

TENTH EDITION

Civil Procedure

Kevin M. Clermont

BLACK LETTER OUTLINES



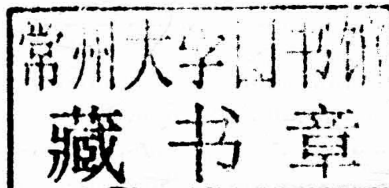
 **WEST**
ACADEMIC
PUBLISHING

BLACK LETTER OUTLINES

Civil Procedure

TENTH EDITION

by **Kevin M. Clermont**
Ziff Professor of Law,
Cornell University



BLACK LETTER SERIES®

 **WEST**
ACADEMIC
PUBLISHING

The publisher is not engaged in rendering legal or other professional advice, and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional.

Black Letter Series is a trademark registered in the U.S. Patent and Trademark Office.

Copyright © 1982, 1988, 1993, 1995 WEST PUBLISHING CO.

© West, a Thomson business, 1999, 2001, 2004

© 2009, 2012 Thomson/Reuters

© 2015 LEG, Inc. d/b/a West Academic

444 Cedar Street, Suite 700

St. Paul, MN 55101

1-877-888-1330

West, West Academic Publishing, and West Academic are trademarks of West Publishing Corporation, used under license.

Printed in the United States of America

ISBN: 978-0-314-29053-3

Summary of Contents

Capsule Summary of Civil Procedure.....	1
Perspective	27

PART ONE. GENERAL CONSIDERATIONS

Chapter I. Civil Procedure Analyzed	39
A. Approaches to Civil Procedure	40
B. Approach of Outline	40
Chapter II. Civil Procedure Synthesized	43
A. Nature of Civil Procedure	44
B. Content of Civil Procedure	46
C. History of Civil Procedure	47
Review Questions.....	55

PART TWO. LITIGATING STEP-BY-STEP

Chapter III. Preliminary Considerations	59
A. Federal Focus	60
B. Selecting a Court with Authority to Adjudicate	60
Chapter IV. Pretrial.....	63
A. Pleading Stage	64
B. Disclosure	74
C. Discovery	76
D. Pretrial Conference.....	83
E. Other Steps	84
Chapter V. Trial.....	91
A. Scenario	92
B. Jury and Judge	96
Chapter VI. Judgment	103
A. Entry of Judgment.....	104
B. Kinds of Relief.....	104
C. Enforcement of Judgment	105
D. Relief from Judgment	107

Chapter VII. Appeal	109
A. Appealability	110
B. Reviewability	112
Review Questions	115

PART THREE. AUTHORITY TO ADJUDICATE

Chapter VIII. Subject-Matter Jurisdiction	121
A. Introduction to Subject-Matter Jurisdiction	122
B. State Courts	122
C. Federal Courts	123
Chapter IX. Territorial Authority to Adjudicate	139
A. Introduction to Territorial Authority to Adjudicate	140
B. Application of Current Due Process Doctrine	143
C. Other Limitations on Territorial Authority to Adjudicate	153
Chapter X. Notice	165
A. Introduction to Notice	166
B. Constitutional Requirement	166
C. Nonconstitutional Requirements	168
D. Contractual Waiver of Protections	169
Chapter XI. Procedural Incidents of Forum-Authority Doctrines	171
A. Procedure for Raising	172
B. Consequences of Raising	175
C. Consequences of Not Raising	175
Review Questions	177

PART FOUR. COMPLEX LITIGATION

Chapter XII. Preliminary Considerations	183
A. Historical Note	184
B. Federal Focus	184
C. Abuses	185
Chapter XIII. Multicclaim Litigation	187
A. Compulsory Joinder	188
B. Permissive Joinder	190
Chapter XIV. Multiparty Litigation	193
A. General Joinder Provisions	194
B. Special Joinder Devices	196
Review Questions	209

