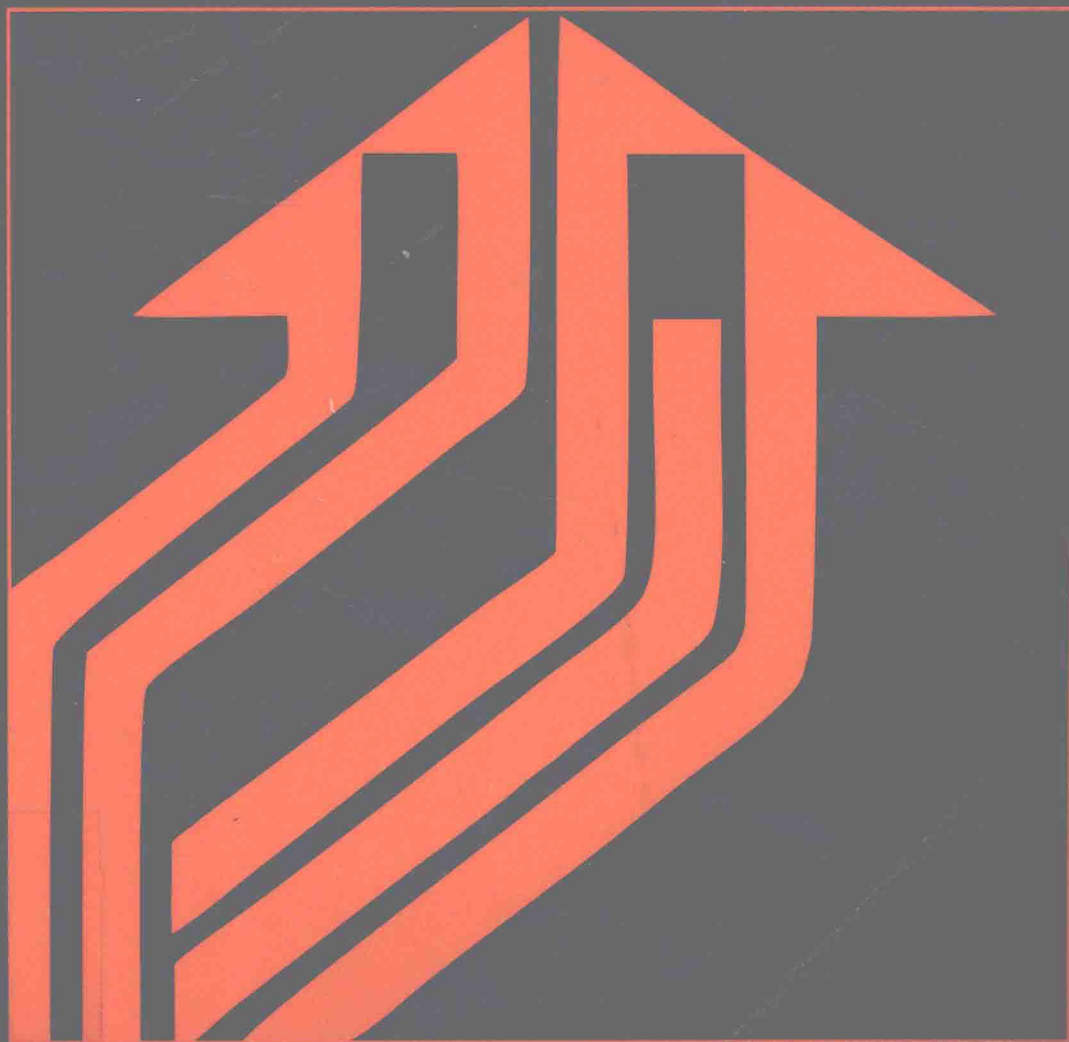


# FUNDAMENTALS OF PRETRIAL LITIGATION

Third Edition

ROGER S. HAYDOCK • DAVID F. HERR • JEFFREY W. STEMPEL



# FUNDAMENTALS OF PRETRIAL LITIGATION

**Third Edition**

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**AMERICAN CASEBOOK SERIES®**



**WEST PUBLISHING CO.**

ST. PAUL, MINN., 1994

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610 Opperman Drive  
P.O. Box 64526  
St. Paul, MN 55164-0526  
1-800-328-9352

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Printed in the United States of America

**Library of Congress Cataloging-in-Publication Data**

Haydock, Roger S.

