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CIVIL PROCEDURE  
*Doctrine, Practice, and Context*

*Fourth  
Edition*



Wolters Kluwer

Law & Business

ASPEN CASEBOOK SERIES



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# **CIVIL PROCEDURE**

## **Doctrine, Practice, and Context**

### **Fourth Edition**

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# *Dedication*

I dedicate this book to over three decades of  
Northeastern Law students who have insisted that intelligence,  
compassion, and justice must go hand in hand, and to Joan,  
who has done the same—and then some.

—**Stephen N. Subrin**

I dedicate this book to law students past and future in hopes  
that you will work to make procedure more civil, and to Joe Singer,  
who inspires accessible casebooks and other improvements of daily life.

—**Martha L. Minow**

I dedicate this edition to all those who devote their talents and energies  
to the pursuit of justice in the courts across the land.

—**Mark S. Brodin**

I dedicate this book to my parents, who always seem to know the way,  
and to Paula, with whom I read maps.

—**Thomas O. Main**

I dedicate this book to Martha Minow for her thoughtful guidance;  
Nick, Oona, and Moshe for every minute; Pnina Lahav, my inspiration  
and imma; and to all the students who thought they wouldn't like  
civil procedure, but found out that they do.

—**Alexandra D. Lahav**

# Preface to the Fourth Edition

Twelve years have passed since our first edition. We remain grateful to the dozens of professors who have adopted our book, many of whom have given us suggestions through the years that we continue to incorporate. Please keep advising us. And please tell us your questions about the book that arise in the course of your teaching.

Working on the book this time around has prompted us to reminisce about its origins and to consider whether we have remained true to our initial insights and goals. It's been two decades since Steve Subrin talked at Brooklyn Law School about *Teaching Civil Procedure While You Watch It Disintegrate*, 59 Brooklyn L. Rev. 1155 (1993). Thom Main, his student and research assistant at the time, attended the conference. We recall the backlash from those who claimed that our assertion of disintegration was overblown, and that we were overly pessimistic.

Fast forward to the last several months as we have been revising the book, and found that we had to revise our historical and contextual materials to take account of the multiple constrictions on civil litigation and the right to trial by jury that have continued to evolve. Maybe we weren't pessimistic enough two decades ago. In any event, with regard to the changes in pleading requirements, we decided to summarize *Twombly* and print the majority and dissenting opinions in *Iqbal*. We assure students in the materials that it is not their fault that the language of rules can remain the same, while their "interpretation" can dramatically change.

We have remained true throughout the book to our belief that historical context is necessary to truly understand doctrine; context allows students to

see that procedure is neither dry nor devoid of important political and social consequences. We also continue to believe that practice – engaging in how lawyers actually use procedure – is essential to understanding the doctrine and becoming initiated in the challenges and joys of becoming a professional. We have added a couple of practice exercises and several new review problems. We continue to think that law students, like most people, learn best by doing. In short, we still embrace our title: *Civil Procedure: Doctrine, Practice, and Context*.

Those who have used the book before will notice a few other improvements. In addition to the normal exchange of a few cases for better ones and updating the commentary, we shifted the focus of Chapter Six, *Questioning and Taming the Current System*, to the strengths and limitations of courts, explored through the lens of structural injunctions and alternative dispute resolution. We have moved material on the adversary system to our chapter on discovery. Chapter Eleven, *Class Actions*, has been completely overhauled and streamlined. The chapter focuses on the due process requirements for class actions and the policies motivating approval for and opposition to the class action device. We give due attention to the requirements of Rule 23, and other issues in complex litigation, such as aggregate settlement and federal jurisdiction over class actions and mass court cases.

As we were finalizing this edition, The Federal Courts Jurisdiction and Venue Clarification Act of 2011 became law. Fortunately, we were able to include the changes and clarifications of this act. There is an improved Teacher's Manual which takes account of the changes in the book and what we have learned from our students and other professors about teaching the material.

The most important change has been the addition of Alexandra Lahav as a co-author. Alexandra joined Martha in revising the materials in Chapters One, Two, and Six, and she also revised Chapter Eleven. Having been relieved of that chapter, Thom and Steve revised Chapter Eight on Subject Matter Jurisdiction and Removal, and continued their work on Chapters Three, Four, and Five. Mark revised Chapters Seven, Nine, and Ten. Being obsessive law professors, we talked together (and even occasionally argued) about the final product. You now know whom best to call or write with your questions and suggestions with respect to particular chapters. Thom handles digital issues and technical problems. Despite our and the editors' proofreading, there are inevitably errors. Please tell Thom about them.

Once again we thank our families for putting up with us as we grappled with the decisions and minutia that come with revising casebooks. We thank Sonia McNeil and Kate Epstein of Harvard Law School for their research assistance. And we thank Gretchen Otto and all of our friends at Aspen Publishers for their editorial guidance and support. Finally, a word of appreciation to ourselves. Steve, Martha, Mark, and Thom have truly enjoyed collaborating with each other through these many years. The truth is that we have never exchanged a harsh word throughout this experiment in trying to

improve the teaching of civil procedure. We are overjoyed to have Alexandra join us. She not only brings us her rare blend of intelligence, knowledge, and creativity, but also a wry sense of humor and a much appreciated infusion of energy and relative youth.

