procedure forces us to confront questions of when, where, and under what conditions private citizens can call upon the state through its judicial institutions to force another citizen (or the state, itself) to either pay damages for a failure to conform behavior to some governing legal standard (i.e., negligence in tort law), or to immediately conform to a governing legal norm.

By this measure, a course in civil procedure is not merely memorizing rules, or litigation strategies, but it calls upon some of our most cherished values of respect for the dignitary interests of individuals whose rights have been infringed upon by private and/or public actors. Further, it asks us to balance that commitment against the unavoidable costs imposed on others who might not be liable at all. In short, Civil Procedure –like so much else in law—forces us to confront issues of justice, fairness, efficiency, balancing of interests and competing values. I consider it my first priority to engage you in thinking about these issues within the context of the specific questions that will arise in the life of real disputes. In this respect, you will be asked to understand what the law is. But beyond the ability to articulate that, you will be expected to develop the capacity to convey *what function* does the law serve. Beyond that, you will be expected to begin to develop the capacity to understand what values are at stake in a particular “procedural” issue, and what prioritization of values is being made by rulemakers, courts and other policymakers.

This class will be in-person and will be recorded. Access to class recordings will not be automatic, but they will be available upon request. My teaching style is a mix of lecture and Socratic conveyance of material. Ours is a conversation, and you teach me (and your classmates) as much by your engagement during class as by your engagement with the reading material prior to class.

## Course Information

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### Why Civil Procedure?

Having described Civil Procedure, or at least my version of it, above, I want to try to convey how it fits within the larger first-year curriculum. There is nothing intrinsic about Civil Procedure as a first-year course other than that it serves as the backdrop of nearly all that you do during the first year of law study. As you likely have seen, much of what you learn in contracts and torts are through disputes that find their way into litigation. Litigation is one mechanism of dispute resolution—perhaps an improvement upon earlier methods like feuds, war and dueling. Largely the system that we will study is a public system of state-established courts, invoking state authority. Again, the central questions are on what terms can private actors invoke such authority to resolve their private disputes. This course allows you to better understand the context in which much of the substantive law that you will learn (i.e., lawsuits in casebooks) comes to you.

Beyond the interaction of litigants (plaintiffs and defendants), this course is an introduction to the American judicial system. Given the central role that the American judiciary has played in many of the most important issues in American history – school desegregation, marriage equality, prison reform, among many others – an understanding how the mechanics of how that system works is crucial whether you are considering a career as a litigator or not. As we will see, procedural rules can impact the ways that corporate entities structure themselves and their business operations.

Further, and as stated above, the course in Civil Procedure asks you to think like a policymaker. It asks you to think about the balancing of values and interests. In any area of importance the answers will involve some degree of balancing of values and interests. Here, we are asked to balance a desire that individuals have an opportunity to vindicate wrongs suffered against the value that those who are called to answer for such wrongs might not be liable for alleged wrongs. But beyond that, at what societal cost should we seek to vindicate wrongs in the ways that a civil liability system suggests. By this, I mean, there are clearly winners in the system that we have set up—namely lawyers. Could society’s resources be better distributed to resolve the injury rather than assigning blame for injuries and allocating the costs to individual parties?

Last, and not least, is that this course will introduce you to a critical set of rules and laws that guide the process by which litigation is undertaken. While there may be fewer trials than before, there is still a significant amount of litigation, and assisting clients in solving problems means that litigation has to be on the table as an option within the legal professional’s toolbox. This course intends to develop the knowledge and

skills to navigate and deploy the procedural world in an effort to give you the tools to protect and prosecute your client's interests.

### **Class Format**

Classes will last one hour and fifteen minutes. As stated above, class will involve a mix of lecture and questions to be answered by student participation. When I think it necessary, I will record a pre-lecture so that you will have an introduction to complicated or unfamiliar material. These lectures will always be shorter than 20 minutes, and likely around 10 minutes. They will be posted on Blackboard.

### **Course Learning Outcomes**

1. Understand key concepts in substantive law, legal theory, procedure, and legal practice;
2. Perform competent legal analysis and reasoning;
3. Demonstrate competence in other professional skills needed for competent and ethical participation as a member of the legal profession;
4. Understand the importance of considering available options for dispute prevention and resolution;
5. Communicate effectively about legal matters, both orally and in writing, in objective and persuasive styles, to a variety of audiences;
6. Identify, frame and address legal problems from differing perspectives; and
7. Understand the role and responsibility of laws, lawyers, and legal systems in achieving justice for society and individuals, including those who lack access to effective legal representation.

### **Course Materials**

#### **Required Texts:**

Richard Field, Benjamin Kaplan and Kevin Clermont's Civil Procedure: Materials for the Basic Course (13<sup>th</sup> ed., 2020) ("Text" or "CB").

Kevin Clermont, Federal Rules of Civil Procedure and Selected Other Procedural Provisions (2021) ("Rules") (or another edition, including:

<https://www.law.cornell.edu/rules/frcp> (with Advisory Committee Notes)

[https://www.uscourts.gov/sites/default/files/federal\\_rules\\_of\\_civil\\_procedure\\_dec\\_1\\_2019\\_0.pdf](https://www.uscourts.gov/sites/default/files/federal_rules_of_civil_procedure_dec_1_2019_0.pdf)

You can also access the Federal Rules of Civil Procedure on Lexis and Westlaw.