PART FIVE. GOVERNING LAW

Chapter XV. Choice of Law	215
A. Techniques	216
B. Constitutional Limits	216

Chapter XVI. Choice Between State and Federal Law	217
A. State Law in Federal Court: <i>Erie</i>	218
B. Federal Law in State Court: Reverse- <i>Erie</i>	233
C. Summary	234
Review Questions.....	235

PART SIX. FORMER ADJUDICATION

Chapter XVII. Preliminary Considerations.....	241
A. Introduction to Former Adjudication	242
B. Rationale of Res Judicata.....	244
C. Application of Res Judicata.....	245
Chapter XVIII. Claim Preclusion	249
A. Requirements of Claim Preclusion	250
B. Exceptions to Claim Preclusion	251
C. Counterclaims	253
Chapter XIX. Issue Preclusion	255
A. Requirements of Issue Preclusion	256
B. Exceptions to Issue Preclusion.....	256
C. Multiple Issues.....	257
Chapter XX. Nonordinary Judgments	259
A. Nonpersonal Judgments.....	260
B. Noncoercive Judgments.....	260
C. Nonjudicial or Noncivil Proceedings.....	260
Chapter XXI. Nonparty Effects	263
A. Privies.....	264
B. Strangers.....	264
Chapter XXII. Nondomestic Judgments	267
A. General Rules.....	268
B. Judgments of American Courts	268
C. Judgments of Foreign Nations.....	269
Review Questions.....	271
Appendix A. Answers to Review Questions	275
Appendix B. Practice Examination	287
Appendix C. Glossary	291
Appendix D. Text Correlation Chart.....	301
TABLE OF CASES.....	315
TABLE OF STATUTES.....	317
TABLE OF RULES	319
INDEX	323

Table of Contents

Capsule Summary of Civil Procedure.....	1
Perspective	27

PART ONE. GENERAL CONSIDERATIONS

Chapter I. Civil Procedure Analyzed	39
A. Approaches to Civil Procedure	40
B. Approach of Outline	40
1. General Considerations	40
2. Litigating Step-by-Step	40
3. Authority to Adjudicate	40
4. Complex Litigation	40
5. Governing Law	41
6. Former Adjudication	41
Chapter II. Civil Procedure Synthesized	43
A. Nature of Civil Procedure.....	44
1. Definition.....	44
a. "Civil"	44
b. "Procedure"	44
c. Narrow Focus	44
2. Sources.....	45
3. Motivation	45
B. Content of Civil Procedure	46
1. Policies	46
a. Adversary System	46
b. Other Policies	46
2. Rules	47
C. History of Civil Procedure	47
1. English Roots	47
a. Common Law.....	47
1) Origins.....	47
2) Courts.....	47
3) Procedure	48
a) Writ System	48
b) Forms of Action.....	48
4) Remedies	49
5) Substantive Law	49
6) Problems	49

b. Equity	49
1) Origins	49
2) Courts	49
3) Procedure	49
4) Remedies	50
5) Substantive Law	50
6) Problems	50
a) Joinder	50
b) Equitable Counterclaims and Defenses	50
2. State Developments	51
a. Early Period	51
b. Code Reforms	51
1) Field Code	51
2) Subsequent Developments	51
3. Federal Developments	52
a. Pre-Reform Period	52
b. Rules Reform	52
1) Rules Enabling Act	52
2) Federal Rules of Civil Procedure	53
3) <i>Sibbach</i>	53
Review Questions	55

PART TWO. LITIGATING STEP-BY-STEP

Chapter III. Preliminary Considerations	59
A. Federal Focus	60
B. Selecting a Court with Authority to Adjudicate	60
1. General Requirements	60
2. Specific Assumptions	60
a. Rule 3	61
b. Rule 4	61
Chapter IV. Pretrial	63
A. Pleading Stage	64
1. General Rules	64
a. Purposes of Pleadings	64
b. Form of Pleadings	65
1) Caption	65
2) Paragraphs	65
3) Separate Counts and Defenses	65
4) Signing	66
5) Verification	66
c. Contents of Pleadings	66
1) Burden of Allegation	66
2) Relevance	66
3) Detail	66
d. Flexibility of Pleadings	67
1) Alternative and Inconsistent Pleading	67
2) Multiple Claims and Parties	67
e. Governing Law	67

