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CIVIL PROCEDURE
Cases and Problems

*Fifth
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Civil Procedure

Cases and Problems

Fifth Edition

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Wolters Kluwer

Law & Business

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Published by Wolters Kluwer Law & Business in New York.

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PO Box 990
Frederick, MD 21705

Printed in the United States of America.

1 2 3 4 5 6 7 8 9 0

ISBN 978-1-4548-2267-7

Library of Congress Cataloging-in-Publication Data

Babcock, Barbara Allen.

Civil procedure : cases and problems / Barbara Allen Babcock, Judge John Crown Professor of Law, Emerita Stanford Law School; Toni M. Massaro, Dean and Milton O. Riepe Chair in Constitutional Law, University of Arizona College of Law; Norman W. Spaulding, Nelson Bowman Sweitzer and Marie B. Sweitzer Professor of Law and Associate Dean for Curriculum Stanford Law School. — Fifth Edition.

pages cm

Includes bibliographical references and index.

ISBN 978-1-4548-2267-7 (alk. paper)

1. Civil procedure—United States—Cases. I. Massaro, Toni Marie, 1955-

II. Spaulding, Norman W. III. Title.

KF8839.B33 2013

347.73'5—dc23

2013024966



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*To Tom, Jerry, and Ticien,
Our better halves.*

Preface

As we go to press, the nation has been on a war footing for more than a decade. The conflict has stirred profound questions about whether the essentials of due process of law are an impediment to our security or a necessary condition of our liberty. At the same time, the worst economic conditions since the Great Depression have challenged the civil justice system to produce fairness among individuals and institutions in the United States while globalization and international security threats have sparked controversy about the meaning of justice as between peoples and countries. Such pressing concerns form a contemporary backdrop to the constitutional and practical questions about enacting due process, which are always at the core of our civil procedure course.

In the case that opens the book, traditional due process principles clash with powerful arguments of exigency, national security, and executive authority. We think it is a good place to start your study of the enduring values that define procedural law: the belief in the power of rules to constrain government decision makers and fellow citizens; the commitment to equal access to law; the desire for efficiency and rationality in dispute resolution; the peculiarly American zest for adversarial exchange; and the belief in meaningful participation in decisions affecting one's substantive legal rights. With this grounding in procedural first principles, we turn to doctrines defining the power of courts over the parties and subject matter of a dispute ("jurisdiction") and then make a survey of each stage of the modern litigation process. Throughout the book we rely on old chestnuts as well as new developments to teach the mechanics of public dispute resolution.

Since the last edition, the Supreme Court has modified the architecture of pre-trial litigation in a series of important decisions regarding jurisdiction, pleading, the certification of class actions, and summary judgment. The Court has narrowed the number of fora in which a dispute may be litigated and intervened in new and surprising ways to enhance the power of judges to dispose of cases early in litigation. It also has strictly limited the rights of consumers and employees to avoid contract provisions requiring that they forgo litigation and submit their disputes to private resolution through arbitration. Although the full effects remain uncertain, these developments are the harbingers of an era in which full adversary litigation is truly uncommon. Yet we seem, as much as ever, to rely on it for the model and meaning of due process of law. We have structured the new cases and materials to highlight this seeming contradiction.

We have retained coverage of cases and readings on Rule 11 sanctions, as well as sanctions in discovery practice, in order to prompt reflection on ethical standards of practice and what it means to be committed to an adversary system. We also have expanded materials on the increasingly difficult and important issues surrounding the preservation, storage, and disclosure of digital data. Discovery now dominates modern law practice, and the development of digital data, metadata, and new means of storage and recovery, among other technological advances, have complicated nearly all the traditional burdens and opportunities of discovery practice. And we have continued to expand the treatment of emerging doctrines governing the burgeoning transnational litigation attendant on the growth of a global economy. Throughout the text we have sought to place greater emphasis on empirical studies of the practical consequences of procedural change, as well as the relationship between procedural rules and both ethical and social understandings of the lawyering role.

For the new edition, invaluable assistance with research was provided by a cadre of dedicated students at Stanford Law School: Amelia Green, Ariel Green, Rebecca Maurer, Lila Miller, Ashlee Pinto, and Thomas Rubinsky. We are immensely grateful for their diligence and good cheer as well as their insights and passion for procedure. Ms. Maurer, Ms. Miller, and Mr. Rubinsky provided instrumental help with new edition from its very inception and spent particularly long hours as it went to press.

Over the years we have been uncommonly fortunate in the support others have provided to the production of this book at both Stanford and Arizona. On the fourth edition, outstanding work was done by Samantha Bateman, Sarah Edwards, Caroline Jackson, Menaka Kalaskar, Rakesh Kilaru, David Owens, and Priyanka Rajagopalan. On the third edition, we benefitted from assistance by Esther Kim, Melanie Wachtell, Kathryn Johnson, Nancy B. Leong, and Naomi Ruth Tsu. Ms. Leong and Ms. Tsu dedicated especially long hours, thoughtful comments, and close editing to enrich the third edition. The exceptional research support of Robyn Kool and Joanna Grossman was instrumental in the first and second editions. Laura Gomez, Kara Mikulich, Jason Richards, Lisa Sitkin, Joseph Vigil, Matthew Gowdy, Jill Harrison, Katherine Wilson, Mary Jensen, Beth Smith, Melinda Evans, Susan Hightower, Maureen Lewis, Julie Loughran, Melinda Mattingly, and Amy Ruskin also contributed much appreciated research assistance.

For outstanding administrative support on this edition we thank Laurel Schroeder. She replaced Donna Fung who provided uncommonly generous and expert help with three prior editions. We are also grateful to the editors at Aspen for supporting a new edition and to Troy Froebe for outstanding assistance with the production of the casebook.

As always, we are deeply grateful to our fellow procedure teachers who have offered new ideas and input to improve the book. We are particularly indebted to Professor Mary Twitchell for her extremely insightful substantive suggestions early on, and to Paul Carrington, whose book decades ago

started us on this course. He remains our intellectual mentor, still raising fresh insights even as we preserve much of what he has left behind.

Thanks to all for the inspiration.

*Barbara Babcock
Toni M. Massaro
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July 2013

Acknowledgments

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