

THE NEW DILEMMA FOR CIVIL PROCEDURE (AND OTHER LAW SCHOOL) TEACHERS

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Civil procedure teachers have always faced dilemmas on classroom coverage. In the past, the chief dilemma, prompted by limited credit hour allocations, involved choices about the content and extent of coverage of written and unwritten federal civil procedure laws. Traditionally and currently, first year civil procedure courses focus on the federal constitutional Article III courts, especially district courts, and their procedures. These procedures chiefly originate in written U.S. Supreme Court rules and Congressional enactments, as well as in related and unrelated U.S. Supreme Court precedents, though there are some important local court rules and traditions. This focus has introduced students to civil procedure laws relevant nationwide; facilitated relative uniformity across state borders on how law students are trained, perhaps much prompted by bar examiners and textbook publishers; and, allowed important training on case analysis and synthesis, on statutory and rule interpretation, on inherent judicial authority, and on the fundamental role(s) of trial courts.¹

Since the inclusion of federal civil procedure on the multistate bar exam (MBE) in February 2015, there are significant new pressures on civil procedure teachers to continue, if not do more, instruction on the Federal Rules of Civil Procedure, federal statutory procedural laws, and related and unrelated U.S. Supreme Court precedents. The initial set of sample test questions for the MBE exam confirm the importance to the bar examiners of such topics as federal

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1. Of course there are some variations in the materials and teaching methods generally employed in required federal civil procedure and other first-year courses. See, e.g., Jens David Ohlin, *The Changing Market for Criminal Law Casebooks*, 114 Mich. L. Rev. 1155 (2016) (perhaps less uniformity in classroom practice than in the past due to “changing profile of law students” and “the great diversity of intellectual perspectives that law teachers bring to the lectern”); A quite revolutionary approach to teaching civil procedure was presented by Professors Cover, Fiss, and Resnik in their course book simply titled *Procedure* (The Foundation Press 1988), labeled as a book on “metaprocedure” due to its inclusion of materials on civil, criminal, and agency adjudicatory procedures; See also William Eskridge, *Metaprocedure*, 98 Yale L. J. 945 (1989) (book review) and Mark V. Tushnet, *Metaprocedure? Procedure*, 63 S. Cal. L. Rev. 161 (1989) (book review) (not generally employed in law schools).

district court subject matter and personal jurisdiction, venue, pleading, choice of law, and trial (especially jury trial) processes.²

Yet there are significant new counter pressures arising from the ascending goal of graduating law students who can hit the ground running, that is, who are practice ready.³ Most recent law school graduates undertaking civil litigation will not soon-or perhaps ever-practice in the Article III federal courts, or do many trials (whether jury or bench) when there. A continuing emphasis on federal district court practices, and on trials therein, will detract from this ascending goal. Understanding of federal civil procedure laws does not make a law school graduate very practice ready for the dispute resolution work they will do in state civil litigation and in facilitating civil claim settlements.

In fact, whether yesterday, today, or tomorrow, civil litigation has been practiced primarily in state courts and other state tribunals, and, more recently, increasingly in private dispute resolution bodies rather than in Article III federal courts. There, the challenges involving subject matter and personal jurisdiction arise infrequently. In state and private adjudicatory bodies, there are also major differences between written state and federal civil procedure laws, as well between the civil litigation guidelines falling outside of any written laws. Practice ready lawyers will need some feel for these differences.

Amongst the key differences between the written civil procedure laws governing federal and nonfederal courts are the sources of subject matter jurisdiction, which are typically constitutional for the states courts;⁴ the requirements on the compulsory joinder of parties, far more extensive outside

2. MBE Civil Procedure Sample Test Questions, NCBEX , <http://www.ncbex.org> (last visited April 13, 2017) (in presenting samples in 2014, the examiners “assume the application of” the amendments to the FRCP through 2012 and the sections of 28 U.S.C. “pertaining to jurisdiction, venue and transfer”).

