

TO: CIVIL PROCEDURE C – FALL 2009

FROM: PROFESSOR MICHAEL MOFFITT

RE: INITIAL CIVIL PROCEDURE PACKET  
ASSIGNMENT FOR MONDAY, AUGUST 24, 2009

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Please prepare the following material in advance of our first class.

1. Complete the Case Writing Assignment described in this packet and submit it to me according to the instructions below no later than **9:00 am, Monday, August 24, 2009**. I may use one or more of the assignments in class, beginning that afternoon.
2. Read the “Personal Jurisdiction and the Internet” section of this packet. In it, you will find descriptions of the facts underlying four lawsuits, along with a question to consider regarding the appropriate forum for each lawsuit.
3. Read the Introductory Chapter found in the casebook (Freer & Perdue, pp.1-19).
4. Read the Introduction to the Supplement for this course (Moffitt Fall 2009 Civil Procedure Supplement, p.1).
5. Read at least the first three pages of the Syllabus for this course. (You may find it helpful to read the entire syllabus.) The syllabus is available on Blackboard and on my faculty website.

## CASE WRITING ASSIGNMENT

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### **It is helpful to look at many specific cases**

Broadly speaking, Civil Procedure considers the processes disputants must follow during adjudication and the structures within which those processes operate. The topic includes a great number of rules and statutes, many of which are not particularly intuitive or easy to read. I am convinced that the best method for understanding our system of Civil Procedure is *not* to sit down and read the rules and statutes straight through, from start to finish. Instead, in order best to understand the procedural mechanisms relevant to adjudication, it is extremely helpful to consider the way(s) in which various procedures affect different kinds of disputes and disputants. Each of the cases described in your casebook provides a glimpse at the way our adjudication system handled some aspect of a particular dispute procedurally. The cases are helpful, in part, because they highlight specific aspects of procedural rules and their application. At the same time, you will find that the cases are often somewhat lengthy, and there is a limit to the number of cases that we will be able to consider during a semester-long course. Mastery of Civil Procedure requires an ability to analyze how procedural rules would be applied to cases that are different from those included in your casebook.

### **It is helpful to consider cases from different perspectives**

I encourage you to think about Civil Procedure from several different perspectives as we go through the course. One valuable perspective is that of the disputants. How would you, as a possible plaintiff or defendant, want the system to be shaped? Another perspective is that of the judge. If these parties were before you, how would you structure the process of resolving their dispute? Finally, consider the question from the perspective of society at large. Recognizing that we collectively structure and fund this process, how well do the existing rules of procedure serve societal interests with respect to dispute resolution? Is this mechanism the best we can devise for resolving disputes between members of society?

### **Choosing a case for the case writing assignment**

Consistent with the two observations above, I will ask you to provide me with a written description of a dispute – almost any dispute. Some guidelines may be useful to you as you complete this assignment:

*The dispute should be one that you imagine could, conceivably, wind up in court.* It need not be something that presents an obvious legal basis for a claim. You need not think that the plaintiff would prevail in the case. But please don't choose something along the lines of, "My friend thinks that hot fudge sundaes are better than root beer floats, but I think that's crazy. We wind up fighting about this a lot."

*The dispute should involve specifically identifiable people or organizations.* So, feel free to describe a dispute between a contractor and a subcontractor, or a conflict between a company and a customer, or a fight between a professional athlete and her coach, team, or agent. Less useful examples of disputes would be writing something broad like "There is a dispute between Israelis and Palestinians," or "The Man is keeping me down."

*The dispute should involve at least one party from the U.S.* It would not be helpful for our purposes if you were to describe Slobodon Milosevic and his arguments with the War Crimes Tribunal, for example. It would be fine to write a paragraph about a dispute between Canadian and American fishing vessels. Similarly, you should feel free to describe a dispute between you and a clumsy waiter you encountered while vacationing in Belgium.

*The dispute should not be uncomfortably personal.* I may choose to use one or more of the sample disputes you send me as a means of directing class discussion. As a result, you should not describe a situation that you would not be comfortable sharing with the class. So, if you have a dispute with your mother along the lines of “My mother won’t get off my back about me not yet being married,” and it’s not something you would be comfortable having a room full of us consider as an example, you might want to choose something else. At the same time, you are welcome to describe disputes that are personal to you. It would be fine, for example, for you to describe your disappointment with a particular friend who consistently fails to pay her or his share of the tab when you go out together.

