ELECTIVE SERIES



Contemporary Civil Litigation

STEPHEN C. YEAZELL



ASPEN PUBLISHERS

CONTEMPORARY CIVIL LITIGATION

Stephen C. Yeazell

David G. Price & Dallas P. Price Professor of Law UCLA School of Law



© 2009 Aspen Publishers. All Rights Reserved. http://lawschool.aspenpublishers.com

No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopy, recording, or any information storage and retrieval system, without permission in writing from the publisher. Requests for permission to make copies of any part of this publication should be mailed to:

Aspen Publishers Attn: Permissions Department 76 Ninth Avenue, 7th Floor New York, NY 10011-5201

To contact Customer Care, e-mail customer.care@aspenpublishers.com, call 1-800-234-1660, fax 1-800-901-9075, or mail correspondence to:

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

Printed in the United States of America.

1234567890

ISBN 978-0-7355-6246-2

Library of Congress Cataloging-in-Publication Data

Contemporary civil litigation / Stephen C. Yeazell.

p. cm.

Includes bibliographical references and index.

ISBN 978-0-7355-6246-2 (alk. paper)

1. Civil procedure — United States. 2. Practice of law — United States. I. Yeazell, Stephen C.

KF8839.C56 2009 347.73'5—dc22

2009036192

This book contains paper from well-managed forests to SFI standards.

CONTEMPORARY CIVIL LITIGATION

EDITORIAL ADVISORS

Vicki Been

Elihu Root Professor of Law New York University School of Law

Erwin Chemerinsky

Dean and Distinguished Professor of Law University of California, Irvine, School of Law

Richard A. Epstein

James Parker Hall Distinguished Service Professor of Law University of Chicago Law School Peter and Kirsten Bedford Senior Fellow The Hoover Institution Stanford University

Ronald J. Gilson

Charles J. Meyers Professor of Law and Business Stanford University Marc and Eva Stern Professor of Law and Business Columbia Law School

lames E. Krier

Earl Warren DeLano Professor of Law The University of Michigan Law School

Richard K. Neumann, Jr.

Professor of Law Hofstra University School of Law

Robert H. Sitkoff

John L. Gray Professor of Law Harvard Law School

David Alan Sklansky

Professor of Law University of California at Berkeley School of Law

Kent D. Syverud

Dean and Ethan A. H. Shepley University Professor Washington University School of Law

Elizabeth Warren

Leo Gottlieb Professor of Law Harvard Law School

About Wolters Kluwer Law & Business

Wolters Kluwer Law & Business is a leading provider of research information and workflow solutions in key specialty areas. The strengths of the individual brands of Aspen Publishers, CCH, Kluwer Law International and Loislaw are aligned within Wolters Kluwer Law & Business to provide comprehensive, in-depth solutions and expert-authored content for the legal, professional and education markets.

CCH was founded in 1913 and has served more than four generations of business professionals and their clients. The CCH products in the Wolters Kluwer Law & Business group are highly regarded electronic and print resources for legal, securities, antitrust and trade regulation, government contracting, banking, pension, payroll, employment and labor, and healthcare reimbursement and compliance professionals.

Aspen Publishers is a leading information provider for attorneys, business professionals and law students. Written by preeminent authorities, Aspen products offer analytical and practical information in a range of specialty practice areas from securities law and intellectual property to mergers and acquisitions and pension/benefits. Aspen's trusted legal education resources provide professors and students with high-quality, up-to-date and effective resources for successful instruction and study in all areas of the law.

Kluwer Law International supplies the global business community with comprehensive English-language international legal information. Legal practitioners, corporate counsel and business executives around the world rely on the Kluwer Law International journals, loose-leafs, books and electronic products for authoritative information in many areas of international legal practice.

Loislaw is a premier provider of digitized legal content to small law firm practitioners of various specializations. Loislaw provides attorneys with the ability to quickly and efficiently find the necessary legal information they need, when and where they need it, by facilitating access to primary law as well as state-specific law, records, forms and treatises.