Fundamentals of pretrial litigation / by Roger S. Haydock, David

F. Herr, Jeffrey W. Stempel. — 3rd ed.

p. cm. — (American casebook series)

Includes index.

ISBN 0-314-04079-X

1. Pre-trial procedure—United States. I. Herr, David F.

II. Stempel, Jeffrey W. III. Title. IV. Series.

KF8900.H433 1994

347.73 '72—dc20

[347.30772]

94-25387

CIP

ISBN 0-314-04079-X



TEXT IS PRINTED ON 10% POST  
CONSUMER RECYCLED PAPER

Printed with **Printwise**  
Environmentally Advanced Water Washable Ink



1st Reprint—1995

*To*  
*Marni, Marci and Jeffrey*

*To*  
*Mary Kay, Ehrland and Alec*

*and*

*To*  
*Ann, Ryan, Shanen and Reed*

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## Preface

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The adventure of pretrial litigation resembles most life experiences. There will be times of success, failure, joy, sorrow, excitement, weariness, confidence, fear, laughter, depression, and mirth. You will face another client!, continuing investigations?, more pleadings (phooey), endless discovery (sigh), countless motions (#\$%&) and satisfying settlements (ahhh). This book has been designed to provide you with the knowledge, procedures, tactics, and skills to guide you through these thrills of victory and agonies of defeat.

The civil litigation process includes both pretrial procedures and trial itself. The amount of time a litigator spends in trial is minimal. The amount of time a litigator spends on pretrial matters is enormous. Pretrial litigation is the heart and soul of litigation practice and constitutes the vast universe of how most litigators spend their professional life: breathing and thinking investigation, pleading, discovery, motions, hearings, negotiations, strategies, tactics, rules, cases, procedures, research, and the law.

The conceptual and pragmatic considerations addressed in this book provide an overview and an inner view of the dynamics of the pretrial litigation process. This book is based upon the authors' experiences as practitioners and professors, the contributions of colleagues and commentators, common sense, and the law. What law? The Federal Rules of Civil Procedure and federal court decisions mixed with representative state law form the primary focus of this book. There often is, in actuality, little difference between federal rules, statutes, decisions, and the respective laws of many states. Similarity also exists between federal and state practice even in those states that have not modeled their laws after federal practice. Admittedly the courthouses are blocks or cities apart and the captions are different, but many litigation strategies and tactics are the same in both systems.

Following the amendments to the Federal Rules of Civil Procedure in 1993, much greater variation exists in federal court rules. The 1993 amendments allow individual districts to "opt out" of the rule changes or to modify the rules as they determine is best. The result is that about half of the federal districts are either not following some of the rules or are considering not following them. The new rules are discussed in this edition, but with the understanding that in some districts the changes of the new rules are just experiments being conducted in other districts, and that do not affect the local practice.

The litigation process represents one method to resolve disputes. This method needs to be placed in perspective. The end result of litigation—a trial—resolves a small percentage of disputes. Negotiated settle-

ments resolve many, many, many more disputes. Other dispute resolving procedures—notably arbitration, conciliation, and mediation—can be more efficient and less costly than litigation. These alternative approaches to dispute resolution are covered at the end of this book. This placement does not reflect any bias in favor of or prejudice against any of these remedies, but merely reflects that this book covers the primary means our society relies upon to resolve civil disputes: the pretrial litigation process.

This process involves a sequence of events that typically occur in a reasonably patterned order. The Table of Contents of this book outlines that pattern, although this outlined sequence will not always occur in this order. A motion may be interposed instead of a pleading; discovery may follow the submission of motions. You should not presume—now having reread the Contents—that the real world reflects this precise sequence. Much of the litigation process will proceed in a set pattern: pleadings will follow research and investigation; discovery will precede motions; negotiation settlement discussions will likely resolve the case. But it should come as no surprise to you that facets of the litigation process will be as out of “order” as other facets of your life.

