

ASPEN PUBLISHERS

BABCOCK  
MASSARO  
SPAULDING

CIVIL PROCEDURE  
Cases and Problems

*Fourth  
Edition*



Wolters Kluwer  
Law & Business

ASPEN PUBLISHERS

# *Civil Procedure*

## **Cases and Problems**

*Fourth Edition*

*Barbara Allen Babcock*

**Judge John Crown Professor of Law, Emerita  
Stanford Law School**

*Toni M. Massaro*

**Dean and Milton O. Riepe Chair in  
Constitutional Law  
University of Arizona College of Law**

*Norman W. Spaulding*

**Nelson Bowman Sweitzer and Marie B. Sweitzer  
Professor of Law and Associate Dean  
for Curriculum  
Stanford Law School**



**Wolters Kluwer**  
Law & Business

AUSTIN BOSTON CHICAGO NEW YORK THE NETHERLANDS

© 2009 Barbara Allen Babcock, Toni M. Massaro, and Norman W. Spaulding  
Published by Aspen Publishers.

All Rights Reserved. No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopy, recording, or any information storage and retrieval system, without permission in writing from the publisher. Requests for permission to make copies of any part of this publication should be mailed to:

Aspen Publishers  
Attn: Permissions Department  
76 Ninth Avenue, 7th Floor  
New York, NY 10011-5201

To contact Customer Care, e-mail [customer.care@aspenpublishers.com](mailto:customer.care@aspenpublishers.com), call 1-800-234-1660, fax 1-800-901-9075, or mail correspondence to:

Aspen Publishers  
Attn: Order Department  
PO Box 990  
Frederick, MD 21705

Printed in the United States of America.

1 2 3 4 5 6 7 8 9 0

ISBN 978-0-7355-8292-7

**Library of Congress Cataloging-in-Publication Data**

Babcock, Barbara Allen.

Civil procedure : cases and problems / Barbara Allen Babcock, Toni M. Massaro, Norman W. Spaulding. — 4th ed.

p. cm.

ISBN 978-0-7355-8292-7

1. Civil procedure — United States — Cases. I. Massaro, Toni Marie, 1955-  
II. Spaulding, Norman W. III. Title.

KF8839.B33 2009

347.73'5 — dc22

**This book contains paper from well-managed forests to SFI standards.**

## *Civil Procedure*

## EDITORIAL ADVISORS

**Vicki Been**

Elihu Root Professor of Law  
New York University School of Law

**Erwin Chemerinsky**

Dean and Distinguished Professor of Law  
University of California, Irvine, School of Law

**Richard A. Epstein**

James Parker Hall Distinguished Service Professor of Law  
University of Chicago Law School  
Peter and Kirsten Bedford Senior Fellow  
The Hoover Institution  
Stanford University

**Ronald J. Gilson**

Charles J. Meyers Professor of Law and Business  
Stanford University  
Marc and Eva Stern Professor of Law and Business  
Columbia Law School

**James E. Krier**

Earl Warren DeLano Professor of Law  
The University of Michigan Law School

**Richard K. Neumann, Jr.**

Professor of Law  
Hofstra University School of Law

**Robert H. Sitkoff**

John L. Gray Professor of Law  
Harvard Law School

**David Alan Sklansky**

Professor of Law  
University of California at Berkeley School of Law

**Kent D. Syverud**

Dean and Ethan A. H. Shepley University Professor  
Washington University School of Law

**Elizabeth Warren**

Leo Gottlieb Professor of Law  
Harvard Law School

---

## About Wolters Kluwer Law & Business

Wolters Kluwer Law & Business is a leading provider of research information and workflow solutions in key specialty areas. The strengths of the individual brands of Aspen Publishers, CCH, Kluwer Law International and Loislaw are aligned within Wolters Kluwer Law & Business to provide comprehensive, in-depth solutions and expert-authored content for the legal, professional and education markets.

**CCH** was founded in 1913 and has served more than four generations of business professionals and their clients. The CCH products in the Wolters Kluwer Law & Business group are highly regarded electronic and print resources for legal, securities, antitrust and trade regulation, government contracting, banking, pension, payroll, employment and labor, and healthcare reimbursement and compliance professionals.

**Aspen Publishers** is a leading information provider for attorneys, business professionals and law students. Written by preeminent authorities, Aspen products offer analytical and practical information in a range of specialty practice areas from securities law and intellectual property to mergers and acquisitions and pension/benefits. Aspen's trusted legal education resources provide professors and students with high-quality, up-to-date and effective resources for successful instruction and study in all areas of the law.

