CIVIL PROCEDURE

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Section A:
3-4:10 p.m. Wednesday-Thursday
1-2:10 p.m. Friday

Section B:
11 a.m.-12:10 p.m. Wednesday-Thursday
RDB 2008

Discussion Questions

Introduction to Civil Procedure:

1. What is "procedure" or "procedural law" as opposed to "substance" or "substantive law?" What is the substantive law involved in the four sample pleadings (*Naruto*, *Godin*, *Morgan*, and *Visions*)?
2. Parse the definitions of procedure in *Shady Grove* and the connection among substance and procedure as concepts.
3. If you are creating a set of procedural rules for a judicial system, what values or principles or policies do you want those rules to serve and further? How do different values or policies complement or conflict within a system of procedural rules? What is the goal of having a system of procedural rules?
4. What are the possible sources of procedural rules for courts and who can create those rules?
5. Prior to 1938, federal trial courts applied the procedural rules of the state in which they sat. What are the drawbacks to that system?
6. The Fifth and Fourteenth Amendments guarantee "due process of law" before loss of life, liberty, or property. What should "due process" entail or guarantee?
7. Review the materials showing the structure of the federal and Florida judicial systems.
8. Carefully read §§ 2071-2074 (the "Rules Enabling Act"). What is the process for creating the Federal Rules of Civil Procedure? What is the role for Congress and the courts?
9. The United States operates as an "adversary system"--what does that mean? What is the theory beyond that?
10. What does "jurisdiction" mean? Consider the distinction between two pairs: "Original" v. "Appellate" jurisdiction and "Concurrent" v. "Exclusive" jurisdiction. What is the consequence of appellate review being limited to "final" orders?
11. The federal rules are said to be "trans-substantive." What does that mean? Is it good policy?

Pleading

Introduction to Pleading

1. What is the purpose of the complaint? What does the judicial system want the complaint to do? What does the plaintiff want to achieve through the complaint?
2. What does it mean to draft a pleading as a "press release?" Why would a party do that? What are the drawbacks to that? *See Trump v. New York Times*
3. How does the U.S. being an "adversary system" affect how the plaintiff drafts the complaint and how we should read it?
4. What stops a plaintiff from making stuff up?
5. Review FRCP 2 and 3. What are the basic facts, law, and remedies sought in each case?
6. The federal rules are said to be "trans-substantive." What does that mean? Is it a good idea?
7. A claim for relief is defined as "a set of facts showing a violation of one right of one party by one party justifying relief." What does that mean? Looking at the four assigned pleadings (*VOA*, *Naruto*, *Morgan*, *Godin*), how many claims are in each?
8. How do the pleadings conform to the structure of FRCP 10?

Joinder of Claims and Parties

1. How does FRCP 18 differ from FRCP 20? What work does FRCP 18 do in each of your pleadings? What work does FRCP 20(a)(1) do in each of your pleadings? What work does FRCP 20(a)(2) do in each of your pleadings?
2. What makes "opposing parties" under FRCP 18?
How does party joinder alleviate the concern for inconsistency?
3. What is the defendant's procedural move when it believes parties or claims have been improperly joined? How does the party flag joinder for the court?
What does it mean for claims to arise from the "same transaction or occurrence?" (This phrase appears in many rules).
4. What does the standard in *Ford* (p.454) mean for FRCP 20(a)(1)(A) and 20(a)(2)(A)? What does this mean about the facts giving rise to different claims between different parties?
5. What claims can one plaintiff join against one defendant? Why allow broad joinder of claims and parties? (Hint: Do not stop with simple efficiency).
6. What is the defendant's procedural move when it believes parties or claims have been improperly joined? How does the party raise this with the court?
7. How do FRCP 8(d)(2) and (3) affect *VOA*? Is the language in ¶¶ 68-74 necessary?
8. How do FRCP 19, 24, and preclusion limit the usual permissiveness of FRCP 18 and 20? How is consolidation under FRCP 42 different from joinder? What role does it play where claims are not or cannot be joined?
9. What is the difference between issue preclusion and claim preclusion? How does each affect later litigation?
10. What is consolidation and how does it differ from joinder? How might it affect:
    - Morgan's claims against Walmart and Jones' claims against Walmart?
    - If Matus brings his own suit against Zacek.