2.	Steps in Pleading Stage.....	67
a.	Complaint	67
1)	Jurisdictional Allegation.....	68
2)	Statement of Claim	68
3)	Demand for Relief.....	69
b.	Defendant's Motion and/or Answer.....	69
1)	Objections.....	69
a)	Types	69
b)	Presentation and Waiver	69
2)	Disfavored Defenses	69
a)	Types	69
b)	Presentation and Waiver	70
3)	Defenses on the Merits.....	70
a)	Types	70
b)	Presentation and Waiver	70
4)	Favored Defenses	70
a)	Types	70
b)	Presentation and Waiver	71
5)	Subject-Matter Jurisdiction Defense	71
a)	Type	71
b)	Presentation and Waiver	71
c.	Plaintiff's Motion, Reply, and/or Answer.....	71
1)	Responding to Defenses	71
a)	Motion	71
b)	Reply.....	71
2)	Responding to Counterclaims	72
a)	Motion	72
b)	Answer.....	72
3.	Amendments.....	72
a.	Amendments as a Matter of Course	72
b.	Other Amendments.....	72
1)	When Allowed	73
2)	Special Situations.....	73
a)	Amendments to Meet Objections at Trial	73
b)	Amendments to Conform to Evidence at Trial	73
c.	Relation Back of Amendments	73
d.	Supplemental Pleadings	74
B.	Disclosure	74
1.	Purposes	74
2.	Scope	74
a.	Initial Disclosures	74
b.	Expert Information	74
c.	Pretrial Disclosures.....	75
3.	Mechanics	75
a.	Form.....	75
b.	Certification.....	75
c.	Supplementation	75
d.	Sanctions.....	75
e.	Conference	75
4.	Problems	76

C. Discovery	76
1. General Rules	76
a. Purposes of Discovery	76
b. Scope of Discovery	76
1) General Standards	76
a) Relevance	76
b) Privilege	77
2) Additional Provisions	77
a) Work Product	77
b) Expert Information	77
c) E-Discovery	78
d) Other Restrictions	78
c. Mechanics of Discovery	78
1) Signing	78
2) Requests to Discover	78
3) Discovery Responses	79
a) Supplementation	79
b) Protective Orders	79
c) Sanctions	79
d) Procedural Incidents of Court Action	80
4) Discovery Expenses	80
5) Use of Discovery Products	80
d. Problems of Discovery	80
2. Specific Devices	81
a. Types	81
1) Oral Depositions	81
2) Written Depositions	81
3) Interrogatories	81
4) Production of Documents and Such	81
5) Physical and Mental Examination	82
6) Requests for Admission	82
b. Summary	82
D. Pretrial Conference	83
1. Purposes	84
2. Procedural Incidents	84
3. Order	84
E. Other Steps	84
1. Provisional Remedies	84
a. Seizure of Property	84
1) Procedural Incidents	85
2) Constitutional Aspects	85
b. Injunctive Relief	85
1) Temporary Restraining Order	85
2) Preliminary Injunction	85
2. Summary Judgment and Other Steps That Avoid Trial	85
a. Summary Judgment	86
1) Availability	86
2) Standard	86
3) Procedural Incidents	86
a) Support	86
b) Burden	87