Wolters Kluwer Law & Business, a unit of Wolters Kluwer, is headquartered in New York and Riverwoods, Illinois. Wolters Kluwer is a leading multinational publisher and information services company.

For Owen and Emmet, my contemporary sons

ACKNOWLEDGMENTS

Stephen Yeazell gratefully acknowledges the superb assistance of the Darling Law Library at UCLA, whose librarians and student assistants have tracked down publications, verified references, and moved this project forward at critical times. He thanks as well several generations of UCLA law students, whose enthusiasm and patience helped shape the course—including its title, which was the winner of a contest sponsored when one class came to him explaining, "This is a really interesting course, but no one will ever take it if you keep calling it Advanced Civil Procedure." I would like to thank the following authors and publishers for kindly granting permission to reproduce excerpts of, or illustrations from, the following materials:

- American Civil Liberties Union (ACLU), About the ACLU, http://www.aclu.org/about/index.html (last visited Sept. 14, 2009). Copyright © 2009 by the American Civil Liberties Union (ACLU). Reprinted with permission.
- American Judicature Society, Judicial Selection in Mississippi: An Introduction, http://www.ajs.org/js/MS.htm (July 6, 2005). Copyright © 2005 American Judicature Society, http://www.ajs.org/js/MS.htm (July 6, 2005). Courtesy the American Judicature Society.
- Baker & McKenzie, Our Firm, http://www.bakernet.com/BakerNet/Firm+Profile/default.htm. Copyright © 2009 by Baker & McKenzie. Reprinted with permission.
- Begue, Yvette, and Candice Goldstein, *How Judges Get into Trouble: What They Need to Know About Developments in the Law of Judicial Discipline*, 26 Judges' J. 8 (1987). Yvette Begue, formerly a staff attorney with the Center for Judicial Conduct Organizations of the American Judicature Society, currently serves as Deputy General Counsel for the Massachusetts Department of Telecommunication and Energy. Reprinted with permission.
- Berenson, Alex, Analysts See Merck Victory in Vioxx Deal, N.Y. Times, Nov. 10, 2007. Copyright © 2007 The New York Times. All rights reserved. Used by permission and protected by the Copyright Laws of the United States. The printing, copying, redistribution, or retransmission of the Material without express written permission is prohibited.

