

CIVIL PRETRIAL PRACTICE AND SETTLEMENT

SPRING 2015

SYLLABUS AND WEEKLY ASSIGNMENTS

Abbreviations:

Mauet=	Thomas A. Mauet, <u>Pretrial</u> (8 th Ed.)
FRCP=	Federal Rules of Civil Procedure
RPC=	Missouri Rules of Professional Conduct
FRE=	Federal Rules of Evidence
LR=	Local Rules of the U.S. District Court for the Eastern District of Missouri

Note on the readings:

Unlike a doctrinal class, we will not spend a lot of time in class discussing the readings. The readings from the text Pretrial, by Thomas Mauet, are chosen to give you information, background, and suggestions to help you complete the written assignments and prepare for and participate in the in-class exercises.

However, the rules – whether the Federal Rules of Civil Procedure, Rules of Professional Conduct, Rules of Evidence, or Local Rules – will be discussed in class. Part of your grade in this course will be based on your understanding of and compliance with the rules in the completion of written assignments and in-class exercises.

Note on written assignments:

There are eleven written assignments in this class. Unless otherwise instructed by your professor, you should submit your assignments at the times set forth in this syllabus. Many of these assignments are due by noon on the day before class. Others are due in class or at other times. Be sure to check this syllabus each week to find out when the assignment is due.

Your professor will provide you with instructions on how to submit your written assignments. Some assignments are also required to be “served” on your opposing counsel. “Service” for purposes of this course means putting a hard copy of the document in the mail folder of your opposing counsel. Again, however, you may arrange in advance to send the documents by e-mail if your opposing counsel agrees.

Additional resources:

Through the course’s My Law page, you will find a number of actual court documents under the “Library Database.” You may wish to review these documents to familiarize yourself with the types of documents used in actual cases.

A useful resource for learning more about the rules and the litigation process is Wright & Miller’s Federal Practice and Procedure. There is a link to this on the course webpage and a hard copy version on reserve in the library.

Week 1 / January 12-14, 2015

- Readings:** Introduction to Pretrial Practice
RPC 4-1.1, 4-1.2, 4-1.3, 4-1.4, 4-1.5, 4-1.6

Maue 3-43 (up to § 2.5)
- Written Assignment:** None
- Class Preparation:** Please read the assigned rules and pages in the Maue text and be prepared to do a mock interview with a new client.

Week 2 / January 20-21, 2015 – Monday 1/19 (MLK Holiday – This week’s Monday class will be rescheduled based on the professor’s and students’ schedule to accommodate the Martin Luther King Holiday.)

- Readings:** Case Evaluation and Strategy
Maue 57-116

Introduction to Pleading
Maue 119-148 (up to § 5.4)

A Preview of Discovery
FRCP 26 (a) and (b)
- Written Assignment:** None
- Class Preparation:** You will be conducting an initial client interview in class. In order to elicit the relevant information and counsel the client effectively, you must know something about the law in the area (i.e., you will need to do some legal research to familiarize yourself with the substantive law). The legal materials attached to your instruction memo provide a starting point.
- Role Assignments:** Student 1 plays Lynn Burelli. Student 7 plays Terry Martin.
Client and Witness scripts should be kept strictly confidential and should be returned at the end of class.

Week 3 / January 26-28, 2015

Readings:

Mauet 43-56

Investigation

RPC 4-4.2, 4-4.3

Pleading Ethics

FRCP 11

RPC 4-3.1

Introduction to Federal Pleading

FRCP 3, 4, 7(a), 8(a), 9, 10, 38

Written Assignment:

Petition Drafting Exercise

Due by noon the day before class in Room 541B

The instructions for this assignment are included in the packet you received in class.

Class Preparation:

Please be prepared to do the following: (1) Conduct a witness interview: You will have the opportunity in class to interview a third party witness with additional information about the events described by your client last week.