**Kluwer Law International** supplies the global business community with comprehensive English-language international legal information. Legal practitioners, corporate counsel and business executives around the world rely on the Kluwer Law International journals, loose-leafs, books and electronic products for authoritative information in many areas of international legal practice.

**Loislaw** is a premier provider of digitized legal content to small law firm practitioners of various specializations. Loislaw provides attorneys with the ability to quickly and efficiently find the necessary legal information they need, when and where they need it, by facilitating access to primary law as well as state-specific law, records, forms and treatises.

Wolters Kluwer Law & Business, a unit of Wolters Kluwer, is headquartered in New York and Riverwoods, Illinois. Wolters Kluwer is a leading multinational publisher and information services company.

---

*To Tom, Jerry, and Ticien,  
Our better halves.*

# *Preface*

When the last edition went to press, the nation was on a war footing, raising profound questions about whether the principles and practices associated with due process of law are an impediment to security or a condition of liberty. Even as a new administration looks to strike a different balance in foreign and domestic policy between security and liberty, the constitutional and practical questions about bringing due process to life for those who turn to the law to vindicate their rights remain as pressing as ever. Thus in the case that opens the book, traditional principles of due process meet arguments of exigency, national security, and executive authority.

As before, we begin with constitutional due process, not only to frame the principal themes of the course, but to lay a proper foundation for the study of jurisdiction. There is no better place to start because the study of due process invites sustained reflection about the enduring values that define procedural law: the belief in the power of rules to constrain government decision makers and fellow citizens; the commitment to equal access to law; the peculiarly American zest for adversarial exchange; and the belief in meaningful participation in decisions affecting one's substantive legal rights. With this grounding in procedural first principles, we turn to old chestnuts and new developments in each stage of the modern litigation process.

We have extended treatment of the pleading process in the new edition, primarily because the Supreme Court has intervened in new and surprising ways to enhance the power of judges to dispose of cases early in litigation, before either side knows much about the facts. Although the effects of this development remain uncertain—indeed, there is new litigation before the Supreme Court to clarify the scope of changes to the pleading process—the development is of a piece with general trends in the law of procedure evincing judicial skepticism about the kinds of litigants and disputes that belong in court. We live in an era in which full adversary litigation is both more important and more uncommon than ever. We have structured the new material to highlight and provoke reflection on this seeming contradiction.

We also have addressed the much-discussed style changes to the Federal Rules of Civil Procedure. The restyled rules took effect on



December 1, 2006, with the Advisory Committee promising that the amendments were stylistic only. For those of us in practice long enough to have developed a practitioner's sensitivity to the nuances of the old language, the changes have in some respects been jarring, and there is of course concern about whether and to what extent they will produce new interpretations of the rules and bring new consequences. For the new student of procedure, however, the changes can be learned as any rule change is learned—using precedent and principle to give meaning to new language. For that reason, rather than anticipate substantive changes the courts have yet to find, we include a comprehensive Appendix to support side-by-side comparison of the new and old rules.

We also have deepened coverage of cases and readings on Rule 11 sanctions, sanctions in discovery practice, and the increasingly difficult and important issues surrounding the preservation, storage, and disclosure of digital data. Discovery now dominates modern law practice, and the development of digital data, meta-data, and new means of storage and recovery, among other technological advances, has complicated nearly all the traditional burdens and opportunities of discovery practice. Finally, we have continued to expand the treatment of emerging doctrines governing the burgeoning transnational litigation attendant on the growth of a global economy.

As with the third edition, increases in the discretion of the trial judge over both litigants and the jury have caused us to retain our coverage of some old favorites, including extended treatment of the 1986 trilogy of summary judgment decisions by the Supreme Court, *Walker v. City of Birmingham* on pre-judgment remedies and contempt, and discussion of the inherent powers doctrine. We canvass recent efforts by Congress and the Supreme Court to clarify the scope of federal jurisdiction, and to charge lower federal courts with the task of managing increasingly complex, multiparty litigation. And throughout the text we have sought to place greater emphasis on empirical studies of the practical consequences of procedural change, as well as the relationship between procedural rules and both ethical and social understandings of the lawyering role.

For the new edition, invaluable assistance with research was provided by a cadre of dedicated students at Stanford Law School: Samantha Bateman, Sarah Edwards, Caroline Jackson, Menaka Kalaskar, Rakesh Kilaru, David Owens, and Priyanka Rajagopalan. We are immensely grateful for their diligence, creativity, and passion for procedure. For outstanding administrative support, we once again thank Donna Fung, who now has provided uncommonly generous and expert help with three editions. We are also grateful to the editors at Aspen for supporting a new edition. Special thanks are due to John Devins, our patient development

editor; Katy Thompson, our diligent project manager; and to the manuscript editors.

