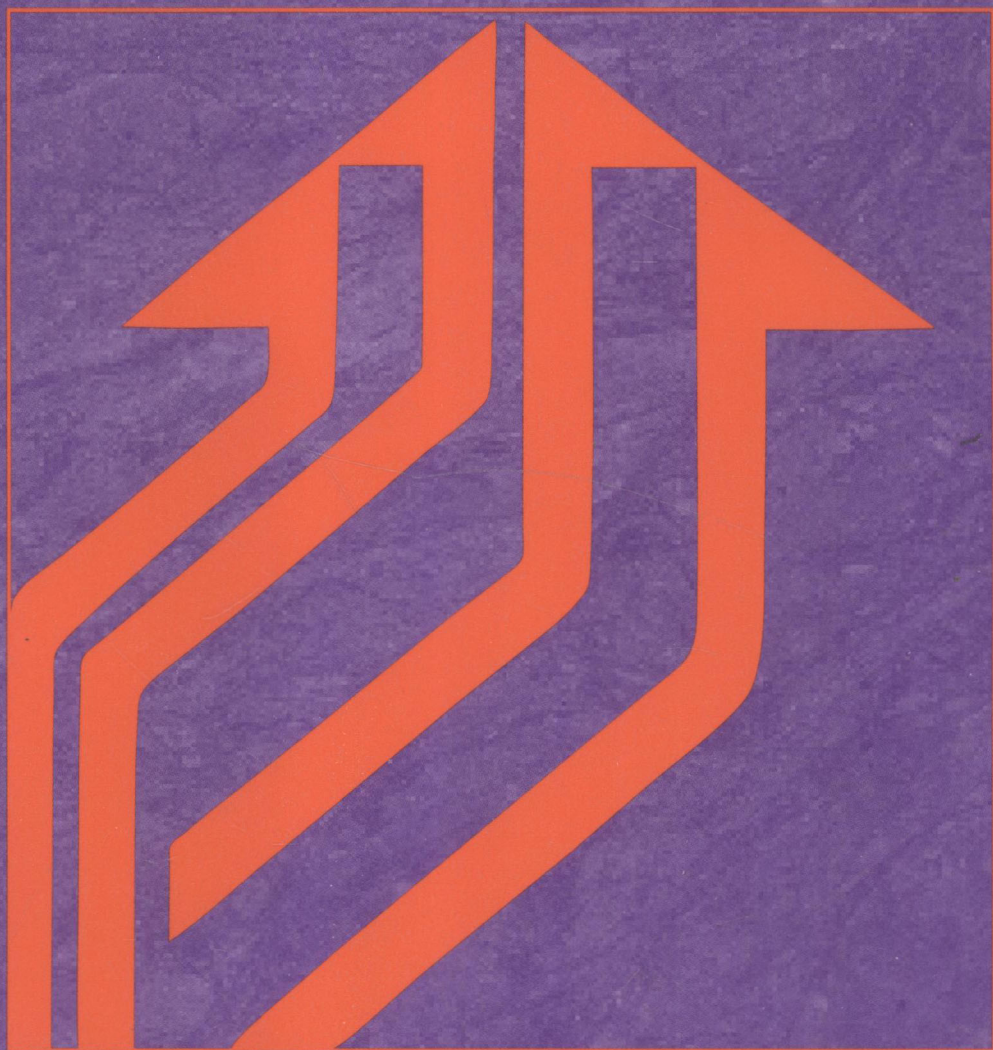


# FUNDAMENTALS OF PRETRIAL LITIGATION

Seventh Edition

ROGER S. HAYDOCK • DAVID F. HERR • JEFFREY W. STEMPEL



# FUNDAMENTALS OF PRETRIAL LITIGATION

**Seventh Edition**

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*Marni, Marci and Jeffrey*

*To*  
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*and*

*To*  
*Ann, Ryan, Shanen and Reed*

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## Preface

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The adventure of pretrial litigation resembles most life experiences. There will be times of success, failure, joy, sorrow, excitement, weariness, confidence, fear, laughter, depression, and mirth. You will face another client!, continuing investigations?, more pleadings (phooey), endless discovery (sigh), countless motions (#\$%&) and satisfying settlements (ahhh). This book has been designed to provide you with the knowledge, procedures, tactics, and skills to guide you through these thrills of victory and agonies of defeat.