*The dispute need not be real, and you need not be an expert on it.* If you’ve got the inclination to make up a dispute, please go ahead. If you want to write a paragraph about how an entirely fictitious Civil Procedure professor assigned an unbearable amount of homework, fine. Also, you should feel free to identify disputes about which you do not know the details. You might, for example, give the basic contours of the fight between Ford and Bridgestone/Firestone regarding the SUV/tire safety issue. You should feel comfortable doing that even if you don’t know all (or even many) of the details. For our purposes in class, we’ll fill in details that are relevant – even making them up if we don’t know them or if they serve our pedagogic purpose.

*Please don’t tell me about your landlord.* While I welcome descriptions of virtually any kind of dispute that could give rise to a legal action, I would ask you *not* to choose to describe a dispute between a landlord and one or more tenants. I trust that you are able to conjure more creativity than that.

## **Writing your case description**

*Edit your case description with care.* I will not assign a specific grade to this assignment, but please recognize that part of your grade in this course will stem from your participation in the course. This is your first opportunity to participate.

Ideally, I would like you to summarize the dispute in *one or two paragraphs* of reasonable length. It will be difficult to complete the assignment adequately in just a few sentences. At the same time, it will be unhelpful to us if your description is terribly long. At the very outside, please make sure that your dispute description does not exceed one page of single spaced type. We all recognize that disputes, by their nature, are often very complex matters. Use your judgment in deciding what information is critical to our understanding of the dispute.

I am attaching a few sample descriptions, to provide more guidance on the assignment. My purpose in providing these is not to confine you in any way. Indeed, my hope is to show the breadth of things that would make fine examples of disputes.

## Submitting Your Writing Assignment

Submit your writing assignment to me **no later than 9:00 am on Monday, August 24, 2009.**

In the top, right-hand corner of your assignment, please include your name and your University of Oregon email address.

If you have the assignment completed before then, **please, please** submit it in advance of the deadline. I would very much appreciate the extra time to read them.

Unless you are unable to access email, please email your assignment to me at:

MMOFFITT@UOREGON.EDU

with a copy to my assistant Jill Forcier at

JILLF@UOREGON.EDU

Please take care to get your assignment to the correct Moffitt. (I am M. Moffitt. One of the other Associate Deans here at the law school is J. Moffitt.)

My strong preference is for you to embed your dispute description into the text of your email, because my computer sometimes experiences compatibility issues with files that are attached as documents. If at all possible, please email the document from your law school email account, so that I have a record of your law school contact information.

If you are not able to email your description, place a hard copy in my faculty mailbox (on the third floor just beyond the stairs).

I look forward to reading your dispute descriptions.

## SOME SAMPLE DISPUTE DESCRIPTIONS

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### **Example 1.**

Moogene is a small, single-store boutique in downtown Eugene, Oregon. Incorporated in Oregon in the early 1950s, it has been selling dairy-related novelties ever since. In preparation for the company's 50<sup>th</sup> anniversary, the owner's granddaughter decided to set up a Moogene website. To her surprise, she found that the site moogene.com was taken by a company named Moogene, Inc. Moogene, Inc. is a Delaware corporation whose headquarters are in New York. Moogene, Inc. is a biotech company formed in the late 1990s, specializing in bovine growth hormone products. Moogene and Moogene, Inc. are now fighting over copyright and trademark issues and over the right to the moogene.com domain name.

*(Author's note: As far as I know, no such companies exist. I just made this up.)*

### **Example 2.**

Barry (apparently known by his fraternity brothers as "Boogidy") loaned his car keys to another fraternity brother (currently identified only as "MuPuPu"). The car was later discovered parked near the bottom of a ditch on the University President's lawn, the stereo playing a loud and unfortunate dance re-mix version of a Culture Club tune, previously thought extinct. MuPuPu insists that he was not the one who drove the car, saying, "I wound up walking downtown that night. It was probably Doug who drove it into the President's ditch." Doug (a third fraternity brother, who for reasons yet unclear appears not to have any nickname) alleges that MuPuPu handed him Boogidy's keys and said, "Hey Doug, Boogidy said it was OK to take his car on a little road trip. And by the way, you know how much he hates the President. Go nuts." MuPuPu denies any such conversation, though he admits giving Boogidy's keys to Doug. Boogidy now wants someone to pay his campus fine, the insurance deductible associated with towing and repairing the car, and substantial compensation for his "loss of reputation" stemming from the music heard playing from his car. He sues both MuPuPu and Doug.