Over the years we have been uncommonly fortunate in the support others have provided to the production of this book at both Stanford and Arizona, including Esther Kim, Melanie Wachtell, Kathryn Johnson, Nancy B. Leong, and Naomi Ruth Tsu. Ms. Leong and Ms. Tsu dedicated especially long hours, thoughtful comments, and close editing to enrich the third edition. The exceptional research support of Robyn Kool and Joanna Grossman was instrumental in the first and second editions. Laura Gomez, Kara Mikulich, Jason Richards, Lisa Sitkin, Joseph Vigil, Matthew Gowdy, Jill Harrison, Katherine Wilson, Mary Jensen, Beth Smith, Melinda Evans, Susan Hightower, Maureen Lewis, Julie Loughran, Melinda Mattingly, and Amy Ruskin also contributed much appreciated research assistance.

As always, we are deeply grateful to our fellow procedure teachers who have offered new ideas and input to improve the book. We are particularly indebted to Professor Mary Twitchell for her extremely insightful substantive suggestions, and to Paul Carrington, whose book decades ago started us on this course. He remains our intellectual mentor, still raising fresh insights even as we preserve much of what he has left behind.

Thanks to all for the inspiration.

*Barbara Allen Babcock  
Toni M. Massaro  
Norman W. Spaulding*

April 2009

# Acknowledgments

We wish to thank those who have given permission for the use of excerpts from the following articles and books:

- Babcock, Barbara A., *A Place in the Palladium: Women's Rights and Jury Service*, 61 U. Cin. L. Rev. 1139 (1993). Copyright © 1993 by the University of Cincinnati. Reprinted by permission of the author and the Cincinnati Law Review from the Cincinnati Law Review, Vol. 61.
- Canby, Hon. William C., *Tribal Court, Federal Court, State Court: A Jurisdiction Primer*, Arizona Attorney (July 1993). Copyright © 1993 State Bar of Arizona. Reprinted by permission of the author and Arizona Attorney.
- Carrington, Paul D. and Barbara A. Babcock, *American Civil Procedure* (3d ed. 1983). Copyright © 1983 by Paul D. Carrington and Barbara A. Babcock. Reprinted by permission of the authors and Little, Brown and Company.
- Cohen, Jerome A., *Chinese Mediation on the Eve of Modernization*, 54 Cal. L. Rev. 1201 (1966). Reprinted by permission of the author and the California Law Review from California Law Review, Vol. 54, pp.1206-1208.
- Dawson, John, *Lawyers and Involuntary Clients in Public Interest Litigation*, 88 Harv. L. Rev. 849 (1975). Copyright © 1975 by the Harvard Law Review Association. Reprinted by permission of the Harvard Law Review Association from the Harvard Law Review, Vol. 88.
- Fowler, W. Gary, *A Comparison of Initial Recommendation Procedures: Judicial Selection Under Reagan and Carter*, 1 Yale L. & Poly. Rev. 199 (1983). Copyright © 1983 by The Yale Law and Policy Review. Reprinted by permission of the author and The Yale Law and Policy Review from The Yale Law and Policy Review, Vol. 1, pp. 303-304, 307-310, 317-318, 331, 332.
- Friedenthal, Jack H., Mary Kay Kane, and Arthur R. Miller, *Civil Procedure* (4th ed. 2005). Copyright © 2005 by West Publishing Corporation. Reprinted with permission of the authors and West Publishing Corporation from Civil Procedure 4th ed., pp. 575, 620, 690-698.

