

Syllabus and Schedule (Final Revised)
January 12—April 16, 2022

PROFESSOR: Hon. Mary Mertens James, Senior Circuit Judge, Adjunct Professor of Law.

TEXT: Morrill and Tornquist, Trial Diplomacy
Oregon Rules of Evidence
Oregon Rules of Civil Procedure

Trial Practice Coordinator: Marisa Walker telephone (503) 370-6405
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Days and Hours of Classes: Classes are from 5:30 p.m. to 8:30 p.m., Tuesdays January 11 – April 12, 2022. The final exam will be on April 16 (Saturday).

The first two weeks will be conducted by Remote Means, via Zoom scheduled in WISE. Thereafter, we will comply with WUCL Covid-19 protocols, governing in-person class attendance. **The last class is on Tuesday, April 12. There is a final trial, scheduled for Saturday, April 16, but no exam.**

Willamette Law is committed to making sure that everyone is able to participate fully in our courses. If you have particular needs for access to this course that you need in order to do that, please contact Dean Mac Alpine or Sue Minder, Director of Accessible Education Services, at sminder@willamette.edu or 503-370-6737. The Law School and Judge James are committed to professionalism and respect for every registered student's equal access to the curriculum and to classroom engagement.

Communication and Telephone Numbers:

- If you are stumped about something, do not hesitate to contact Professor James!! Please e-mail your question through WISE. (She might be able to save you hours of work with an answer to a question.)
- WISE: Use WISE for communications with Judge James that are class-related. She will cc: responses to the class in WISE. Assignment outlines should be posted before class commences. If we are in person, you are welcome to provide paper outlines, at the commencement of class.

REQUIRED Texts: Trial Diplomacy, L. Tornquist; Access to Oregon Evidence Code; Oregon Uniform Jury Instructions; Casebook for Final Trial (will be supplied)

ON TEACHING TRIAL ADVOCACY

At the outset, I will acknowledge that it is impossible for one person to "teach" another how to become a trial lawyer. Advocacy is an art, the performance of which is dependent upon predisposition, preparation, passion and practice. One becomes a trial lawyer through a mixture of organization, preparation, perseverance, authenticity, observation, doing it, accepting feedback from judges and great lawyers, adjusting and improving then constantly repeating the latter four, observing – doing – accepting feedback--improving.

I also acknowledge that there is not one "right way" to be a trial lawyer. The purpose of encouraging you to try different approaches and to having guest presenters throughout the term is to expose you to different successful approaches, styles, viewpoints and methods of accomplishing your objectives.

While I cannot and do not advise taking on your first trial *ala* Vincent La Guardia Gambini (of *My Cousin Vinny* fame), I do promise to expose you to the intellectual, ethical, emotional and physical demands of being a trial lawyer. In a simulated courtroom setting, you can, and will, confront situations and solve problems which all trial lawyers encounter and must learn to solve. Your skill development will be performed under the guidance of a diverse group of able judges and lawyers. I am honored to be able to preside over, critique and discuss your performances with you and the problems and strengths that attended them. I will emphasize doing it right, by organization and preparation. I will coach you, critique and discuss your performances and the problems that attend them. Other students are also expected to provide feedback in a constructive manner. This is a prepare it and "do it" course in which the lecture-preparation-exercise-critique collaboration between participants before a presiding judge method of instruction is used.

THE FACULTY

Judge James is a senior trial judge, former trial attorney and law professor with considerable jury trial experience. She brings a varied background, including both civil and criminal cases before state and federal courts on behalf of plaintiffs and defendants, and nearly two decades of presiding over civil and criminal trials. Judge Norm Hill is an experienced Circuit Court Judge and former trial attorney, and adjunct professor teaching Property, Real Estate Transactions and Juvenile Law. Other invited

judges will also participate during the term to provide additional perspective and insights.