3. *Compare Report and Recommendations of the Special Committee on the Impact of Law School Curriculum on the Future of the Practice of Law in Illinois*, ILLINOIS STATE BAR ASSOC. 2015, at 7-8 (“Law school graduates must be equipped with practice-ready skills to succeed” and proposing “a new perspective on law school curriculum,” which would yield “a better investment on the cost of legal education” and provide more and better practice skills for new graduates”) with Daniel B. Rodriguez, Assumptions of Risk, 2014-3 AALS NEWSLETTER 1, November 2014 (flaws in push for law schools to focus on preparing practice ready students).

4. *Compare*, Ill. Const. art. VI, 9 (circuit courts have original jurisdiction over “all justiciable matters,” though they may only “review administration action as provided by law”) with U.S. Constitution Art. III, 1 (Congress ordains and establishes federal trial courts, though only federal question or diversity cases may be vested in these courts). See also Jeffrey A. Parness, “Failed or Uneven Discourse of State Constitutionism?: Governmental Structure and State Constitutions,” 5 St. Thomas L. Rev. 155, 158-159 (1992).

federal district courts;⁵ the existence of differentiated procedures in states for so-called common law claims, like personal injury claims arising from accidents, and statutory causes of action, as with probate, adoption, juvenile delinquency and marriage dissolution;⁶ the work product and attorney-client communication privileges, often far more limited outside federal courts;⁷ and, the more extensive nonfederal norms on standardized interrogatories,⁸ mandated jury instructions,⁹ and form pleadings.¹⁰

Amongst the important differing civil litigation guidelines for state courts outside written civil procedure rules and codes are the processes for handling nonparty claims, including lienholder¹¹ and other subrogation interests;¹² the

5. See Penn. S. Ct. Rule 2228 (husband and wife to enforce related non-death, personal injury claims “in one action,” as should minor and parent(s)) and Wis. Stat. Ann. § 803.03(2)(a) (compelled joinder of all persons who have related claims involving subrogation, derivative rights, or assignments).

6. See, e.g., *Strukoff v. Strukoff*, 389 N.E.2d 1170, 1172-3 (Ill. 1979)(where statutes address civil case procedures not subject to the general common law or equity powers of constitutionally-created courts, courts have less or no “inherent power” and General Assembly authority is greater); *In re Adoption of Baby Boy Martindale*, 940 S.W.2d 491, 493 (Ark. 1997)(adoption proceedings are “special” and not wholly governed by general civil procedure laws); and Rule 1-001 of N.M. Rules Civ. Pro. for District Courts (committee comment describes special cases, including probate, adoption, condemnation, election contests, and zoning).

7. See, e.g., Ill. Sup. Ct. Rule 201(b)(unlike FRCP 26(b), this rule only protects opinion work product from compelled disclosure, meaning no access to materials if they “contain or disclose the theories, mental impressions or litigation plans of the party’s attorney”) and *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 432 N.E. 2d 250 (Ill. 1982)(adopting “control group” test for assessing who are clients where corporation retains an attorney, thus rejecting the federal approach in *Upjohn v. U.S.*, 449 U.S. 383 (1981)), utilized in *The Manitowoc Co., Inc. v. Kachmer*, 2015 WL 1746552 (N.D. Ill. 2016)(audio recordings of company employees by company attorney are discoverable by employees over company’s objections).

8. See, e.g., Ill. Sup. Ct. Rule 213(c) (recognizing Supreme Court power to adopt “standard forms of interrogatories “which have their own special numerical limits; today, there are standard interrogatories for motor vehicle, matrimonial and medical malpractice cases).

9. See, e.g., Ill. Sup. Ct. Rule 239(a) (an Illinois Pattern Jury Instruction “shall be used, unless the court determines that it does not accurately state the law”).

10. See, e.g., Rule 7.2(a) of Rules of Solano County, California Courts (“Printed forms of petitions, orders and other documents which have been approved or adopted by the Judicial Council shall be used in all cases where applicable”) and “Circuit court forms,” on Wisconsin Supreme Court website at www.wi.courts.gov/forms1/circuit/index.htm (declaring: “standard, statewide forms are required by all Wisconsin circuit courts for civil, criminal, family, guardianship, juvenile, mental commitment, probate and small claims cases”).