(2) Evaluate your client's case with your firm: During class, there will be separate "firm meetings" in which counsel will discuss and decide whether or not to represent the client you interviewed last week (i.e., Lynn Burelli or Terry Martin). Be prepared to discuss the client's potential legal claims, potential defenses to those claims, what remedies are available, the likelihood of prevailing, the potential for resolving the case short of trial, whether the case should be filed in state or federal court, whether all administrative and jurisdictional prerequisites can be met, and the possible financial arrangements with the client. Consider what additional information you would like to have in order to make a decision. *Again, effective case evaluation requires that you do legal research in order to understand the substantive legal rules you should be applying.*

Role Assignments:

Student 2 plays Jo Staples. Student 8 plays Lee Katzen. **Client and Witness scripts should be kept strictly confidential and should be returned at the end of class.**

Week 4 / February 2-4, 2015

Readings: Mauet 148-161 (up to § 5.6)

Drafting a Federal Complaint

Review these rules before drafting your complaint:

FRCP 3, 4, 7(a), 8(a), 9, 10, 38, Forms 1-8

LR 5-2.01 (p. 16-17), 3-2.02 (p. 18), 28-2.04 (p. 20), 3-2.07-2.10 (p. 24-30), 11-2.11 (p. 31), 5-2.12 (p. 32), 83-2.13 (p. 33), 6-2.14 (p. 34), 83-2.15 (p. 35), 7-2.16 (p. 36), 5-2.17 (p. 37-38)

Preparing to Respond to the Complaint

FRCP 8, 10, 11, 12, 13

Written Assignment:

Complaint in *Burelli* or *Martin*

Due by noon the day before class in Room 541B

Everyone is required to draft and serve an individually prepared complaint on behalf of the client you interviewed in week 2 (Lynn Burelli or Terry Martin). Assume that your complaint will be filed in Federal District Court, Eastern District of Missouri. Your complaint is due by noon the day before class. You should prepare 2 copies – turn one in to Room 541B and serve the other copy on your “opposing counsel.” Opposing counsel are paired as follows: 1↔7, 2↔8, 3↔9, 4↔10, 5↔11, 6↔12.

In order to properly draft your complaint you will need to do legal research to identify potential causes of action and to know the elements of each.

In drafting your complaint, you may refer to the materials from last week’s exercise, your book, or the sample pretrial documents on the intranet and on reserve in the library. You may NOT use sample pleadings or documents you obtain from any outside source, such as law office work.

Don’t merely copy samples found either on the intranet or in Form books. The sample complaints may be anachronistic and poorly written, and even good examples may not be well suited to the particular case. Blindly following examples you have found from other cases or Form books can result in serious substantive or strategic errors, so do not copy the language you find in the samples unless you understand why it is there. A simple, straightforward complaint that you draft using plain English will be best.

In terms of format, check your local rules! Be sure to fill out any required forms and attach them to your complaint when you turn it in. [Hint: Use the “Civil Case Checklist” as a guide. The Civil Case Checklist is available on the U.S. District Court, Eastern District of Missouri’s website at www.moed.uscourts.gov The website also has all required court forms.]

In addition to the complaint itself, you should turn in to your professor only a short memo explaining any strategy choices you made in drafting the complaint. For example, you should explain why you chose to include or not include certain parties or causes of action.

Class Preparation:

Your newest client has just been sued by a former employee based on claims arising from his/her termination. Be prepared to interview your client about the facts underlying the complaint and to counsel him or her about what may happen next and what courses of action are possible. *In order to counsel the client effectively, you must know something about the law governing his or her alleged actions (i.e., you will need to do some legal research to familiarize yourself with the substantive law.)* The legal materials attached to your instruction memo provide a starting point.