TEACHING MATERIALS

Cases selected from Trial Diplomacy are *People v. Burks* and *Cheek v. Penn Central*. Excerpts from *Otway v. Tite Security, Inc.* may also be included. The first two cases should be read before the course begins. The case for the final trial will be distributed during the class. **Please note that the materials and the subject matter of the exemplar cases may be disturbing to work within and to reference. Both are based on historic cases. The criminal case involves prosecution of alleged rape; the civil case sounds in negligence case based on the death of a driver and passenger in a collision with a train.**

SECTION, SIZE AND DESCRIPTION

The class is small by design. Students will be paired to conduct direct, cross and serve as witnesses. This requires that each student develop a mastery of the course materials including the cases identified, above. Students will participate in teams for the Final, a Civil Trial. Grading is individual, not team grading.

COURSE OBJECTIVES AND METHOD OF INSTRUCTION

It has been established through experience that strict adherence to the syllabus will result in the maximum instructive benefit. Constant work with the exercise problems produces desirable fixed habits in phrasing questions. Judge James and Judge Hill will direct the exercises, serve as the presiding judge during the demonstrations between participants, and provide in-the-moment critiques with each participant, as well as with the group of participants. Participants are also expected to observe and note effective techniques and skills.

- Direct Testimony. One of the objectives is to form a fixed habit of asking questions of one's own witnesses, which do not lead the witness or suggest the answer desired and which are otherwise proper in form, and that provide the fact finder (jury) with useful and relevant information.
- Cross examination. Another objective is to elicit facts of witnesses under cross-examination that place the examining lawyer in complete control of the cross-examination. Cross-examination questions should be specific, and to the point, almost always call for a "yes" or "no" answer, and bring forth facts from adverse witnesses in an effective manner. With proper preparation, a participant will be able to outline and phrase questions to make specific points in the examination, despite hearing some information for the first time in direct.

- Making Objections. All observing participants are expected to raise objections to any improper questions. Participants who raise objections should stand, to gain the Court's attention, and make the objection succinctly in furtherance of developing a working knowledge of the tools provided to trial lawyers. If a question calls for a conclusion, is leading, assumes a fact not in evidence, is argumentative or objectionable for some other reason, it should be objected to and the grounds for the objections stated in clear, concise language. For this reason, a prerequisite Course is Evidence.
- Additional course objectives include Introduction to Effective Voir Dire, Opening Statements, Expert Witness Examination, Closing Argument, Jury Instructions and Motions in Limine. The Course culminates in a Final trial, before a jury if Covid protocols permit.

ATTENDANCE AND PREPARATION FOR CLASS

It should be noted that your learning experience depends upon participation of every student. Because this is a practicum course, **attendance is required. Requests for an absence to be excused must be submitted in advance, and may require a make-up, at the discretion of the professor.**

Key student responsibilities in preparation for this course:

The syllabus is distributed to give you ample opportunity to read the text and prepare for every class. Before the second class on January 18, 2022 you should spend a considerable amount of time reading Trial Diplomacy (particularly chapters 3 and 4 on direct and cross-examination). Before the course you should review Oregon rules of evidence on relevance, witnesses and hearsay. *Due to the interactive and participatory nature of the course it is essential that you come to class prepared.*

Students may be called upon at random to begin the problem--e.g., the direct examination of Louella Wilson in the case of *People v. Burks*. The examining lawyer will be opposed by another member of the class. **Each student must be prepared to take the role of any witness.** Therefore, you must become familiar with the cases. Because the course is a three credit course, there is a significant time commitment in advance of each the class to get yourself ready to participate as either witness, party or advocate. It is important to be prepared, and also to adapt to learn new approaches to each situation. At any time during the course of any presentation, another participant may be called upon to substitute for the current participant. In short, you may be called upon at any time to undertake any examination. Your role as a witness is to testify

consistent with the record and to respond to a proper examination. The lawyer may complete the examination or be “paused” and another lawyer called upon to continue the examination.

The direct and cross-examinations included within the cases are not intended as a model, nor are the materials contained within the cases intended as a model. The materials contained within the assigned cases constitute the materials a trial lawyer would have on the eve of the trial. In the case of *People v. Burks*, you may assume that the case has been appealed, reversed and remanded for new trial. This is why we provide you with prior sworn statements. Of course, all the materials contained in the files may be used to impeach the credibility of any witness, regardless whether someone has done this in the past.

