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CIVIL PROCEDURE
Cases and Problems

Sixth Edition

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Barbara Allen Babcock
Judge John Crown Professor of Law, Emerita
Stanford Law School

Toni M. Massaro
Regents' Professor, Milton O. Riepe Chair in Constitutional Law, and Dean Emerita
University of Arizona College of Law

Norman W. Spaulding
Nelson Bowman Sweitzer and Marie B. Sweitzer Professor of Law
Stanford Law School

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Civil Procedure

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To Tom, Jerry, and Ticien,
Our better halves.

Preface

The famous legal realist Karl Llewellyn once observed that law can be really known only "through the spectacles of procedure." This casebook is designed to help you learn this new way of seeing. Sometimes, as in the first case, the effect of procedure on substantive rights is glaringly obvious—a creditor attempts to use a procedure called "garnishment" to seize the wages of Ms. Sniadach *before* the creditor has proved in court that the debt is owed. In other instances the connection between procedural and substantive law is more subtle. But Llewellyn was right. You will soon begin to see this connection everywhere. That is in no small part because the rule of law itself is dependent on due process of law—no theory of rights or justice can be established or sustained without fair, transparent, participatory, and affordable rules for the resolution of disputes.

From the very first edition of this casebook we have selected cases that reveal the power of procedure in the lives of ordinary Americans, especially those for whom access to law has not come easily. Struggles for civil rights and civil liberties—for the full legal recognition of women, minorities and other disenfranchised groups in American society—are always also procedural in nature. It is no accident that the connection between substance and procedure is most vivid in these cases.

This casebook also sets critiques of the modern adversary system alongside praise songs for the noble service profession you are training to enter. On the one hand, the cost and delay of litigation have been a constant source of popular frustration with the adversary system and with the legal profession. Many important reform movements have tapped into that popular frustration or sought to check it. On the other hand, at critical moments in the history of our nation, courageous lawyers have stepped forward to defend due process of law and other democratic values. As you begin the study of procedure, consider what assumptions about professionalism are embedded in the rules governing litigation. And we invite you to ask what choices you would have made as counsel for the parties in the cases you will read.

As the Sixth Edition goes to press, the nation is recovering from the most profound economic crisis since the Great Depression, reeling from a bruising presidential election in which the value of equal justice under law has itself been challenged, and struggling to respond to social justice movements that have revealed profound disparities in the way civil and criminal justice is administered. Now more than ever we believe in starting the course with the enduring values that define procedural law: the belief in the power of rules to constrain government decision makers and fellow citizens; the commitment to equal access to law; the desire for efficiency and rationality in dispute resolution; the peculiarly American zest for adversarial exchange; and the belief in meaningful participation in decisions affecting one's substantive legal rights.

With this grounding in procedural first principles, we turn to doctrines defining the power of courts over the parties and subject matter of a dispute ("jurisdiction"). Subsequent chapters provide a survey of each stage of the modern litigation process: the rules governing the initial filings that notify the court and litigation opponents of the nature of the controversy ("pleading"); the rules governing the exchange of information relevant to the dispute ("discovery"); techniques for disposing of a case before trial (settlement and "summary judgment"); the balance of power between a judge and jury during trial; the management of complex litigation; and finally, doctrines that define the finality of a judgment ("repose" or "preclusion").

Over the last decade, the Supreme Court has been particularly active in the area of procedure. It has modified the architecture of pre-trial litigation in a series of important decisions regarding jurisdiction, pleading, the certification of class actions, and summary judgment. The Court has narrowed the number of fora in which a dispute may be litigated and intervened in new and surprising ways to enhance the power of judges to dispose of cases early in litigation. It also has strictly limited the rights of consumers and employees to avoid contract provisions requiring that they forgo litigation and submit their disputes to private resolution through arbitration. Although the full effects remain uncertain, these developments have sharpened an already precipitous decline in the number of cases that go to trial. And yet both bench and bar seem, as much as ever, to rely on jury trial for the model and measure of due process of law. We have structured the new cases and materials to highlight this seeming contradiction.

The Advisory Committee for Civil Rules has also been active, particularly in the area of discovery, and we have taken up new amendments in detail in the new edition. We have expanded materials on the increasingly difficult and important issues surrounding the preservation, storage, and disclosure of digital data. Discovery now dominates modern law practice, and the development of digital data, metadata, and new means of storage and recovery, among other technological advances, has complicated nearly all the traditional burdens and opportunities of discovery practice. We have also retained coverage of cases and readings on Rule 11 sanctions and sanctions in discovery practice, in order to prompt reflection on ethical standards of practice and what it means to be committed to an adversary system. Finally, we have continued to expand the treatment of emerging doctrines governing transnational litigation. Throughout the text we have sought to place greater emphasis on empirical studies of the practical consequences of procedural change, as well as the relationship between procedural rules and both ethical and social understandings of the lawyering role.

For the new edition, invaluable assistance with research was provided by a cadre of dedicated students at Stanford Law School: Brittany L. Benjamin, Joe DeMott, Samuel A. Martin, Tierney O'Rourke, Max Schoening, Rachel Rose Suhr, and Michelle Wu. We are deeply indebted to them for their hard work, keen editorial insights, and enthusiasm in every phase of production. Ms. O'Rourke and Ms. Wu were instrumental from the very earliest planning and research phases of the new edition. Ginny Smith provided invaluable, prompt, and highly professional administrative support. We are grateful as well to the fine editors at Wolters-Kluwer for assistance with the new edition and to Troy Froebe and his team for outstanding assistance with production.

Finally, we would like to give special thanks to our fellow procedure teachers who have been so generous over the years with comments, ideas, and suggestions to improve the casebook. The book is better for it and the joys of teaching the subject have been amplified by our lively engagement with those who share our passion for procedure. When we launched the "due process" approach to teaching civil procedure many years ago, we had no expectation that it would become the dominant approach to the introductory course. That it remains so relevant today is a credit to the wisdom of our intellectual mentor Paul Carrington. And for being so much more than a mentor, Toni and Norman wish to thank Barbara. She is an inspiration to us, as she has been to generations of students who, in *every* encounter with her, have found warm comfort, wise counsel, boundless good cheer, and insight into the joys of the practice of law.

Barbara A. Babcock
Toni M. Massaro
Norman W. Spaulding

December 2016

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