Role Assignments:

Student 9 plays Pat McKay. Student 3 plays Randy Taylor. **Client and witness scripts should be kept strictly confidential and should be returned at the end of class.**

Week 5 / February 9-11, 2015

Readings:

Responding to the Complaint

Review these rules before drafting your answer:

FRCP 8, 10, 12, 13, Forms 30, 40

Negotiation

RPC 4-1.2, 4-1.4, 4-3.4

LR 16-6.01 (p. 55), 16.602 (p. 57-59(b)), 16-6.05 (p. 64)

Scope of Discovery

FRCP 26, 29, 37(a)-(c)

LR 26-3.01 (p. 39), 26-3.02 (p. 41)

FRE 401, 402

Written Assignments:

Answer and memo re: pre-answer motions.

Due by noon the day before class in Room 541-B.

Everyone is required to draft and serve an individually prepared answer. Your answer should respond to the complaint you received from your “opposing counsel” last week. The answer should consist of separately numbered paragraphs, which respond to each of the numbered paragraphs in the complaint. Your answer is due by noon the day before class. Prepare 2 copies – turn one in to Room 541-B and serve the other on your “opposing counsel.”

In addition to the answer, you should turn in to your professor only a brief memo explaining any strategic choices you made, such as whether or not to include in your answer affirmative defenses or counterclaims. Your memo should also outline any pre-answer motions you *would have brought* in response to the complaint served on you by your opposing counsel if this were a real case and the reasons supporting such motions.

In terms of format, check your local rules! Be sure to fill out any required forms and attach them to your answer when you turn it in. Required forms can be found on the Eastern District of Missouri’s web site: www.moed.uscourts.gov

Class Preparation:

Familiarize yourself with the negotiation general facts and confidential facts, and be prepared to role-play negotiations in class.

Week 6 / February 16-18, 2015

Readings:

Mauet 187-271 (up to § 6.9)

Pretrial Planning Conference

FRCP 16(a)

LR 16-5.01-5.04 (p. 50-54)

EDMF “Order Setting Rule 16 Conference” and “Case Management Order Track 2 Standard”

Specific Discovery Devices

Depositions:

FRCP 30(a) and (b)

Interrogatories:

FRCP 33

LR 33-3.03 (pg. 41)

Requests for Production:

FRCP 34

Other:

FRCP 35, 36, 45

Written Assignments:

Litigation Plan

Due in class

Draft a litigation plan for your client in Burelli v. Sweet Sounds. Bring 4 copies to class – one to turn in and one each for yourself and your teammates.

The litigation plan may take any form which makes sense to you, but it should at a minimum address the following questions: What are the elements of proof for each cause of action and each defense asserted in the pleadings? What facts are needed to establish each element? What evidence exists as to each element? What additional information must be discovered? What are likely sources of additional evidence?

Include every witness you would like to talk to and every document or category of documents you would like to see. Because this is a simulation you will not be able to talk to every witness you would like to or to see every imaginable document – nevertheless, you should try to be as complete as possible in developing your litigation plan, as if it were a real case. Your litigation plan will provide the basis for drafting your written discovery requests next week.

Class Preparation:

During class you will have the opportunity to conduct some informal discovery through witness interviews. You will also exchange and critique your litigation plans with your teammates and together develop a detailed discovery plan.

In doing so, consider what objections and privileges your client or the opposing party can or might assert, what evidentiary foundations you will need in order to use certain evidence at trial, and which discovery device is best suited to obtain each type of information you seek.

Once your group has created a comprehensive discovery plan, you will divide up responsibility within your team for drafting deposition notices, interrogatories, requests for production, requests for exams, and requests for admissions. *Each person should be assigned at least one deposition notice and a few interrogatories and/or document requests to draft.* You will find “skeletons” for all the various discovery devices under “Course Materials” on your section’s My Law page.

Role Assignments:

Student 4 plays Lee Katzen; student 10 plays Chris Gardner.
Client and witness scripts should be kept strictly confidential and should be returned at the end of class.

