

# PRETRIAL LITIGATION

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Law, Policy & Practice  
Fourth Edition

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R. Lawrence Dessem

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# **PRETRIAL LITIGATION**

## **LAW, POLICY AND PRACTICE**

**Fourth Edition**

By

**R. Lawrence Dessem**

*Dean and Professor of Law  
University of Missouri-Columbia*

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The first edition was dedicated

**To Beth**

The book's second edition was dedicated

**To My Parents**

The book's third edition was dedicated

**To Judge William K. Thomas**

The book's fourth edition is dedicated

**To My Children:**

**Matthew**

**Lindsay**

**Emily**

\*

## Preface

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Despite popular misconceptions perpetuated by television and the movies, practicing attorneys spend very little of their time in the courtroom. Nevertheless, to the extent that law schools have attempted to teach lawyering skills, they traditionally have focused on courtroom skills involved in trial and appellate advocacy. Because most legal textbooks contain reported judicial opinions, law students have further reason to believe, incorrectly, that most cases end in trial.

One of my reasons for writing this book originally was to correct such misperceptions. In the sixteen years since the publication of the book's first edition, great attention has been paid to the civil pretrial process. Congress, the judiciary, the bar, and legal scholars have focused on the pretrial process and offered various suggestions for reforming that process. These developments, especially the 1993 and 2000 amendments to the Federal Rules of Civil Procedure, were incorporated in the second and third editions of the book. Major amendments to the Federal Rules that became effective on December 1, 2006, have changed pretrial practice once again—particularly with respect to increasingly important and pervasive issues of electronic discovery. These new Rules, the increasing impact of technology upon pretrial litigation, and other recent legal and practice developments necessitated this fourth edition.

Rather than focus on the trial of civil actions, this text systematically considers the civil pretrial process. The text explores pretrial activities such as interviewing clients and witnesses, drafting pleadings, drafting and responding to discovery requests, preparing and responding to motions, and negotiating settlements. Of necessity, the text considers both the formal and informal lawyering that occurs prior to trial. So that students can better understand the pretrial process and the interrelationships among the various aspects of that process, the book includes many exercises that place students in simulated settings similar to those that they will encounter as practicing lawyers.

A course in pretrial litigation provides excellent opportunities for employing teaching techniques other than the Socratic and lecture formats traditionally used in American legal education. This text can be used in small classes, either with or without the writing and simulation exercises contained in each chapter. However, because of its mix of cases, textual material, forms, and problems, the book effectively can be used in a larger class by a professor utilizing more traditional teaching methods. The first three editions of the book were used successfully in upper-level pretrial litigation courses, in more comprehensive civil procedure offerings, and in legal writing courses.

Multiple exercises have been included to give the professor maximum flexibility in using the book. In most chapters, one or more exercises can be discussed in class while another exercise can be assigned for independent student work. Included are exercises that students can perform with one another outside of class or that students, professors, or attorneys can perform during classroom sessions.

Many of the exercises in this book are based upon a single, complex civil case. The major advantages of drawing exercises from a single case are that (1) students can concentrate on the procedural aspects of the pretrial process, rather than upon the differing fact patterns and governing law that inevitably will be raised by different cases, and (2) if the class is taught in a problem or workshop fashion, students can better see how decisions made early in the pretrial process can affect, and limit, later choices in that same case.

The civil action chosen as the basis for many of this text's problems, *Prince v. The Pittston Company*, Civil Action 3052 (S.D.W.V. filed Sept. 3, 1972), was brought by and on behalf of several hundred individuals injured or killed by the 1972 collapse of a mining dam in Logan County, West Virginia. This litigation was chronicled by plaintiffs' attorney Gerald Stern in *The Buffalo Creek Disaster*, and it has been written about by others as well. The use of supplemental materials, particularly Stern's book, should enhance students' understanding of many of the factual exercises contained in the text. However, the text is self-contained and does not presuppose the reading of any outside materials.

Much of a lawyer's work in the pretrial process occurs outside the presence of the court and, sometimes, outside the presence of other lawyers. It therefore is particularly important that students receive a strong foundation in the ethics of pretrial litigation. Accordingly, each chapter of this text explicitly raises ethical concerns that arise during the pretrial process.

The procedural law underlying this text is that which is set forth in the Federal Rules of Civil Procedure. Local rules of court are cited throughout the text to illustrate some of the practice alternatives that can be decreed by courts or adopted by counsel. In citing to these local rules, I have not specifically designated them as the civil (as opposed to criminal or general) local rules of the federal district court in question. No text in pretrial litigation could do justice to its subject without a consideration of how law is practiced, as opposed to how the drafters of the Federal Rules envisioned that it would be practiced. For this reason, I also have integrated into the text illustrative pleadings, motions, and practice forms.

