CIVIL PROCEDURE Section A  
Fall 2008 – Professor David Diamond

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Course Information

This memo sets out some information about the course that you may find useful. I have not provided the assignments for the year with these papers. I have given you the assignment for the first few classes. I will give you additional assignments as we proceed. It is difficult to give an entire semester’s assignments in advance, since sometimes we move faster and sometimes slower. I will confess to you that it is more likely to be slower than faster. That may result in having to hurry through some matters, or the rare scheduling of an extra class. In addition, courts, newspapers and even Congress, produce matters that may be inserted into the middle of the semester. This semester we will cover substantially all of the Casebook [Silberman, Stein, Wolff 2d ed.] through chapter 4 (pages 1-573). We will skip pages within these chapters; I will tell you about omissions in subsequent assignments.

Schedule

This class will meet twice a week – Tuesday and Thursday from 2:40 to 4:00. I have to cancel class on Tuesday August 26, and we will make it up in some way. In addition there are holidays, cancelled classes and ‘legislative’ class days throughout the semester. Keep up with announcements that come from the Deans’ office during the semester.

"TWEN" (The West Education Network)

I will set up a course page on Westlaw’s TWEN, at www.lawschool.westlaw.com. This will enable us to extend class discussions beyond classroom hours. I hope it will encourage people to express their opinions or to raise questions that they were unable to or hesitant to raise in class. One of the best measures of whether you understand something is whether you can explain it to someone
else. So I urge you both to post and to respond to each other’s questions on TWEN. TWEN will also give me a quick way to reach all of you with any special announcements, Syllabus changes, interesting links, etc, as well as to get a sense of problem areas that seem to be troubling many people. Please register for this course on TWEN by the start of class on Thursday, August 21 and post some comment or question on something to do with the initial readings. The initial readigns have interesting issues, and this will ensure that you at least know how to use TWEN. The limits on comments are courtesy, propriety and legality. And for the most part, confine your comments to Civil procedure matters.

**Grading Policies**

Grading is based on a final examination grade for the semester, as modified by class attendance and participation.

**Class attendance and participation:** Both regular attendance and class participation are important to learning the law. While there are always some students who never speak in class and end up with extraordinary grades, this is the unusual situation. The legal profession will require you to speak clearly and precisely, often enough under stressful and adverse circumstances; you might as well start practicing. But in addition, no matter what you think you know, if you cannot articulate it, you do not know it. Class participation will help you learn law, and to learn how well you know it. If you attend regularly and contribute responsibly to class discussion, I may increase your grade by one half step (e.g. B to B+). It is the unusual first year first semester law student who does not attend class regularly; however, bad attendance or gross unpreparedness as revealed by class performance may result in a diminution of a half grade. The Board of Bar Examiners requires us to testify that you have been in good and regular attendance in class; failure to attend regularly may result in you not receiving credit for the course.

**When you must miss class or are unprepared:** If you must miss a class due to illness, emergency, or personal circumstances, please send me an e-mail to let me know. If you are not prepared for a class, please send me an e-mail or hand me a note before class begins so I do not embarrass you by calling on you. Ordinarily, however, I expect every student to be fully prepared for every class. Being a law student is a full time job. There will be an attendance sheet circulated for every class. Records of more than 4 unexcused absences (roughly 15% of the classes) will be reported to the Deans’ Office.

**Final exam:** The final examination will be three to four hours long and is likely to consist of some combination of essay questions, short answer questions, multiple choice questions, and true-false questions. The exam has not been written yet, and there is no guarantee that it will contain all of the category of question just described. I lean toward multipart complex essay questions. It may cover any or all of the material that we study during the semester. I usually give a closed book exam but provide selected rules and statutes in a handout, if needed. You will not have to memorize rules. Although it may be a statement of futility, I urge you to spend your initial time in this class
worrying about learning civil procedure and not about the final exam.