Week 7 / February 23-25, 2015

Readings: Mautet 271-284 (up to f); 311-321 (up to d)

Discovery Practice

Review:

FRCP 26, 29, 37(a)-(c), 30 (a) and (b), 31, 32, 33, 34, 35, 36

FRE 401, 402

LR 26-3.01-3.03 (p. 39-41)

Written Assignment: Written Discovery Requests

Due by noon the day before class in Room 541-B

Each team will create one complete set of any and all written discovery requests (e.g., interrogatories, requests for production, requests for exams, requests for admissions, deposition notices) warranted by the facts of the Burelli case. Consider carefully which discovery device is best suited to obtaining each piece of information you need. Individual requests should be written concisely in plain English. Avoid using form interrogatories. You will find “skeletons” for all the various discovery devices under “Course Materials” on your section’s My Law page. Written discovery should comply with the federal rules and any relevant local rules, including any numerical limits on discovery. For each discovery request, indicate who drafted it by putting the drafter’s initials next to it.

As you may know, attorneys typically begin these discovery documents with some fairly standard boilerplate instructions and/or definitions. In order to allow you to focus on drafting the specific requests, rather than spending time looking for and typing in a set of boilerplate instructions, a set of “Instructions for Interrogatories” and “Instructions for Document Requests” are available for your use. You may download these “Instructions” from the MyLaw page for this class and incorporate them into your written discovery. Although some samples you see elsewhere may incorporate more detailed instructions or definitions, those posted are sufficient for the purpose of this exercise. After making any necessary changes so that these standard instructions fit this particular case, you do not need to add any new definitions or instructions.

Before class, each team should combine the individual efforts of the teammates into a single set of written discovery. Written discovery is due by noon the day before class. Turn in one copy to

Room 541-B and serve copies on each of your (6) opposing teammates.

Class Preparation:

Before class you will receive discovery requests from the opposing party. During class, you will have the opportunity to meet with your client to review the requested discovery and to decide how you will respond. You should prepare for class by familiarizing yourself with the rules of governing discovery responses, including any applicable objections or privileges.

Role Assignments:

Student 3 plays Lynn Burelli. Student 9 plays Pat McKay. **Client and witness scripts should be kept strictly confidential and returned at the end of class.**

Week 8 / March 2-4, 2015

Readings:

Mauet 284-311 (up to § 6.10); 321-323 (up to § 6.13)

Depositions

Review FRCP 30, 31, 32

Written Assignment:

Responses to Written Discovery

Due by noon the day before class in Room 541-B

After meeting with your client regarding discovery in the previous class, each team will draft responses to the written discovery served on it. You may draft all responses as a group effort, or divide responsibility and draft responses individually after you have discussed as a team how to respond to each request. If you choose the latter course, indicate after each response who prepared it by putting your initials next to it.

After all responses have been drafted, each team should combine its responses into a single set of documents and attach copies of all responsive documents that you are willing to turn over to the other side (i.e., all documents that are not privileged or objectionable). Make 4 copies of the final product, including the attached documents. If you need assistance copying the documents, please see Dorothy Campbell in Room 541-B. Responses to written discovery are due by noon the day before class. Turn in one copy to Room 541-B and serve the remaining copies on your (3) opposing teammates.

Outline of Staples Depo (Sweet Sounds Lawyers only)

Due in class

Think through your goals for the deposition and the areas of questioning you want to focus on, and prepare an outline of your questions in advance. You should do this individually; however, before the deposition you will meet with your teammates and divide responsibility for the actual questioning. *Each person should use at least one document during his or her questioning of the witness.* You will be unable to conduct an effective deposition if you have not thought through your goals and questions in advance.