- Bernstein, Lisa, and Daniel Klerman, *An Economic Analysis of Mary Carter Settlement Agreements*, 83 Geo. L.J. 2215 (1995). Reprinted with permission of the publisher, Georgetown Law Journal © 1995.
- Brooks, C. W., *Pettyfoggers and Vipers of the Commonwealth: The "Lower Branch" of the Legal Profession in Early Modern England* 233, 236 (1986). Reprinted with the permission of Cambridge University Press.
- Carson, Clara N., *The Lawyer Statistical Report: The U.S. Legal Profession in 2000* (2004). Copyright © 2004 by American Bar Foundation. Reprinted with permission.
- Center for Individual Rights, Fighting for Individual Rights, http://www.cir-usa.org (Jan. 5, 2005). Reprinted with permission of the Center for Individual Rights.
- Cummings, Scott, *The Politics of Pro Bono*, 52 UCLA L. Rev. (2004). Copyright © 2004. Reprinted with permission of the author.
- Deja, Daniel, *How Judges Are Selected: A Survey of the Judicial Selection Process in the United States*, 75 Mich. B.J. 904 (1996). Reprinted with permission from the September 1996 issue of the Michigan Bar Journal.
- Deutsch, Linda, *Kozinski Declares Mistrial in L.A. Obscenity Case*, Associated Press, June 16, 2008. Copyright © 2008 by the Associated Press. Reprinted with permission.
- Engler, John, and Lucille Taylor, *Judicial Selection: A View from the Governor's Perspective*, 75 Mich. B.J. 910 (1996). Reprinted with permission from the September 1996 issue of the Michigan Bar Journal and the authors.
- Friedenthal, Jack, *Secrecy in Civil Litigation: Discovery and Party Agreements*, 9 J.L. & Poly. 67, 67-71, 76-77, 78, 81-83, 85, 87, 90, 92, 94, 95, 96, 97-98 (2000). Copyright © 2000. Reprinted with permission.
- Glater, Jonathan, *Study Finds Settling Is Better Than Going to Trial*, N.Y. Times, Aug. 8, 2008. Copyright © 2008 The New York Times. All rights reserved. Used by permission and protected by the Copyright Laws of the United States. The printing, copying, redistribution, or retransmission of the Material without express written permission is prohibited.
- Goldberg, Barbara, and Kenneth Mauro, *Utilizing Structured Settlements*, Practising Law Institute/Litigation and Administrative Practice Course: A Handbook Series, 658 PLI/Lit 31 (2001). Reprinted with permission.
- Gray, Cynthia, *Judicial Discipline in 2003*, 87 Judicature 193 (2004). Judicature, the journal of the American Judicature Society. Reprinted with permission.
- Heinz, John, *The Changing Character of Lawyers' Work*, 32 Law & Socy. 751 (1998). Copyright © 1998 by Blackwell Publishing. Reprinted with permission.
- JAMS, Mediation, http://www.masadr.com (July 7, 2005). Reprinted with permission. Copyright 2009 JAMS. All rights reserved.
- Jones Day, Firm Overview: One Firm Worldwide, http://www.jonesday.com/firm/overview (Feb. 23, 2009). Reprinted with permission.
- Jones, Ashby, More Law Firms Charge Fixed Fees for Routine Jobs, Wall St. J., May 2, 2007, at B1. Copyright 2007 by Dow Jones & Company, Inc. Reproduced with permission of Dow Jones & Company, Inc. in the format Textbook via Copyright Clearance Center.

- Kirkland & Ellis LLP, Our Firm, http://www.kirkland.com (Feb. 23, 2009). Copyright © 2009 by Kirkland & Ellis LLP. Reprinted with permission.
- Koppel, Nathan, *Recession Batters Law Firms, Triggering Layoffs, Closings*, Wall St. J., Jan. 29, 2009, eastern ed., at 1. Copyright 2009 by Dow Jones & Company, Inc. Reproduced with permission of Dow Jones & Company, Inc. in the format Textbook via Copyright Clearance Center.
- Kornhauser, Lewis A., and Richard L. Revesz, *Settlements Under Joint and Several Liability*, 68 N.Y.U. L. Rev. 427, 430-434, 435-441, 442-444 (1993). Copyright © 1993 by the New York University Law Review. Reprinted with permission.
- Kritzer, Herbert, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DePaul L. Rev. 267 (1998). Copyright © 1998. Reprinted with permission of the author.
- Legal Services Corporation, Serving the Civil Legal Needs of Low-Income Americans, A Special Report to Congress, April 30, 2000. Copyright 2000. Reproduced by permission of Legal Services Corporation.
- Leubsdorf, John, *Legal Malpractice and Professional Responsibility*, 48 Rutgers L. Rev. 101 (1995). Copyright © 1995 by Rutgers Law Review. Reprinted with permission.
- Lewis, Barbara, and Dan Otto, *The Financially Healthy Law Firm*, County Bar Update: The Newsletter of the L.A. County Bar Association (Nov. 2002). Copyright © 2002. Reprinted with permission.
- Lieff Cabraser Heimann & Bernstein, letter dated October 30, 2007, http://www.lieffcabraser.com. Reprinted with permission.
- Liptak, Adam, *Judicial Races in Several States Become Partisan Battlegrounds*, N.Y. Times, Oct. 24, 2004, at 1. Copyright © 2004 The New York Times. All rights reserved. Used by permission and protected by the Copyright Laws of the United States. The printing, copying, redistribution, or retransmission of the Material without express written permission is prohibited.
- Liptak, Adam, *Lenders to Those Who Sue Are Challenged on Rates*, N.Y. Times, May 19, 2003, at A15. Copyright © 2003 The New York Times. All rights reserved. Used by permission and protected by the Copyright Laws of the United States. The printing, copying, redistribution, or retransmission of the Material without express written permission is prohibited.
- Los Angeles County Bar Association, Judge in a Flash, email message to members dated Dec. 16, 2008. Copyright © 2009 by Los Angeles County Bar Association. Reprinted with permission.
- McElhaney, James, *Spotting the Losers*, ABA J., June 2005. James W. McElhaney is the Baker and Hostetler Distinguished Scholar in Trial Practice at Case Western Reserve University School of Law in Cleveland and the Joseph C. Hutcheson Distinguished Lecturer in Trial Advocacy at South Texas College of Law in Houston. Reprinted with permission of the author.
- Miller, Stanley A., II, Wills on the Web Online Services Cover the Basics, but Are No Substitute for a Lawyer, June 4, 2002, Section E, http://www.mjstech.com. Milwaukee Journal Sentinel [Only Staff-Produced Materials May Be Used] by Stanley A. Miller II. Copyright 2002 by Journal/Sentinel, Inc. Reproduced with permission of Journal/Sentinel, Inc. in the format Textbook via Copyright Clearance Center.