Communicating with Me
I have listed my office location, telephone, e-mail, as well as those of my secretary at the start of this memo. I am happy to see students pretty much any time. If you knock on the door and it is a bad time, I will tell you so. See me any time to make an appointment to talk. E-mail is a good way of communicating, but please do not send me e-mail questions like “I don’t understand jurisdiction; would you explain it to me”, when we have just spent the past month on jurisdiction. Try and figure out what it is that you don’t understand before we discuss it. Law is very heavily a self-taught profession, even in law school. I also will always stay after class to talk with students about what we have just been doing, except on those occasions when I have another commitment immediately at hand.

Course Materials

1. Required: Silberman, Stein and Wolff, CIVIL PROCEDURE: THEORY AND PRACTICE, 2d ed. (Aspen 2006) (abbreviated in the Syllabus as "Casebook" or “CB”). This is our main textbook. Read every case before class. Law is a new language and cases are not like novels. You are likely not to understand a case on just one reading. Always bring this book to class.

2. Required: 2008 Supplement to the Cound, Friedenthal casebook, formally entitled FEDERAL RULES OF CIVIL PROCEDURE WITH SELECTED STATUTES AND CASES (abbreviated in the Syllabus as "Rulebook"). This book contains the rules, statutes, and constitutional provisions that are critical to the structure of civil procedure. For help understanding a given Federal Rule of Civil Procedure, read the Advisory Committee Notes following the rule. Always bring this book to class.

3. Optional: Gene R. Shreve & Peter Raven-Hansen, UNDERSTANDING CIVIL PROCEDURE (Matthew Bender & Co., 3rd ed. 2002). This is a clear and useful hornbook that explains fundamental concepts of civil procedure and discusses many of the cases and rules that we will read, as well as some important cases that are not in our casebook.

4. Optional: Joseph Glannon, THE GLANNON GUIDE TO CIVIL PROCEDURE (Aspen Law & Business, 2003). Professor Glannon is a gifted teacher. Students like the way he presents the material and are enthusiastic about this book.


6. Additional materials: There are many other secondary sources. You may well find some
of them more congenial than those listed. Look in the library and in the book store. Speak to me. You will learn about Law Review Articles, legal encyclopedias, and multi-volume treatises. All may be worth consulting at one time or another.

6. **Highly recommended:** Law, I suggested, is a new language. Many words are new; many old words may have new meanings. Therefore I highly recommend that you heavily utilize a law dictionary. This advice applies, in my view, to all your courses. Whether you chose to buy it is purely a matter of your convenience and pocketbook.

**General Advice About Class Preparation**

Please give yourself plenty of time to read the assigned materials carefully and review them before class. You often cannot really understand the facts of a case until you read the court’s legal analysis, so until you read the materials a second time you won’t fully understand what happened, factually or legally. In short, reviewing is a crucial part of preparing for class.

Students have often said to me “I thought I understood the case until we took it apart in class”. Others have said “I hadn’t read the case and I didn’t have any idea what was going on in class” The former is the preferable of the two positions. One subject of discussion for First Year students is whether they should brief cases. - i.e. should they write out a precis of the case under certain established headings. Attached below is a short model briefing form. I believe that you should brief cases. As I previously mentioned about class participation, you do not really know whether you understand something until you try to put it out externally. In one sense, if you understand the case, you don’t need to brief it. But you won’t know if you understand the case until you try to brief it. Moreover, a brief is often a wonderful device for bringing the case back into your mind for review purposes.

**Initial Assignments**

1. Attached is an article from Newsday, and two from the New York Law Journal and a recent one from the New York Times. Read and consider the articles and the questions that appear. Attached also is a page on briefing cases.

2. As an initial matter, we are trying to get some sense of what a civil procedure problem might look like, what kinds of issues are involved in its resolution, and why we should care about it anyway. This is also true of the introductory chapter of the casebook.

3. Flip pages and look at the table of contents both of the Casebook and of the Supplement. See if you can figure out what the matters in the Supplement are.
4. For the first class, also read pages 1-13 in the Casebook

5. For the second class read pages 13-49 in the Casebook

Pages 1-49 speed through an entire lawsuit and the structure of the civil procedure system; that is close to the entirety of the year’s course. Obviously we will go through it lightly the first time around; We start again more seriously in Chapter II. But notwithstanding that we will be reading the introduction more lightly than you will ordinarily be reading during law school, pay attention to the ideas presented, and try to find the materials in the Supplement that are relevant to whatever you are reading at the time.

