

CIVIL PROCEDURE

CASES AND MATERIALS

Eighth Edition

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Jack H. Friedenthal
Arthur R. Miller
John E. Sexton

American Casebook Series®



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ST. PAUL, MINN., 2001

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

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ISBN 0-314-25329-7



TEXT IS PRINTED ON 10% POST
CONSUMER RECYCLED PAPER



Preface

This Eighth Edition, which has been prepared by Jack H. Friedenthal, Arthur R. Miller, and John E. Sexton, has had the benefit of many comments of colleagues from the large number of schools in which the first seven editions have been used. These responses have been gratifying in confirming our own conclusion that the book continues to be a highly successful teaching tool, regardless of the precise form of the civil procedure course being taught or of the specific material covered. As a result, the Eighth Edition preserves the same basic format and much of the material included in the earlier editions.

A new edition cannot be justified merely to reflect minor changes in the law or to substitute newer material of the same substance as the old. There have, however, been some significant developments in a number of areas of procedure that give rise to intellectually stimulating questions and policy considerations that require inclusion in a contemporary casebook. The effect of emerging technological changes—particularly the Internet—on the processes of litigation is both fascinating and important knowledge for future attorneys. Supreme Court pronouncements as to the advancement and limitations of the *Erie* doctrine are excellent topics for classroom discussions. Refinements of the Federal Rules regarding pretrial discovery are significant and thought-provoking. Cases governing the direction and future of class actions are, to say the least, fascinating topics for analysis. The areas of the book covering these and other matters that have been affected by new rules, cases, and statutes have been carefully reworked. New sections have been added where appropriate and, of course, introductory material, case notes, and citations to treatises, law review articles, and cases have been revised and updated.

We have looked for modern cases in which the facts are interesting, the conflicting policies seem to be in equipoise, or in which the context has extrinsic fascination, rather than for cases whose opinions offer tight little monographs on various aspects of procedure. There can be no question that a student's preparation and participation in class discussion frequently are in direct proportion to the extent to which the materials are interesting and involving. We believe that the study of civil procedure can and should be one of the most enjoyable courses taught in law school and that is true for the instructor as well as the students.

The notes and questions that follow nearly every principal case have been designed primarily to encourage deeper analysis of the problems raised in the principal cases rather than to fill the student with additional detail. At the same time, we have provided sufficient and selective references to secondary sources for the student who wishes to look deeper into a subject.

We have not attempted to construct a “hard” book, but rather an enlightening and enjoyable one. Civil procedure is sufficiently mysterious, especially to beginning law students, that its ability to challenge operates best when presented in a clear and simple environment. The danger is not in patronizing students, but of losing them. In the textual survey at the beginning of Chapter One, in the long note on the operation of the class-action device in Chapter Ten,

as well as in the briefer introductions to other sections of the book, we have tried to tell students where they are going. Through extensive cross-referencing and questions we have tried to require them to review where they have been and constantly to gain greater perspective on the ways in which the various aspect of procedure fit together.

We have not concentrated on the law of any one jurisdiction, although there is substantial emphasis on the operation of the Federal Rules of Civil Procedure, which serve as a model and focal point for serious discussion and implementation of procedural reform in a large majority of state courts. In general the book operates on a comparative basis, except in contexts in which an in-depth exploration of a single system has greater utility.

We have attempted to strike a balance between exploring underlying philosophical problems and analyzing day-to-day matters that arise frequently in office practice or in the courts. Our theory is that a mixture of both is necessary to give students a comprehensive understanding of procedure and its significance in the development of the law. Thus they must learn why, even today, after so many years of study, revision, and reform, major proposals for alteration of adjective law are still being made, and, undoubtedly, will continue to be made in the years to come. In addition, significant use has been made of historical material, not only when it is directly relevant to today's system, as in the study of the right to jury trial, but also in contexts in which it is necessary for a true grasp of the basic problems.

Because courses in civil procedure vary greatly as to the hours allotted, the extent to which they are mandatory or optional, and the law school year or years when students are expected to enroll in them, the materials in this edition are designed for maximum flexibility. The cases and subjects covered have been selected primarily for a comprehensive, year-long course beginning in the first term of the law student's first year; yet the book may easily be divided into two or more quite distinct subjects to be taught as preliminary or advanced courses.

The first chapter of this casebook sets forth a basic, textual statement of a procedural system's framework, without which an understanding of any particular part of the system is difficult, if not impossible. This initial discussion defines those procedural terms necessary for comprehending legal opinions, whether they deal with procedural or substantive matters. This is an important function of a procedure course, especially when it forms part of the curriculum in a student's first year of law school. The textual analysis can be assigned for study with little or no classroom discussion. It is followed by a series of illustrative cases designed to raise the basic problems of a procedural system, to illustrate the interplay among its various aspects, and to highlight many of the points made in the initial text. An effort has been made to select cases that can be handled with relative dispatch so that the introduction does not become a de facto study of the entire course. In general, Chapter One is intended to let students form some idea as to the nature of the litigation "forest" before asking them to master any of its "trees." Teachers of short or advanced courses may choose to omit it.