- Hazard, Geoffrey, Panel Discussion on Professional Responsibility and the Model Rules of Professional Conduct. Reprinted from the University of Miami Law Review, 35 U. Miami L. Rev. 639, 659-660, 662 (1981), which holds copyright on this article.
- Hensler, Deborah, et al., Class Action Dilemmas, reprinted by permission of the RAND Corporation. Copyright © 2000, pp. 375-401.
- Higginbotham, A. Leon, The Case of Missing Black Judges, N.Y. Times, July 29, 1992, Op-Ed. Copyright © 1992 by the New York Times Company. Reprinted by permission.
- Hinds, Michael deCourcy, Computer Gives Odds on Jury Awards, N.Y. Times, Jan. 21, 1994. Copyright © 1994 by the New York Times Company. Reprinted by permission.
- Kagan, Robert, Adversarial Legalism: The American Way of Law, pp.6-16 (2001)
- Landers, Jonathan M., Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance Procedure Dilemma, 47 S. Cal. L. Rev. 842 (1974). Reprinted by permission of the author and the Southern California Law Review from the Southern California Law Review, Vol. 47, pp. 845-847.
- Landsman, Stephan, Readings on Adversarial Justice: The American Approach to Adjudication (1988). Copyright © 1988 by Thomson West. Reprinted with permission of the author and Thomson West from Readings on Adversarial Justice: The American Approach to Adjudication, 1st ed., pp. 2-5.
- Levy, Jerome S. and Robert C. Prather, Sr., Texas Practice Guide, ADR Strategies, 3:10. Copyright © 1998 by Thomson West. Reprinted with permission of Thomson West.
- Luban, David, Taking Out the Adversary: The Assault on Progressive Public Interest Lawyers, 91 Cal. L. Rev. 209, 211- 13 (2003).
- Macey, Jonathan R. and Geoffrey Miller, The Plaintiff's Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform, 58 U. Chi. L. Rev. 1, 22-26 (1991).
- Margolick, David, The Long Road Back for a Disgraced Patrician, N.Y. Times, Jan. 19, 1990, as reprinted in the S.F. Chronicle, Jan. 28, 1990. Copyright © 1990 by the New York Times Company. Reprinted by permission.
- Massaro, Toni M., Rethinking Sixth Amendment Doctrine, Images, and Procedures, 64 N.C. L. Rev. 501 (1986). Copyright © 1986 by the North Carolina Law Review Association. Reprinted with permission from the North Carolina Law Review, Vol. 64, pp. 517-518.
- Matsuda, Mari J., Voices of America: Accent, Antidiscrimination Law and a Jurisprudence for the Last Reconstruction, 100 Yale L.J. 1329 (1991). Reprinted by permission of the author, the Yale Law Journal Company, and William S. Hein Company from the Yale Law Journal, Vol. 100, pp.1329-1407.

- McElhaney, James W., *Nine Ways to Use Depositions*, 19:2 *Litigation* (1993). Copyright © by James W. McElhaney of Case Western Reserve University School of Law. "Nine Ways to Use Depositions" first appeared in Vol. 19, No. 2, Winter (1993) issue of *Litigation* journal. Reprinted with permission of the copyright holder and the American Bar Association.
- Nelson, William E., *Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760-1830*, 69-78, 86-87 (1975).
- Perdue, Wendy, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and Pennoyer Reconsidered*, 62 *Wash. L. Rev.* 479 (1987). Reprinted by permission of the author and the *Washington Law Review*, from the *Washington Law Review*, Vol. 62, pp. 480-490.
- Posner, Richard, *An Economic Analysis of Sex Discrimination Laws*, 56 *U. Chi. L. Rev.* 1311 (1989). Reprinted by permission of the author and *University of Chicago Law Review* from the *University of Chicago Law Review*, Vol. 56, p.1334.
- Purcell, Edward Jr., *Geography as Litigation Weapon: Forum Selection Clauses and the Rehnquist Court*. Originally published in 40 *UCLA L. Rev.* 423, 446-449 (1992). Copyright © 1992 by The Regents of the University of California. All Rights Reserved. Reprinted by permission of the author, *UCLA Law Review*, and Fred B. Rothman & Company.
- Purcell, Edward Jr., *Litigation and Inequality: Federal Diversity Jurisdiction in Industrial America, 1870-1958* (1992). Copyright © 1992 by Oxford University Press, Inc. Reprinted by permission of the author and Oxford University Press, Inc.
- Rabin, Robert L., *A Sociolegal History of the Tobacco Tort Litigation*, 44 *Stan. L. Rev.* 853 (1992). Copyright © 1992 by Robert L. Rabin. Reprinted by permission of the author from *Stanford Law Review*, Vol. 44, pp. 857-860.
- Resnik, Judith, *Revising the Canon: Feminist Help in Teaching Procedure*, 61 *Univ. Cincinnati L. Rev.* 1181 (1993). Copyright © 1993 by Judith Resnik and the University of Cincinnati. Reprinted by permission of the author and the *Cincinnati Law Review* from *Cincinnati Law Review*, Vol. 61, p.1191.
- Restatement Second of Judgments* §§ 17-29, 86-87 (ALI 1982). Copyright © 1982 by the American Law Institute. Reprinted with permission.
- Rhode, Deborah L., *Professional Responsibility: Teaching Ethics by the Pervasive Method* (1994). Copyright © 1994 by Deborah L. Rhode. Published by Little, Brown and Company. Reprinted by permission of the author and Little, Brown and Company.
- Setterberg, Fred, *Service with a Smile: Selecting the Right Process Server*, 5 *Cal. Lawyer* 55 (July 1985). Copyright © 1985 by