- Parrish, Michael, Leading Class-Action Lawyer Pleads Guilty to Conspiracy, N.Y. Times, Oct. 30, 2007. © 2007 The New York Times. All rights reserved. Used by permission and protected by the Copyright Laws of the United States. The printing, copying, redistribution, or retransmission of the Material without express written permission is prohibited.
- Rosenthal, Deborah, *Thinking Big, Staying Small: Even in Today's Legal Market You Can Run a High-Profile Practice with Fewer Than Ten Lawyers*, Cal. Law., May 2008, at 30-33. Copyright © 2008 by California Lawyer. Reprinted with permission.
- Samborn, Hope Viner, *No-Frills Approach Proving Costly: Insurer's Demands to Economize Are Too Much for Some Defense Firms*, ABA J., Mar. 1998. Reprinted by permission, © 2006. ABA Journal and ABA Journal eReport are published by the American Bar Association.
- Sample, James, David Pozen, and Michael Young, Fair Courts: Setting Recusal Standards, Brennan Center for Justice, 2008. Copyright © 2008 by the Brennan Center for Justice. Reprinted with permission.
- Selected notes on the interpretation of 28 U.S.C. sec. 455. Reprinted with the permission of LexisNexis.
- Shanahan, John L., *Controlling the Risks of Trial: The High-Low Agreement*, 33 For the Defense 25 (July 1991). Copyright © 1991. Reprinted with permission of the author.
- Silver, Charles, and Kent Syverud, *The Professional Responsibilities of Insurance Defense Lawyers*, 45 Duke L.J. 255 (1995). Copyright © 1995. Reprinted with permission of the authors.
- So You Want to Be a [California] Judge? Here's How, Cal. B.J., Apr. 2007. © April 2007 The State Bar of California. All rights reserved. Reprinted with permission. No part of this work may be reproduced, stored in a retrieval system, or transmitted in any medium without prior written permission of The State Bar of California.
- Syverud, Kent, *The Duty to Settle*, 76 Va. L. Rev. 1113 (1990). Copyright 1990 by Virginia Law Review. Reproduced with permission of Virginia Law Review in the format Textbook via Copyright Clearance Center.
- Thompson, Maryann Jones, Lovin' It: A New Poll of California's Lawyers Finds Widespread Contentment with Their Work, Cal. Law., July 2005, at 21. Editors of California Lawyer and Point by Point Publishing, Lovin' It: A New Poll of California's Lawyers Finds Widespread Contentment with Their Work by Maryann Jones Thompson, Cal. Law., July 2005. Copyright © 2005. Reprinted with permission of the author and Point by Point Publishing.
- Thompson, Maryann Jones, and Stacy Lawrence, *Mapping the Money*, Cal. Law., Sept. 2004, at 29 (article and figures). Editors of California Lawyer and Point by Point Publishing, *Lovin' It: A New Poll of California's Lawyers Finds Widespread Contentment with Their Work* by Maryann Jones Thompson, Cal. Law., July 2005. Copyright © 2005. Reprinted with permission of the author and Point by Point Publishing.
- Weil, Robert, and Ira Brown, *California Practice Guide: Civil Procedure Before Trial*, §§12:996-12:1000, 1002, 1020, 1030-1033, 1042-1043 (2006 ed.). Reproduced with permission of The Rutter Group, A Division of Thomson