The civil litigation process includes both pretrial procedures and trial itself. The amount of time a litigator spends in trial is minimal. The amount of time a litigator spends on pretrial matters is enormous. Pretrial litigation is the heart and soul of litigation practice and constitutes the vast universe of how most litigators spend their professional life: breathing and thinking investigation, pleading, discovery, motions, hearings, negotiations, strategies, tactics, rules, cases, procedures, research, and the law.

The conceptual and pragmatic considerations addressed in this book provide an overview and an inner view of the dynamics of the pretrial litigation process. This book is based upon the authors' experiences as practitioners and professors, the contributions of colleagues and commentators, common sense, and the law. What law? The Federal Rules of Civil Procedure and federal court decisions mixed with representative state law form the primary focus of this book. There often is, in actuality, little difference between federal rules, statutes, decisions, and the respective laws of many states. Similarity also exists between federal and state practice even in those states that have not modeled their laws after federal practice. Admittedly the courthouses are blocks or cities apart and the captions are different, but many litigation strategies and tactics are the same in both systems.

This Seventh Edition includes materials regarding litigation, arbitration and administrative law proceedings. Many cases are now heard and decided by arbitrators and administrative law judges. Litigators need to know how to plead, seek and respond to discovery, and bring motions in arbitral and administrative forums, in addition to judicial courts. This text now covers these procedures. Sections in the chapters explain the similarities, the differences, and the how of pre-hearing practice before courts, arbitral forums, and administrative law courts.

This Seventh Edition also includes an updated and complete explanation of recent changes in federal and state procedural rules. The 2006 amendments to the federal rules of civil procedure, dealing primarily with discovery of electronic information, are covered throughout, as are the



2007 amendments restyling the federal rules for readability. This book also explains other changes to pretrial litigation practice. New and innovative strategies and tactics are included. This edition reflects the practice of law in the 21<sup>st</sup> Century. Dispute resolution will be an evolving process, drawing from the procedures you study in this book.

There may, however, be significant variations in pretrial practice between courts of different states, between state and federal courts, and between different judges sitting on the same court in the same locale. Increasingly, trial judges have developed their own “standing orders” regarding pretrial practice. Litigators will also need to know these individualized rules. Nonetheless, the material in this volume should prove readily transferable to many forums and provides a core of knowledge that can be adapted as required by differing dispute resolution situations.

The litigation process represents one method to resolve disputes. This method needs to be placed in perspective. The end result of litigation—a trial—resolves a small percentage of disputes. Negotiated settlements resolve many, many, many more disputes. Other dispute resolving procedures—notably arbitration and mediation—can be more efficient and less costly than litigation. These alternative approaches to dispute resolution are covered throughout the text and at the end of this book.

The pretrial litigation process involves a sequence of events that typically occur in a reasonably patterned order. The Table of Contents of this book outlines that pattern, although this outlined sequence will not always occur in this order. A motion may be interposed instead of a pleading; discovery may follow the submission of motions. You should not presume—now having reread the Contents—that the real world reflects this precise sequence. Much of the litigation process will proceed in a set pattern: pleadings will follow research and investigation; discovery will precede motions; negotiation settlement discussions will likely resolve the case. But it should come as no surprise to you that facets of the litigation process will be as out of “order” as other facets of your life.

This book covers all facets of the pretrial litigation process, as well as pre-arbitration and pre-administrative proceedings. Chapter 1 presents an overview of the litigation process, including planning. Chapter 2 covers legal research and factual investigation. Chapter 3 explains pleadings. Chapter 4 addresses motions, pleadings and jurisdiction. Chapter 5 introduces the scope of discovery and disclosure followed by Chapters 6, 7, 8, and 9 that deal respectively with depositions, interrogatories, requests for production and physical examinations, and requests for admissions. Chapter 10 describes the enforcement of discovery rights. Chapter 11 introduces motion practice. Chapter 12 covers a variety of pretrial motions relating to the merits. Chapter 13 explains motion presentations. Chapter 14 explains portions of settlement negotiations. Chapter 15 concludes this book with a discussion of pretrial conferences and orders.