David Benjamin Oppenheimer, et al., Patt v. Donner: A Simulated Casefile for Learning Civil Procedure (2<sup>nd</sup> edition) (2019)

Gerald M. Stern, Buffalo Creek Disaster (2008, 2d Edition) (“Buffalo Creek”).

Additional material will be provided on Blackboard.

**Recommended Texts:**

Joseph W. Glannon, Civil Procedure: Examples and Explanations (either of the last two editions is fine).

**Assignments and Grades**

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**Syllabus/Reading List** (Subject to modification). I teach students, not pages. We may require more time on certain material, and I will adjust the syllabus (and my examination expectations) accordingly.

**I. Introduction**

1. Handy Bikes (Handout); Buffalo Creek, pp. 1-68.
2. The Adversary System: CB pp. 331-361; Goldberg v. Kelly (handout on Blackboard).

**II. The Authority to Adjudicate**

- A. Selection of a Proper Forum: Limitations on Jurisdiction over Subject-Matter
3. The Limits on Territorial Authority to Adjudicate, CB 273-277; The Framework, CB 463-473; 489-510.
  4. Territorial Authority to Adjudicate: Sufficient Minimum Contacts: CB, 511-521; 527-532; 532-533; 537-545; 562-575.
  5. Territorial Authority to Adjudicate: Stream of Commerce: *Asahi Metal Industry v. Superior Court*: (available on Blackboard); *McIntyre v. Nicastro* (available on Blackboard); *Cybersell, Inc. v. Cybersell, Inc.* (available on Blackboard); CB 559-560; *Burnham v. Superior Court of California* (available on Blackboard); consent case.
  6. Territorial Authority to Adjudicate: Minimum Contacts and *In Rem* Jurisdiction, CB 474-489; 545-559.

**Quiz on *In Personam Jurisdiction* (Multiple Choice)**

7. Distinguishing between Specific and General Territorial Authority to Adjudicate: CB, 521-527; 595-602; *Goodyear v. Dunlop Tires Operations, S.A. v. Brown* (available on Blackboard); cases from 2016 Supreme Court Term (available on Blackboard).
8. Territorial Authority to Adjudicate: Venue, CB, 277-280; 613-626; *Forum Non Conveniens*, CB, 626-652.
- B. Selection of a Proper Forum: Limitations on Jurisdiction over Subject-Matter
9. The Judicial Power of the states, CB 253-355; The Judicial Power of the United States – Federal Question Jurisdiction, CB 256-259; 686-693; Embedded Federal Question - *Grable v. Darue* (available on Blackboard). The Judicial Power of the United States -- Diversity Jurisdiction, CB 258-267; 737-744. Jurisdictional Amount, CB 716-730.
10. Removal, CB 267-269; 730-736; Supplemental Jurisdiction, CB. 477-500; 693-716.

### Mid-Term Examination (Issue Spotter Essay)

#### III. Governing Law in Federal Courts

##### A. The Constitution, State Law, and the Federal Courts

11. The Lawmaker in Federal Courts, Handout (Swift v Tyson) (excerpt on Blackbaord), The *Erie* Doctrine, CB, 367-398.
12. The Erie Doctrine (cont'd), CB, 398-403; 408-440.

#### Quiz on *Erie* Doctrine

#### IV. Phases of the Lawsuit

##### A. Pretrial

13. The Story of Pleading: Stating the Claim, CB 39-60; FRCP 8; 9; 11; Form 11.
14. The Story of Pleading, The Complaint, CB, 1233-1273. Jones v. Clinton, Chap. 1; Buffalo Creek Disaster, pp. 69-88.
15. The Story of Pleading Cont'd.: Interposing Defenses and Objections, CB 60-71; Replying to Defenses, CB 72-73; Interposing Counterclaims, CB 73-79 FRCP 7, 8, 12, 13, 15; Forms 30, 40. Jones v. Clinton, Chaps. 2-3; Buffalo Creek, pp. 91-113.

16. The Story of Pleading Cont'd.: The Response, 1312-1331. Jones v. Clinton, Chap. 4-5; Ethical Limitations on Pleadings, CB, 1290-1312. FRCP 11
17. Amending the Pleadings. CB, 79-87.
18. Disclosures and Discovery, CB 87-117; FRCP 26, 30-37; Jones v. Clinton, Chap. 6-7.
19. Scope of Discovery, CB, 1333-1363; Buffalo Creek, pp. 114-167.
20. Supervision of Discovery, CB, 1363-1380; E-Discovery, CB 1380-1401.
21. Pretrial Conferences, CB 134-141; 1403-1429.
22. Devices for Terminating Litigation without Trial, CB 143-156; Provisional Remedies, CB 156-167; FRCP 16; 12; 56; 64; 65.
23. Settlement before Trial, CB 167-179; Parties CB, 280-290; General Joinder Rules, CB 957-978.
24. Parties (cont'd): Class Actions, CB 290-329.
25. Stepping Back: Assessing the Adversary System, CB 1747-1764; Stepping Away: Changing the System, CB 1765-1780; 1784-1795.