4) Judgment on the Pleadings Distinguished	87
a) Relation of Rule 12(c) to Rule 12(b)(6) and to Rule 12(f)	87
b) Conversion of Rule 12 Motions	87
b. Other Steps That Avoid Trial	87
1) Voluntary Dismissal	87
2) Involuntary Dismissal	88
3) Default	88
4) Settlement	88
3. Masters and Magistrate Judges	88
a. Masters	88
b. Magistrate Judges	89
Chapter V. Trial	91
A. Scenario	92
1. Plaintiff's Case	92
a. Burden of Proof	92
b. Rules of Evidence	93
2. Motions	93
3. Defendant's Case	93
4. Motions	93
5. Submission of Case	94
6. Motions	94
B. Jury and Judge	96
1. Trial by Jury	96
a. Formal Characteristics of a Jury	96
b. Selection of a Jury	97
c. Right to Trial by Jury	97
1) Sources of Jury Right	97
a) Trial by Judge	97
b) Loss of Jury Right	98
2) Meaning of Constitutional Jury Right	98
a) Historical Test	98
b) Problems of Historical Test	98
c) Modified Historical Test	99
d. State Practice	100
2. Judicial Controls	100
a. Federal Practice	100
b. State Practice	101
Chapter VI. Judgment	103
A. Entry of Judgment	104
B. Kinds of Relief	104
1. Coercive Relief	104
a. Legal Relief	104
1) Damages	104
2) Restoration of Property	104
3) Costs	105
b. Equitable Relief	105
2. Declaratory Relief	105
a. Actions for Declaratory Judgment	105
b. Declarative Effects of Other Judgments	105

C. Enforcement of Judgment	105
1. Legal Coercive Relief	105
a. Discovery	106
b. Execution	106
c. Supplementary Proceedings	106
2. Equitable Coercive Relief	106
a. Civil Contempt	106
b. Criminal Contempt	107
c. Other Enforcement Tools	107
D. Relief from Judgment	107
Chapter VII. Appeal	109
A. Appealability	110
1. Routes to Court of Appeals	110
a. Final Decisions	110
1) Collateral Order Doctrine	110
2) Ad Hoc Approach	111
3) Rule 54(b)	111
b. Interlocutory Decisions	111
1) 28 U.S.C. § 1292(a)	111
2) Mandamus	111
3) 28 U.S.C. § 1292(b)	112
4) 28 U.S.C. § 1292(e)	112
2. Routes to Supreme Court	112
a. Certiorari	112
b. Certification	112
B. Reviewability	112
1. Standards of Review	112
a. Nondeferential Review	113
b. Middle-Tier Review	113
1) Clearly Erroneous Test	113
2) Abuse of Discretion Test	113
c. Highly Restricted Review	113
2. Appellate Procedure	113
a. Court of Appeals	113
b. Supreme Court	114
c. Stays	114
Review Questions	115

PART THREE. AUTHORITY TO ADJUDICATE

Chapter VIII. Subject-Matter Jurisdiction	121
A. Introduction to Subject-Matter Jurisdiction	122
1. Ends	122
2. Means	122
B. State Courts	122
1. General Versus Limited Jurisdiction	122
2. Exclusive Versus Concurrent Jurisdiction	122
C. Federal Courts	123
1. Federal Questions	125
a. Constitutional Provision	125

b.	Statutory Provisions	125
1)	28 U.S.C. § 1331	125
a)	Adequate Federal Element	126
b)	Well-Pleaded Complaint Rule	126
c)	Substantiality Rule	126
2)	Special Statutes	126
2.	Diversity of Citizenship	127
a.	Constitutional Provision	127
b.	Statutory Provisions	127
1)	28 U.S.C. § 1332(a)	127
a)	Complete Diversity	127
b)	Realignment of Parties	127
c)	Devices to Create Jurisdiction	128
d)	Devices to Defeat Jurisdiction	128
e)	Meaning of Citizenship	128
f)	Exceptions to 28 U.S.C. § 1332(a)	129
2)	28 U.S.C. § 1335	129
3)	28 U.S.C. § 1369	129
4)	28 U.S.C. § 1332(d)	130
c.	Jurisdictional Amount	130
1)	Test Applied	130
a)	Interest and Costs	131
b)	Injunctive and Declaratory Relief	131
c)	Collateral and Future Effects	131
d)	Viewpoint for Valuation	131
e)	Costs Sanction	131
2)	Aggregation of Claims	132
a)	Claims Between Same Parties	132
b)	Claims Involving Different Parties	132
c)	A Better Approach	132
3)	Counterclaims	132
3.	Removal	133
a.	General Rules	133
b.	Removable Actions	133
1)	Nonremovability Statutes	134
2)	Diversity of Citizenship	134
c.	Joinder of Nonremovable Claim	134
d.	Removal Procedure	134
1)	Defendants' Steps	134
2)	Judicial Steps	134
4.	Supplemental Jurisdiction	135
a.	Pendent Jurisdiction	135
1)	General Rule	135
a)	Power	135
b)	Discretion	136
2)	Pendent Parties	136
3)	Venue and Territorial Jurisdiction	136
b.	Ancillary Jurisdiction	136
1)	General Rule	136
a)	Theory	137
b)	Practice	137
2)	Ancillary Parties	137