Attachments

**NEWSDAY**

**SUFFOLK REAPS $17,000 FOR ‘SILLY SUIT’**

By Laura Durkin

A man who sued Suffolk County for invasion of privacy because a police officer leaned into his car to give him two traffic tickets has been ordered to pay the county more than $17,000 in legal fees.

U.S. District Judge Eugene Nickerson ruled Thursday that East Northport attorney Stephen Harbulak must pay $17,029.50 to the county in settlement of a lawsuit that was thrown out of court in 1981 as “unreasonable and groundless, if not frivolous.” Harbulak couldn’t be reached for comment.

County Attorney David Gilmartin said yesterday that the award was the largest Suffolk had been received for reimbursement of legal fees. “We are happy to see that the county can be reimbursed for the expenses we have to go through to defend these silly, groundless nuisance cases,” Gilmartin said. “We intend to pursue these whenever we get them.”

The award stems from an incident in February, 1979, in Commack when Suffolk County Police Officer John McDermott stopped the car Harbulak was driving for speeding. The car was borrowed, and Harbulak, who accepted the speeding ticket, refused to accept tickets for driving without either proper registration or insurance papers. So, McDermott reached inside the car and dropped the tickets on the dashboard.
Harbulak’s suit was dismissed by Nickerson in 1981 on the grounds that it was frivolous, but the judge refused to grant attorney’s fees. However, the Second U.S. Circuit Court of Appeals allowed the county claim for fees, and the case was sent back to Nickerson, who set the amount to be paid by Harbulak.

“Silly Suit” Questions

1. Is the result a good one? Are there arguments against it?

2. Can you formulate a rule that preserves the benefit of this decision without the detriments?

3. Does it deal with a “procedural” problem? What is the problem?

4. How can Judge Nickerson decide the county should get no money and then later decide the county should get $17,000.

5. Compare this case and the results with the “Female Staffers” on the next page - are the cases the same? Should the results be the same?

6. Should Thurgood Marshall have had to pay legal fees for bringing Brown v. Board of Education in the light of Plessy v. Ferguson? (In Plessy the Supreme Court held that separate but equal satisfied the Constitution) Would the answer be different if plaintiffs in Brown had lost?

NEW YORK LAW JOURNAL
AUGUST 8, 1997

Female staffers at music magazine Spin could not gain promotions “unless they submitted to the sexual advances of [former publisher Robert] Guccione [Jr.] and other senior male editors,” Southern District Judge Denise Cote has found, in a decision awarding attorney’s fees in the case. In April, a jury awarded former Spin editorial assistant Staci Bonner $110,000 on her “hostile work environment” claim but rejected her claim of “quid pro quo” sexual harassment. Judge Cote “mistakenly relied upon evidence rejected by the jury,” according to Mr. Guccione’s lawyer, Bettina B. Plevan of Proskauer Rose. Judge Cote denied Spin’s fee request and halved the request of Ms. Bonner’s firm, Rabinowitz, Boudin, Standard, Krinsky & Lieberman, to $717,000 - more than six times her damages award.

NEW YORK LAW JOURNAL

Clark Cites Intimidation Of Lawyers
By Stuart Vincent

New York - Former U.S. Attorney General Ramsey Clark yesterday accused Suffolk County of attempting to intimidate lawyers who sue the county by warning them they may have to pay the county’s legal bills if they lose.

County Attorney Martin Bradley Ashare acknowledged that the county contacts lawyers it believes are pursuing “frivolous” lawsuits to advise them it will seek to recover court costs. Ashare called it a “legitimate remedy” that the county will continue to use.

“Indeed I would be remiss as the chief legal officer of the county not to avail myself of that remedy,” he said. “If a lawyer is intimidated by this kind of remedy, then maybe he shouldn’t be a litigator.”

