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Thomas A. Mauet • David Marcus

PRETRIAL

NINTH EDITION



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PRETRIAL

Ninth Edition

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*To my father, Rudolf B. Mauet
(T.M.)*

*To my father, Howard Marcus, who would
have been a great lawyer
(D.M.)*

PREFACE

New lawyers quickly encounter an uncomfortable reality: A civil procedure course in law school only begins to prepare them for the twists and turns of civil litigation. For civil litigators, rules of procedure are not abstract subjects for academic study, but functional tools that regulate the pretrial stage of the litigation process. The new litigator's primary worry is that he or she might misunderstand or botch a step in pretrial litigation and thereby "miss the boat."

This book aims to ensure that new litigators do not miss the boat. Whether a third-year law student in a clinical program or a litigator in the first years of practice, you must approach every lawsuit systematically to make sure that you think through all important considerations and take all timely steps during the investigation, pleading, discovery, and motion practice stages of the pre-trial process. Only by doing so can you adequately prepare for settlement or trial. This text approaches pretrial litigation in just this systematic way. It reviews the procedural rules and thought processes a litigator should utilize before and during each stage of a civil case. In addition, this text discusses and gives examples of how an understanding of the various stages of civil litigation translates into pleadings, discovery, and motions.

There is no one "right way" to litigate. Consequently, while this book presents standard approaches to pleadings, motions, and discovery, lawyers litigate effectively in a myriad of ways. The examples presented here offer only one approach and simply illustrate how a lawyer can successfully proceed step-by-step through the litigation process.

This text is of necessity an overview of the basic steps in the civil litigation process. Because any single-volume work must limit the space it can devote to any specific topic, compromises and hard choices were inevitable. In making them, we followed a basic rule: Provide an overview that gives inexperienced litigators the basic information they need to handle routine civil cases. To determine what we believe new litigators *need* to know, we reflected on our beginning years as litigators, and we discussed the book's scope with a number of inexperienced lawyers. Sometimes their suggestions were surprising. For example, almost all recommended an overview of joinder, jurisdiction, and venue, since these are complex, technical areas. These new lawyers did not mean to suggest that some topics were more important than others; rather, they felt they were weak in some areas and stronger in others. In many ways their suggestions corresponded with our experiences and account in large measure for the text's coverage.

The text focuses on federal district court practice and the Federal Rules of Civil Procedure. Many states have adopted the Federal Rules, and most of the states that have not have modern code pleading rules that resemble federal practice. Also, legal details do not matter for much of the book's contents. Solid planning, investigation, and drafting are essential skills regardless of the

particular jurisdiction involved, and the text's emphasis is on those skills. Hence, we have designed the book to be a basic resource regardless of the jurisdiction where a case will be litigated.

This book is not intended as a reference manual for nuanced legal research. We cite lightly, certainly as compared to standard treatises, since our goals do not include a detailed, technical discussion of doctrine. We have provided basic citations for most topics, with an emphasis on treatises that litigators commonly use. These are Wright; Hazard et al.; Moore's Manual; the Manual of Federal Practice; Moore's Federal Practice; and Wright & Miller. Most topics discussed in this text begin with a footnote that provides citations to the relevant portions of these treatises.

This edition comes with an authorization to download *Materials in Pretrial Litigation*, which include six tort and contract case files that can be used in a course on pretrial litigation. These materials contain the plaintiff's and the defendant's initial case files. The Teacher's Manual includes the witness materials for these case files. Course instructors may obtain this manual from Wolters Kluwer.

Thomas A. Mauet and David Marcus

What's New in the Ninth Edition

Tom Mauet published the first edition of *Pretrial* in 1987, and he remained the book's sole author for the next seven editions. During this time, experiential courses on pretrial litigation have spread like wildfire in American law schools. This phenomenon surely reflects the gravitational shift from trial to pretrial as the center of the civil litigation process. But the proliferation of these courses also indicates the influence of Tom's book. Not only is *Pretrial* required reading at many law schools, it also offers a model for how to teach essential lawyering skills in an intellectually sophisticated, yet relentlessly grounded, way. Even courses that use other materials bear the hallmarks of Tom's influence. For all that it offers law students and lawyers, *Pretrial* has won a coveted spot on many litigators' bookshelves, next to Tom's texts on evidence and trial practice.

