

# CIVIL PROCEDURE

SECOND EDITION

LARRY L. TEPLY  
RALPH U. WHITTEN

UNIVERSITY TEXTBOOK SERIES

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# CIVIL PROCEDURE

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SECOND EDITION

By

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and

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## PREFACE

Since the first edition of this textbook was published in 1994, significant developments have occurred in virtually every area of civil procedure. These developments have necessitated a second edition to assure that students and others using the text have available the most up-to-date description and evaluation of procedural topics that is possible in a one volume treatment of the subject. With one exception, we have retained the order of coverage contained in the first edition. The exception is that we have reversed the coverage of Chapters 3 and 4 to place coverage of personal jurisdiction before venue. This change seems more compatible with the coverage of procedural topics in most American Civil Procedure courses. In other respects, the format of the book remains the same.

As was true at the time of the first edition, American courses in civil procedure tend to be protean in nature. This being so, the second edition of the textbook, like the first attempts to remain useful to students regardless of what their law school civil procedure course includes. This produces a somewhat more detailed exposition of each topic in procedure than is found in other “hornbooks” on the subject. However, because excessive detail can sometimes overwhelm students of basic civil procedure, each chapter contains illustrations designed to simplify the textual explanations of specific procedural issues. From the standpoint of the beginning student, these illustrations remain one of the most useful aspects of the book.

It is our aim that students be able to use the book as an aid to obtain general background information *or* to assimilate the detail necessary to prepare for the (usually tough) examination that they will encounter at the end of the standard civil procedure course. In addition, we have not ignored the theoretical aspects of procedure. Throughout, we have attempted to provide analysis and critique of the procedures discussed, whether they be derived from court decisions, statutes, or court-made rules such as the Federal Rules of Civil Procedure. Furthermore, because we have continued to include the latest case developments on the most conceptually difficult matters of state and federal practice, we hope that practitioners will also find the book useful and informative.

Each chapter of the second edition contains extensive historical material explaining the evolution of the modern procedural rules and systems that are the main focus of the book. This historical material is essential to provide a complete understanding of current procedural systems. In addition, Chapters 3 and 5 contain historical material based on the original research of the authors. The material in Chapter 3 sheds new light on the development of personal jurisdiction rules in the United States. The material in Chapter 5 presents a nontraditional analysis of the federal courts’ source of law authority in the nineteenth century, an analysis that is continually being reinforced by recent scholarship. All historical material is presented in a nonintrusive way. The primary goal throughout is to assure the reader’s understanding of modern procedural systems. Increasing activity in the lower federal courts within the topic known as the “*Erie* doctrine” (which is the main focus of Chapter 5) has also motivated us to add

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subsections in all chapters dealing with the Rules of Decision Act and Rules Enabling Act problems that are occupying those courts. The descriptive and analytical help provided students in these subsections is, we believe, unique among civil procedure texts. This new material enhances the value of the text not only to students of Civil Procedure, but also to students of other courses in which the *Erie* doctrine is pertinent, such as Federal Courts and Conflict of Laws.

The second edition retains the first edition's extensive treatment of federal practice. We continue to believe this coverage is justified both because of the ever-increasing importance of the federal courts in the United States and because of the influence of federal practice on the states, particularly through the vehicle of the Federal Rules of Civil Procedure. Up-to-date coverage of federal subject-matter jurisdiction and venue developments constitutes one of the book's most important features. Our coverage includes judicial interpretations (through 1999) of the amendments to Title 28 of the United States Code from 1988 to the present. The case interpretations have been extensive. Among other things, these interpretations indicate how the lower federal courts are resolving the knotty interpretive problems presented by the new supplemental jurisdiction statute, 28 U.S.C. § 1367, as well as by the other 1990 amendments to Title 28. Added to this updated case treatment is a treatment of proposed reform efforts, such as the American Law Institute's Judicial Code Revision Project. Of course, the second edition retains the first edition's complete explanation of the 1993 amendments to the Federal Rules of Civil Procedure, including the revolutionary changes in federal discovery, which are sure to influence state practice in the future, along with pertinent case developments under the rules since 1994. It remains our hope that the extensive treatment of federal materials will also make the book useful to students in courses in Federal Courts and Federal Practice and Procedure.

Even though we extensively discuss federal practice, the second edition preserves the thorough exploration of code and other state procedural practices contained in the first edition. Many state procedural systems still contain significant features of code practice, while being influenced in other respects by the Federal Rules of Civil Procedure. We also treat non-code procedure when relevant. For example, Chapter 2 still contains a discussion of some of the most important theoretical problems of state subject-matter jurisdiction. This discussion provides a useful contrast to the federal subject-matter jurisdiction issues examined in the same chapter. Likewise, Chapter 4 continues to cover, among other discussions of state venue problems, an examination of the newly recommended Uniform Transfer of Litigation Act, which may be widely adopted by the states in the future. In addition, we have added an important section to Chapter 4 on antisuit injunctions, which are becoming increasingly important in both multistate and international litigation.

The U.S. Constitution imposes important limits on the operation of the federal and state procedural systems. We explore these constitutional limits at a number of points in the text. Chapter 3 of the second edition retains an extensive analysis of the federal constitutional limitations on the states' power to assert personal jurisdiction over nonresidents. Chapter 5 examines problems of

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separation of powers and federalism in the context of federal source-of-law authority in diversity actions. Chapter 6 contains a discussion of the latest U.S. Supreme Court decisions on state power to issue provisional remedies without prior notice and an opportunity to be heard in defense.

We owe a sizeable debt to the persons who supported and encouraged us in the preparation of this edition, as well as those who helped with the original work. Particular mention should be made of the generous research support supplied by Creighton University Law School. This support reflected a faith in the merits of the work by former Dean (now Dean Emeritus) Rodney Shkolnick, former Dean Lawrence Raful, and our current Dean, Patrick Borchers. Thanks are also due to our librarian, Kay Andrus and his extraordinary staff. Throughout the preparation of both editions, Kay and the Creighton library staff have solved our research problems with alacrity. Our students assisted us by cheerfully identifying and bringing to our attention flaws and ambiguities in the original text.

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We want to express our appreciation to respective spouses, Frances Gayle and Jean, to our children, Ben, Chuck, Matt, and Robert, for their continuing support, understanding, and encouragement.

Larry L. Teply  
Ralph U. Whitten  
March 2000

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