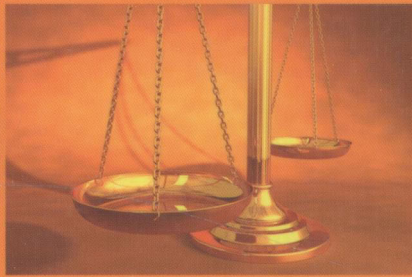


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Inside



Civil Procedure

What Matters and Why

Howard M. Erichson



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Aspen Publishers
Attn: Order Department
PO Box 990
Frederick, MD 21705

Printed in the United States of America.

1 2 3 4 5 6 7 8 9 0

ISBN 978-0-7355-6408-4

Library of Congress Cataloging-in-Publication Data

Erichson, Howard M.

Inside civil procedure : what matters and why / Howard M. Erichson.

p. cm.

Includes index.

ISBN 978-0-7355-6408-4 (pbk. : alk. paper) 1. Civil procedure—United States—
Outlines, syllabi, etc. I. Title.

KF8841.E75 2009
347.73'5—dc22

2009018739

Inside Civil Procedure

What Matters and Why

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For Sara Ann, Danny and Jake.

Preface

Some students love civil procedure. Most don't. Not everybody finds it easy to master topics like personal jurisdiction or *res judicata*, which — let's face it — strike some people as technical, dry, and unintuitive. I've taught civil procedure long enough to know that not everybody *gets* it. This book is devoted to helping you get it.

The key to learning civil procedure is to get inside it. Procedural rules and doctrines that at first seem incomprehensible finally make sense when you understand what they're trying to do, how they're used in practice, and how they fit into the bigger picture. I suppose you could try to memorize rules without really understanding how they work or how they fit into the overall system, but why would you? It's not going to accomplish what your civil procedure professor expects of you, and it's certainly not going to give you what you need in order to serve clients in the real world of litigation.

This book explains the major topics in civil procedure. You won't find endless citations of cases and law review articles on each topic. You won't find every exception to every twist of every nuance. Nor will you find details that you'll simply look up when you're in practice. I'm not going to tell you, for example, the time limit for responding to a request for admissions in federal court. All right, 30 days.

What you will find are clear explanations and a host of features designed to help you master the material. The Overview at the beginning of each chapter positions the material in that chapter within the field of civil procedure. The Frequently Asked Questions (FAQs) give straight answers to questions that commonly pop up in a civil procedure course, and clear up common mistakes and misconceptions. Sidebars add color and offer insights, study tips, and practice pointers. For a number of topics, you'll find a step-by-step Analysis that demonstrates how you might apply the material. The Summary feature near the end of each chapter gives you a quick and easy guide to the most basic points covered in that chapter. And the Connections feature at the end of each chapter helps you fit the points made in that chapter with the other topics in civil procedure. By the end of each chapter, you should have a clear understanding of not only how the procedural rules and doctrines work, but also how the pieces of the puzzle fit together.

For most law students, the course on civil procedure feels different from other first-year courses such as contracts, torts, property, and criminal law. Other courses focus on substantive law, the rights and duties that the law establishes, whereas procedure is all about the process for resolving disputes that arise under those substantive rights and duties. But don't make the mistake of viewing procedure as secondary or insignificant. Process matters. Any lawyer will tell you that the outcome of a case often depends on its procedural path. As Representative John Dingell said during a House subcommittee hearing, "I'll let you write the substance . . . and

you let me write the procedure, and I'll screw you every time."¹ Procedural rules affect the likelihood of achieving just outcomes. And process matters for its own sake. We're talking, after all, about nothing less than our system of justice. Treating participants fairly and taking the resolution of disputes seriously rank among the most important things we do in a civilized society.

This book focuses primarily on procedure in the federal courts, because that's what most law school civil procedure courses emphasize, and because much procedure in the United States, even in state courts, follows the model of the federal rules. Unless noted otherwise, the specific rules cited are Federal Rules of Civil Procedure, but you'll find important state variations mentioned throughout the book.

As you learn about each topic, think about how you will *use* these procedures as a lawyer. To serve your clients well in an adversary system of justice, you need to understand the strategies available under the rules of procedure. Lawyers often compare litigation to a chess game or some sort of ritualized battle. Chess and other games of strategy require players to see all available options, anticipate opponents' moves, and see several moves ahead. Others have compared litigation to theater. Lawsuits involve the presentation of competing stories, and skilled lawyers understand how the rules of procedure create opportunities to present a compelling story based on the evidence. Thinking about the ways in which you can use your procedural knowledge for your clients will greatly enhance your understanding of each topic.

Always look for how each part fits into the whole. You cannot really understand summary judgment, for example, without seeing how it relates to pleadings, discovery, and trial. Although this book necessarily teaches procedural topics one at a time, ultimately you have to understand civil procedure as a seamless web in which each aspect of the litigation process relates to all of the others. But enough metaphors. It's a seamless web, it's a chess game, it's theater, it's ritualized battle. . . . It's civil procedure, and it's time to get down to learning it.

Howard M. Erichson
June 2009

¹Hearing on H.R. 2327, 98th Cong. 312 (1983).

Acknowledgments

I thank Fordham Law School and Seton Hall Law School for their generous support of this project. I thank my research assistants on this book, Lincoln Davis Wilson and Victoria Belyavsky, not only for their meticulous work but also for never letting me forget that this book is for law students. Thanks also to research assistants Robert Gonello and Sunila Sreepada who worked primarily on other projects but ably assisted with this book as needed. At Aspen, I thank Carmen Corral-Reid, Richard Mixer, Barbara Roth, and Lisa Wehrle, as well as outside reviewers who offered valuable suggestions. I am indebted, finally, to two groups of people without whom I could not have written this. My colleagues at my own institutions and throughout the field of civil procedure have taught me so much about how to understand this area of law and how to convey it effectively. This book is saturated with their teaching. Finally, my students have been a constant source of challenge and inspiration. Their questions, confusions, ideas, and insights are woven into every page.

Inside Civil Procedure

What Matters and Why

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