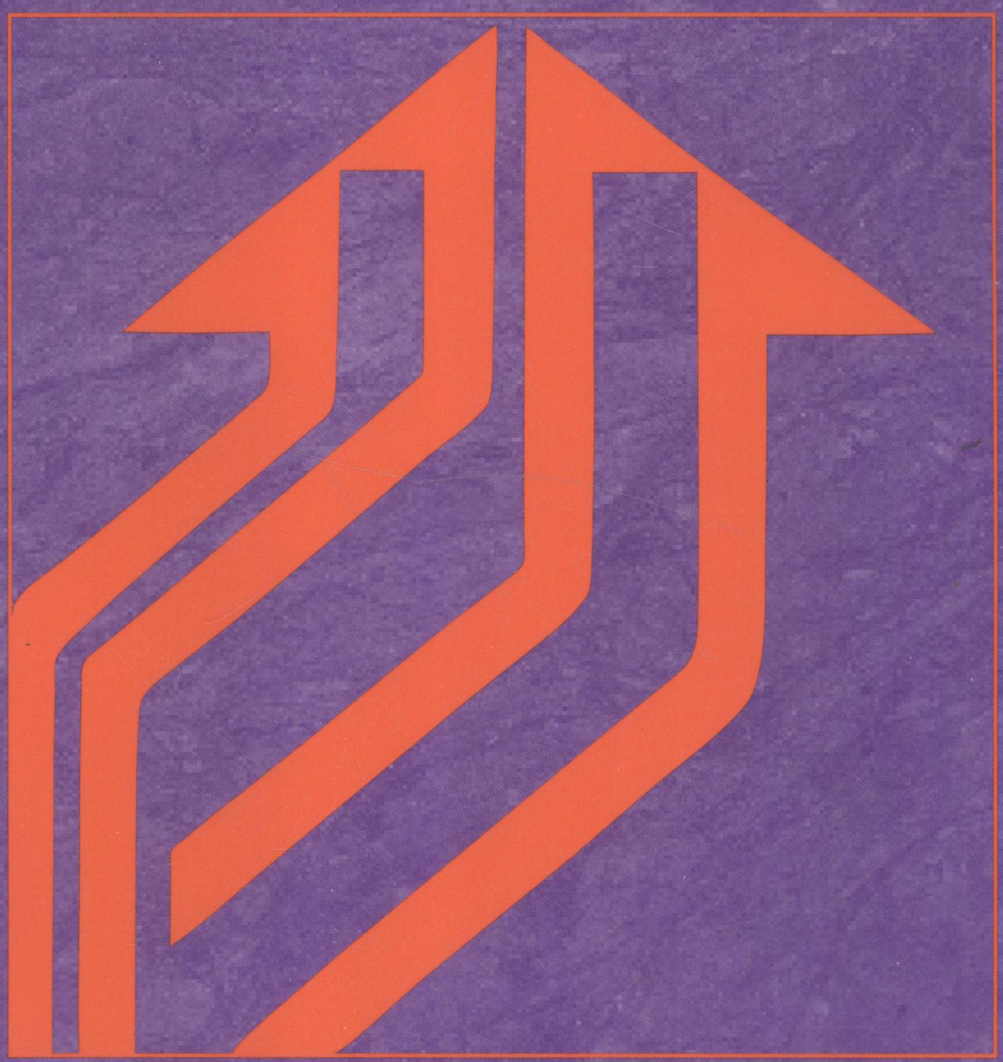
Fundamentals of Pretrial Litigation

Seventh Edition

Roger S. Haydock • David F. Herr • Jeffrey W. Stempel



FUNDAMENTALS OF PRETRIAL LITIGATION

Seventh Edition

By

Roger S. Haydock
Professor of Law, William Mitchell College of Law
Director of Education, National Arbitration Forum
Member, Minnesota and Federal Bars

David F. Herr
Partner, Maslon Edelman Borman & Brand, LLP
Minneapolis, Minnesota

Jeffrey W. Stempel
Doris S. & Theodore B. Lee Professor of Law
William S. Boyd School of Law
University of Nevada Las Vegas
Member, Minnesota, Nevada, and Federal Bars

AMERICAN CASEBOOK SERIES®

THOMSON
WEST

Mat #40770090

610 Opperman Drive
St. Paul, MN 55123
1–800–313–9378

ISBN: 978–0–314–19900–3

TEXT IS PRINTED ON 10% POST CONSUMER RECYCLED PAPER

West's Law School Advisory Board

To
Marni, Marci and Jeffrey

To
Mary Kay, Ehrland and Alec

and

To
Ann, Ryan, Shanen and Reed

*

Preface

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 additional 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 21st 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.