11. See, e.g., 770 ILCS 5/0.01 (Attorneys Lien Act).

12. See, e.g., 770 Ill. Comp. Stat. Ann. 23/5 and 10 (subrogation interests pursued through Health Care Services Lien Act). Written state civil procedure laws are not themselves uniform on

limits on informal fact investigation, both before and after civil litigation has commenced;¹³ and, claim and issue preclusion standards.¹⁴

Furthermore, increasingly civil litigation occurs in state agencies and specialized state tribunals with no significant counterparts within the federal civil litigation fora, as with worker's compensation.¹⁵ And increasingly, much civil litigation occurs in private dispute resolution bodies where again the procedures are significantly different than those operating in Article III federal courts. Consider compulsory and binding arbitrations,¹⁶ which are sometimes even mandated by state laws regardless of party consent, as with certain insurance claims.¹⁷ Practice ready lawyers need some familiarity with these civil litigation bodies, even though their practices will not be tested on the MBE.

As well, whether yesterday, today, or tomorrow, civil claim dispute resolution is primarily driven by civil claim settlement norms. Here, as with trial preparation and trial practice, there are significant differences between the general norms in Article III federal courts, American state tribunals, and private adjudicatory bodies. Further, there are often special settlement norms operative in state tribunals as well as in private civil dispute resolution bodies. Practice ready students need some familiarity with these settlement norms addressing such matters as the roles played by insurers; lawyer civil claim

joinder of subrogation interest. *Compare, e.g.,* Mississippi Civil Procedure Rule 17(b)(where "subrogor still has a preliminary interest in the claim the action shall be brought in the names of the subrogor and the subrogee") to 735 Ill. Comp. Stat. Ann. 5/2-403(c)(any subrogation action "shall be brought either in the name or for the use of the subrogee").

13. *See, e.g.,* Illinois Rule of Professional Conduct 4.2 (lawyer generally shall "not communicate. . . with a person the lawyer knows to be represented by another lawyer").

14. *See, e.g.,* Hudson v. City of Chicago, 889 N.E. 2d 210 (Ill. 2009)(notwithstanding voluntary dismissal statute, res judicata bars refiled claim presented within the time limits of the voluntary dismissal statute).

15. There is a worker's compensation scheme applicable to certain federal employees, but it is far less expansive than state worker's compensation schemes. *Compare, e.g.,* 33 U.S.C. 901 et. seq. ("Longshore and Harbor Workers' Compensation Act") with Iowa Code 85.1 et. seq. (limited exceptions of employees from workers' compensation scheme).

16. 9 U.S.C. § 2 (a written contract to settle by arbitration a controversy is "valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract"); Allied-Bruce Terminex Cos. v. Dobson, 513 U.S. 265, 281 (1995) ("states may regulate contracts, including arbitration contract clauses, under general contract law principles," but may not have, per federal preemption anti-arbitration policies).

17. *See, e.g.,* Reed v. Farmers Ins. Group, 720 N.E.2d 1052 (Ill. 1999) (upon challenge on state jury trial right grounds, upholding statute, 215 ILCS 5/143a, requiring binding arbitration for certain uninsured motorist coverage claims).

settlement authority; the requirements for valid civil claim settlement contracts; the effects of partial settlements on later civil litigation, including the impact of collateral sources and empty chairs; and, the means for addressing civil claim settlement breaches.

Federal civil litigation practices, future bar exams, and the realities of nonfederal civil litigation may not all be able to be simultaneously pursued vigorously in required law school civil procedure courses. There are often insufficient credit allocations and a wide breadth of expected coverage. How can basic civil procedure teachers better prepare students for the challenges posed by contemporary nonfederal civil dispute resolution while also insuring familiarity with Article III federal court practices?

Civil procedure teachers can utilize problems in the first year courses based on procedural laws that are markedly different in Article III federal courts and state tribunals, as well as in the many different state tribunals; exercises on practical issues arising during civil claim settlements; materials on the roles of insurers, noninsurance lienholders, and other interested nonparties (like expert witnesses) in civil cases; and, exercises on the roles of alternative governmental adjudicatory bodies and private civil claim decisionmakers.