### **Example 3.**

A cold, snowy morning saw Lane head to the local ski area, determined to conquer a particularly nasty slope. His brand new skis, manufactured by a Swiss company named K12, glistened in the bright sunlight. At the precipice of the slope, Lane was pondering the wisdom of his plan, while Charles and Roy were scuffling nearby. Through a sequence of events about which there is some disagreement, Charles bumped Lane, causing Lane to hurtle over the edge. Lane's descent went poorly. He was quickly separated from his skis, and he wound up wrapped around slope grooming equipment near the bottom of the hill. Monique, Lane's widow, intends to sue the ski slope operators, the ski manufacturer, Charles, Roy, and anyone else she can think of for causing Lane's untimely demise.

## PERSONAL JURISDICTION AND THE INTERNET

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### *MILLENNIUM ENTERPRISES V. MILLENNIUM MUSIC*

Plaintiff files suit in Oregon seeking damages and injunctive relief for alleged trademark infringement under federal law. Plaintiff also alleges state statutory claims for unlawful trade practices, trademark infringement and dilution, and common law claims of unfair competition and trademark infringement.

Plaintiff, Music Millennium, is a business incorporated in Oregon with its principal place of business located in Portland, Oregon. Plaintiff opened its first retail outlet under the name "Music Millennium" in 1969. Plaintiff now operates two retail music stores in Portland and also sells products through mail and telephone orders and its Internet Web site.

Defendant Millennium Music, Inc., is a South Carolina corporation and general partner of defendant Millennium Music, L.P., a South Carolina limited partnership. Defendants operate retail music stores in South Carolina under the name "Millennium Music." Defendants sell products through their retail outlets and their Internet Web site, although the vast majority of sales occur at their retail stores. From March 1998 through September 1998, defendants sold fifteen compact discs to nine separate customers in six states and one foreign country. The sales totaled approximately \$225. During the same period, defendants' retail sales were \$2,180,000. Defendants also offer franchising circulars through the Internet and have two franchised stores in North Carolina.

Defendants have purchased a small number of compact discs from Allegro Corporation ("Allegro"), a distributor located in Portland, Oregon. Defendants' purchases from Allegro in 1994-1997 totaled approximately one-half of one percent of defendants' inventory purchases for those years.

On or about July 7, 1998, plaintiff received a credit document from Allegro. The credit was mailed to plaintiff in error; the document apparently was intended for defendants.

On August 21, 1998, an Oregon resident, Linda Lufkin, purchased a compact disc from defendants through their Web site. The court learned from defendants that an attorney at the law firm for which Ms. Lufkin works requested that she purchase a compact disc from defendant. Apparently, the attorney is an acquaintance of plaintiff's counsel. Defendants have sold no other merchandise to any Oregon resident.

Plaintiffs filed suit on August 28, 1998. According to plaintiff's complaint, defendants' use of the name "Millennium Music" in connection with the sale of goods in interstate commerce violates plaintiff's state and common law trademark rights. Plaintiff further alleges that consumers familiar with plaintiff will likely be confused as to the source or origin of defendants' goods, thereby causing plaintiff harm.

In September of 1998, defendants added a disclaimer to their Web site indicating that their products and franchise circulars were not available in Oregon.

*Do you think it is proper / fair / appropriate / legitimate for an Oregon court  
to hear the case against Millennium Music, Inc?*

**ZIDON V. PICKRELL**

The plaintiff, Patrick Zidon, is a North Dakota resident. The defendant, Linda Pickrell, is a resident of Colorado. Zidon and Pickrell cultivated a romantic relationship after meeting online in September 2000. Zidon ended the relationship in March 2004.

Zidon allege[s] that Pickrell created a Web site entitled "Monster of Love: Surviving Love/Sex Addicts and Spiritual Predators" at the domain name [www.patrickzidon.com](http://www.patrickzidon.com) following their breakup, where she posted allegedly defamatory statements. In addition, Zidon alleges Pickrell e-mailed a hyper link to the Web site to persons in the Bismarck, North Dakota area as well as the public at large. ...

