

## Practicing Civil Discovery



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## Preface

As two trial attorneys who have collectively spent more than forty years engaged in complex litigation across the country, we came to academia with a sense of personal appreciation for the importance of discovery in civil litigation. Developments over recent years have only intensified our view of the importance of robust discovery coverage in law school curricula. Trials occur infrequently, so the discovery stage is where the vast majority of cases are won or lost (plus where the majority of the legal work occurs and the majority of legal fees are incurred). Additionally, the increased emphasis on producing graduates who are able to “hit the ground running” dictates that recently-graduated lawyers, upon whom much of the discovery burden often falls, be trained in this area.

Additionally, we believe that discovery is ideally suited for simulation classes or other experiential learning environments. While students can learn procedural topics like jurisdiction, pleading standards, and dispositive motion theory by reading cases and attending class, they have a difficult time getting a sense of the real dynamics of discovery without a hands-on struggle through discovery tasks. Sometimes, first-year casebooks contribute to this comprehension gap by de-emphasizing civil discovery with a hope that the missing coverage will be remedied later in some upper-level skills class.

With those considerations in mind, we set out to draft a text to be used both as a companion to a favorite 1L casebook and in a variety of upper-level litigation-oriented classes, whether specifically dedicated to discovery or that include significant discovery content. We spent a few years working on this project, using our classes as captive focus groups, refining our approach to address the input from our students. The final result is this text, which students have praised with comments like “I wish every law

school book were like *Practicing Civil Discovery*.” We also vetted the manuscript with other professors and incorporated many of their generous suggestions.

We’ve structured *Practicing Civil Discovery* to give instructors and students maximum flexibility. We have included one recurring fact pattern that can be used throughout the semester for discovery assignments. The fact pattern involves an amusement park accident with some light, whimsical aspects to engage the classroom and provide some opportunities for creativity and fun.

But we have been careful to not allow the fact pattern to dominate the text. The book’s structure allows different fact patterns to be substituted at the instructor’s discretion, should particular teaching objectives counsel such a path. Throughout the chapters, we also use a variety of different fact patterns to illustrate the workings of the individual discovery topics to make the book more interesting and lessen the chance of fact-pattern fatigue.

Within each chapter, and throughout the text, we strive to deliver the book’s content with a consistent cadence—we try to set the stage for each topic with an introduction that places the topic in context with an explanation aimed at a typical law student’s level of understanding and familiarity with discovery. We then explain the workings of the discovery device, using embedded hypotheticals, with answers, so that students can test and refine their understanding. We include practical tips about how the discovery device works in the real world, then end each chapter with unanswered hypotheticals that make for productive class discussion. Finally, we conclude each chapter with exemplars of documents related to the chapter topic.

We hope that you find *Practicing Civil Discovery* both effective and enjoyable. We have collaborated on a number of other projects, and we always ask for feedback from our readers. Please tell us what you liked, what you didn’t like, and any errors you’ve found. We greatly value your opinions and observations, and we will strive to incorporate your ideas in future editions.

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## Conventions Used in This Book

References to “Rules” in this book are to the Federal Rules of Civil Procedure, unless otherwise expressly noted. The reason for this book’s heavy use of the Federal Rules of Civil Procedure is explained in Chapter 1, Section G. Because those Rules are so dynamic, with amendments made nearly every year, this book does not reprint the Rules in order to avoid mispresenting Rule language as current when, in fact, it may have become superseded.

This book contains only a modest number of case decisions; all are excerpts. Omissions preceding the start of the excerpt occur in nearly all instances and are not noted as such. The same is true with omissions following the end of the excerpt. Omissions within the excerpt are indicated with stars ( \* \* \* ) unless they appear within a sentence or paragraph in which case they are indicated with ellipses ( . . . ). Deletions from the excerpts of parallel citations, parentheticals following citations, references to cited or quoted sources, and internal footnotes are not noted unless they are germane to this book’s objectives.

Sprinkled throughout many of the chapters are hypotheticals followed by answers. These hypotheticals are intended to teach new concepts through the use of fact-based illustrations. The best approach for these hypotheticals is to read the hypothetical, analyze it, settle on your answer, and only then read the supplied answer. Many of the chapters also include additional hypotheticals at the end, this time without a printed answer. These chapter-ending hypotheticals are intended to trigger thoughtful analysis and discussion during class. Read and analyze these before class and come prepared to explain your reasoning.