Responding to a Pleading: *Motions*

1. What is the process and requirements for filing a motion?
2. How does service of the initial complaint operate? What is the purpose and effect of service?
3. What are the defendant's options in responding to a complaint?
4. What does a defendant seek to do with a motion under 12(b)? What are the issues that can be raised on such a motion?
5. What is the difference between 12(b)(4) and (5)?
6. What is the defense argument in the motion in *Naruto*? What facts and law does it offer?
7. Claims or complaints can be dismissed with prejudice or without prejudice. What does that mean? When should a dismissal be with prejudice and when without prejudice?
8. What is argued on 12(b)(6)? How does 12(b)(6) relate to 8(a)(2)? What does the court analyze on a 12(b)(6) motion? How does FRCP 12(d) affect that?
9. A complaint can be legally or factually insufficient. What is the difference? How does that map onto dismissal with or without prejudice?
10. Go through the 7 12(b) defenses. What are they? And should dismissal be with or without prejudice?
11. What is the connection between FRCP 8(a)(2) and FRCP 12(b)(6)?
12. For purposes of 12(b)(6), a complaint may be "legally" insufficient or "factually" insufficient. What is the difference between them? And what should the terms of dismissal be for each?
13. Consider the bases for dismissal in *PAE*, *Naruto* (if granted), and Question B on Glannon p.404.
14. What does factual insufficiency mean and what should be the terms of a dismissal?
15. Read FRCP 12(g) and (h) together. Review the three categories of 12(h) rules. Why the increasing non-waivability in each? Why have different rules for the three categories? What do they have in common to be subject to that rule?
16. What is the purpose of FRCP 12(f) and how does it differ from 12(b)(6)?
17. Go back to *Trump v. New York Times*. Given the court's objections to the complaint, how should it have drafted this order?

How Much Detail: ***The Idea of Notice Pleading***

1. How does *Conley* interpret FRCP 8(a)(2) and why?
2. What is the purpose of the complaint and when is a complaint sufficient?
3. Is *Conley* a case of legal or factual sufficiency?
4. What does it mean to say a plaintiff "pleaded himself out of court?"
5. How do the FRCP prevent pleading from becoming too loose and limited to simple notice?
6. What are the arguments for not requiring too much from the plaintiff in the initial pleading?
7. What is "information asymmetry" and how does it affect the pleading standard?
8. What is the argument against loose notice pleading?
9. How does FRCP 11(b) enable notice pleading, in light of information asymmetry?
10. What are the arguments for not requiring too much from the plaintiff in the initial pleading? How should information asymmetry affect the pleading standard?
11. What role does FRCP 12(e) play in controlling notice pleading and more generally? How might *Trump v. New York Times* have used FRCP 12(e)?

An Alternative: ***Fact or Heightened Pleading***

1. How does FRCP 9(b) differ from 8(a)(2)? How does § 78u-4 differ from FRCP 9(b)?
2. Think about possible justifications for subjecting fraud, mistake, and securities fraud (and only those) to heightened pleading and the counter-arguments for why those rationales do not explain or justify the rules.
3. What is the argument for treating civil rights cases under FRCP 9(b) and why did SCOTUS reject them in *Swierkiewicz*?
4. What does *Swierkiewicz* do with the argument that civil rights cases raise similar problems as fraud claims?

The Present and Future of Federal Pleading

1. Focus on *Twombly* and *Iqbal* and how they changed (or did not change) the meaning of FRCP 8(a)(2). Does any part of *Conley* survive? What is the pleading standard under FRCP 8(a)(2) after *Twombly* and *Iqbal*?
2. What motivates higher pleading? Can what the Court said about policy arguments in *Swierkiewicz* be reconciled with *Twombly* and *Iqbal*'s concerns?
3. What are "conclusory facts" and how are they handled on a 12(b)(6)?
4. What are the policy arguments that drive the Court's decision in *Twombly*? How is that analysis consistent (or not) with *Swierciewicz*? Why do the policy arguments not justify the new standard?
5. What does the REA in your CREAC look like on a 12(b)(6)? Be ready to discuss how that standard applies to *Twombly*, *Iqbal*, *VOA*, and *Godin*. Think about the basic substantive law at issue on each.
6. What is the problem with the Court looking for and finding an "obvious alternative explanation" for the allegations in the complaint? What *NRA v. Vullo* (excerpt posted to ***Blog***) tell us about that element?
7. What does *Johnson* suggest about what a plaintiff must do in his complaint?