- California Lawyer. Reprinted by permission of the author and California Lawyer from California Lawyer, Vol. 5, pp. 5-56.
- Sherwyn, Estreicher and Heise, Assessing the Case for Employment Arbitration, 57 Stan. L. Rev. 1557, 1578-80 (2005).
- Stichman, Barton I., The Veterans' Judicial Act of 1988; Congress Introduces Courts and Attorneys to Veterans' Benefits Proceedings, 23 Clearinghouse Rev. 517 (1989). Copyright © 1989 by the Natural Veterans Legal Services Program. Reprinted by permission of the author and the National Veterans Legal Services Program.
- Taylor-Thompson, Kim, Empty Votes in Jury Deliberations, 113 Harv. L. Rev. 1261, 1264 (2000).
- Thornberg, Elizabeth, Sanctifying Secrecy: The Mythology of the Corporate Attorney-Client Privilege, 69 Notre Dame L. Rev. 157, 193-197 (1993).
- Tyler, Tom, Why People Obey the Law (1990). Published by Yale University Press. Copyright © 1990 by Yale University. Reprinted with permission by the author and Yale University Press.
- Welles, Edmund O., They Also Serve, San Jose Mercury News, Dec. 28, 1986, at 4. Copyright © 1986 by the San Jose Mercury News. Reprinted with permission from the San Jose Mercury News.
- Wells, Catherine, Clarence Thomas: The Invisible Man, 67 S. Cal. L. Rev. 117 (1993). Reprinted by permission of the author and Southern California Law Review from Southern California Law Review, Vol. 67, pp. 119-120.
- Winters, Glenn R., Selection of Judges — An Historical Introduction, 44 Tex. L. Rev. 1081 (1966). Copyright © 1966 by the Texas Law Review Association. Reprinted by permission.
- Woods, Winton, Carnival Cruise Lines v. Shute: An Amicus Inquiry into the Future of "Purposeful Availment," 36 Wayne L. Rev. 1393 (1990). Reprinted by permission of the author and Wayne Law Review from Wayne Law Review, Vol. 36, p.1396.
- Yeazell, Stephen, The Misunderstood Consequences of Modern Civil Procedure, 1994 Wis. L. Rev. 631. Copyright © 1994 by the Board of Regents of the University of Wisconsin System. Reprinted by permission of the author and Wisconsin Law Review from Wisconsin Law Review, pp. 632-633, 636-639, 648, 651, 661-663.
- Zampano, Robert, "From the Bench" Settlement Strategies for Trial Judges, Litigation Magazine, Volume 22, No. 1, Fall 1995. Reprinted with permission of the American Bar Association, pp. 3-6.
- Zweifach, Lawrence J., Deposition Strategy in the Framework of an Overall Discovery Plan (PLI 1992). Copyright © by the Practicing Law Institute. Reprinted by permission of the Practicing Law Institute.

## *Special Notice on Citations*

Some citations have been omitted from case excerpts without notation, including parallel citations, string citations, and footnotes. Other omissions are indicated with ellipses or bracketed text. We have preserved the original footnote numbers for those notes that have been retained; editors' footnotes are designated with an asterisk and the notation "EDS." when they occur within an excerpt.

## *Civil Procedure*



# Summary of Contents

<i>Contents</i>	<i>xi</i>
<i>Preface</i>	<i>xxvii</i>
<i>Acknowledgments</i>	<i>xxxi</i>
<i>Special Notice on Citations</i>	<i>xxxv</i>
<b>Chapter 1 Due Process of Law</b>	<b>1</b>
<b>Chapter 2 Constructing a Civil Lawsuit</b>	<b>269</b>
<b>Chapter 3 Discovery of the Adversary's Case</b>	<b>469</b>
<b>Chapter 4 Dispositions and Adjudications</b>	<b>601</b>
<b>Chapter 5 Decision Makers and Decision Models</b>	<b>679</b>
<b>Chapter 6 More Complex Litigation</b>	<b>865</b>
<b>Chapter 7 Repose: Ending Disputes</b>	<b>1115</b>
<i>Appendix</i>	<i>1233</i>
<i>Table of Cases</i>	<i>1351</i>
<i>Table of Federal Rules of Civil Procedure</i>	<i>1373</i>
<i>Table of Judicial Code Citations</i>	<i>1377</i>
<i>Index</i>	<i>1379</i>