CIVIL PROCEDURE

Fifth Edition

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Hornbook Series

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Preface

Since 2005 when the fourth edition of our Hornbook was published there have been a number of significant changes and developments in civil procedure. Our goal in this fourth edition is to update our volume to include these alterations. We have not, however, made changes for change sake. Thus, we have preserved the basic format that we utilized in the prior editions. Comments we have received from a broad spectrum of those who have used these volumes indicate that the approach we have taken in the past has been a successful one.

As has been the case for some seventy-five years, many of the most significant procedural changes arise first, and sometimes exclusively, in the federal court system. And there has been substantial change occurring in the last ten years in the federal system. In 2007, the federal rules were restyled to remove ambiguities and unnecessary verbiage, and ensure consistent, modern language throughout, requiring all of the references to various federal rules throughout this volume to be updated to refer to the restyled version of the rules. Similarly, in 2009 a general change was made to the various timing provisions throughout the rules and that is reflected in this edition. Major rule amendments to the discovery rules in 2006 and 2010, as well as the complete rewriting of Rule 56, the summary-judgment provision, in 2010, and several other more minor amendments also have been incorporated. There also have been statutory changes in the law of procedure, with the the 2011 amendments to the venue, diversity, and removal statutes. Finally, numerous important Supreme Court decisions have been rendered, particularly in the areas of personal jurisdiction, pleading, and class actions. Thus, several new sections appear in this edition, exploring these changes and the lower courts' application of them. Also included are new sections on personal jurisdiction based on internet transactions and the lower courts' treatment of e-discovery—two issues of particular interest in modern litigation. It is important to recognize, however, that our objective has been to identify and discuss the significant aspects of state as well as federal civil procedure. We have not been deterred from dealing with important questions merely because not all systems answer them alike.

We have tried to capture the complicated interrelationship between state and federal judicial systems in a coherent and systematic manner. Our approach is linear in time, beginning with the initial assertion of jurisdiction and challenges to it, progressing through the framing of matters to be litigated, the joinder of parties, and trial preparation, and continuing on to judgments—their binding effect, their enforcement, and their review on appeal.

The final Chapter is somewhat different in that it is not in chronological sequence. One of the fundamental challenges of our time is how the judicial system can cope with the increasing burden of complex, multiparty litigation that threatens to swamp our current procedural machinery, which, one must acknowledge, was devised for simpler disputes. That problem pervades from the beginning to the end of lawsuits. Thus, we have elected to gather all features of it in a single Chapter rather than distribute it throughout the text, which would create a risk of losing sight of it entirely, or, at the least, diminish its importance.

Our goal is to provide an important resource for law students, lawyers, judges, and researchers of all kinds who need information concerning the law of civil procedure. Thus, our book is far more comprehensive than any law school Civil Procedure course possibly could be. As a result we cover many significant topics which law school courses do not treat or which they handle only peripherally. Accordingly, we have addressed ourselves to Civil Procedure in the broad sense, embracing topics and issues whether or not they are typically covered in law school, and whether state or federal in origin. We also have been attentive to history and have tried to articulate the policies that have governed procedural practices and have led to their modification over time.

Certainly we do not claim that we have identified every procedural question that has arisen or might arise in the future. Nor have we provided answers to each of those we do discuss. But we have attempted to identify the important issues and to give readers sufficient information to allow them to understand what is at stake and why. In many situations our book is only a place to begin. Readers who need to go further are provided with references to another more detailed source in which additional inquiry can be pursued. Of the many instances of this throughout this volume, we call special mention to the numerous references to West Group's multi-volume treatise, Federal Practice and Procedure. That work was orginally authored by Charles A. Wright, in collaboration with two of the authors of this book, Arthur R. Miller and Mary Kay Kane, and Edward H. Cooper, Richard Marcus, Kenneth W. Graham, Michael H. Graham, and Victor Gold, with several additional authors joining the work in more recent years. For simplicity's sake, the citations to that work throughout this book omit its full title and refer to the specific volume number, the authors of the volume in question, the unit of the treatise involved—Criminal, Civil, Jurisdiction, or Evidence—and the particular section within the volume.

Finally, but certainly not of least importance, we gratefully acknowledge the help provided by our student research assistants, Darryl John Pae of the George Washington University Law School, and Arthur Burke, Thomas Coyle, Jennifer Garrett, and Isaac S. Sasson of New York University School of Law. Without their assistance, the task of reviewing and updating the wide range of sources and subjects covered in this text would have been virtually impossible. In addition we thank Rasheen Robinson of the George Washington University Law School for his administrative assistance and Jo Anne Friedenthal, whose encouragement and support were vital throughout the production of this volume.

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January 2015

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INTRODUCTION

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§ 1.1 Civil Procedure Defined

The subject of this book is the field of civil procedure. Thus, its pages explore the principles surrounding the resolution of civil disputes[1] in the courts,[2] and in so doing the reader can examine the various tools available to the lawyer who must defend or bring a lawsuit. As distinguished from substantive matters, the civil-procedure questions that will be studied in the Chapters that follow focus on how attorneys frame their cases in order to bring them properly before a particular court, and how the case proceeds from its institution until a judgment finally is reached and enforced. The availability of an appeal and the likely scope and effect of any judgment that is entered also are discussed.