Significant alterations in coverage and approach in the basic civil procedure courses in the foreseeable future may be unrealistic, however.¹⁸ Changes may be difficult to implement since many law students do not care as they will not become civil litigators. National bar examiners will remain likely unconcerned with non Article III dispute resolution practices and with civil claim settlement norms. Most future law students will take bar exams which even more narrowly approach civil dispute resolution issues than in the past, given the ascent of the Uniform Bar Exam¹⁹ and the 2015 change in the MBE. So how might upperclass students interested in civil litigation become more practice ready through elective courses, even if those courses do little for bar exam preparation purposes?

Local and regional law schools can offer civil procedure electives which focus on in-state, and perhaps neighboring state, civil dispute practices, with emphases on the major differences with Article III federal district court

18. See Jay Feinman and Marc Feldman, "Pedagogy and Politics," 73 *The Georgetown L.J.* 875, 875 (1985) (On the curriculum reform experience within a law school of two law professors who eventually taught "a pedagogically and conceptually innovative course in contracts, torts and legal research and writing – 'Contorts'").

19. In April 2016, New Jersey became the 22nd jurisdiction to adopt the Uniform Bar Exam. *New Jersey Law Journal*, April 14, 2016.

litigation. Similar electives at national law schools can focus on major differences between these same federal courts and the general practices of the varying state tribunals across the nation, if not the world. These suggestions offer little that is new. Such elective courses are prevalent, particularly in local and regional schools, though often offered by adjuncts whose choices on course contents and teaching techniques are not always subject to significant institutional oversight or direction, and thus to coordination with the basic civil procedure course(s). So what else might be done to better prepare practice ready law school graduates who are more able to undertake civil claim resolutions guided chiefly by state laws, both in and outside of litigation?

An intradisciplinary, elective course on civil claims settlements could be offered where the focus would be on the major legal guidelines for amicable civil claim resolution. Such guidelines, of course, encompass issues arising in and outside of litigation. They include norms on partial preclaim settlements, which can be procedural (like those addressing compulsory and binding arbitration and choice of forum) or substantive (like those addressing liquidated damages and waivers of negligence claims).

Such an elective course on civil claim settlements should, at the least, be intradisciplinary in that it addresses guiding U.S. and state legal norms from varying lawmakers, including those who formulate general civil procedure, professional responsibility, tort, contract, privacy, and tax laws, as well as those who formulate special laws applicable to civil claim settlements in discrete arenas like civil rights, professional malpractice, product liability, employment, pollution, auto accidents, defamation, probate, and real estate. More ambitious would be an interdisciplinary and international course that includes materials on psychology, economics, and the like that are important to amicable civil dispute resolution, as well as comparative U.S. and foreign legal procedures guiding civil claim settlements.

A course on civil claim settlements could also include teaching materials that reverse traditional course texts in that they invite initial student discussion on major issues through problems that do not identify the types of relevant guiding laws. Later class materials could then provide some of the black letter laws.²⁰

20. A brief chapter outline for these follow up materials, which are based on a chapter outline of a book the author has under contract with Lexis Nexis, appears in Appendix One. A more complete outline is available from the author at jparness@niu.edu

For example, in the very first class there could be a general discussion of how contract law principles might differ for civil claim settlements, criminal case plea bargains, and widget purchases. A follow up class could include a review of comparative laws. This follow up class could, as well, focus more particularly on the roles of lawyers as agents representing clients who settle civil claims (both before and after litigation); who plead guilty or nolo contendere in criminal cases; and who buy widgets.

In a later class, there could be a more nuanced discussion of how basic contract law principles might themselves differ for varying types of civil claim settlements, which themselves may vary between in-court and out-of-court pacts, or between presuit and postsuit pacts. The later class could, for example, examine the differences in contracts resolving civil rights, marriage dissolution, and auto accident claims or cases. The contract laws for settling these types of civil claims and cases vary significantly. One type often has issues of governmental misconduct; another type frequently has issues of child welfare; and the third type often contains issues involving contingency fee agreements.

