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Discovery Practice**

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# Skills & Values: Discovery Practice

THIRD EDITION

**David I. C. Thomson**

PROFESSOR OF PRACTICE AND  
JOHN C. DWAN PROFESSOR FOR ONLINE LEARNING  
UNIVERSITY OF DENVER, STURM COLLEGE OF LAW



CAROLINA ACADEMIC PRESS

Durham, North Carolina

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ISBN 978-1-5310-0817-8  
eISBN 978-1-5310-0818-5  
LCCN 2017951456

Carolina Academic Press  
700 Kent Street  
Durham, North Carolina 27701  
Telephone (919) 489-7486  
Fax (919) 493-5668  
[www.cap-press.com](http://www.cap-press.com)

Printed in the United States of America

*To Kathy  
With gratitude for  
all your love and support*





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# Foreword to the Third Edition

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As more and more law schools look for ways to increase their experiential learning opportunities, expanding clinics and externships can only go so far. What is also needed is an expansion of courses based on a simulation model that are designed to prepare students for those clinical and externship opportunities, and also for practice after graduation. Further, while the Carnegie report not only articulated the “three apprenticeships” of legal education — doctrine, skills, and professional identity formation — it also argued in favor of integrating the apprenticeships as much as possible in law school courses. One of the strengths of simulation courses is that they are well suited to achieve such integration, since they involve teaching legal doctrine through skills training, and they do so in a way that places students in the role of attorneys, which also allows many opportunities for professional formation. Further, a whole-course simulation can be terrifically effective in achieving this goal by teaching the doctrine of a particular subject placed fully in the most common practice context, allowing students to be “in role” for the entire semester.

The first and second editions of this hybrid textbook have been well received by numerous adopting professors looking for a book that would support teaching the material in exactly this sort of simulation-based experiential format. They took to its extraordinary flexibility, since only the basic principles are printed here in this book, and the fully populated companion online Web Course that is used with the book allowed for teachers to work with the materials in a way that fit their particular learning goals, and to easily add or subtract as needed. Some of those professors have used this text in a traditional pre-trial course, and others have used it in courses focused only on the discovery rules. It works either way. It has even been used in a law firm as part of an in-house training course for new members of the firm’s litigation department.

The third edition of *Skills & Values: Discovery Practice* improves on the original in a number of ways. Many of the adjustments in this edition were made at the suggestion of an adopting Professor, Andrea S. McMurtry, who is a litigator in Kansas City and an Adjunct Professor at UMKC Law School. Ande made many useful suggestions for the text and updates to the complaint and answer, making it better organized and streamlined. I am indebted to Ande for her suggestions, and it is fair to say that much of the improvement between the second and third editions originated with her ideas, generated while using the book in her own courses. I am also indebted to Elizabeth Deline, a teaching assistant in 2015–17 and former student of the course, who also

helped to get the book updated, and who brought her own experience using the book as a student to this task.

I welcome your feedback on the textbook — whether you are an adopting professor or a student. I have written more extensively about my own experience using this book on the Law School 2.0 blog. You will find those posts here: <http://bit.ly/lawtexts>.

David Thomson  
University of Denver  
May 14, 2017

# Introduction

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In law school, all first year students take Civil Procedure — the study of the litigation process under the Federal Rules of Civil Procedure (FRCP). Unfortunately, few courses — and even the assigned casebooks — provide much instruction on the twelve FRCP that relate to and manage the process of discovery: the period in a litigation when parties exchange information in preparation for settlement or trial. This is quite peculiar because in the practice of law most of the working time of a litigator is spent in the discovery phase, for two reasons. First, the discovery phase in litigation is much longer than are most trials. But more significantly, fewer than 2 percent of civil cases filed in Federal Court today even go to trial. Law schools usually have plenty of trial practice classes, and no doubt they teach useful and important skills. But students who want to practice civil litigation should take a course in discovery law. If during their law school career they did not take such a course — perhaps because their school did not offer one — and they join a litigation firm (or litigation department of a larger firm) they will quickly find themselves at a deficit. That is because the subject of this book, discovery, is the part of civil procedure they will find themselves using the most often — and yet the one they are often the least prepared to practice.

This book is intended to remedy this situation, either by supporting the teaching of such a course in law school, or as a supplement for newly-minted attorneys who did not have the benefit of such a course. It is meant to serve as an introduction to the practical application of the discovery rules by introducing each topic briefly, and providing a context and structure for exercises and self-study. It can be used by a professor teaching a full pre-trial course, or one focused just on discovery law. It can be used alone or in conjunction with another pre-trial text. It can be used with the problem set provided in the appendix (and online), or with a professor's own problem set. Finally, it can easily be used in a mentorship program in a civil litigation law firm.

Each chapter offers an introduction to the key aspects of discovery and then offers exercises that focus on the governing Federal Rule of Civil Procedure (FRCP). The chapters are organized in the order that the discovery rules are most commonly used. In practice, of course, they are often used in a different order than they are presented here — and they sometimes overlap — so these chapters could easily be addressed in a different order as well. The exercises at the end of each chapter ask the student to put the governing rules into action by actually drafting the discovery documents described in the preceding chapter.

