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# CIVIL PROCEDURE

THIRD EDITION



*Richard D. Freer*



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ASPEN TREATISE SERIES



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# CIVIL PROCEDURE

Third Edition

**RICHARD D. FREER**

**Robert Howell Hall Professor of Law  
Emory University**



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## **Preface, Acknowledgments, and Conventions**

Many students consider Civil Procedure the most difficult first-year law school course. The main reason is simple: Civil Procedure is foreign to your experience. While everyone has had some exposure to principles addressed in the other core first-year courses (such as Contracts and Torts), virtually no one spends any of her youth or young adulthood pondering the jurisdiction of the federal courts, the appealability of interlocutory orders, or supplemental jurisdiction over impleader claims against nondiverse third party defendants. Some students never break through the shroud of unfamiliarity to appreciate this course and why it is important. And it is indeed important. For a great many lawyers, Civil Procedure will address the most significant set of doctrines and principles in their practice.

I hope this book is of use not only to law students but to lawyers. We want to de-mystify Civil Procedure, which we will do in several ways. First, we try to use real-world, common terms. When I was in law school, for instance, I could not figure out how a court could “attach” property. Nothing in my course made the idea any easier. I think we will find the idea fairly straightforward here. The book, like its author, is informal and (hopefully) occasionally funny.

Second, we break complex doctrines into constituent parts. So, for example, instead of trying to approach the entire constitutional test for personal jurisdiction as one whole, we break it into smaller, easily understood components. And instead of asking you to memorize Rule 12 of the Federal Rules of Civil Procedure to determine when various defenses can be raised, we break it into three easily remembered principles that cover every possible permutation for an examination or a real-world case.

Third, we will emphasize how various doctrines fit together. Sometimes, students master individual topics—such as subject matter jurisdiction and venue—but have no idea how they fit together. Throughout the book, you will see cross-references and footnotes that constantly force the reader to consider how various

## Preface, Acknowledgments, and Conventions

topics interrelate. For example, we emphasize that many of the most important elements of a Civil Procedure course—personal jurisdiction, service of process, subject matter jurisdiction, and venue—all relate to a single idea: that of choosing a place where litigation will take place. And we discuss in detail why that choice of “forum” is so important that litigants may spend a great deal of money and time arguing over where the litigation will proceed.

Fourth, throughout, there are hypotheticals to test your application of the principles discussed. And not imponderable hypotheticals, but hypos with answers provided and discussed. I have never forgotten that you need not only to know the doctrines, but to be able to apply them to a fact pattern on your examination.

Fifth, at various points, we pull together complex topics into analytical frameworks. So, for instance, after you study Chapter 2 on personal jurisdiction, we have a section pointing out how to use the tools acquired from the case law to address an examination question. This section walks step by step through how we might analyze any exam question in that area, using each of the relevant factors identified by the Supreme Court.

Finally, though our focus is largely on legal doctrine, I have tried to convey an appreciation of the richness and depth of the subject, to put topics in context with each other and with the larger goal of the pursuit of justice. I believe this work will be helpful not only to students but to lawyers and judicial law clerks whose handle on (or memory of) Civil Procedure and federal jurisdiction may be less than they wish it to be.

There are 14 chapters in the book. They are arranged largely in chronological order, addressing the various issues that are confronted in bringing, defending, and litigating a case. You should realize, however, that there is no single “right” order in which to teach Civil Procedure. Professors and casebooks vary greatly in the order in which they address the subjects. So if the syllabus for your course looks different from our table of contents, do not worry. Each chapter in this book is intended to stand on its own—to be self-contained. At the same time, each, as noted above, will tell you how the material relates to other material throughout the course. So the order in which you approach the topics is irrelevant. This book will help you not only to master the individual areas of Civil Procedure, but to appreciate the whole of the course as well. That said, I do think it a good idea to read Chapter 1 before delving into any particular area. It gives you an overview of the course and



## Preface, Acknowledgments, and Conventions

discusses some background topics that will be relevant at various points along the journey.

So welcome to Civil Procedure. We will get a good handle on it, put the pieces together, and understand it. And we will have some fun doing it.

\*\*\*\*\*

I am indebted to my colleagues at Emory. In particular, Tom Arthur is generous and insightful and has contributed enormously to my career—a career that has overlapped his for nearly three decades now. Likewise, Peter Hay has given indispensable guidance and has helped me appreciate, if not understand fully, the vexing world of conflict of laws. Tom and Peter are dear friends, and I owe them a great deal. Through the years, all the Emory Civil Procedure faculty has been wonderful in helping me develop this book and the casebook I of which I am a coauthor. I am grateful to each of them—Colleen Murphy, Kimberly Robinson, Robert Schapiro, and George Shepherd. And I will always value the patient mentorship of our dear departed colleague Don Fyr.

It is a singular honor to have known the late Judge Robert Howell Hall, whose contributions to the federal and state benches in Georgia are legendary. I am privileged and humbled to hold the chaired professorship that bears his name. I give a special note of thanks to Scott Fingerhut, who took time from a very busy schedule to comment on manuscript. Likewise I thank Debra Cohen, who has patiently contributed comments on this work as it has evolved. I am proud to say that Scott and Debra are former students and present colleagues in the academy. I am prouder to say that they are dear friends.

My work has also been enriched by Civil Procedure colleagues at other schools. Many thanks to Vince Alexander, Joe Bauer, Ed Brunet, Bob Casad, Howard Fink, Charlotte Goldberg, Cynthia Ho, Bill Janssen, Hillel Levin, Ben Madison, Naomi Mezey, Lou Silverman, Joan Steinman, Margaret Tarkington, and Carl Tobias.

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I owe a special debt to my friend and coauthor of our casebook (now in its sixth edition), Wendy Perdue, with whom I have been privileged to work on that volume for nearly 20 years. Working

## Preface, Acknowledgments, and Conventions

with Wendy enabled me to meet Sherman Cohn, who has been a wonderful mentor and colleague.

Research assistants through the years at Emory have gone many extra miles on this work. I am grateful to Jennifer DiAngelo, Myra Mormile, Katy Quarles, Ethan Rosenzweig, and Ashley Wilkes for timely and meaningful contributions. Each of them is now flourishing in the “real world,” and I remain grateful for their help.

My wife Louise is patient and supportive. When I started the original edition of this book, our children were in grade school. Now they are pursuing their professional careers and dreams. I wish for them the joy and fulfillment I continue to find in this wonderful field called law teaching. The dedication of the book to Weasie and our children is a small token of my indebtedness.

\*\*\*\*\*

Throughout the book, I cite the two standard multivolume works—Moore’s Federal Practice and Wright & Miller’s Federal Practice and Procedure—in abbreviated form, without noting the authors on specific volumes. Thus, they are cited as specific volumes of “Moore’s Federal Practice” and “Wright & Miller,” respectively. I am honored to be a contributor to both of those works. The citations to them are through the 2011 supplements. In addition, citations to Charles Alan Wright & Mary Kay Kane, *The Law of Federal Courts* (7th ed. 2011) are indicated “Wright & Kane, Federal Courts.”

*Richard D. Freer*  
*Atlanta*  
*April 2012*

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