Correspondence may be sent to the authors at:

Professor Roger S. Haydock
William Mitchell College of Law
875 Summit Avenue
Saint Paul, Minnesota 55105-3030
roger.haydock@wmitchell.edu

David F. Herr, Esq.
Maslon Edelman Borman & Brand, LLP
3300 Wells Fargo Center
90 South Seventh Street
Minneapolis, Minnesota 55402-4140
david.herr@maslon.com

Professor Jeffrey W. Stempel
Doris S. & Theodore B. Lee Professor of Law
William S. Boyd School of Law
University of Nevada Las Vegas
4505 Maryland Parkway—Box 451003
Las Vegas, Nevada 89152-1003
jeff.stempel@unlv.edu

R.S.H.
D.F.H.
J.W.S.

September 2008

Acknowledgments

Many persons made this book a reality. No three authors write a book without the substantial support, comfort, and assistance of each other and others. Those whom we love and who love us deserve public recognition for their special place in our lives. Roger thanks Elaine, Marni, Marci, Jeffrey, Gabe, Chuck, Kelsey, Cole, Olivia, Emma, Brooks, Will, Chase, Blake, Sophie, and Joyce. David thanks his family, his friends, his partners, and his colleagues. Jeff also thanks his family and friends, especially Ann, and particularly expresses appreciation to the late Judge Raymond J. Broderick, who passed away in 2000 after nearly 30 years of setting an example of outstanding public service as a judge.

We thank Thomson/West for publishing this book. We are also indebted to Little, Brown & Company for its permission to reprint at length from our earlier books, DISCOVERY PRACTICE, DISCOVERY: THEORY, PRACTICE AND PROBLEMS, and MOTION PRACTICE. Those works, now published by Aspen Law & Business, form a substantial foundation for this book. We are particularly indebted to William Mitchell College of Law for the continuous and substantial support throughout this project and to the William S. Boyd School of Law, University of Nevada Las Vegas for additional support.

The judges before whom we have appeared and for whom we have clerked have taught us much about how litigation is and should be conducted. In addition to Judge Broderick, Judges Jonathan Lebedoff, Harold Kalina, and Susanne Sedgwick, and Judge, then Chief Justice, Douglas Amdahl have been valuable and lasting mentors and examples of how the judicial system is supposed to work.

Peter Knapp, Cindy Jesson, Richard Corky Wharton, Joyce Wharton, Tom Harvick, Libby Joyce, Ed and Cathy Anderson, John and Morgan Wood, Mike Kelly, Alice Martin, and Dean Eric Janus, provided us with additional ideas and encouragement for this edition. Cory Hample with The FORUM assisted with the editing of this Seventh Edition.

The lawyers at Maslon Edelman Borman & Brand have provided wonderful examples of excellent lawyering and their support and forbearance is appreciated. Lynnette Shanahan and Patricia Porter provided valuable assistance.

Our thanks also extend to Richard J. Morgan and John White, Deans of the William S. Boyd School of Law–University of Nevada Las Vegas, Judge (and former Brooklyn Law School dean) David G. Trager, as well as Annette Appell, David Arsenault, Margaret Berger, Mary Berkheiser, Rick Brown, Jay Bybee, Stacy Caplow, Trish Carney, Don Castle, Mark Evans, Mary Jo Eyster, Dianna Gleason, Lisa Jolly, Paul Hemanowski, Dennis Kennedy, Minna Kotkin, Ed Labaton, Mary McCormick, Ann

McGinley, Terry Pollman, James Quinn, Tuan Samahon, Liz Schneider, Ed Schroeder, Trish Simonds, Kory Staheli, Jean Sternlight, Kathleen Sullivan, Carrie Teitcher, David Thronson, Carl Tobias, Jim Whitmire, and Matthew Wright. Jeff also thanks colleagues in the Association of the Bar of the City of New York, the Florida Bar, and the State Bar of Nevada for additional examples and insights that have benefitted this book.

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

*

Summary of Contents

*

Table of Contents