3) Venue and Territorial Jurisdiction	138
c. Synthesis: Supplemental Jurisdiction	138
d. Role of Discretion in Jurisdiction	138
Chapter IX. Territorial Authority to Adjudicate	139
A. Introduction to Territorial Authority to Adjudicate	140
1. Territorial Jurisdiction and Venue	140
a. Territorial Jurisdiction	140
b. Venue	140
2. Current Due Process Doctrine.....	140
a. Categorization—Introductory Definitions	140
1) In Personam	140
2) In Rem	141
a) Pure In Rem	141
b) Jurisdiction over Status	141
3) Quasi In Rem	141
a) Subtype One	141
b) Subtype Two	141
b. Jurisdictional Tests—Introductory Definitions	142
1) Power	142
2) Unreasonableness.....	142
3. Future Due Process Doctrine	142
a. Jurisdictional Test.....	143
b. Categorization	143
c. The <i>Mullane</i> Case.....	143
B. Application of Current Due Process Doctrine	143
1. In Personam	143
a. Modern Analysis.....	144
b. Scope of Jurisdiction	145
1) General Jurisdiction	145
a) Presence	145
b) Domicile.....	145
c) Incorporation.....	146
d) Principal Place of Business	146
2) Specific Jurisdiction	147
a) Consent.....	147
b) State-Directed Acts.....	148
2. In Rem.....	149
a. Pure In Rem.....	150
1) Scope of Jurisdiction.....	150
2) Problem of Seizure.....	150
b. Jurisdiction over Status	150
3. Quasi In Rem.....	150
a. Subtype One	150
1) Scope of Jurisdiction.....	151
2) Problem of Reification	151
b. Subtype Two	151
1) Scope of Jurisdiction.....	151
2) Problem of Categorization.....	152
C. Other Limitations on Territorial Authority to Adjudicate	153
1. Limits on State Trial Courts	153
a. Federal Law	153

1) Federal Constitution	153
a) First Amendment	153
b) Commerce Clause	154
2) Federal Statutes	154
3) Other Federal Law	154
b. International Law	154
c. State Law	154
1) State Constitutions	154
2) Long-Arm Statutes	154
3) Other Doctrines of Self-Restraint.....	155
a) Fraud or Force	155
b) Immunity	156
c) Forum Non Conveniens.....	156
d) Door-Closing Statutes	156
4) Venue Restrictions	157
a) Venue Statutes	157
b) Local Actions	157
c) Territorial Jurisdiction Versus Venue	157
d. Agreements Among Parties	157
2. Limits on Federal District Courts	158
a. Federal Law	158
1) Federal Constitution	158
a) Power	158
b) Unreasonableness	158
c) Other Constitutional Provisions	158
2) Jurisdictional Statutes and Rules	158
a) Service of Process	159
b) Structure of Service Provisions	159
c) Territorial Jurisdiction Under Service Provisions	160
d) Summary	160
3) Other Doctrines of Self-Restraint.....	161
a) Fraud or Force	161
b) Immunity	161
c) Forum Non Conveniens.....	161
4) Venue Restrictions	161
a) General Venue Statute	161
b) Special Venue Statutes	162
c) Territorial Jurisdiction Versus Venue	162
5) Transfer of Venue	163
a) 28 U.S.C. § 1404(a)	163
b) 28 U.S.C. § 1406(a)	163
c) Choice of Law	163
b. International Law	164
c. State Law	164
d. Agreements Among Parties	164
Chapter X. Notice	165
A. Introduction to Notice	166
B. Constitutional Requirement.....	166
1. General Rule.....	166
2. Notice Before Seizing Property	166
a. Leading Cases.....	166