Class Preparation: Sweet Sounds' attorneys should be prepared to take Jo Staples deposition; Burelli's attorneys to attend and object, if appropriate. *The depositions will be videotaped.*

Role Assignments: Student 1 plays Jo Staples. **Client and Witness scripts should be kept strictly confidential and should be returned at the end of class.**

*******MARCH 9-13, 2015 SPRING BREAK*******

Week 9 / March 16-18, 2015

Readings: Mauet 323-334

Discovery Disputes
FRCP 26 (c), 37
LR 37-3.04 (p. 42)
RPC 4-3.2, 4-3.3, 4-3.4

Written Assignment: Outline of Gardner Depo (Burelli lawyers only)
Due in class

You should think through your goals for the deposition and the areas of questioning you want to focus on, and prepare an outline of your questions in advance. You should do this individually; however, before the deposition you will meet with your teammates and divide responsibility for the actual questioning. *Each person should use at least one document during his or her questioning of the witness.* You will be unable to conduct an effective deposition if you have not thought through your goals and questions in advance.

Class Preparation:

(1) Negotiation re: Discovery: Review the written discovery propounded by both parties so far in the case and the responses produced. Determine what issues remain in dispute and be prepared to discuss them with your co-counsel and opposing counsel in class.

(2) Deposition of Chris Gardner: Burelli's attorneys should be prepared to take Chris Gardner's deposition; Sweet Sounds attorneys to defend. *The depositions will be videotaped*

(3) Client Deposition Preparation: You will be meeting with your client to prepare him or her to be deposed the following week. You should be ready to explain fully the deposition process, to review likely areas of questioning, and to address any of your client's concerns about the process.

Role Assignments:

Student 7 plays Chris Gardner, Student 5 plays Lynn Burelli, and Student 11 plays Pat McKay. **Client and Witness scripts should be kept strictly confidential. Students playing Burelli and McKay should hang on to scripts to prepare for next week's deposition.**

Week 10 / March 23-25, 2015

Readings:

Mauet 335-346 (up to 1); 356-371; 360-382

Motions

FRCP 7(b)

LR 7-4.01 (p. 44-45), 78-4.02 (p. 46)

FRCP 56

FRE 403

Written Assignment:

None

Class Preparation:

Burelli Deposition: Attorneys for Sweet Sounds should be prepared to take the deposition of Lynn Burelli as a team. Prior to class, you should meet as a team, discuss what areas should be covered in the deposition, and divide responsibility for the questioning into three roughly equal parts. Then each individual attorney should develop a detailed outline of his/her part of the deposition questioning, including the use of at least three documents. You are not required to turn in these deposition outlines; however, you will be unable to conduct an effective deposition without one.

Attorneys for Lynn Burelli should be prepared to defend their client's deposition.

The deposition will be videotaped.

Role Assignments: Student 5 plays Lynn Burelli. **Client and Witness scripts should be kept strictly confidential and should be returned at the end of class.**

Week 11 / March 30-April 1, 2015

Readings: Mauet 189-191 (experts-review); 209-210 (expert disclosures); 213-216; 215-219 (practice approach to expert disclosures)

Experts
FRCP 26(a)(2)
FRE 702-705

Written Assignment: Motions Memoranda
Due in class

This is an individual assignment. Turn in one copy to your instructor in class and serve the other on your "opposing counsel." Counsel are paired as follows:

1 ↔ 7, 2 ↔ 8, 3 ↔ 9,
4 ↔ 10, 5 ↔ 11, 6 ↔ 12

You should prepare two separate memoranda in support of two different motions that you would bring on behalf of your clients in either the *Burelli* or the *Martin* case. Each memorandum should identify: the nature of the motion, its factual basis, supporting legal authority, your arguments in support of a motion, and the relief you are requesting. You may bring any motion we have discussed thus far that you think is warranted by the facts, including discovery motions, summary judgment motions, motions in limine, or preanswer motions. You should also identify in a brief cover memo to your professor the time at which you would have brought each motion if this were a real case (e.g., at the close of discovery, prior to your client's deposition, etc.) and any supporting documents that you would submit with the memorandum (e.g., affidavits saying..., discovery documents such as...)