[During the time in question, Pickrell] made telephone calls to Zidon [while Zidon was in North Dakota], and sent e-mails and instant messages over the Internet to Zidon. [Pickrell also] created a Web site and encouraged individuals to visit that site via e-mail and other mediums.

Pickrell's website has an e-mail hyper link. [It] offers detailed information about Zidon including where he resides. [The site] contains a bulletin board allowing individuals to exchange information. Last, [Pickrell's] site encourages viewers to contact the Web creator. ...

The following comments [appeared] on Pickrell's Web site: ...

As a businessman and community leader in Bismarck, North Dakota, few would suspect his double life of deceit, lies and the trail of tears he leaves behind him. A warning, this man plans to pursue a career in psychological therapy. If you have a history with this man you'd like to share, please contact

[webmaster@patrickzidon.com](mailto:webmaster@patrickzidon.com). ...

A business man and community leader in Bismarck, North Dakota, Patrick John Zidon is manager of Bismarck Lumber. He is a father of one grown son, former husband of an artist/medical technician and claims to have been: past president of Dakota Zoo, past president of the Nodak Lumberman's Association, past president of his Catholic church's counsel, past chair of the legislative committee for the Northwestern Lumberman's Association, ... He recently graduated (supposedly in May of 2004) from the University of Mary with degrees in business and psychology. He is a predator.

Zidon [alleges] defamation and intentional infliction of emotional distress.

*Do you think it is proper / fair / appropriate / legitimate for a North Dakota court to hear the case against Pickrell?*

***BARRETT V. CATACOMBS PRESS***

Plaintiff Stephen Barrett filed this action in Pennsylvania under Pennsylvania's defamation law, against Defendants the Catacombs Press, James R. Privitera, Alan Stang, Darlene Sherrell and CDS Network, Inc.

Plaintiff in this case is a resident and psychiatrist in Allentown, Pennsylvania. Since 1969, he has been involved in investigating and dealing with many aspects of quackery, health frauds, misinformation and consumer strategy. He has also been responsible for writing, co-authoring or editing over 200 publications relating to consumer health. Since December 1996, Plaintiff has maintained a computer Web site called Quackwatch, which provides information about quackery, health frauds and consumer decisions. Plaintiff's Web site has received international acclaim, with more than fifty awards and/or favorable mentions in newspapers, magazines and journals throughout the world.

Only about 1% of the Quackwatch Web site addresses the fluoridation debate through its "Fluoridation: Don't Let the Poisonmongers Scare You" page. This Web site also provides hypertext links to other Web sites that promote fluoridation of public water sources. Although Plaintiff has participated in these activities and has edited a book and a few articles that mention fluoridation, he claims that he has not been involved in promoting fluoridation nationally.

Plaintiff first became aware of the existence of Defendant Sherrell, a resident of Oregon, after she joined the health fraud discussion group co-sponsored by the Quackwatch Web site, which has 300 members from across the country. She joined the discussion list by posting a message on-line for view by the entire discussion group. In the Plaintiff's opinion, when the volume of messages posted became sufficiently large to be unproductive, he posted a message to that effect, which was disseminated to the entire discussion group. Ms. Sherrell, however, claims that she simply posted one message to the list and that the additional postings were responses to other participants' postings. She then apparently attempted to engage Plaintiff in a private e-mail discussion about fluoridation.

Subsequently, the alleged defamatory statements appeared on Defendant's Web site. Defendant sent an email in order to engage Plaintiff in an e-mail discussion about issues discussed on his Quackwatch Web site. Plaintiff refused to respond to her e-mail. However, when Plaintiff later came across her Web site, he did then e-mail Defendant the following message threatening a lawsuit:

I have just read and downloaded your page at <http://home.cdsnet.net/fluoride/quacks.htm>. The information you have taken from Privitera's book contains statements about me that are false and defamatory. I have informed him of this fact and, since he has refused to retract them, I expect to sue him ... for libel. Unless you remove what his book says about me from your web page, I will add you as a co-defendant. ... You also directly accuse me of being a big liar. I would suggest that you remove that statement also. If you want to attack what I say, you have a right to do so. But calling me names can get you sued. I regard libel as a serious matter. I am not thin-skinned and have no objection to people disagreeing with my ideas. But attacking me as dishonest is quite another matter.

In response, the Defendant sent an e-mail stating that she had modified the content of her Web site to some degree.