Responding to a Pleading: *Responsive Pleading*:

<u>Failure-of-Proof Defenses</u>

1. What are the defendant's responsive options? How does the *Kinsmann* answer use each? Does it do so properly?
2. Must the defendant explain a response?
3. What was wrong with the defendant's initial response to ¶ 4 in *Zielinski*?
4. What is the remedy for an improper defense?
5. How can each party use FRCP 12(c) in response to the defendant's responses to the allegations in the complaint?
6. The court has struck an insufficient defense (as in *Zielinski*) or plaintiff sees that defendant failed to deny some allegations. What is plaintiff's procedural move? How can each party (plaintiff or defendant) use FRCP 12(c)?

Responding to a Pleading: *Responsive Pleading*:

Affirmative Defenses:

1. Consider the following definition of affirmative defense: "Allegations or statements of new matter, in opposition to a former pleading, which, admitting facts in such former pleading, shows cause why they should not have their ordinary legal effect." What does "they" refer to? What former pleading? What is the ordinary legal effect?
2. What affirmative defenses are available and where do they come from?
3. What affirmative defenses did Winston include? What is wrong with how they were pleaded in *Winston*?
4. What is the difference between a fact being an element of a claim and an element of an affirmative defense? How do you figure out which something is? How does it affect pleading?
5. How could a fact be part of a claim or defense and how does it affect pleading in the following?
6. How did Winston arguably err in his consent defense? See ¶ 49 and the affirmative defenses.
7. What is the connection between 12(b)(6) and 8(c)? What are the procedural mechanisms for a defendant to ask the court to decide on an affirmative defense?

• Consider the example of a statute of limitations defense (that a claim was filed more than two years after the events) as an example of using Rule 12(b)(6) for an affirmative defense.

Responding to a Pleading: *Responsive Pleading*:

Additional Claims

1. What rules govern in pleading additional claims? What happens in response to those additional claims?
2. Who can those claims be brought against? What happened procedurally in *Jones*?
3. What is the common standard for bringing additional claims?
4. What is the difference between an affirmative defense and a counterclaim? Consider the plaintiff in a tort claim being negligent in some way and the plaintiff in a contract claim having committed fraud to induce the defendant to enter the contract.
5. What happens if a party mixes affirmative defense and counterclaims up?
6. What is the problem with Winston's Eighth Affirmative Defense?
7. What rules govern in pleading additional claims? What happens in response to those additional claims? Who can those claims be brought against? What happened procedurally in *Jones*?
8. What is the common standard for bringing additional claims?
9. What does the logical relationship require? What are its limits, according to *Jones*?
10. Were Ford's counterclaims permissive or compulsory?
11. Are Winston's counterclaims permissive or compulsory?
12. What happens if the defendant fails to respond to a pleading that requires a responsive pleading?
13. What happens if the plaintiff decides not to pursue the case?

Amending Pleadings and Relation Back

1. What might a party do in amending a pleading that states a claim for relief? What might a defending party do in amending a responsive pleading?
2. Review the facts and procedure in *Zielinski* and *Krupski* and consider arguments around different possible pleadings.
3. How do the 15(a)(1) time periods work? What is the latest a party can amend and what is the earliest?
4. When must a party look to FRCP 15(a)(2)? What should a party do if a pleading is improperly filed under FRCP 15?
5. What happens in the following: plaintiff files a complaint, amends with leave of court, files a new complaint, then files a new amended complaint without seeking leave of court?
6. What is the effect of the amended complaint and previously filed pleadings and motions?
7. How do amendments affect FRCP 7(a) designations for pleadings stating a claim and for responsive pleadings?
8. Do Winston's eight and ninth affirmative defenses have any force or effect?
9. How does FRCP 15(a)(2) connect to dismissals with or without prejudice?
10. On the connection between dismissal with or without prejudice: What would happen if the court dismissed a complaint but did not specify the terms? What would the plaintiff do and how would the court respond?
11. What are the six considerations for leave in *Foman*? What do these considerations mean and how do they relate to the text of FRCP 15(a)(2)?
12. What is the connection and distinction between undue delay and undue prejudice? What makes an amendment futile?
13. What does it mean for a pleading to relate back? How does relation back connect to futility? How can the court know that a proposed amendment is futile?
14. Consider the following:

    In *Zielinski*, PPI moves for leave to amend to change its answer to ¶ 5 to make clear it is not responsible for the pier. What is Zielinski's argument for undue prejudice?
15. What is the purpose of relation back and how does it operate? What are the procedural frames in which it can be raised?
16. What are the underlying policies behind statutes of limitations? How do those policies connect to relation back?
17. What knowledge or notice must the new party have under FRCP 15(c)(1)(C)?
18. What is imputed or constructive (as opposed to actual) notice? Key emphasis on "impute"--what does that word mean and how does that explain "imputed knowledge?"

19. How can the to-be-added party get either actual or imputed notice? What are the timing requirements for that notice?

20. What is a "mistake concerning the proper party's identity," according to the 1966 Committee notes, *Krupski*, and *Herrera*?

21. Why does a claim against a Doe defendant not relate back? What is the argument that *Krupski* allows Doe relation back?

Managerial Judging

1. What is managerial judging and how does FRCP 16 contribute to that? What does FRCP 16 require or allow the judge to do?

Discovery

1. How does discovery square with the adversary system? How does adverseness work into discovery? How do parties protect their interests within discovery?

2. Consider the example of making and responding to document requests under Rule 34 and objecting in a deposition. How might you a plaintiff frame a document request in *Godin* or in *Morgan*.

3. What is the connection between discovery and notice pleading?

4. If we think the discovery process is out of control, how might we control it?

5. What is disclosure and what is the standard for disclosure? How is that different than the ordinary standard for what is discoverable? Why have a different standard for disclosure?

6. Why have the proportionality requirement in Rule 26(b)(1)? How does FRCP 26(b)(2) relate to 26(b)(1)?

7. Review the rules relating to the various discovery devices. Is there a particular order in which to use each device?

8. What is unique about FRCP 35 compared with other rules? What does *Schlagenhauf* tell about the scope and meaning of FRCP 35?

9. Where does the obligation for parties to comply with discovery rules come from? What about non-parties?

10. How does the exchange of information work? What does each party do? When and how does the court become involved?

11. What is the mechanism for enforcing discovery obligations?

12. What sanctions are available and how does the court decide on a sanction? Note the special treatment for sanctions for violation FRCP 35 and 45.

Summary Judgment

1. What is the connection between discovery and summary judgment?
2. How does summary judgment differ from 12(b)(6) and 12(c)? What will the court consider on a motion for summary judgment?
3. What is a stipulation?
3. What is an affidavit or declaration (and how do they differ)?
4. How else can a party preview a witness' testimony besides an affidavit or declaration? What is the difference and when will the party choose one or the other?
5. Break down the elements of FRCP 56(a) and the meaning of each key term.
6. Think of how these terms apply in *Scott*, *Adickes*, and *Celotex*. What are the key facts in each case? How does the court decide each of these terms without acting as factfinder?
7. What is the burden of production? What is the burden of persuasion?
8. How do FRCP 50 and 56 relate to one another, according to *Celotex*?
9. What was wrong with the affidavits in *Adickes*? How could they have been corrected?
10. Can you reconcile *Adickes* and *Celotex* in terms of what the movant must do to support a summary judgment motion? What would have happened, on the evidence the plaintiff had, if *Adickes* had gone to trial? What does Justice White's concurrence in *Celotex* add to this question?
11. Watch the *Scott v. Harris* video. Was the majority correct that the video is capable of one reasonable understanding? And how does that affect summary judgment? Why did Justice Stevens believe summary judgment was improper?
12. What is the argument that the majority took the wrong approach to the video?
13. When the burden of production shifts to Party II, what can Party II with that shifted burden?
14. What are the procedures under the FRCP through which parties analyze burden of production, at trial and prior to trial? What is the connection between those procedures and their standards?
15. What did the court require of the movant in *Adickes*? What about in *Celotex*? Can you reconcile those approaches? How does current 56(c)(1) reconcile them? What was the problem with the affidavits in *Adickes*?
16. What would have happened had *Adickes* gone to trial? How should that affect summary judgment?
17. How might *Adickes* have proceeded if the defendants followed the approach in *Celotex*?
18. How much evidence must the party offer to create a genuine dispute? How much uncertainty about the fact must there be?
19. What form will the evidence take when presented to support and oppose a motion? What evidence did Mrs. Catrett offer and what were the problems with it?
20. How much of a dispute is necessary to be "genuine?"