This book covers all facets of the pretrial litigation process. Chapter 1 presents an overview of the litigation process, including planning. Chapter 2 covers legal research and factual investigation. Chapter 3 explains pleadings. Chapter 4 addresses motions, pleadings and jurisdiction. Chapter 5 introduces the scope of discovery (and, where followed, disclosure) followed by Chapters 6, 7, 8, and 9 that deal respectively with depositions, interrogatories, requests for production and physical examinations, and requests for admissions. Chapter 10 describes the enforcement of discovery rights. Chapter 11 introduces motion practice. Chapter 12 covers a variety of pretrial motions relating to the merits. Chapter 13 explains motion presentations. Chapter 14 explains portions of settlement negotiations. Chapter 15 concludes this book with a discussion of pretrial conferences and orders. Chapter 16, which was omitted, explained how litigators, with the assistance of either the divine or the devil, created this whole process and continue to revel in its functions.

Analyzing and deciphering these chapters should explain the whys and wherefores and dos and don'ts of litigation practice. But learning about litigation also requires direct involvement in the practice of analyzing problems, planning a case, conducting an investigation, drafting pleadings, engaging in discovery, presenting motions, and resolving a dispute. These skills can be developed and refined by completing the problems and exercises that appear throughout the book.

There are two types of problems. Short, self-contained problems appear at the ends of each chapter and present a concise problem scenario. Case files of various lengths appear at the end of the book and provide factual settings for some of the exercise assignments in the chap-

ters. In particular, the adventures of Case File A, *Hot Dog Enterprises v. Tri-Chem, Inc.*, provide a rich factual and legal background from which a number of exercises (either included in this book or created by the instructor) can result. Relevant substantive laws appear in legal memoranda included in each case file. These memos provide the basic law necessary to conduct the litigation exercises. Other or additional laws from another jurisdiction may also be applied, if necessary.

Some of the problems, particularly the discovery exercises, may require the inclusion of detailed information that does not appear in the problem or case file. Confidential information may be available through supplemental materials from your instructor. Further, you and your opponent may add such facts if it is reasonable that an attorney, witness, or client would know of such facts and would remember them. These added details must be consistent with the facts given and cannot distort or exaggerate the situations.

Fact situations have been designed and selected that mimic typical and common cases civil litigators face. Alternative fact scenarios have been provided that raise the same or similar issues in different contexts. This variety allows the reader or the instructor the option to exclude problems and exercises from coverage in a class or program.

Forms, examples, sample pleadings, discovery documents, and motions are included throughout the text and files. A caveat needs to be added to your use of these forms. They provide illustrative examples. They are not written in stone. We offer them as visual illustrations of what the litigation process looks like and to assist you in drafting your own documents. They are not perfect examples of what should be done in every case. Nor are they comprehensive. Readily available sources provide more forms than any reasonable litigator needs. These sources include West's Federal Forms, Moore's Federal Forms, and state court form books. Some of these proposed forms are unduly verbose, others needlessly formalistic. Sample documents should not be blindly copied unless the form applies directly to the specifics of the particular case involved. The examples in this book or any book need to be modified and adapted for use in each individual case.

Each chapter also contains cross-references to sources of more complete and detailed information. This does not mean that this book does not contain absolutely *everything* you need to know about litigation. Some of you, in your lonelier moments, may wish to peruse other litigation materials and articles and you can do so at your leisure. Two appendices appear at the end. Appendix A includes a set of instructions for the preparation of deponents. This "brochure" can be read by prospective deponents to better prepare them for depositions. Appendix B contains the case files previously described.

Dashes of humor appear throughout this book. These occasional comments may seem out of place to some of you, irrelevant to others, and

even humorous to still others. We only encourage the last response. Sometimes we take ourselves and the practice of law too seriously (just think of law school exams and the bar examination) and an occasional guffaw, moan, or titter helps put things in perspective.

We now begin this book with the hope that you have or will discover the excitement and adventure that accompanies litigation practice. If you don't believe us, return this book (easy now). If you do, read on.