Clark made the charge as he argued before the U.S. Court of Appeals in Manhattan in support of attorney been fined $5,000 after he lost a suit against three Suffolk County police officers. The appeals panel reserved decision on the case.

Clark told the panel that the question before the court was a federal rule designed to control lawsuits brought in bad faith and “the need of any society that is privileged to freedom to have a full and vigorous right to counsel that protect’s people’s rights.”

Graseck has filed dozens of lawsuits against Suffolk over the years charging police officials with mistreating prisoners. In this case, Graseck represented Paul Oliveri of Long Beach in a suit charging that Suffolk Police arrested him without sufficient cause and used excessive force in doing so. When a jury ruled against Oliveri, the county moved to recover its legal fees from Oliveri and his lawyer. A judge ruled in favor of the county and fined Graseck $51,143, later reduced to $5,000.

Clark and others who rallied to Graseck’s defense— including nationally known civil rights attorney William Kunstler, the Suffolk County Chapter of the New York Civil Liberties Union – warned of the chilling effect such a ruling could have on lawyers who accept civil rights cases.

Commenting on the Suffolk County policy in pursing fees, Suffolk Bar Association President Joshua Pruzansky said in an interview, “From the point of view of the county attorney, what he’s doing is a service and is putting an attorney representing a civil rights client on notice that he’s risking penalties. From the point of view of some attorneys, however, that’s perceived as intimidation.

Pruzansky said the bar association is opposed to the practice of assessing penalties against attorneys because it discourages attorneys from representing low-income clients. Penalties assessed against an indigent defendant can become the burden of the attorney.

Last November, after U.S. District Court Judge Jacob Mishler ordered Oliveri to pay the legal fees to the county, Oliveri was found to be indigent and the burden of payment fell on Graseck. Graseck appealed the fine, while the county appealed the reduction to $5,000, asking the court to restore the original legal fees.

The fine was imposed under Rule 11 of the Federal Rules of Civil Procedure, which spells out the conditions under which a court may impose a sanction on attorneys who bring frivolous lawsuits.

Georgene Vairo, an associate professor of law at Fordham Law School, who has studied Rule 11, said in an interview that it “appears to be having a tremendous impact on the litigation
strategies of lawyers across the board and especially in the civil rights area.”

Justin Vigdor, president of the New York State Bar Association, said in an interview that “many times what is frivolous is in the eye of the beholder, and that’s where the great debate arises. If you put a chill on people’s exercise of their rights, whether it is their civil rights or any other types of rights, that is not healthy for our system.”

New York Times

The following article concerns the use of ‘experts’, a subject we may get into next semester. It is complicated, and I do not want you to read this article for technical mastery of the subject. Pay attention to the basic procedural system values involved, and the cosmic problem of how mere mortals can determine ‘truth’ (or whether there is such a thing).

American Exception
In U.S., Expert Witnesses Are Partisan

By ADAM LIPTAK
Published: August 11, 2008. NY Times

Judge Denver D. Dillard was trying to decide whether a slow-witted Iowa man accused of acting as a drug mule was competent to stand trial. But the conclusions of the two psychologists who gave expert testimony in the case, Judge Dillard said, were "polar opposites." One expert, who had been testifying for defendants for 20 years, said the accused, Timothy M. Wilkins, was mentally retarded, had a verbal I.Q. of 58 and did not understand the proceedings. The prosecution expert, who had tested for the state more than 200 times, said that Mr. Wilkins’s verbal I.Q. was 88, far above the usual cutoffs for mental retardation, and that he was competent to stand trial.

Judge Dillard, of the Johnson County District Court in Iowa City, did what American judges and juries often do after hearing from dueling experts: he threw up his hands. The two experts were biased in favor of the parties who employed them, the judge said, and they had given predictable testimony. "The two sides have canceled each other out," the judge wrote in 2005, refusing either expert’s conclusion and complaining that "no funding mechanism" existed for him to appoint an expert.