In another later class, there could also be a general discussion of a problem involving confidentiality pacts on settlements of sexual abuse or pollution claims, with the next class focusing on the guiding laws. In these classes there could be an initial review of how churches might structure settlements with the alleged child abuse victims and their families, or how oil companies might approach the consequences of oil spills. In a follow up class, comparative laws demonstrating the differences in public access to civil, criminal, and regulatory adjudicatory proceedings could be examined, including any differences in access to prelawsuit and lawsuit settlements.

And in another later class, there could also be an initial discussion of a problem focusing on the roles of presiding adjudicators, be they judges or alternative dispute resolution officials, in facilitating settlement pacts. In a follow up class there could be explored the differences in the laws guiding civil, criminal, and private case adjudicators, including variations in their settlement enforcement, including sanctioning, authority.

Of course, an interdisciplinary civil claim settlement course could be narrowly tailored, as with a course addressing the roles of insurers and other indemnitors in civil dispute resolution. Here auto insurers and property insurers might be compared, as might private insurance companies, private employers with vicarious liability for at least some of their employees' acts, and governmental bodies with statutory, ordinance, and/or contractual indemnification responsibilities germane to at least some of their officers' acts. A somewhat broader, though not comprehensive civil claim settlement course could encompass the roles of nonparties in civil dispute resolution, so as to include not only indemnitors tied to defending parties, but also those with

subrogation, reimbursement, lien and similar interests tied to the recoveries by claimants.

Comparable intradisciplinary domestic, if not interdisciplinary and international, elective law school courses can also be devised. For example, consider a course on the varying legal consequences, both substantive and procedural, flowing from negligent conduct, intentionally bad acts, or both. Here, there could be review of criminal, regulatory, tort, contract, and professional licensing laws, as well as of the variations in the applicable dispute resolution processes and in the procedural due process demands. A more narrow course could address negligence, as with negligent driving; negligence by those acting in a professional capacity; negligence in product design, manufacture and sale; or negligence in parental childcare. Alternatively, there could be an even narrower course, focusing on entity responsibility (i.e., to prevent) and liability (i.e., to compensate) for the negligent actions of its agents/employees in varying settings, including contracts, business licensing, crimes, civil rights and litigation sanctions.

In other intradisciplinary law school elective courses, as with a civil claim settlement course, issues could first be generally introduced and then followed by a review of the relevant laws, even if the laws are of diverse types and pigeonholed elsewhere in the curriculum.

Particularly with more narrowly focuses courses, like a course on the roles of insurers in civil litigation or, more narrowly, the roles of insurers in defending insureds before and during civil litigation, even a two credit hour allocation may be unwarranted. Shorter courses could be offered during only a portion of an academic semester or quarter, with other shorter courses possibly piggybacked into the law school schedule. There are benefits in more focused and shorter courses, including accommodations within a particular law school community of long-established law review, moot court, and clinical course schedules demanding intense, albeit brief, student time commitments. Shorter courses could also meet regularly early in a term and then reconvene later, with later classes focused on student projects completed in the interim. Here, in-depth student research projects would allow each student to help other students think outside the boxes of pigeonholed courses.

Whether intradisciplinary and domestic, or interdisciplinary and international, new elective law school courses on civil claim settlement are well-suited to provide more advanced skills training. Exercises involving interviewing, negotiating, drafting, and/or advocating can be easily incorporated. Here, unlike at least some other skills training courses, like pretrial civil practice or trial advocacy, many diverse laws could also be introduced in ways that break the molds operating in other (and particularly in first year) law school classes. Clients do not neatly present just contract law issues, or just property law issues,

or just tort or criminal law issues, or just procedural rather than substantive law issues. Lawyers must listen and determine which lawmakers and which laws are most relevant in helping to resolve their clients' problems. To become more practice ready, law students should have more experiences in which they are challenged to sort and assess varying lawmakers and legal doctrines applicable to varying client needs.

APPENDIX ONE

PRINCIPLES GUIDING CIVIL CLAIM SETTLEMENTS

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