21. What is the slightest doubt test? What did *Scott* replace it with?

22. Can the Non-Movant oppose summary judgment based on the possibility of disbelief of the Movant's evidence? In *Adickes*, had the officer denied presence, could Adickes oppose summary judgment by arguing the jury might disbelieve the officer?

23 . What is required for a valid affidavit? Does it matter that the affidavit is self-serving (works to the benefit of the affiant)?

24. What should the court do if one person's affidavit and deposition diverge. Imagine:

Adickes Deposition: *The student told me the officer was in the store. I didn't see anyone.*

Adickes Affidavit (submitted in opposition to SJ motion): *I saw the officer in the store.*

25. How does substantive law affect the summary judgment analysis? What if substantive law requires clear-and-convincing evidence?

26. What if, in *Adickes*, the plaintiff produces evidence of presence but not of communication or agreement--make the argument for defendant on summary judgment.

27. Imagine the Court in *Scott* adopted a per se Fourth Amendment rule: A person fleeing police at high speeds is per se an imminent threat. How does that affect summary judgment in that case? How does it affect the argument that the video is not one-sided?

28. When can a party that will have the burden of persuasion/initial burden of production at trial (e.g., plaintiff on her claim) get summary judgment and what must that plaintiff do in support of the motion for summary judgment?

29. What happens if both parties believe they are entitled to judgment as a matter of law?

30. What happens if a plaintiff gets partial summary judgment? What happens if a defendant gets partial summary judgment?

Subject Matter Jurisdiction

Overview

1. When does each party consider whether the case is in the correct forum?
2. How does each party (the plaintiff filing in federal court and the defendant sued in federal court) present issues about subject matter jurisdiction to the Court?
3. What is the constitutional structure of the federal judiciary? What does Article III tell us about the jurisdiction of the federal courts? What doesn't it tell us about the jurisdiction of the federal courts?
4. What is the connection between Article III and the various statutes, such as § 1331 and § 1332? (Note: We discussed Art. III § 1 and the basic court structure at the beginning of the semester—review that material).

Diversity Jurisdiction

1. How do you determine domicile for corporations?
2. What about for non-corporate business entities?
3. What is the significance of entities having (potentially) multiple domiciles? Is there diversity jurisdiction in *Morgan*?
4. What about in *VOA*?
5. What is the purpose of the amount-in-controversy requirement?
6. How do you determine if it is satisfied?
7. What if the case seeks equitable relief (such as specific performance or an injunction)?
8. Plaintiff files in state court and wants to make clear the case cannot be filed in federal court because of the amount-in-controversy, by dramatically being .01 below the threshold. The complaint states "The amount in controversy is $ 74,999.99 and not one cent more." What did the lawyer do wrong, if the goal was to be .01 below?
9. What happens if the court finds non-diverse adverse parties and thus no jurisdiction?
10. What happens if adverse parties are entities (incorporated or unincorporated) with multiple citizenships?
11. What are the policies behind diversity jurisdiction? How does placing cases in federal court serve those policies?
12. A(FL) sues X (NY) in federal court in Louisiana. Is there subject matter jurisdiction?
13. What is complete diversity and minimal diversity? What is required, by what source of law, and why?
14. How does that requirement relate to the purposes of diversity jurisdiction?
15. What is the argument in favor of minimal diversity and what are the problems with that argument, given the purposes of diversity jurisdiction?
16. What is domicile? What is change of domicile? What facts and evidence can parties use to prove domicile? Where is Mrs. Mas a citizen?
17. What is the statutory basis for jurisdiction in *Mas* and why? Why is it necessary to consider the citizenship of Mrs. Mas in addition to Mr. Mas?