Analyzing and deciphering these chapters should explain the whys and wherefores and dos and don’ts of pretrial and pre-hearing practice. But learning about this practice also requires direct involvement with

analyzing problems, planning a case, conducting an investigation, drafting pleadings, engaging in discovery, presenting motions, and resolving a dispute. These skills can be developed and refined by completing the problems and exercises that appear throughout the book.

There are two types of problems. Short, self-contained problems appear at the ends of each chapter and present a concise problem scenario. Case files of various lengths appear at the end of the book and provide factual settings for some of the exercise assignments in the chapters. In particular, the adventures of Case File A, *Hot Dog Enterprises v. Tri-Chem, Inc.*, provide a rich factual and legal background from which a number of exercises (either included in this book or created by the instructor) can result. This Seventh Edition includes new and revised problems, including some that focus on governmental litigation. Relevant substantive laws appear in legal memoranda included in each case file. These memos provide the basic law necessary to conduct the exercises. Other or additional laws from another jurisdiction may also be applied, if necessary.

Some of the problems, particularly the discovery exercises, may require the inclusion of detailed information that does not appear in the problem or case file. Confidential information may be available through supplemental materials from your instructor. Further, you and your opponent may add such facts if it is reasonable that an attorney, witness, or client would know of such facts and would remember them. These added details must be consistent with the facts given and cannot distort or exaggerate the situations.

Fact situations have been designed and selected that mimic typical and common cases civil lawyers face. Alternative fact scenarios have been provided that raise the same or similar issues in different contexts. This variety allows the reader or the instructor the option to exclude problems and exercises from coverage in a class or program.

Forms, examples, sample pleadings, discovery documents, and motions are included throughout the text and files. A caveat needs to be added to your use of these forms. They provide illustrative examples. They are not written in stone. We offer them as visual illustrations of what the process looks like and to assist you in drafting your own documents. They are not perfect examples of what should be done in every case. Nor are they comprehensive. Readily available sources provide more forms than any reasonable litigator needs. These sources include WEST'S FEDERAL FORMS, MOORE'S FEDERAL FORMS, and state court form books. Some of these proposed forms are unduly verbose, others needlessly formalistic. Sample documents should not be blindly copied unless the form applies directly to the specifics of the particular case involved. The examples in this book or any book need to be modified and adapted for use in each individual case.

Each chapter also contains cross-references to sources of more complete and detailed information. This does not mean that this book does not contain absolutely everything you need to know about litigation.



Some of you, in your lonelier moments, may wish to peruse other materials and articles and you can do so at your leisure. Two appendices appear at the end. Appendix A includes a set of instructions for the preparation of deponents. This “brochure” can be read by prospective deponents to better prepare them for depositions. Appendix B contains the case files previously described.

Dashes of humor appear throughout this book. These occasional comments may seem out of place to some of you, irrelevant to others, and even humorous to still others. We only encourage the last response. Sometimes we take ourselves and the practice of law too seriously (just think of law school exams and the bar examination) and an occasional guffaw, moan, or titter helps put things in perspective.

We now begin this book with the hope that you have or will discover the excitement and adventure that accompanies litigation practice. If you don’t believe us, return this book (easy now). If you do, read on.

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We are grateful for the widespread acceptance the first six editions received. We were in 1985, and remain in 2008, convinced that the teaching and learning of how the civil litigation process works before trial is immensely important. We are glad to see law school curricula increasingly focus on this area. We hope this book proves memorable, enjoyable, and useful.

We further acknowledge you—who will be reading and using this book—and your decision to attend law school and to enter practice. We have written the text, problems, and exercises for you, for the clients you will represent, and for the system you serve.

# **FUNDAMENTALS OF PRETRIAL LITIGATION**

**Seventh Edition**

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