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May 1994



## Acknowledgements

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Many persons made this book a reality. No three authors write a book without the substantial support, comfort, and assistance of each other and others. Those whom we love and who love us deserve public recognition for their special place in our lives. Roger thanks Cherie, Marni, Marci, Jeffrey, Sil, Sue, and Joyce. David thanks his family, his friends, his partners, and his colleagues. Jeffrey also thanks his family and friends, especially Ann.

Several students spent many hours working with us. Research assistants, editors, and cite checkers include: Mike "No problem" Miller, Sonja "I'll work late" Peterson, Hazel "This is funny?" Hanley, Nancy "You mean what?" Quattlebaum, Kay "I can get it" Tuveson, Tim "This is ethical?" Strom, Janey "Breaktime" Gohl, Carol "Another break?" Eckersen, Deborah "I have time" Hoch, Diane "Let me edit" Dube, and Mark "Index card" Thompson.

Alberta Dowlin, Annette Friedley, Jacque Krigbaum, Lynn Bourasa, Dawn Christensen, Betty Wade, Lynnette Shanahan, and Marthanne Juvland typed, corrected, and re-typed countless drafts and helped with many of the tasks necessary to place a final manuscript into our editors' hands.

Professors John Sonsteng, Michael Steenson, William Danforth, Melvin Goldberg, Marcia Gelpe, Geoffrey C. Hazard, E. Donald Elliot, and Guido Calabresi provided invaluable assistance in the form of inspiration, ideas, criticism, and encouragement. We thank West Publishing for publishing this book. We are also indebted to Little, Brown & Company for their permission to reprint at length from our earlier books, *Discovery Practice*, *Discovery: Theory, Practice and Problems*, and *Motion Practice*. Those works form a substantial foundation for this book and we gratefully acknowledge the contributions made by Little, Brown and its editorial staff. We are particularly indebted to William Mitchell College of Law for the continuous and substantial support throughout this project, and to all the lawyers of Maslon Edelman Borman & Brand, and to Donald Horton and Judith Langevin, whose support and forbearance are appreciated by each of us.

The judges before whom we have appeared and for whom we have clerked have taught us much about how litigation is and should be conducted. Judges Raymond Broderick, Jonathan Lebedoff, Harold Kalina, and Susanne Sedgwick, and Judge, then Chief Justice, Douglas Amdahl have been valuable and lasting mentors and examples of how the judicial system is supposed to work.

Peter Knapp, Cindy Jesson, Stephen Patrick Doyle, Richard Corky Wharton, Ann Juergens, Eric Janus, Renee Anderson, Teri Killen, and

Julie Antonson provided us with additional ideas and encouragement for this edition.

The lawyers at Maslon Edelman Borman & Brand have provided wonderful examples of excellent lawyering and their support and forbearance is appreciated. Lynnette Shanahan and Patricia Porter provided valuable assistance.

Thanks to Dean (now Judge) David Trager, Richard Allan, Margaret Berger, Richard Farrell, Maryellen Fullerton, Ann McGinley, Jennifer Rosato, and Liz Schneider of Brooklyn Law School. Special thanks to Brooklyn clinical professors (a/k/a real lawyers) Stacy Caplow, Mary Jo Eyster, Minna Kotkin, Kathleen Sullivan, and Carrie Teitcher. Jeff's colleagues on the Committee on Federal Courts of the Association of the Bar of the City of New York have provided frequent, useful (and real-life) suggestions that have benefited this book.

Aaron Dean, Shawn Raiter, Millicent Calinog, Margaret Kane, and Michael Rowley, Ana-Maria Galeano, Mark Kornfield, Nancy London and Terri Pandolfi served as very able research assistants.

We are grateful for the widespread acceptance the first and second editions received. We were in 1985, and are in 1994, convinced that the teaching and learning of how the civil litigation process works before trial is immensely important. We are glad to see law school curriculums increasingly focus on this area. We hope this book proves memorable, enjoyable, and useful.

We further acknowledge you—who will be reading and using this book—and your decision to attend law school and to enter practice. We have written the text, problems, and exercises for you, for the clients you will represent, and for the system you serve.

# **FUNDAMENTALS OF PRETRIAL LITIGATION**

**Third Edition**

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