Much can be learned about pretrial litigation, and about legal practice generally, by examining case studies of lawyers and judges at work. This book includes excerpts from other books describing how law is actually practiced. These excerpts include nonfiction accounts of alleged document destruction in the *Berkey v. Kodak* litigation, Judge Jack Weinstein's efforts to settle the *Agent Orange* class actions, the pretrial

investigation by a court-appointed lawyer that led to freedom for Clarence Earl Gideon, and an excerpt from *Anatomy of a Murder* that raises important issues concerning the ethics of interviewing

There are increasing numbers of quality CD ROMs, videotapes and other supplemental aids that can enhance a course in pretrial litigation and give students a sense of what a deposition or a motion hearing actually looks like in practice. These supplemental materials easily can be integrated into a pretrial litigation course taught from this text. Supplemental materials that I have used in my own course, as well as other teaching suggestions, are contained in the Teacher's Manual written in connection with this book.

Because so many cases are resolved by the parties short of trial, a text in pretrial litigation is a natural place in which to discuss alternative dispute resolution. The text contains a final chapter devoted to this subject, and throughout the book students are asked to consider whether formal adjudicatory resolution of various disputes is in the best interests of the persons involved.

Case and statute citations, as well as footnotes, have been omitted from documents reprinted in the text without so indicating. The footnotes in the motion for a protective order reprinted in Chapter 10 have been designated by asterisks rather than by the numerals that were used in the original motion. While I have not added the first names of the authors of the many law review articles that I have cited, I have identified the authors of student work where possible.

A truly scientific method was used to determine the gender of the attorneys, clients and judges referred to in this book. I flipped a coin. As a result of that coin flip, the text generally refers to attorneys as females and judges and clients as males.

As I tell the students in my own classes, I welcome any thoughts, criticism, or suggestions concerning this text. I hope that it is as useful a teaching device for others as it has been for me.

R. LAWRENCE DESSEM

Columbia, Missouri  
March 1, 2007

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Writing a book makes you realize the debt that you owe to other people. Any author should thank the parents, friends, teachers and others who have nurtured and taught him over the years, and I do so now. I also must thank those who taught me about the practice of law: Judge William K. Thomas, my friends in the General Counsel's Office of the National Education Association, and, especially, my former colleagues and continuing friends in the Federal Programs Branch of the Civil Division of the United States Department of Justice.

I owe a special debt to my former colleagues at the University of Tennessee College of Law for all that they taught me about law teaching, legal education, and life. Dean Richard Wirtz was especially supportive of the first two editions of this book, as were Deans John Sebert and Marilyn Yarbrough in connection with the book's first edition. I also thank Professor Lawrence Grosberg, who has graciously shared with me and others Buffalo Creek litigation documents and his experiences using the Buffalo Creek factual scenario in classroom exercises.

My family is worthy of special mention. I could not have written any of the editions of this book without the help of my wife Beth, who is a gifted teacher, inspirational leader, and valued friend. She read the first edition of this book in draft untold times and always offered valuable commentary (including pithy comments such as "This is why some people hate lawyers!"). My three children have been very supportive, and I thank Matthew ("the advocate"), Lindsay ("the investigator"), and Emily ("the settlement judge"). They continue to teach me about the many things in life that are more important than pretrial litigation. This fourth edition of the book is dedicated to them.

I have been blessed with outstanding research assistance in connection with all four editions of this book. Jessica Gunder, Whitney Pile, and Kathy Birkhofer made invaluable contributions to this fourth edition, just as Cullen Sheppard, Rhonda Wilcox, Ann-Riley Caldwell and Patricia Nicely did a superb job on the book's first, second and third editions. Their many hours of hard work on this project have improved both the style and substance of this text. Among those who have been of special assistance in the preparation of the book's fourth edition are Judy Tayloe and Randy Diamond, Cindy Shearrer, John Dethman, Steve Lambson, Needra Jackson, Tom Ellis, and their colleagues within the Law Library of the University of Missouri-Columbia School of Law. Debbie Manly, Patsy Tye, and the librarians and staff of the Mercer University School of Law and Patricia Hurd, LaVaun Browder, Jacqueline Bonvin, and the librarians and staff of the University of Tennessee College of Law provided invaluable help with the earlier editions of the text. Both the students in my own pretrial litigation classes and those who have taught pretrial



litigation at the University of Tennessee have been quite helpful with their suggestions, especially Judges Robert Murrian and Thomas Phillips.

Finally, I thank those who have permitted me to reprint excerpts from the following articles and books:

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