Plaintiff is clearly a national, if not international, figure who has investigated and dealt with issues relating to quackery, health frauds, misinformation and consumer strategy. The following are several examples of Defendant's defamatory statements posted on the Internet:

(1) To those of you who are interested in Stephen Barrett's true purpose in attacking chiropractic, as well as his relentless promotion of water fluoridation, this file might be of interest: <http://home.cdsnet.net/fluoride/quacks.htm>. It exposes Quackwatch and the American Council on Science and Health (Barrett, Jarvis, Whelan, Easley, Munro, et al) in their attempt to eliminate competition in the health care field, discredit chiropractors, and pander to the anti-consumer special interests.

(2) The American Council on Science and Health, and Stephen Barrett's Quackwatch group pretend to be consumer advocates.

(3) Barrett Easley, Whelan, Jarvis: Bogus Consumer Watchdogs.

Plaintiff also alleges that Defendant subsequently posted messages with a hypertext link back to her Web site on several listserves or USENET discussion groups.... In December, Defendant opened another Web site which Plaintiff alleges is dedicated to "attacking me and several colleagues." Plaintiff alleges that he has "good reason to believe that she posted a total of at least 90 messages to at least 12 USENET news groups, with total membership in the tens of thousands, and that many of these messages encouraged people to visit one or more [of] her sites that contained defamatory statements about me."

Defendant is closely associated with individuals who are interested in advocating against the fluoridation of water sources throughout the United States. Defendant states that she has never been physically present in the Commonwealth of Pennsylvania except to pass through the state a few times, more than ten years ago. She also alleges that the information that she has posted on the World Wide Web "was not targeted to the Commonwealth of Pennsylvania" and that her activity was part of a larger public debate on fluoridation issues.

*Do you think it is proper / fair / appropriate / legitimate for a Pennsylvania court to hear Dr. Barrett's case against the defendants?*

***PLANET BEACH FRANCHISING CO. V. C3UBIT, INC. D/B/A TANTODAY, BRUCE SCHOENFELDER***

Plaintiffs, Planet Beach Franchising Corporation and Planet Beach Tanning Salons, Inc., are Louisiana corporations in the business of franchising tanning salons. Defendant TanToday.com operates a website on which users share information and news related to the tanning salon industry and salon operations. Bruce Schoenfelder, also a defendant in this matter, is TanToday.com's sole managing officer. Schoenfelder resides in Pennsylvania. TanToday.com is a Pennsylvania corporation that is operated and managed by Schoenfelder in Pennsylvania. Defendants have no officers, employees or property in Louisiana. Defendants have never entered into or performed a contract or other transaction with a Louisiana citizen or business.

On or about May 22, 2002, defendants posted an article on their website entitled: "SCOOP: Planet Beach--the DEATH Of A Franchising Chain?" In the article, defendants state that

"we are alerting the ENTIRE INDUSTRY of a meltdown, and warning everyone with business dealings with Planet Beach to review your status, your arrangements, and hunker down."

Defendants further assert that Stephen Smith, the President of Planet Beach, had experience with "FOUR \*\*FAILED\*\* tanning salons." The article also alleges that the training provided by Planet Beach to new franchisees, "if any at all, was done by people with LIMITED TO NO background in running a successful tanning operation." The article indicates that defendants based these allegations on a deposition taken under oath that is now in their possession. The article also indicates that defendants "called the corporate offices of Planet Beach, left a message for the director of franchising, telling them of our investigation, and asking for them to call us. They have failed to do so." Alongside the article, defendants posted an image of Planet Beach's registered trademark.

The primary source of defendants' information is a deposition of Stephen Smith, founder and president of Planet Beach, who defendants know to live in Louisiana. Plaintiffs drew from Louisiana sources when they discussed Smith's deposition with a former Planet Beach franchisee located in Louisiana. Defendants also tried to obtain information about Planet Beach through a phone call to Planet Beach's Louisiana headquarters.

On June 18, 2002, plaintiffs filed a complaint in Louisiana alleging that defendants' posting constitutes libel, libel per se, tortious interference with business interests, interference with trademark rights and unfair trade practices. Plaintiffs seek actual and punitive damages. Plaintiffs also moved for a preliminary injunction.

*Do you think it is proper / fair / appropriate / legitimate for a Louisiana court  
to hear the case against TanToday and Mr.Schoenfelder ?*