- West, from Weil & Brown, *California Practice Guide: Civil Procedure Before Trial* (TRG 2006), Chapter 12 Part II. All rights reserved.
- Wollschlager, Christian, Exploring Global Landscapes of Litigation Rates, in Soziologie Des Rechts: Festschrift Fur Erhard, Blankenburg Zum 60 Geburstag, 587 (J. Brand & D. Stempel eds., 1998). Reprinted with permission.
- Yeazell, Stephen C., Brown, *The Civil Rights Movement, and the Silent Litigation Revolution*, 57 Vand. L. Rev. 1975 (2004). Copyright © 2004 by Vanderbilt Law Review. Reprinted with permission.
- Yeazell, Stephen C., *Getting What We Asked For, Getting What We Paid For, and Not Liking What We Got: The Vanishing Civil Trial,* 1 J. Empirical Legal Stud. 943 (2004). Copyright © 2004 by Blackwell Publishing. Reprinted with permission.
- Yeazell, Stephen C., *The Misunderstood Consequences of Modern Civil Process*, 1994 Wis. L. Rev. 631. Wisconsin Law Review; Copyright © 1994 by The Board of Regents of the University of Wisconsin System; Reprinted by permission of the Wisconsin Law Review.
- Yeazell, Stephen C., *Refinancing Civil Litigation*, 15 De Paul L. Rev. 183, 190-193 (2001). Copyright © 2001 De Paul Law Review. Reprinted with permission.

CONTEMPORARY CIVIL LITIGATION

SUMMARY OF CONTENTS

Contents			
Acknowledgments			
INTRODUCTION			
1 LAWYERS, CLIENTS, AND CIVIL LITIGATION	9		
2 FINANCING LITIGATION, FINANCING LAW: BASIC MECHANISMS	173		
3 SETTLEMENT: THE LAW AND STRATEGY OF LITIGATION RISK CONTROL	281		
4 IUDGES	459		

CONTENTS

	Acknowledgments	xxiii
	INTRODUCTION	1
	A. GOALS AND MEANS	1
	B. THIS COURSE AND THE REST OF LAW SCHOOL	2
	C. SOME HYPOTHETICAL CASES	3
1	LAWYERS, CLIENTS, AND CIVIL	
	LITIGATION	9
	INTRODUCTION	9
	A. LAWYERS: WHO WE ARE, HOW WE MAKE	
	A LIVING	10
	1. The Organization and Structure of the Profession	11
	 John Heinz, The Changing Character 	
	of Lawyers' Work	11
	 Clara N. Carson, The Lawyer Statistical Report: 	
	The U.S. Legal Profession in 2000 (Excerpted)	20
	 State Bar of California, 2006 Membership Survey 	21
	 UCLA Law Graduates, Class of 2007: A Comparison 	
	Cohort	24
	 Leigh Jones, Top Law Schools Tighten Their 	
	Hold on NLJ 250 Firms	26
	William Henderson & Andrew Morriss, What Law	
	School Rankings Don't Say about Costly Choices	27