SYLLABUS GUIDE
for
CIVIL TRIAL PRACTICE, Law 321
January 11, 2022—April 16, 2022

By Tuesday, January 11, 2022

Read the entire case of People v. Burks found in the textbook. Read the case of Cheek v. Penn Central found in the textbook.

By Tuesday, January 18, 2022

Read Morrill & Tornquist, Chapter 3 “Direct Examination” and prepare the direct examination of Louella Wilson, Herman Burks and Officer Johnson.

Tuesday, January 11, 2022

5:30 PM Introduction to trial advocacy and to course, case Theory and Theme and witness examination (James) Description of *People v. Burk* and *Cheek v. Penn Central* for term’s exercises (James)

6:30 PM Students will work in small groups to come up with one sentence catch phrases for Theory and Theme of the cases, for both plaintiff and defendants (Random split)

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7:00 PM Students will demonstrate one to two sentence catch phrases for Theory and Theme of the cases, for both plaintiff and defendants

7:30 PM Break

7:40 PM Lecture on Witness Preparation and Direct examination (James)

Discussion: General overview of civil pretrial preparation and trial strategy – use of trial notebook (will cover in detail March 29)

Read Morrill & Tornquist, Chapter 3 “Direct Examination” and prepare the direct examination of Louella Wilson, Herman Burks and Officer Johnson.

Tuesday, January 18, 2022 (Hill, Geyer)

5:30 PM Guest Lecture: “Persuasion through Opening Statements” (Judge Courtland Geyer)

6:40 PM Exercises in direct examination. Conduct direct examination of:

1. Louella Wilson in *People v. Burks*
2. Herman Burks in *People v. Burks*
3. Officer Johnson in *People v. Burks*

7:50 PM Break

Continued Direct Examinations

8:30 PM Adjourn

Read Morrill and Tornquist, Chapter 2 Opening Statements; start outlining Opening statements (do not use the one in the book; be creative!)

Read Morrill and Tornquist, Chapter 4, Cross Examination and Impeachment, and Chapter 7, “Exhibits. Prepare for direct and cross-examination in People v. Burks Prepare for direct of and cross examination in Cheeks v. Penn Central, of Elmer Tutt, and L.D. Gross

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Tuesday, January 25, 2022

- 5:30 PM Lecture on "The Art of Cross-Examination" Discussion and Demonstration of Impeachment and discussion of "Adverse Witnesses" (Hill/James)
- 6:30 PM Exercises in direct, and cross-examination
1. Louella Wilson in *People v. Burks*
 2. Officer Johnson in *People v. Burks*
 3. Elmer Tutt in *Cheeks v. Penn Central*
- 7:50 PM Break
- 8:00 PM Lecture: "Laying Foundations and Introducing Exhibits; use of Demonstrative Aids"

Read Morrill and Tornquist, Chapter 4, Cross Examination and Impeachment, and Chapter 7, "Exhibits.

Tuesday, February 1, 2022

- 5:30 PM Talking about Damages in a Trial: How to incorporate damages/remedies into Opening Statements
- 6:00 PM Exercises in direct, cross-examination and impeachment,
1. Officer Johnson in *People v. Burks*
 2. Herman Burks in *People v. Burks*
 3. Elmer Tutt in *Cheek v Penn Central*
- 7:00 PM Lecture and Demonstration of Objections and Questions in Aid of Objection –Use, Strategy and Timing (Handout)
- 7:30 PM Exercises in adverse witnesses (select two): (James/Hill)
1. Elmer Tutt in *Cheek v. Penn Central (by the Plaintiff)*
 2. R.C. Brown in *People v. Burks (by the State)*
 3. Detective Donald Masnjak in *People v. Burks (by the defense)*

Read Morrill and Tornquist, Chapter 8 Trial Objections and Preserving the Record;

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Read Morrill and Tornquist, Chapter 8 Trial Objections and Preserving the Record; Review and revise, as needed, outlines for Direct and cross examination and impeachment, and adverse witnesses to include Exhibits. Prepare to introduce letters, photos, etc. in People v Burks and in Cheek v Penn Central