In most of the rest of the world, expert witnesses are selected by judges and are meant to be neutral and independent. Many foreign lawyers have long questioned the American practice of allowing the parties to present testimony from experts they have chosen and paid. The European judge who visits the United States experiences "something bordering on disbelief when he discovers that we extend the sphere of partisan control to the selection and preparation of experts," John H. Langbein, a law professor at Yale, wrote in a classic article in The University of
Partisan experts do appear in court in other common-law nations, including Canada, Singapore and New Zealand. But the United States amplifies their power by using juries in civil cases, a practice most of the common-law world has rejected. Juries often find it hard to evaluate expert testimony on complex scientific matters, many lawyers say, and they tend to make decisions based on the expert’s demeanor, credentials and ability to present difficult information without condescension. An appealingly folksy expert, lawyers say, can have an outsized effect in a jury trial.

Some major common-law countries are turning away from partisan experts. England and Australia have both adopted aggressive measures in recent years to address biased expert testimony.

Both sides in Mr. Wilkins’s case said the American approach to expert testimony was problematic. "One’s biased for the defense," said Rockne O. Cole, Mr. Wilkins’s lawyer. "The other’s biased for the state. I think it’s who’s signing their paycheck." Anne M. Lahey, an assistant prosecutor in Johnson County, Iowa, largely agreed. "They’re usually offsetting as far as their opinions are concerned," she said of expert testimony.

Judge Dillard ruled that Mr. Wilkins was not competent to stand trial, a decision an appeals court reversed last year, though it accepted the judge’s conclusion that the experts had canceled each other out. Since it is the defense’s burden to prove incompetence, the appeals court said, the tie went to the state. The case against Mr. Wilkins was dismissed in October for reasons unrelated to his competency, said Janet M. Lyness, the prosecutor in Johnson County. A confidential informant crucial to the case against Mr. Wilkins could not be found, she said.

Dr. Frank Gersh, the defense expert in the case, did not respond to a request for comment. But Dr. Leonard Welsh, the psychologist who testified for the state, said he sometimes found his work compromising. "After you come out of court," Dr. Welsh said, "you feel like you need a shower. They’re asking you to be certain of things you can’t be certain of."

He might have preferred a new way of hearing expert testimony that Australian lawyers call hot tubbing. In that procedure, also called concurrent evidence, experts are still chosen by the parties, but they testify together at trial — discussing the case, asking each other questions, responding to inquiries from the judge and the lawyers, finding common ground and sharpening the open issues. In the Wilkins case, by contrast, the two experts "did not exchange information," the Court of Appeals for Iowa noted in its decision last year.

Australian judges have embraced hot tubbing. "You can feel the release of the tension which normally infects the evidence-gathering process," Justice Peter McClellan of the Land and Environmental Court of New South Wales said in a speech on the practice. "Not confined to answering the question of the advocates," he added, experts "are able to more effectively respond to the views of the other expert or experts." In a dispute over the boundary of an Australian wine
region, for instance, "there were lots of hot tubs — marketers, historians, viniculturalists," said Gary Edmond, a law professor at the University of New South Wales in Sydney.

Joe S. Cecil, an authority on expert testimony at the Federal Judicial Center, a research and education agency in Washington, said hot tubbing might represent the best solution yet to the problem of bias in expert testimony. "Assuming the judge has an active interest in ferreting out the truth and the experts are candid, I prefer the hot-tubbing option," Mr. Cecil said. "But those are two bold assumptions, and the procedure drives the attorneys nuts."

But Professor Edmond said hot tubbing in Australia had drawbacks and was "based on a simplistic model of expertise." "Judges think that if we could just have a place in the adversarial trial that was a little less adversarial and a little more scientific, everything would be fine," Professor Edmond said. "But science can be very acrimonious."

England has also recently instituted what Adrian Zuckerman, the author of a 2006 treatise there, called "radical measures" to address "the culture of confrontation that permeated the use of experts in litigation." The measures included placing experts under the complete control of the court, requiring a single expert in many cases and encouraging cooperation among experts when the parties retain more than one. Experts are required to sign a statement saying their duty is to the court and not to the party paying their bills.