### **Grading:**

Your final grade will be based on a combination of class participation, quizzes, midterm, and the final examination. The midterm will be 20% of your final course grade. Your final examination will constitute 80% of your final course grade. Participation and quizzes will be used to determine whether to award a “grade bump” to no more than five (5) students, at the professor’s discretion. Such grade bumps will not affect the final letter grade of other students, as they will be awarded once all other grades have been calculated.

## **Policies and Expectations**

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### **ATTENDANCE**

“The American Bar Association and the University of Miami School of Law require regular and punctual attendance by students. Regular attendance is presumed to mean at least 80% of the total classes or class hours for a course. A student who fails to comply with the attendance requirement may be subject to withdrawal from the course, denied permission to sit for the final examination, or other reasonable penalty for non-compliance, which includes the lowering of the course grade.”

## CLASS ENGAGEMENT

As stated above, Civil Procedure is interactive. It involves some lecturing, but will primarily include my calling on you. In first-year classes, I call on students randomly without notice (i.e., cold call). I expect that you will be prepared when I call on you. If you are unprepared, please pass immediately. You are allowed two no-questions-asked passes during the semester. Otherwise, I expect you to be prepared to engage the material whether it is introduced in the reading or in lecture format. The readings will always form the foundation for class discussion, but discussion will almost certainly not be limited to the readings. I expect you to be prepared to go beyond the reading material in the directions I have discussed above. I expect you to be able to think about the doctrinal issues, the policy issues, the distributional issues involved in the material that we read.

My job is neither to intimidate nor embarrass students. I want our time together to be fun, engaging, passionate, inspirational, and nerve-wracking. But none of these things for their own sake. I want you to experience these feelings, and more, because the material is worth those feelings. I hope that you will grow to care about this subject, and to honestly be able to say that Civil Procedure was the best class you never heard of. So let's be prepared, respectful of one another, and cognizant of the fact that innovation often comes from mistakes. What others think of as crazy thoughts might be exactly the kind of thinking that leads us to thoughtful reconsideration of prior positions and beliefs.

## Communications

Describe any expectations or guidance about the best way to communicate with you, including your expected response time to student emails. Here's a sample from one professor's syllabus:

1. Please email me at [ccopeland@law.miami.edu](mailto:ccopeland@law.miami.edu). I will check email at least once per day, and will endeavor to respond within 24 hours during from Monday thru Friday. Please email me from your "@law.miami.edu" email account, and please insert "Civil Procedure" into the subject line, as emails from students will receive my highest attention.
2. As stated above, office hours will be held weekly, beginning Tuesday, August 31.
3. I will be inviting a small group of you lunch during the semester to get to know you a bit better in a smaller setting. Lunch will likely be outside.
4. I will email you via Blackboard, or use Blackboard's Announcements feature. Email is my preferred method, so you should make it a practice to check your @law.miami.edu account regularly.
5. Regarding feedback on assignments. Sometimes feedback will be individual, and reported via email or Blackboard. Other times it will involve a collective engagement with the assigned material in a non-class session that will allow you to go over your own work as I discuss issues at a more general level. These sessions will generally be scheduled after hours, and will be recorded.



### **ACCOMMODATIONS FOR STUDENTS WITH DISABILITIES**

It is the policy and practice of the University of Maryland, Baltimore to create inclusive learning environments. If you are a student with a disability and believe you will need accommodations for this class, it is your responsibility to register with the Office of Educational Support and Disability Services (ESDS). For more information, please visit the ESDS Website ([www.umaryland.edu/disabilityservices](http://www.umaryland.edu/disabilityservices)), email [disabilityservices@umaryland.edu](mailto:disabilityservices@umaryland.edu), or call (410) 706-5889.

### **RECORDING POLICY**

All classes will be recorded and will be made available to all students registered in this course through the end of this semester. By attending class, you are consenting to the recording for class purposes. If you have concerns, please reach out to me to discuss.

1. Recordings are for your personal use to study for this class only. All unauthorized interception, recording, or broadcast of class is prohibited. Intercepting, recording, or broadcasting class or the live stream, including taking screen shots of the class without permission, is a violation of Honor Code. Recording by students in any way is not permitted. You should use the official class recordings only for study purposes.
2. Authorized class recordings will be available upon request. These recordings may be deleted after two weeks.
3. The law school takes this recording policy seriously. Any unauthorized use, reproduction, or distribution of class recordings is a violation of the Law School's Honor Code.

### **ACADEMIC INTEGRITY AND STUDENT HONOR CODE**

The Law School's policies on academic integrity and the Honor Code apply to this course. More information, including on conduct deemed to violate the Honor Code and the procedure for handling alleged violations by students, is available at: <https://www.law.umaryland.edu/Policy-Directory/Academic-Standards-and-Honor-Code-Policies/>.