	2. Where Do I Fit into This Picture—And Will I Like It?	33
	 Marcia Ruben, Getting Their Due: It's Never 	33
	Been as Easy as It Is Today to Be a Female Lawyer,	
	but a Few Hurdles Remain	33
	 Karen Asner, Commentary: Where the Women Are 	33
	 Kellie Schmitt, Got Kids? These Clients Don't Care 	35
	• Editors of California Lawyer & Point by Point	
	Publishing, Lovin' It: A New Poll of California's	
	Lawyers Finds Widespread Contentment with	
	Their Work	37
В.	LITIGATION: HOW MUCH, ABOUT WHAT, AND	
	WITH WHAT OUTCOME?	39
	1. Global Civil Litigation	39
	 Christian Wollschläger, Exploring Global 	
	Landscapes of Litigation Rates	39
	2. Civil Litigation in the United States: The Big Picture	47
	 National Center for State Courts, Civil Filings 	
	in State Courts by Type of Litigation	47
	 National Center for State Courts, Civil Filings 	
	in State Courts by Type of Litigation	48
	 Lynn Langton & Thomas H. Cohen, U.S. 	
	Department of Justice, Bureau of Justice Statistics	
	Special Report, Civil Bench and Jury Trials in State	
	Courts, 2005	49
C.	CLIENTS: REPRESENTATION AS THE HINGE OF	
	LITIGATION DYNAMICS	64
	1. Duties of Lawyers as Lawyers	65
	a. The Formal Structure: Selected Model Rules of	
	Professional Conduct	65
	b. Informal Exhortations	69
	 State Bar of California, California Attorney 	
	Guidelines of Civility and Professionalism	69
	c. The Consequences	71
	 John Caher, Proposal Gives Higher Penalties 	
	to Fake Lawyers	71
	• Hawes v. State Bar of California	72
	• In re Dale: In the Matter of Joshua M. Dale,	
	a Member of the State Bar	75
	Mike McKee, Bad News for Bad Lawyers: Bar Leaders	
	Want Miscreants to Foot the Tab for Discipline	75
	 State Bar of California, Client Security Fund 	76

			Contents
	2.	Duties of Lawyers as Professionals • John Leubsdorf, Legal Malpractice & Professional	77
		Responsibility	77
		Waldman v. Levine	91
		• Century Media Corp. v. Carlile Patchen	
		Murphy & Allison	97
		 Mosier v. Southern California Physicians 	
		Insurance Exchange	102
		 Gina Passarella, Duane Morris Defeats Claim 	
		of Malpractice	108
		Mary Pat Gallagher, NJ Court Rules Lawyers	400
		Must Report Colleagues' Known Misdeeds	109
		Lisa Siegel, Lawyers Face Civil RICO Charges Leff Plumenthal, Survey, More Firms Using	110
		 Jeff Blumenthal, Survey: More Firms Using Their Own GC 	111
	2		112
	Э.	Duties of Lawyers as LitigatorsChristian v. Mattel	113
ъ	CI		113
υ.		LIENTS FINDING LAWYERS, LAWYERS NDING CLIENTS	117
	1.	A Problem Seen from Two Sides	117
		a. Client Ignorance	117
		b. Lawyer Ignorance	117
	2.	Solutions for Clients	117
		a. Information	117
		 Sheri Qualters, Controversial Lawyer-Rating 	
		Service to Expand	117
		Dan Levine, California Bar Votes to Require	
		Client Disclosure on Malpractice Insurance	118
		b. Referral and Advertising	119
		 Leiff Cabraser Heimann & Bernstein Web Site Joel Stashenko, Suit over NY Rules on Lawyer 	119
		Advertising Goes to Trial	120
	3	Solutions for Lawyers, Including at Least One	120
	٥.	Illegal One	121
		James McElhaney, Spotting the Losers	121
		California Rule of Professional Conduct 2-400	124
		Michael Parrish Leading Class-Action Lawyer	

xiii

124

Pleads Guilty to Conspiracy