Tuesday, February 8, 2022 (James/Hill)

- 5:30 PM Exercises in Introduction of letters, photos, etc; and Questions in Aid of Objection on Exhibits, Reports, Demonstrative Aids; Cross Examination, including impeachment with documents or prior testimony (James/Hill)
1. Examine Louella Wilson in *People v. Burks*, regarding location in question, using prepared diagrams or blackboard.
 2. Examine Louella Wilson regarding map of the areas each time she had contact with Herman Burks; where he was apprehended
 3. Introduce photos in *Cheek v Penn Central*, using witness D. Singleton.
 4. Examine/Cross examine Officer Johnson including reference to police reports and other exhibits; or using demonstrative aid of his contacts with Wilson and Burks.

7:30 PM Break

7:40 PM Discussion of Jury Instructions – How to incorporate Instructions into theory, theme, opening statements and voir dire (standards of proof, consideration of evidence, focusing on preliminary and precautionary instructions) (James to demonstrate)

8:15 PM Receive assignments in opening statements

Each student will be required to prepare an opening statement for one plaintiff and one defendant. Pick one side in the criminal case (prosecution or defendant) and the other side in the civil case (plaintiff or defendant Penn Central). If you want the practice, prepare four opening statements; one for the plaintiff and one for defendant in each case.

In two of your opening statements, prepare and include exhibits and demonstrative aids; Receive and review How-To Tips on Opening Statements

Storytelling/no preparation required

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Tuesday, February 15, 2022

5:30 PM Exercises in opening statements. Incorporate a demonstrative aid or exhibit in your opening. Deliver opening statements:

1. *People v. Burks*
2. *Cheek v Penn Central*

Small groups will switch judges at ½ way point

Tuesday, February 22, 2022

5:30 PM Exercises in opening statements, continued.

Presentation of revised Opening Statements from previous week.

7:15 PM Break

7:25 PM Lecture on “Direct and Cross-Examination of Expert Witnesses” (Hill)

Read Morrill and Tornquist, Chapter 6, Direct and Cross Examination of Expert Witnesses; Prepare Direct Examination of Expert Wm. H. Lockart, using exhibits 122 and 128, as supplemented by Judge James; Prepare direct/cross of D. Singleton as an Expert in Accident reconstruction

Tuesday, March 1, 2022

5:30 PM Exercise in examination of expert and skilled witnesses, to focus on opinion, basis for opinion and qualification:

1. Detective Donald Masnjak in *People v. Burks*
2. Wm H. Lockart in *Cheek v Penn Central*
3. L. D. Gross in *Cheek v. Penn Central*

7:00 PM Break

7:10 PM Lecture and discussion on Jury Selection -- Planning your voir dire: asking the right questions, practical considerations, educating your jurors,

deselection. Using the seating chart in a trial. Watch Jury Video and discuss use in voir dire.

Demonstrate use of Jury Selection Forms – each student will fill out a Jury Questionnaire, assuming either your own life or that of a fictional but not completely absurd person, as you wish. (you may select an interesting family member or friend—please include your name as well as your alter ego if you are being someone else)). Submit forms to entire class, via email; print out everyone else's form so you can annotate them for jury selection. Please **finish this assignment by Friday, March 4** so you can each prepare for jury selection before Tuesday March 8. Plan to voir dire jurors for the same side that you plaintiff or defend.

Read Morrill and Tornquist, Chapter 1, Voir Dire Examinations; Prepare outlines for Jury Selection Exercises in each case (Voir Dire)

Tuesday, March 8, 2022 (James/Hill)

Exercises in Jury Selection (Voir Dire); discussion of what to do with what you learn.

Review materials for Professional witness and prepare questions for direct/cross examination

Tuesday, March 15, 2022

5:30 PM Expert and professional witnesses – Invited guest presenter Trooper Justin Zemlicka on working with and examining a Professional Witness.