Class Preparation:

Attorneys for Burelli should be prepared to take the deposition of Pat McKay. Prior to class, you should meet as a team, discuss what areas should be covered in the deposition, and divide responsibility for the questioning into three roughly equal parts. Then each individual attorney should develop a detailed outline of his/her part of the deposition questioning, including the use of at least three documents. You are not required to turn in these deposition outlines; however, you will be unable to conduct an effective deposition without one.

Attorneys for Sweet Sounds should be prepared to defend their client's deposition.

The deposition will be videotaped.

Role Assignments:

Student 11 plays Pat McKay. **Client and Witness scripts should be kept strictly confidential and should be returned at the end of class.**

Week 12 / April 6-8, 2015

Readings:

Mauet 383-410 (up to 5)

Negotiation and Settlement Process

RPC 4-1.2, 4-1.4, 4-3.4

FRE 408

Final Pretrial Conference

FRCP 16

Written Assignment:

Deposition self evaluation

Due in class

Review the videotape of the depositions you took, and write a brief self-evaluation of your performance addressing the following:

(1) Identify your goals for the deposition and discuss how effective you were in achieving those goals. What factors hindered your ability to achieve your goals? What could you have done differently to be more effective?

(2) Identify three questions you asked that could have been improved or required a follow-up question you failed to ask. For each question, write out the question and answer in full, then describe the problem with the question (e.g., seeks privileged information; compound; confusing), and explain how the question should have been rephrased or followed up.

(3) Identify with a brief description of the strongest and weakest moments of your part of your depositions. Explain why the strong part went well and what you would do differently for the weak part.

Class Preparation:

Review the motions you submitted and the motions served on you by your opposing counsel. Be prepared to argue your client's position on any of these motions to "the court" during class.

You will also be discussing the possibility of settling the Burelli case with your firm and your client during class. You should begin to evaluate the settlement value of your case before class and prepare to counsel your client about the possibility of settlement and obtain final authority regarding settlement from your client.

Role Assignment:

Student 6 plays Lynn Burelli and student 12 plays Pat McKay. **Client and Witness scripts should be kept strictly confidential and should be returned at the end of class.**

Week 13 / April 13-15, 2015

Settlement Negotiation should take place prior to Week 13 Class.

You should arrange a one-hour block of time to negotiate settlement in Burelli v. Sweet Sounds with your opposing counsel and with your instructor present *prior to the last class*. The Settlement Evaluation/Negotiation strategy memo is due at the beginning of your negotiation session.

Readings: Mauet 410-427

Settlement Documents
FRCP 41

Written Assignment: Settlement Evaluation/Negotiation Strategy
Due at the beginning of your negotiation session

Write a brief memo that (1) evaluates your client's case for settlement purposes and (2) outlines your strategy for negotiating a settlement. Consider the following.

Settlement evaluation - - What are the possible outcomes if the case fails to settle now? What is the likelihood each outcome will occur? How much is each outcome worth (in both monetary and non monetary terms) to your client?

Negotiation Strategy - - What are your client's main interests? What do you believe are the opposing party's main interests? Are there solutions that would be mutually advantageous to both sides in light of the interests listed above? What are the strengths and weaknesses of your client's case as you go into the negotiation? the opposing party's case? Which of these strengths or weaknesses does the opposing party know? What will you reveal? What concessions is your client willing to make? What is your client's "bottom line"? How do you want the negotiation to proceed (e.g., Who makes the first offer? What should it be?) What is your goal?

This is an individual assignment and should be turned in at the beginning of your settlement negotiation.

**Additional Written
Assignment:**

Settlement Agreement

Due by 5 p.m. on Friday, April 17, 2015, or as otherwise indicated by your instructor.

If you settled your case, draft a settlement agreement reflecting the terms of the settlement. If you did not settle your case, draft a settlement agreement that you and your client would have been willing to sign. This is an individual assignment.