After the first chapter, the structure of the book proceeds in a chronological fashion. The authors believe that this is the most logical way to teach civil procedure because it permits students to understand how cases begin, develop,

and mature. Furthermore, by studying personal and subject-matter jurisdiction and the materials dealing with the history of civil procedure before subjects such as pleading, joinder, and discovery, first year students are given “breathing time” in which to absorb enough substantive law in courses such as torts, contracts, and property to enable them to comprehend such matters as “pleading a cause of action,” “alleging contributory negligence,” and “establishing the existence of joint and several interests.” Finally, we believe that despite its conceptual difficulty, personal jurisdiction is a much more teachable and exhilarating introduction to civil procedure than would be pleading and joinder.

The chapters on jurisdiction include an extensive treatment of the federal courts. An investigation of a single system seems to be the best way to impress students with the significance attached by courts to the concept of jurisdiction over the subject matter. The length of this material is greater than is customary in a civil procedure book, but parts of it may readily be treated at the end of the course or left for consideration in an advanced course. We believe, however, that without a working knowledge of such concepts as diversity of citizenship and supplemental jurisdiction, the procedural ramifications of the *Erie* doctrine and such indisputably procedural problems as joinder cannot properly be understood.

We have determined that it is important to include a section on common-law pleading, the forms of action, equity, and the nineteenth century reforms (although many procedure casebooks do not do so). The background provided is important, if for no other reason, in order for students to understand the right to jury trial and the concept of a claim. Nevertheless we are cognizant of time constraints that may require the chapter to be skipped and its basic substance to be provided by lecture. Therefore the chapter on modern pleading that follows has been planned as a choate whole, and does not require coverage of the earlier background material.

As has been the case with all of the past editions, the materials in this volume refer to and are augmented by a Supplement, which contains not only the federal statutes and rules governing procedure, as is traditional, but also comparative state provisions. A number of other materials, such as Advisory Committee notes, proposed rule alterations, and local court rules, are also included. Thus at a glance students are able to see different solutions put forth for particular procedural problems and are induced to explore reasons why one rule has not been universally acclaimed as “superior” and adopted by all jurisdictions. Use of the Supplement has the added advantage of permitting teachers and students to keep abreast of interesting amendments to oft-changing procedural statutes and rules without constant revision of the casebook itself.

All teachers of civil procedure are well aware of how difficult it is for students to grapple with problems in the abstract; for example they may have only a vague notion of just how a case proceeds and what a pleading or motion looks like. The Supplement therefore also contains a litigation timechart and an illustrative problem, showing how a case develops in practice and samples of the documents that actually might have formed a portion of the record. It is important to note that these samples are not designed as models to be emulated. To the contrary, they often contain defects intended to induce students to criticize them in light of knowledge they have obtained from the cases and classroom discussion.

The cases and excerpts from other materials obviously have been carefully and extensively edited in order to shorten them and clarify issues for discussion. With a few exceptions, the materials from the Seventh Edition have not been significantly shortened in preparing the Eighth Edition; we see no reason to alter what has been working well. With regard to footnotes, the same numbering appears in the casebook as appears in the original sources; our footnotes are indicated by letters.

The authors are deeply grateful to a host of people who have assisted us in the preparation of this volume, the earlier editions, and the Supplements. Among our students deserving special mention for the aid they have provided in preparing one or more editions of the book are Prudence Beatty Abram, Sam L. Abram, Kim Barry, Richard B. Bernstein, (Professor) Barry B. Boyer, (Professor) Michael Broyde, William M. Burns, Bertram Carp, (Professor) Sanford Caust-Ellenbogen, Jeffrey J. Chapman, Daniel Chazin, Tan Yee Cheung, Adam S. Cohen, Stephanie Cohen, Steven Cohen, Diane Costa, David Drueding, Gary Eisenberg, Lisa Fair, (Judge) Raymond Fisher, Grant H. Franks, Stacy Gershwind, Lisa E. Goldberg, Robert H. Goldman, Steven F. Goldman, Ashley K. Goodale, Kevin A. Griffin, Edward Hartnett, Wendy B. Jacobs, (Professor) Joe J. Kalo, (Dean) Mary Kay Kane, Lonnie Keene, Daniel Laguardia, Fredrick W. Lambert, Judyann M. Lee, Christopher Mahon, Shirin Malkani, Maureen P. Manning, (Professor) John J. McGonagle, Matthew McGrath, Kiran H. Mehta, Franklin N. Meyer, Gary Meyerhoff, Jennifer Nevins, Marcy Oppenheimer, Jennifer Pariser, Dawn A. Pederson, Kate Elizabeth Phillips, Norman A. Platt, Martin C. Recchuite, Christopher Reich, James E. Rossman, Beth A. Rotman, Gregory S. Schmolka, Marc Schuback, (Professor) Linda J. Silberman, Donna Silverberg, (Professor) William Slomanson, Roger D. Smith, David A. Stein, Brian A. Stern, Mara E. Trager, Jacqueline Veit, (Professor) Michael Vitiello, and Gail Zweig. A special thanks to Jo Anne Friedenthal, Dan Evans, and Stephen Wagner for their invaluable work on this volume and prior editions.

Finally, we sincerely thank our many colleagues across the legal community for the countless excellent suggestions they have offered. Their contributions have been instrumental in the preparation of this Eighth Edition.

J.H.F
A.R.M.
J.E.S.

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