There are no signs of similar changes in the United States. "The American tendency is strictly the party-appointed expert," said James Maxeiner, a professor of comparative law at the University of Baltimore. "There is this proprietary interest lawyers here have over lawsuits." American lawyers often interview many potential expert witnesses in search of ones who will bolster their case and then work closely with them in framing their testimony to be accessible and helpful. At a minimum, the process results in carefully tailored testimony. Some critics say it can also produce bias and ethical compromises.

"To put it bluntly, in many professions, service as an expert witness is not considered honest work," Samuel R. Gross, a law professor at the University of Michigan, wrote in the Wisconsin Law Review. "The contempt of lawyers and judges for experts is famous. They regularly describe expert witnesses as prostitutes." Melvin Belli, the famed trial lawyer, endorsed this view. "If I got myself an impartial witness," he once said, "I’d think I was wasting my money."

The United States Supreme Court has expressed concerns about expert testimony, but it has addressed bias only indirectly, by requiring lower courts to tighten standards of admissibility and to reject what some call "junk science."

Trials in the United States routinely feature expert testimony, and there is a thriving litigation-support industry matching experts and lawyers. Expert witnesses in major cases often charge $500 to $1,000 an hour. More than 40 percent of all experts, according to a 2002 study of federal civil trials by the Federal Judicial Center, give medical testimony. Economists and engineers also appear frequently as expert witnesses.
Judges and lawyers agreed, in separate surveys conducted by the center in 1998 and 1999, that the biggest problem with expert testimony was that "experts abandon objectivity and become advocates for the side that hires them." American judges are generally free to appoint their own experts, but they seldom do. Oscar G. Chase, a law professor at New York University and an editor of the textbook "Civil Litigation in Comparative Context," said there was a reason for that. "Many judges, if not most, have been trial lawyers, and they are suspicious that any expert is truly neutral," Professor Chase said "The virtue of our system is that it allows people to sort of balance things out."

Indeed, said Jennifer L. Mnookin, a law professor at the University of California, Los Angeles, who recently wrote about expert testimony in the Brooklyn Law Review, "neutrals risk being a sort of false cure" because "there are often cases where there are genuine disagreements." The future, Professor Mnookin said, may belong to Australia. "Hot tubbing," she said, "is much more interesting than neutral experts."

A version of this article appeared in print on August 12, 2008, on page A1 of the New York edition.

**A Brief Note on Briefing Cases**

For practicing lawyers, “Briefs” are generally organized written presentations of legal arguments, utilizing logic, precedent and policy, designed to persuade a tribunal that it should decide a particular case or issue in a particular way.

Students in this and other law school classes “brief” cases that they are assigned to read. The brief of a case is a written synopsis, intended to contain the critical information about the case in sufficiently concise and accessible form such that the student can, by glancing at the brief he or she has prepared, be in possession of the necessary material to work with the case. Perhaps more importantly, if you haven’t read and understood the case, you won’t be able to write the brief; the process of writing the brief lets you know whether you have accomplished what you needed to do in reading the case.

There is no definitive way to brief a case. Here is one pattern. It is a good way to start, while you work out whatever pattern seems useful to you. Your brief should include:

1. The name and citation of the case.
2. The significant facts of the case.
3. The procedural history of the case and the procedural setting in which it is now presented.
for decision.

4. The terms of any pertinent statutory provisions.

5. The issues of law involved.

6. The actions, if any, of previous tribunals in this case on the issues of law.

7. The decision of this tribunal.

8. The approach, logic, legal argument, sources of law, and other considerations relied upon by the court in reaching its decision; similarly for any dissents or concurrences.

9. You may want to include some concise statement about what this case does to the area of law (or your understanding of the area of law) that you are studying.

The brief should serve as a quick and ready reference to review and refresh knowledge that you already possess from having studied the case. It should not be a paraphrase or recapitulation of everything the court said. Try to develop a sense for the relevant, and do not slight the facts of the case.