b.	General Rule	167
c.	Other Applications	167
1)	Seizure for Jurisdictional Purposes	167
2)	Post-Judgment Seizure	167
C.	Nonconstitutional Requirements	168
1.	Manner of Service	168
a.	Serving Individuals	168
b.	Serving Corporations and Unincorporated Associations	168
c.	Serving Other Defendants	168
d.	Service Tactics	168
2.	Technical Requirements of Service	169
D.	Contractual Waiver of Protections	169
Chapter XI. Procedural Incidents of Forum-Authority Doctrines		171
A.	Procedure for Raising	172
1.	Subject-Matter Jurisdiction	172
a.	Pleading	172
b.	Challenging	172
2.	Territorial Authority to Adjudicate and Notice	172
a.	Special Appearance	172
1)	Availability	172
a)	Appearance Treated as Waiver	172
b)	Defense on Merits Treated as Waiver	172
c)	Interlocutory Appeal Allowed	173
d)	Defense on Merits and Final Appeal Allowed	173
2)	Procedure	173
b.	Limited Appearance	173
1)	Availability	174
a)	General Rule	174
b)	Effect of <i>Shaffer</i>	174
c)	Effect of <i>Erie</i>	174
2)	Procedure	175
B.	Consequences of Raising	175
1.	Subject-Matter Jurisdiction	175
2.	Territorial Authority to Adjudicate and Notice	175
C.	Consequences of Not Raising	175
1.	Litigated Action	175
a.	Subject-Matter Jurisdiction	175
b.	Territorial Authority to Adjudicate and Notice	176
2.	Complete Default	176
a.	Subject-Matter Jurisdiction	176
b.	Territorial Authority to Adjudicate and Notice	176
Review Questions		177

PART FOUR. COMPLEX LITIGATION

Chapter XII. Preliminary Considerations		183
A.	Historical Note	184
1.	Common Law	184
2.	Equity	184
3.	Code Approach	184

4. Modern Approach	184
B. Federal Focus	184
1. Governing Law	184
2. Federal Joinder Rules	184
3. Jurisdiction and Venue	184
C. Abuses	185
1. Defenses of Nonjoinder and Misjoinder	185
a. Nonjoinder	185
b. Misjoinder	185
2. Judicial Power to Combine and Divide	185
a. Expanding the Case	185
b. Contracting the Case	186
Chapter XIII. Multicclaim Litigation	187
A. Compulsory Joinder	188
1. Claim Preclusion	188
a. Transactional View	188
b. Pleading	188
2. Compulsory Counterclaims	188
a. Same Transaction or Occurrence	188
b. Exceptions	189
1) No Pleading	189
2) Unavailable Counterclaim	189
3) Additional Party	189
4) Another Pending Action	189
5) Nonpersonal Action	189
c. Pleading	189
d. State Practice	190
B. Permissive Joinder	190
1. Parallel Claims	190
2. Permissive Counterclaims	190
3. Crossclaims	190
a. Required Relationship	190
b. Judicial Construction	190
c. Pleading	191
Chapter XIV. Multiparty Litigation	193
A. General Joinder Provisions	194
1. Compulsory Joinder	194
a. Necessary Parties	194
b. Indispensable Parties	194
c. Procedure	194
1) Realignment	195
2) Involuntary Plaintiff	195
2. Permissive Joinder	195
a. Rule 20	195
b. Real Party in Interest	195
1) Representative Parties	195
2) Procedure	196
c. Capacity	196
1) Governing Law	196
2) Procedure	196