

# CIVIL PROCEDURE

## CASES, PROBLEMS AND EXERCISES

Second Edition

John T. Cross  
Leslie W. Abramson  
Ellen E. Deason

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# **CIVIL PROCEDURE**

## **CASES, PROBLEMS AND EXERCISES**

**Second Edition**

By

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## Preface

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Civil Procedure can be one of the most difficult courses in law school, both for the student and for the professor. And yet, it also can prove to be among the most rewarding. This book is designed to help both the student and the professor overcome the challenges and reap the rewards. We have tapped into our many years of combined experience teaching Civil Procedure to produce a book that we hope is highly “teachable,” while also providing a solid foundation in the subject matter.

What makes Civil Procedure difficult? The difficulty is really not the subject matter. Although Procedure is not easy, the rules and doctrines are by and large no more difficult than in most of the other courses in law school. Instead, the real problem in learning—and teaching—Procedure is one of perspective. Most students dealing with the subject for the first time have one of two vastly different preconceptions of the course. Some students think that Procedure will be their one practical or “hands on” course. Those in this camp are surprised to learn that Procedure, no less than their other courses, is laden with difficult policy concerns. While they readily adapt to making policy-based arguments in their other courses, such arguments may seem somehow out of place in a rules-dominated course like Procedure.

The second group of students has quite a different preconception. To those in this camp, Civil Procedure’s apparent complexity is intimidating. Overwhelmed by the arcane nature of the subject, students in this group tend to want to approach the subject as a Herculean task of remembering hundreds of individual rules.

Both of these views represent a problem of perspective. It is an inescapable fact that Procedure may seem like a foreign language to most students. Everyone has a rough idea of what a tort, contract, or property interest is. More importantly, most students have their own basic notions as to how the law ought to treat those matters. Although those ideas may not be correct, it is much easier to learn a legal rule when you have a preconceived notion of what that rule ought to be. Students rarely have such preconceived notions for rules of Civil Procedure. Indeed, students often think that the rules of Procedure are mainly arbitrary choices about time limits, wording, and motions. Nothing could be further from the truth. Although it may be difficult for the newcomer to spot, Civil Procedure is a system in which choices as to individual rules are generally made with the overall litigation structure in mind.

This book provides students a more accurate perspective on Civil Procedure. For those intimidated by the subject, it makes an effort to start with the basics, and only then to proceed to the more difficult issues. On the other hand, the book pays considerable attention to the underlying policy concerns, both to deal with students who think of

Procedure as merely practical, and to foster a greater appreciation of the subject in all students. Moreover, the book presents Procedure as a unified whole, something that is much greater than the sum of its seemingly unrelated parts. This approach provides a better long-term understanding of the subject. After all, although the actual *rules* of Procedure may change with some regularity, the basic system has remained remarkably stable. Studying Procedure as a system will help the student throughout a career that may span forty or more years.

This book differs from other Civil Procedure casebooks in five main ways. The first, and most significant, is the extensive use of problems and exercises. Most sections include both an Introductory Problem, which encourages students to think about the issues, and review problems at the end of the section. These problems serve two primary purposes. First, they help the students become comfortable in *applying* the rules they have learned. Such application aids immensely in overcoming any fear of Procedure and gaining a deeper understanding of the underlying rule. Second, of all the first-year courses, Civil Procedure is the most “statutory” in nature. Given that many doctrines are governed by statutes and especially the Federal Rules, problems give the students the incentive to look closely at the language of the positive law itself, rather than simply relying on how that (sometimes outdated) language is paraphrased in a judicial opinion. The exercises go one step further, typically asking the students to use their recently acquired skills to research local law, which may differ from the Federal Rule being discussed.

The second main feature of this book is the extensive notes. Although some of the notes help explain the preceding case, most provide additional information that provides a fuller understanding of the doctrine in question. Although this book cannot completely replace a good secondary source, the extensive notes should greatly reduce the frequency with which students will need to refer to outside sources to understand what is being discussed.

Third, the book whenever possible uses newer cases. Most of the cases in the book were decided during the last decade. In some cases, we replaced an old Supreme Court case that established a rule with a newer lower court decision that applies that rule to a new situation. In our view, using these newer cases affords two advantages. First, the newer decisions often do an excellent job explaining the earlier cases, providing the students a good exposition of the rules and policies. Second, and more subtly, using newer cases reinforces in the reader’s mind that Civil Procedure remains a vibrant, changing field of the law. The old Supreme Court “chestnuts” that populate many of the other Procedure casebooks rarely resolve the policy clash for all time. Instead, courts must continue to deal with the policy concerns even today.

Fourth, we present dispute resolution methods like mediation, not as a recent curiosity at the book’s end, but as part of the overall procedural context. Despite media depictions that all cases go to trial, settlement and dispute resolution are essential elements for keeping the American litigation system moving.

Finally, you will find that although this book by and large follows the traditional chronological order of a Civil Procedure book, we have diverged from that order in certain places. Three of these are especially worth noting. First, rather than overwhelming the students with a discussion of jurisdiction, we start (in Chapter 2) with an introduction to the basic rules of joinder (multiple plaintiffs and defendants, counter and cross-claims, and impleader). In our experience, joinder is one of the few topics in Procedure that requires no knowledge of any other topic. Moreover, knowing what parties and claims can be in a case helps the students immensely when they deal later with questions of jurisdiction and venue. Second, we divided the discussion of two issues unique to the federal courts—federal question jurisdiction and *Erie*—into a relatively straightforward basic discussion (Chapters 3 and 5.D, respectively), and a more in-depth discussion (Chapter 13). This treatment affords the professor considerable flexibility in how to teach that material. Third, we lump all of the various ways to resolve a case without a jury—from dismissals and defaults to the judgment as a matter of law—in a single chapter. Although these methods of resolution occur at different times, studying them as a group helps students immensely in learning the nuances of, and proper roles for, each. This in turn reinforces an idea that we are trying to stress: namely, that Civil Procedure is a unified system.

These differences make for what we feel is a highly teachable book, as well as an excellent desk reference for the students. Several changes were made in this second edition in response to student reaction. Of course, we would also welcome any input that you might offer as to how the book could be improved. Although everyone teaches Civil Procedure in his or her own unique way, we hope that this book proves useful to many of you.

Finally, we would be ungrateful if we failed to acknowledge that several student research assistants helped us in the production of this book. We are especially grateful to Katherine Vesely for her keen eyes, hard work, and encouragement. We likewise appreciate the unflagging support of Reva Campbell, Amanda Hartley, Barbara Kehoe, Karen Paulin, and Elizabeth Worthing.

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