7:30 PM Break

7:40 PM Lecture: "Closing Arguments, including Damages and Use of Jury Instructions"

Revisit Jury Instructions and Demonstrate how to use in closing

Receive assignments in closing arguments. Each student will be required to prepare for one plaintiff and one defendant. Pick one side in the criminal case (e.g., defendant) and the other side in the civil case (e.g., plaintiff).and closing arguments for Tuesday exercises.

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Read Morrill and Tornquist, Chapter 9, "Closing Arguments" and review Chapter 10, "Jury Instructions". Prepare closing argument

Tuesday, March 22

SPRING BREAK!

Tuesday, March 29, 2022 (James/Hill)

5:30 PM Closing Arguments. Each student will be required to prepare for one plaintiff and one defendant. Pick one side in the criminal case *(e.g., State or Herman Burks) and one side in the civil case (e.g. Cheek's estate or Penn Central) and prepare your argument, incorporating at least one instruction of law.

8:00 PM Discussion of *Addison v Peyton* civil trial, and options for trial regarding witnesses, exhibits.

Evening Assignment: *Read Morrill and Tornquist, Chapter 5, "Preparation of Witness" and read final case Addison v Peyton and begin preparation for final trial.*

Trial assignments for Final Trials and Trial Rules (James)

Students will be placed in trial teams. **Each team will be required to get two witness volunteers for their case, who agree to prepare for and attend the final trial.**

Trial Preparation in individual teams. This will include Case specific witness preparation, voir dire, openings, direct, cross, likely objections, and closing arguments including instructions of law and verdict form.

Tuesday, April 5, 2022 (James/Hill)

5:20 PM Lecture on Motions in Limine; Preserving the Record for Appeal during the trial (review of Objections/Motions for Directed Verdict/Exceptions to jury instructions); Drafting Stipulations in civil and criminal cases.

6:00 PM Review of Trial Checklist (Openings/closing; witness and exhibit lists, preparing argument for pretrial rulings and preparation of orders, jury selection, instructions of law); Preparation of witnesses, incorporating

theory

7:00 PM Individual Plaintiff/Defendant Team meetings with Judges Hill and Judge James

ASSIGNMENT: By Noon, Tuesday April 12.

Counsel for the plaintiff and counsel for the defendant must confer on pre-trial motions, stipulations, and jury instructions. *Preparation of, exchange and confer with opposing counsel, and presentation of motions in limine and proposed jury instructions to Judge James mjames@willamette.edu (limit of four motions and six instructions per side)(via e-mail) For Motions in Limine, note which motions you stipulate to and which you want to argue pretrial, if any. For jury instructions, indicate which instructions you stipulate to, and which you object to, if any.*

Motions in limine will be heard on April 12, 2022. The team who prevails will be responsible for preparing the Order and presenting the results to the Judge at the commencement of the trial.

Tuesday April 12, 2022

5:30 PM Lecture: Mechanics of the trial; Etiquette in the Courthouse and Courtroom;

6:00 PM Students will argue in teams their Motions in Limine (Judge James) and will submit proposed jury instructions in editable format

Oral Argument Schedule:

6:00 PM
6:20 PM
6:45 PM
7:00 PM

The remainder of the evening will be used by the teams for trial prep.

NOTE: A full set of trial instructions has been posted to WISE and discussed in class. As a Reminder, in advance of trial, Participants must conduct witness preparation.

Final Trial Schedule will be determined
Potential dates include: Thursday April 15, 2022 or Saturday April 17, 2022.

FINAL TRIAL- Addison v. Peyton (or alternative case)

Trial may be to a jury. A one-two page list of proposed voir dire questions must be submitted.

Each side is required to call two witnesses. Each attorney for a side shall conduct the direct of one witness for that side, and the cross of one witness for the opposing side. One attorney shall make the opening statement and the other attorney shall make the closing argument for each side.

The parties are prohibited from stipulating to liability. The trial will be conducted on both the issues of liability and damages. The parties are prohibited from settling the case pre-trial.

Critiques and discussion with judge will follow the trial.

There will be no class April 19, 2022, provided we are able to conduct every class without the need for any make-up dates. Judge James hopes to spring for beer or soft drinks and appetizers when we complete the need to physically distance.

NO FINAL EXAM

BE SAFE and THANK YOU!