



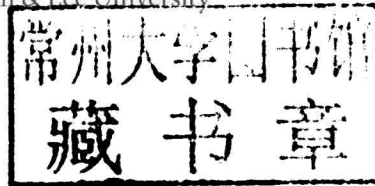
EXPERIENCING SERIES

EXPERIENCING CIVIL PROCEDURE



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To all Legal Education reform fellow travelers.

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Preface

THIS BOOK IS THE FIRST in a new series designed to blend traditional materials and teaching styles with experiential education materials and teaching styles. The books in the series will cover the mainstream courses in legal education. The books are not supplements but instead are meant to cover full courses.

This book, *Experiencing Civil Procedure*, includes the core civil procedure cases, excerpted as they are in traditional casebooks. It includes the necessary statutes and rules and obviates the need for students to purchase an additional statutory/rule supplement. These materials are meant to support teaching the substance of civil procedure law in traditional modes. Much of the course supported by this book will be indistinguishable from traditional Civil Procedure courses.

But this book then departs from tradition by including fewer notes and additional readings from law reviews and treatises. Those materials are generally available and may be accessed by those who wish to read them. Instead of those materials, the book includes scenarios and experiential assignments. These scenarios and experiential assignments are meant to place the student in the role of lawyer, doing civil procedure work done by beginning lawyers.

Students learn from traditional teaching methods, but they gain greater insights into the meaning, the theory, and the function of the law when they must use the law. Many students say that they learned law when they later used it in clinics, externships, or summer work experiences. Of course they did learn during the traditional course, but in a way they did not realize the gain in knowledge until they later used the law they learned in their courses. In this book's design, students learn the substance of the law and immediately use it. Closing the time between acquisition of knowledge and its use further solidifies the gains students can make in their advance toward becoming professionals.

— James Moliterno
March 2013

EXPERIENCING
CIVIL PROCEDURE

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CHAPTER 1

An Overview of the Litigation Process and This Book

THIS BOOK IS MEANT to support a course in Civil Procedure in which students are active, engaged participants, doing basic civil procedure work of lawyers along the way.

There are three main types of materials covered in the Civil Procedure course. First and most prominent, much of the Civil Procedure course is rule-bound. The Federal Rules of Civil Procedure, first adopted in 1938, govern most of what happens in civil litigation in federal courts. Nearly all the states have procedure codes modeled on the federal rules. They are the basis of chapters 4, 5, 6, 7, 8, and 9 of this book. Rules can be tedious and difficult to read, but there is no substitute for carefully parsing the words of the FRCP. Most of the answers to civil procedure questions are found in the language of the rules themselves. Second, the U.S. Constitution and statutes form the basis for some topics in the Civil Procedure course. Mainly, they govern the fundamental concepts of jurisdiction (chapter 2), the delicate federalism topic of the use of state law in federal courts (chapter 3), and the basis for the rules material governing the jury trial right (the 7th amendment in chapter 9). Always, the due process clauses of the 5th and 14th amendments are a backdrop for the fairness of process across the range of Civil Procedure topics. Third, some general legal principles, mostly from the common law, have developed that make the civil dispute resolution process work. The doctrine of preclusion is the best example (chapter 10).

But so, too, are the concepts relating to burdens of proof and presumptions (chapter 8). When constitutional and statutory authorities are the main focus, the Civil Procedure course sometimes feels like a Constitutional Law course. When the general legal principles are being studied, it feels like a common law course such as Property or Torts. And when, as is true for the vast majority of the course, the rules are at the center of discussion, it feels like nothing else, except perhaps the parts of the Criminal Law course in which the Model Penal Code is being studied or parts of the Contracts course in which the Uniform Commercial Code is being studied. Noticing what part of this course you happen to be in can be quite helpful to your studies.

A. How a Civil Action Works

Rule Materials

Rule 1: Scope and Purpose

These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.

Rule 2: One Form of Action

There is one form of action—the civil action.

1. Some Design Questions: If you were designing a civil dispute resolution system, how would you answer the following questions?

1. Should the plaintiff get to choose among alternative courts to hear case?
2. What should start the process?
3. Should defendant be notified? How?
4. Should defendant ever have a say in where a case is brought?
5. What should happen after the matter begins?
6. How, if at all, should information be formally gathered and exchanged?
7. Should all cases go to trial?
8. If not, which ones should go to a trial? How should other cases be resolved?

9. At trial, what should happen when the evidence seems like a tie?
10. What about juries? Yes or no, always or sometimes? Should a jury decision have to be unanimous or should majority be enough?
11. How should “judgments”/ results work? What should happen after a party wins?
12. What if a related claim is brought later?
13. What if a similar case has been decided elsewhere?

2. A Checklist: In the U.S. model of civil litigation, no two cases proceed in exactly the same way. But it is possible to form a general chronology of events of civil litigation understanding that there are many exceptions that cause the general order to be different. Here is a sort of checklist of the steps of a civil action with the relevant Federal Rules of Civil Procedure listed in parentheses. Use it to form a sense of where the law and this course will lead you.

STEPS	FEDERAL RULE
• Complaint	(7, 8, 9, 10)
• Service of Summons and Complaint	(4)
• Default	(55)
• Answer and Counterclaim	(same as complaint)
• Joinder Issues	(14, 19, 20, 21, 22, 24)
• Answer to Counterclaims, Cross-Claims, Third-Party Claims, if any	(same as complaint)
• Mandatory, Initial Discovery Exchange	(26)
• Scheduling Order	(16)
• Amendments to Pleadings	(15)
• Motion to Dismiss	(12)

STEPS	FEDERAL RULE
• Interrogatories	(33)
• Depositions	(30)
• Requests for Admissions and Production of Documents	(36, 34)
• Discovery Sanctions	(37)
• Various Non-Dispositive Motions	(7)
• Motion for Summary Judgment	(7, 56)
• Pretrial Order	(16)
• Judgment as a Matter Of Law	(50)
• Proposed Findings of Fact and Conclusions of Law/ Jury Instructions	(51, 52)
• Verdict	(49)
• Judgment Order	(54)
• Post-Trial Motions	(59, 60)
• Notice of Appeal	(Federal Rule of Appellate Procedure 3)

3. Basic Court Structure: This simple chart (opposite) indicates the basic court structure in the United States and the lines of direct appeal. The names of courts vary from state to state, but in generic terms, most state court systems follow the pattern on this chart. A few states have no intermediate court of appeals. Notice that the direct appeal from the state court of last resort is to the U.S. Supreme Court, not to the federal district court.