Supplemental Jurisdiction

1. Is there supplemental jurisdiction in *VOA* and in *Godin* and why?
2. Is there supplemental jurisdiction over Winston's counterclaims and why? Does it matter to whether the court can hear this counterclaim?
3. What might cause the court to decline jurisdiction under § 1367(c) and what facts might the court consider?
4. When should the parties and court rely on § 1367(a) and how does that reveal problems with how VOA pleaded its citizenship?
5. Why is it preferable to establish diversity jurisdiction rather than rely on § 1367?
6. *Ford* (p.457) says § 1367(a) reaches the limits of Article III. What does that mean?
7. What is the connection between § 1367(a)'s standard and the standard for joinder in FRCP 13(a), (b), and (g); 14(a), and 20? There are 3 logical possibilities--what are they and which does *Jones* adopt?
8. Is there jurisdiction over the counterclaim in *Jones*? What about the counterclaim in *Kinsmann* (review our prior discussion)
9. Does § 1367(b) apply in *Godin*? What are the "jurisdictional requirements" of § 1332?
10. § 1367(b) identifies 3 categories of cases in which there is no supplemental jurisdiction. What do they have in common?

Removal

1. What is the logic of the "Forum Defendant Rule" of § 1441(b)(2)?

Personal Jurisdiction

Introduction and History

1. How can each party consent or submit to a court's jurisdiction?
court? See FRCP 4(k).

Shift to Minimum Contacts

1. How does *Shoe* change the standard for personal jurisdiction? When can a court exercise personal jurisdiction over a defendant?
2. What is general personal jurisdiction, what is specific personal jurisdiction, and how do they differ? Look at *Shoe* and *Daimler* on this.
3. What is a "Long Arm Statute?" Why call it that?
4. How does the PJ analysis in federal court compare with the PJ analysis in state court? *See* FRCP 4(k)

Modern Analysis

1. How does *World Wide* adjust the two pieces of the *Shoe* standard and how do the two connect?
2. How does a defendant establish "certain minimum contacts?"
3. How can a defendant "purposefully avail?" In what way(s) did WW and Seaway, perhaps, purposefully avail?
4. Did *Nicastro* resolve the choice between "stream of commerce" and "stream-plus? (hint: count the votes)?
5. Where can Nicastro sue, if not New Jersey? Does FRCP 4(k)(2) have anything to say on this?
6. How does a contract create minimum contacts? What is the test and what are the jurisdictional facts in *BK*?
7. What is the "effects test" for PJ? How does *Walden* distinguish *Calder*?

General Jurisdiction Revisited

1. What is the difference between general and specific jurisdiction?
2. When is a defendant subject to general jurisdiction according to *Daimler*?
3. How does the question of specific or general jurisdiction fit into the *Shoe* framework?
4. What happens if there is no specific jurisdiction?

Property, Service, Consent

1. How do property-based actions (in rem and quasi in rem) fit in the *Shoe* framework?
2. How is personal jurisdiction analyzed for a non-US citizen? What about for a US citizen sued in another country?

Venue, Change of Venue, and Forum Non Conveniens

1. What is the difference between improper venue and change of venue--in terms of how they are raised, what they argue, and the appropriate remedy?
2. How do venue rules relate to removal of an action from state court?
3. What is the difference between § 1404 and forum non conveniens? How are they the same? What are the three steps in the analysis?
4. Look at *VOA*: Is venue proper in ND Cal and why?
5. Burger King is sued in the Southern District of Florida and the Middle District of Florida. How would the venue and PJ analyses differ in those two cases?

Erie

1. What does the Rules of Decision Act say and mean?
2. What was the issue in *Erie* and what were the different answers in federal court and state court under *Swift*? Who wins in *Erie*, given resolution of the choice-of-law issue?
3. *Erie* overrules *Swift* in four steps--what are they? What is forum shopping and why is it problematic? What is the difference between "horizontal" forum shopping and "vertical" forum shopping?
4. If a federal court must predict how the state supreme court would resolve an issue, what can it look to in deciding that?
5. Under *Hanna*, what is the connection between the RDA and the Rules Enabling Act?
6. What are the "twin aims of *Erie*?"
7. What is procedure? What is substance? What are the 3 types of rules we might have under *Hanna* (p.674-75)?