Stephen N. Subrin  
Martha L. Minow  
Mark S. Brodin  
Thomas O. Main  
Alexandra D. Lahav

March 2012

# Preface to the First Edition

The impetus for this book grew out of our own experience as law students and professors. We find that students learn most effectively when legal doctrine, its context, and how doctrine actually works in practice are integrated. Empirical and theoretical research support the notion that we learn and remember at our best as a result of intense, sustained experiences in which we must perform concrete tasks that call upon a number of our faculties. Many of our deepest learning experiences have come from teaching a new course, helping a client solve a problem, or writing an article or a book—experiences that call upon a combination of knowledge, insight, values, clarity, advocacy, judgment, and endurance. These are the lessons that stick.

We wanted a civil procedure course that created a more unified learning experience. Civil procedure doctrine can seem remote from the reality of torts, crimes, contracts, and land. And yet perhaps no other legal subject so calls into question the major issues of law and practicing law in the United States: separation of powers, federalism, the adversarial relationship, efficiency, fairness, power and powerlessness, justice, and fees. In a civil procedure course one finds, for example, the conceptual challenges of *Erie*, the ethical dimensions of discovery, and the practical necessities of hard and fast rules. Moreover, this is a field in flux, and studying the underlying values and historical context of procedure helps one make some sense of the inherent uncertainty and change.

Often students say that they know the doctrine, yet (frustratingly) they cannot meaningfully apply it. We wanted to develop a course in which students applied the doctrine they were learning. Seven years ago, Steve Subrin and several of his students at Northeastern University School of Law

confronted the challenge of creating a more unified civil procedure course. They put two real cases, with practice-oriented exercises, at the center of a contextual, philosophic, and multidisciplinary study of civil procedure. They reprinted fewer opinions, but retained more of the procedure and factual context by not severely editing them. They also reprinted longer excerpts of pertinent articles to demonstrate the flow of an extended argument. The students were given challenging questions to contemplate or answer, but they were not given questions that required additional reading or expert knowledge. Finally, they employed *orientation essays* to illuminate certain doctrines and to elucidate the contextual and practical environments that influenced, and were influenced by, those doctrines.

We have remained true to the vision of Steve Subrin and his students—the vision of creating a civil procedure course that not only taught the doctrine but also applied it and illuminated the integral role of civil procedure in every substantive area of the law. Many features of this book promote that vision:

- Orientation essays that focus on doctrine, practice, or context, or a combination of these.
- Pleadings and files of two real cases are threaded throughout the book.
- To maintain a manageable size yet cover all of the essentials, the authors have carefully edited the book's cases.
- There is complete integration of contextual materials and practice exercises.
- Thomas Main helped design the founding materials as a law student, and became a co-author of this text as he entered practice and added a law-practice perspective to this course.
- Martha Minow and Mark Brodin brought original materials and different perspectives that contributed to this effort to reinvent a course in civil procedure.

We are grateful to those who aided and abetted this project. In particular, Jeff Stern, a distinguished trial lawyer at Sugarman, Rogers, Barshak & Cohen in Boston, Massachusetts, helped us develop the materials for the wrongful death action involving the roll-over of a Jeep. Jane Picker, Ken Kowalski, and the Fair Employment Law Clinic at Cleveland-Marshall College of Law, Cleveland State University, helped us develop the materials for the Title VII class action against the Cleveland Ohio Fire Department. In both cases, we have changed the names and, in a few instances for pedagogical purposes, certain facts.

Many Northeastern University School of Law students and graduates inspired Steve's vision for this book, and participated in its initial preparation and later iterations. He gives special thanks to Mary Azzarito, John Becker, David Brenner, Kent Brintnall, Kevin Brown, Shawn Bush, Genna Carver, Stephanie Cucurullo, Rachel Dimitruk, Liz Goldstein, Amy Hubert, Vik Kanwar, Dovie King, Amber Klinge, Aileen Lachs, Laura Matlow,

Mark McGrath, David Plotkin, Judy Prosper, Sasha Rosebush, Joel Rosen, Nicole Voigt, Jason Walta, Angela Wessels, and Debra Williams.

Martha thanks Laurie Corzett, Katie Cook, Naomi Ronen, and many generations of civil procedure students.

Mark thanks the hundreds of civil procedure students over the years who, he insists, have taught him far more than he has taught them.

Thomas thanks Grace Petrola, Sandy Heffley, and countless others who contributed time and expertise to this project. He also thanks Hill & Barlow, Boston, Massachusetts, and Platinum Equity Holdings, Los Angeles, California, who wittingly shared (and in important respects shouldered) his commitment to this text.

All of the authors sincerely thank Greg Pingree for helping to clarify the collective voice of this book. The authors also thank Bernard Johnston, Melody Davies, and Jay Boggis of Aspen Publishers for their assistance and patience. And finally, the authors thank Carol McGeehan, our Acquisitions Editor, for her support, guidance, and belief in this project. The final product is truly a collaborative effort.

Stephen N. Subrin  
Martha L. Minow  
Mark S. Brodin  
Thomas O. Main

February 2000



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