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# Advanced Torts

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A Context and Practice Casebook

SECOND EDITION

**Alex B. Long**

UNIVERSITY OF TENNESSEE COLLEGE OF LAW

**Meredith J. Duncan**

UNIVERSITY OF HOUSTON LAW CENTER



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# Series Editor's Preface

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Welcome to a new type of casebook. Designed by leading experts in law school teaching and learning, Context and Practice casebooks assist law professors and their students to work together to learn, minimize stress, and prepare for the rigors and joys of practicing law. **Student learning and preparation for law practice are the guiding ethics of these books.**

Why would we depart from the tried and true? Why have we abandoned the legal education model by which we were trained? Because legal education can and must improve.

In Spring 2007, the Carnegie Foundation published *Educating Lawyers: Preparation for the Practice of Law* and the Clinical Legal Education Association published *Best Practices for Legal Education*. Both works reflect in-depth efforts to assess the effectiveness of modern legal education, and both conclude that legal education, as presently practiced, falls quite short of what it can and should be. Both works criticize law professors' rigid adherence to a single teaching technique, the inadequacies of law school assessment mechanisms, and the dearth of law school instruction aimed at teaching law practice skills and inculcating professional values. Finally, the authors of both books express concern that legal education may be harming law students. Recent studies show that law students, in comparison to all other graduate students, have the highest levels of depression, anxiety and substance abuse.

**The problems with traditional law school instruction begin with the textbooks law teachers use.** Law professors cannot implement *Educating Lawyers* and *Best Practices* using texts designed for the traditional model of legal education. Moreover, even though our understanding of how people learn has grown exponentially in the past 100 years, no law school text to date even purports to have been designed with educational research in mind.

The Context and Practice Series is an effort to offer a genuine alternative. Grounded in learning theory and instructional design and written with *Educating Lawyers* and *Best Practices* in mind, Context and Practice casebooks make it easy for law professors to change.

I welcome reactions, criticisms, and suggestions; my e-mail address is mschwartz@pacific.edu. Knowing the author(s) of these books, I know they, too, would appreciate your input; we share a common commitment to student learning.

In fact, students, if your professor cares enough about your learning to have adopted this book, I bet s/he would welcome your input, too!

Michael Hunter Schwartz, Series Designer and Editor  
Consultant, Institute for Law Teaching and Learning  
Dean and Professor of Law, McGeorge School of Law,  
University of the Pacific

# Preface

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As professors who write and teach in the fields of Torts and Professional Responsibility, we feel *Advanced Torts: A Context and Practice Casebook* fills several needs.

First, as the first part of its title implies, the book can be used as casebook for an Advanced Torts class at those law schools that do not require two semesters of Torts or in a Business Torts class. The cases included cover nearly every subject covered in an upper-level Torts elective, and the book includes most of the cases (*New York Times v. Sullivan*, *Ultramares Corp. v. Touche*, etc.) one would expect to find in an Advanced Torts casebook. However, our book also includes material on subjects such as bad faith claims and consumer protection statutes that contain a wealth of interesting material, but that often go uncovered in the typical Torts class. Thus, the book can be used by any Torts professor and any student interested in learning about the array of theories of civil liability beyond negligence and the intentional torts covered in a first-year Torts class.

In addition to being an Advanced Torts casebook, the book is designed specifically to expose aspiring lawyers to the theories of civil liability that may impact them in their professional lives. It is no secret to those who study legal ethics that the threat of legal malpractice and related claims may pose a greater deterrent to attorney misconduct than the threat of professional discipline. While law students will inevitably take some type of course on professional responsibility while in law school, few have the opportunity to take a course that addresses in any detail the general and specific theories of civil liability they themselves might one day face as professionals.

Therefore, we conceive of this book as a means of bridging this gap. The book can certainly be used as part of a standard Advanced Torts class, but many of the cases included involve lawyers as plaintiffs and (more often) defendants. Students are therefore able to see the potential pitfalls they may face in practice as well as some of the special legal rules that apply when a lawyer is a party to the ensuing lawsuit. Thus, the subject matter of *Advanced Torts: A Context and Practice Casebook* should resonate with students.

In addition, the book can be used as part of a course devoted to legal malpractice and related torts. Again, as professors who teach and write in the areas of Torts and Professional Responsibility, we tend to think that, historically, too few law schools have offered such courses. For those like-minded individuals, this book may serve as a resource. The first part of the book is devoted to the special rules regarding legal

malpractice. The material that follows — while more general in nature — devotes significant time to legal theories that may have special relevance for lawyers in their professional lives. For example, in addition to exploring the torts of malicious prosecution and abuse of process, the chapter on misuse of the legal process also addresses spoliation of evidence and anti-SLAPP suits. While covering more general topics, we have attempted to identify at least some of the special rules and issues that have developed with regard to lawyers engaged in the practice of law.

Regardless of how an instructor decides to use this book, part of our goal in writing it was to help law students develop a sense of professionalism and professional identity. Throughout this book, readers will read about defendant-lawyers who have engaged in egregious behavior, behavior that is entirely consistent with the lawyer's ethical responsibilities, and behavior that falls somewhere in between these extremes. We hope that this focus on lawyers acting in their professional capacities will force students and their instructors to think more deeply about what it means to practice law in a professional manner. To aid in that goal, nearly every chapter contains a reference to the relevant rules of professional conduct so that students can see how a lawyer's ethical responsibilities square with the lawyer's legal responsibilities.

Finally, throughout the process of writing the book, we have endeavored to keep the goals of the Context and Practice Series (CAP) in mind. A set of focus questions precedes all of the major cases in the book in order to better focus students' attention to the important issues. We have incorporated problems — some detailed, some relatively short — to allow students to extract the relevant legal principles from the material they have read and apply those principles in a more practical way. Finally, all of the cases were selected not just with the goal of helping students understand the material, but with the goal of helping them understand how the material applies to them as future lawyers.

*Alex B. Long*

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