This book is focused on the Federal Rules of Civil Procedure, and does not address the occasional variations that exist in various State-based discovery rules. This is primarily for the sake of expediency – there is more variation in state rules than is possible to effectively cover here, and for the most part, the discovery rules in most states either mirror the FRCP or operate much the same way. But professors using this text in different jurisdictions will want to include important differences between their jurisdiction and the FRCP as they deem appropriate.

Because the discovery process involves an exchange of information, the exercises in this book are most instructive when they are done in conjunction with an assigned opposing counsel — another student or colleague — so that each student can prepare the assigned discovery document and “serve” it on his or her opposing counsel. That way they also receive a discovery document to which they need to prepare an answer. This process continues through the course. It works best when each student is provided with only his or her side’s portion of the available problem information which allows the student to learn both how to write the requesting document and respond to one that requests information as well. This approach creates a simulated litigation environment where student attorneys on each side spend the semester actually using the discovery documents they are learning about to obtain the information they need to prepare a case for trial or settlement.

Each chapter includes some self-study guidance, and online, offers an example discovery document (in a different case) to get them started. These can be used by the student alone or in conjunction with a teacher or mentor who can provide additional feedback on some or all of the exercises. These aspects of the book are designed to help in building skills as well as judgment: the federal rules set the parameters of what can be done, but the goal of this book is for students to begin to develop good judgment about what should be done under a given set of circumstances. As a result, there are no perfect answers to the questions presented in this book. They are, instead, designed to prepare the student for the practice of civil litigation where a mix of rule comprehension, strategy, judgment, and ethical balancing all come into play.

Each chapter also includes electronic materials, which the student may access by visiting the online companion site for the book. Carolina Academic Publishing representatives can help with this process. These materials include problem sets to work with, documentary information, video clips, example discovery documents, checklists, and links to the complete rules, important case law, and other supporting information.

## Organization of the Book

Each chapter contains:

- An introduction that puts the chapter within the context of the actual day-to-day practice of law. Each chapter presumes that the student has read the applicable Federal Rule of Civil Procedure that corresponds to the topic of the chapter (links to each rule are available in the online companion site).



- An assignment in which the student can practice the skills learned in the chapter.
- Example documents from which to begin to prepare the assignment (online).
- A self-assessment section the student should use after he or she has completed a draft of each assignment.



# Acknowledgments

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As with all such efforts, this book would not exist without the help and support of many people other than the listed author, and I would like to express my gratitude to them. First I must thank the many students at the University of Denver's Sturm College of Law who have made their way through the course upon which this book is based. I have taught a course called Discovery Practicum at the law school on and off for 25 years. In those years, I have taught the course over a 15 times with approximately 20 students in each administration of the course. I cannot thank 300 students individually, but I can thank them collectively. And I must, because without their eagerness to learn this material and willingness to try a different way of learning, I might have retreated to a more conventional approach. Indeed, their enthusiasm for this approach to law teaching has also taught me much, and encouraged me in these efforts. But more importantly, I suspect that I have learned as much from them about Discovery law as I think they have learned from me.

While virtually all scholarly production requires the assistance of students, this book is particularly indebted to the work of Eileen Joy (Class of 2010), who worked tirelessly on many parts of it. Having been a student of mine in Lawyering Process in her first year, she took the Discovery class in her second year, and became my primary research assistant in her third year. Having taken the class on which this book is based, she was able to create initial drafts of some of the chapters based on what she learned there. Because she was both a terrific student and had the experience of taking the class, she has also helped to ensure that the book has the student focus and orientation to practice that the course has always had.

In addition to Eileen, I am indebted to Ian London (Class of 2011) who read drafts of many of the chapters and improved them with his comments. I am also grateful to Kendra Beckwith (Class of 2008) who developed parts of the problem set that is provided in the Appendix and online. Also many thanks to Beth Tomerlin (Class of 2007) who took the class, and then started her career in civil litigation. In reviewing a draft of the book she was able to provide insights from current practice that were very helpful. Also, thanks to Kelley Haun and Edgar Barraza, who both took the course in 2014, and assisted me with the second edition. And thanks also to Liz Deline, who took the course and was a TA for me, and helped me to update to this third edition. Also, I am extremely grateful to my late father, David S. Thomson, for offering many thoughtful and precise editing suggestions on an earlier version of this manuscript. In addition, my dearly departed (and much missed) colleague Professor Ann Scales added terrific suggestions in her review of the manuscript for the first

edition, and brought her characteristic combination of comprehensive knowledge and rapier wit to the effort.

I am particularly indebted to former Dean Marty Katz for supporting this work with a summer stipend in the summers of 2009 and 2010. I remain grateful for the mentoring over the years provided by the late former Associate Dean Fred Cheever, who for the many years of our friendship was always supportive of my work in this area. I am also grateful to Flora and Dan Russel, who continue to allow me to use their “Casita” in Santa Fe, where I go to work on large projects (such as this) once a year.

Finally, I am deeply grateful for the love and support of my wife Kathy and our two children Angelina and Sarah-Jane. I could not do this work without their help and understanding.