In sum, then, this volume presents an exposition of how the procedural aspects of the civil-justice system operate. In order to understand the rules of procedure, it is important to appreciate two things. First, the purpose underlying the establishment of most rules of civil procedure, in any judicial system, is to provide a fair process for ascertaining the truth and achieving the just, efficient, and economical resolution of civil disputes.[3] This is not to say that these goals always will be met or that they are entirely consistent, and many examples can be found throughout this volume of cases in which both judges and lawyers appear to have lost sight of them. Nonetheless, these objectives remain the foundation on which current procedural rules are based, and, as is explored

[1] Distinct bodies of procedural rules surround criminal, administrative, and other dispute-resolution proceedings. Although many of the same devices and mechanisms are used in all of these contexts, important differences exist between the rules in civil-court proceedings and those in other systems. Discussion of other dispute-resolution systems is outside the scope of this volume.

[2] For a classic description of the adjudicatory process, see Fuller, The Forms and Limits of Adjudication, 92 Harv.L.Rev. 353 (1978).

Although civil procedure traditionally focuses on court procedures and rules, serious problems of court congestion have resulted in increased attention by legislatures, judges, and commentators to alternative means by which parties may resolve private disputes. An extensive literature on these procedures now exists. See, e.g., Reuben, Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice, 47 U.C.L.A. L.Rev. 949 (2000).

[3] Federal Civ.Proc. Rule 1, which governs civil litigation in the United States district courts, provides: "[These rules] should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." See American Bar Association, The Improvement of the Administration of Justice 2–3 (5th ed.1971). See also Pound, The Causes of Popular Dissatisfaction with the Administration of Justice, 29 A.B.A.Rep. 395, 416–17 (1906).

in later Chapters, the desire to achieve them underlies many of the proposals for change in today's procedures.[4]

The second matter that must be remembered is that the Anglo-American judicial system is based on the adversary model, which in many respects is lawyer-centered. This differs from systems in civil-law countries in which a judge-centered or so-called inquisitorial model prevails.[5] Under the latter system, the court conducts an active and independent inquiry into the merits of each case. This may include having the judge question and examine witnesses, as well as specifically ordering certain fact-finding.[6] The main feature of the adversary system that influences the development of particular procedures is that the parties (or their lawyers) control and shape the litigation. The traditional view is that the judge sits solely to decide disputed questions, most commonly questions of law and procedure. Issues not raised, objections not mentioned, and points not made are, with very few exceptions, waived. The case proceeds only in response to the demands of the litigants. Necessarily, then, the adversary model places enormous emphasis and responsibility on the lawyers; the court maintains a relatively passive role throughout the proceedings.

The ideal of the adversary system has come under increasing pressure in modern times.[7] Many judges have assumed more active roles in guiding the litigation before them.[8] This is seen in the participation of judges in the settlement process, during the pretrial-conference stage,[9] and in the various management techniques by which courts are responding to complex modern litigation,[10] such as massive class actions charging

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[4] For example, for more than thirty-five years many proposals have been made, and some adopted, to streamline the discovery process and to place controls on lawyers to discourage them from using it to delay or harass opponents. See, e.g., the 1983 amendment to Federal Rule 26, requiring the attorney to certify that a discovery request, response, or objection is made in good faith, is not interposed for purposes of delay, and is not unduly burdensome or expensive, and the 1993, 2000, and 2006 amendments to that rule, making the exchange of certain information mandatory, rewording the scope of discovery, and dealing with the discovery of electronically stored information. Discovery is discussed in Chapter 7, below.

[5] Although the term "inquisitorial" brings to mind images of torture and trials with no true opportunity for defense, that is inappropriate in this context. As recognized by Judge Friendly of the United States Court of Appeals for the Second Circuit in testimony before Congress: "Whoever first characterized the continental European system as 'inquisitorial' did a profound disservice to constructive legal thought. Substitute 'inquiring' and the bad becomes the good. The adversary system is not the only way to the truth; indeed, it has too often been a game in which both sides vie in their efforts to obscure the truth. Hopefully, by the year 2000, we will have learned where to preserve the adversary system and where to substitute something else." Hearings Before Commission on Revision of the Federal Court Appellate System, second phase, vol. I, at 205 (1974).

[6] For a description of two different European systems, see Murray & Stürner, German Civil Justice (2004), Kaplan, von Mehren & Schaefer, Phases of German Civil Procedure I, II, 71 Harv.L.Rev. 1193, 1443 (1958), and Osakwe, The Public Interest and the Role of the Procurator in Soviet Civil Litigation: A Critical Analysis, 18 Texas Int'l L.J. 37, 37–49 (1983). See generally O. Chase, H. Hershkoff, L. Silberman, Y. Taniguichi, V. Verano & A. Zuckerman, Civil Litigation in Comparative Context (Chase & Hershkoff eds., 2007).

[7] Frankel, The Search for Truth: An Umpireal View, 123 U.Pa.L.Rev. 1031 (1975); Miller, The Adversary System: Dinosaur or Phoenix, 69 Minn.L.Rev. 1 (1984).

[8] To assist judges and lawyers in complex cases the Federal Judicial Center has produced several editions of a Manual for Complex Litigation, outlining procedures the federal courts may use to control "big" cases and administer the pretrial process to ensure that these cases are handled as expeditiously as possible.

[9] Federal Rule 16, governing pretrial conferences, was amended in 1983 and 1993 to encourage active management and scheduling by district judges during all the pretrial phases of federal-court litigation. See Chapter 8, below.

[10] In major litigation in fields such as antitrust, securities fraud, and toxic torts, courts have begun to rely heavily on the services of magistrate judges and special masters to organize and facilitate the pretrial stages of the lawsuit. For an interesting description of their roles as special masters in the government