

**Learning  
Civil  
Procedure**



# Learning Civil Procedure

SECOND EDITION

David A. Dittfurth

PROFESSOR OF LAW

ST. MARY'S UNIVERSITY SCHOOL OF LAW



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# Comments on the NextGen Bar Exam

The NextGen subject matter outline for Civil Procedure (included below) lists a number of topics, all of which are covered in this book. The bar exam administrators state that the listing of a topic “does not indicate greater importance or [its] testing frequency.” This might appear rather ambiguous, but it means the exam writers may well not include every listed topic on every bar exam. By listing the topics, however, the bar exam administrators are saying that these are more likely to appear on the bar exam than others that are not listed.

- I. Jurisdiction and venue
  - A. Federal subject-matter jurisdiction
    - 1. Federal question jurisdiction
    - 2. Diversity jurisdiction
    - 3. Concurrent and removal jurisdiction
    - 4. Supplemental jurisdiction
  - B. Personal jurisdiction
  - C. Service of process and notice
  - D. Venue, forum non conveniens, and transfer
- II. State law in federal court
- III. Pretrial procedures
  - A. Preliminary injunctions and temporary restraining orders
  - B. Notice pleading and amended pleadings
  - C. Rule 11
  - D. Joinder of parties and claims
    - 1. Joinder of multiple claims, joinder of parties, counterclaims, crossclaims, third-party practice, and the court’s overriding power to sever
    - 2. Intervention under Rule 24

- E. Disclosures and discovery
  - 1. Scope and limits of discovery
  - 2. Rule 26(f) conference and planning for discovery
  - 3. Discovery tools and mechanisms, including e-discovery
  - 4. Discovery motions
- IV. Preserving the right to a jury trial
- V. Dispositive motions
  - A. Motion to dismiss for failure to state a claim
  - B. Summary judgment motion
  - C. Motion for judgment as a matter of law (directed verdict and judgment notwithstanding the verdict)
- VI. Judgments
  - A. Default judgment
  - B. Effect of judgment
- VII. Appealability and review
  - A. Final judgment rule
  - B. Availability of interlocutory review
  - C. Standard of review on appeal

I cover these topics, some in more detail than others, in the second edition of this book. Other chapters provide greater detail about the issues that arise under particular topics. For example, the NextGen Bar Exam outline of topics mentions “State law in federal court.” That is a shorthand reference to the mysteries of the “*Erie* doctrine,” and this book will explain those difficulties in detail and the applicable policies that make this such an interesting topic. I have discussed in my Overview the rules that establish and regulate injunctions, especially provisional injunctions.

# Preface

A great deal of time has passed since I wrote the first edition of this book. The law of Civil Procedure has changed in specific areas, such as with regard to general jurisdiction or to the determination of a corporation's principal place of business for diversity purposes. Although one might not describe these as significant changes, they were constructive in that they made federal jurisdictional law easier to understand without sacrificing the underlying principles. On the other hand, the Court should have unentangled the so-called *Grable* exception which allows a federal court to assert federal question jurisdiction over a state law claim that relies on an important and disputed federal issue. The current rule was somewhat refined in the *Gunn* decision, but this confusing issue remains largely a trap for the unwary. It lies about providing those with unlimited resources a tool for wearing down opponents with often frivolous assertions of the exception. Unfortunately, the confusing character of this exception makes it difficult to sanction those who seek to use it for those purposes.

Procedure is not a course that is often buffeted by the precedent-shattering winds of ideology. Civil procedure is more sedate and concerns practical issues. It is a course that grapples with the core activity of our profession. As I noted in 2006, lawyers pay attention to litigation as bees are concerned with the hive. The activities of courts mold the law and provide the primary ground on which legal competence is tested. If you practice civil law and don't understand civil procedure, you are a blink away from doing harm to your client. Even those who avoid litigation must understand the significance of the judicial decisions that relate to their area of the law. And those decisions often concern or have been limited by the issues of civil procedure.

In this book, as in most civil procedure courses in law school, the focus will be on the procedural and jurisdictional rules applicable in the federal court system. We will deal with the Federal Rules of Civil Procedure extensively and with the federal statutes that create, empower,

and limit federal courts. Closely related to these discussions will be the brooding shadow of Article III of the Constitution and its effect on federal judicial power.

The typical justification for giving such importance to federal courts is that what they do often resembles what state courts do in terms of procedure. If procedural issues trouble those in federal courts, they will often appear in state court practice as well. Also, many states have copied the Federal Rules of Civil Procedure in whole or in part so that learning federal procedure will support one's understanding of similar state court practices. Another reason for this focus is that federal subject matter jurisdictional issues are far more intricate than those confronting one in a state court practice. The federal courts are creatures of the Constitution of the United States, and that document restricts those courts to their assigned powers. We speak of state courts as being courts of general jurisdiction because the Constitution did not create or directly limit their powers. In contrast, federal courts have limited subject matter jurisdiction because they were created and given specific powers by that document.

Another reason for our focus on federal courts is that those who write bar exams focus on federal procedural and jurisdictional issues. It makes sense to alter the coverage of material so that those reading this edition are familiar with the topics mentioned by the NextGen Bar Exam, and I have done so. (See the Comments at the end of the Table of Contents.) Bar exam questions typically provide poor tests of one's competence to practice law and have more to do with the competence of one's bar preparation course. My role is to teach students to understand the issues that will confront them in litigation, and I will do that in my own fashion.

I believe civil procedure is an endless bundle of interesting topics and have long found it fascinating. If this book works as I hope, it will introduce you to that fascination and allow you a tool for understanding those topics.

DAVID DITTFURTH  
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