For these reasons and others, I am excited and humbled to join Tom as his co-author on the ninth edition of *Pretrial*. I bring to the book a decade of experience teaching and writing on civil procedure, as well as lessons learned from my several years in practice as a civil litigator. Tom continues to provide ideas, suggest edits, offer advice, and contribute research. But he has turned primary responsibility for revisions over to me.

I have taken a "first do no harm" approach to this edition. Thousands of lawyers around the United States would agree that no one teaches how to litigate as well as Tom. I have left the book's organization, its overall themes, its flow, and its style mostly untouched. Tom is also a masterful strategist, so I have only lightly edited those sections that focus on litigation strategy.

The changes I have made for this edition fit into one of three categories. The first are minor stylistic edits, mostly to reflect my authorial voice. These edits appear throughout the text.

Second, in several places I have adjusted the way prior editions have presented applicable doctrine. These places include, for example, sections

on choice of law in the federal courts, federal pleading doctrine, and class action doctrine. The revisions are to topics about which I have written at length. In a couple of instances I view the law somewhat differently than Tom does, but most of my changes are in the vein of modest refinements or clarifications.

Third, I have revised the text to account for a number of recent changes to the law of federal civil procedure. Among others, these include:

- Significant developments in the law of personal jurisdiction. Since the eighth edition, the Supreme Court has issued a number of important decisions on personal jurisdiction issues. I have rewritten relevant sections of *Pretrial* to account for the new clarity the Court has given to general jurisdiction, and to indicate where this law remains in flux.
- Adjustments to venue and removal jurisdiction law. In 2011 Congress made a number of changes to the federal venue and removal jurisdiction statutes. This edition accounts for these changes.
- Changes to class action practice. The Supreme Court has paid close attention to the class action in recent years. The ninth edition includes more commentary on class action doctrine than previous editions, and this commentary reflects the alterations the Supreme Court has made to practice under Rule 23 of the Federal Rules of Civil Procedure.
- The continuing evolution of federal pleading doctrine. The eighth edition discussed the Supreme Court's well-known *Twombly* and *Iqbal* decisions on the federal pleading standard. These decisions caused a good deal of ferment in federal procedural law, which had not died down before the eighth edition's date of publication. This edition presents an emerging consensus on the two decisions and their implications for pleading.
- Amendments and proposed amendments to the Federal Rules of Civil Procedure. The Supreme Court has approved minor changes to the Federal Rules since the eighth edition's publication, mostly to the rule regarding subpoenas issued to non-parties. As this edition went to press, however, fairly significant proposed amendments were pending, with a good chance of getting promulgated. I have tried to note in the text each instance where a proposed amendment would alter the law.

As Tom has before, I welcome any suggestions for how we might improve *Pretrial* in the future. Comments from practitioners are particularly welcome. Please do not hesitate to contact me by e-mail (dmarcus@email.arizona.edu) if you have any suggestions for future editions.

David Marcus

Tucson, Arizona
November 2014

CITATIONS

For ease in citing, the text uses the following abbreviated citations:

Wright

Law of Federal Courts, Charles Alan Wright & Mary Kay Kane (6th ed. 2002)

James & Hazard

Civil Procedure, Fleming James, Jr., Geoffrey C. Hazard, Jr. & John Leubsdorf (5th ed. 2001)

Friedenthal

Civil Procedure, Jack H. Friedenthal, Mary Kay Kane & Arthur R. Miller (4th ed. 2005)

Moore's Manual

Moore's Manual—Federal Practice and Procedure, James W. Moore, Allan D. Vestal & Philip B. Kurland (supplemented semi-annually)

Manual of Federal Practice

Manual of Federal Practice, Richard A. Givens (5th ed.), which is part of Trial Practice Series (supplemented annually)

Moore's Federal Practice

Moore's Federal Practice, James W. Moore, et al. (3d ed.) (updated quarterly)

Wright & Miller

Federal Practice and Procedure: Civil, Charles Alan Wright, Arthur R. Miller, and E.H. Cooper (updated annually)

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