

PREFACE

PRETRIAL LITIGATION

The adventure of pretrial litigation resembles most life experiences. There will be times of success, failure, joy, sorrow, excitement, weariness, fun, anxiety, laughter, frustration, and peace. You will face another client (hooray), continuing investigations (why?), more pleadings (phooey), endless discovery (sigh), countless motions (#\$%&), and satisfying settlements (ahhh). This book has been designed to provide you with the knowledge, law, rules, process, theories, strategies, tactics, techniques, and skills to guide you through these thrills of victory and agonies of defeat.

The civil litigation process includes both pretrial procedures and trial proceedings and includes arbitration and administrative cases as well as court cases. The amount of time a litigator spends on pretrial matters is substantial, compared to time spent on trials and final hearings. Pretrial litigation is the heart and soul of litigation practice and constitutes the vast universe of how most litigators spend their professional life: breathing and thinking investigation, pleading, discovery, motions, hearings, negotiations, strategies, tactics, and related rules, cases, procedures, research, and the law.

The conceptual and pragmatic considerations addressed in this book provide an overview and an inner view of the dynamics of this pretrial process. This book is based upon the authors' experiences as practitioners and professors, special masters and expert consultants, and the contributions of colleagues and commentators. The Federal Rules of Civil Procedure and federal court decisions mixed with representative state law form the primary focus of this book. There often is, in actuality, little difference between federal rules and decisions and the respective laws of many states. Similarity also exists between federal and state practice even in states that have not modeled their laws after federal practice. Admittedly the courthouses are blocks or cities apart and the captions are different, but many litigation strategies and tactics are the same in both systems.

The litigation process represents one method to resolve disputes. The end result of litigation—a trial or final hearing—resolves a very small percentage of disputes. Negotiated and mediated settlements resolve many, many, many more disputes. Often, these compromise agreements follow pretrial and prehearing discovery and motion practice and are discussed throughout the materials.

This text covers judicial lawsuits and arbitration and administrative law proceedings. Many cases are now heard and decided by arbitrators and

administrative law judges. Litigators need to know how to plead, seek and respond to discovery and bring motions in arbitral and administrative forums, in addition to judicial courts. Sections in the chapters explain the similarities, the differences, and the how and why of litigation practice before courts, arbitral forums, and administrative law tribunals.

There may and will be some variations in pretrial practice between courts of different states, between state and federal courts, and between different judges sitting on the same court in the same locale. Many courts have adopted their own “local rules,” and many judges have developed their own “standing orders.” The materials in this volume are readily transferable to many forums and provide a core of knowledge that can be adapted as required by differing dispute resolution situations.

ELEVENTH EDITION

This new edition includes an updated explanation of the most recent changes in federal and state procedural rules and case law and explains novel and modern pretrial strategies and tactics. Recent amendments and court decisions over the past several years include new and revised rules and procedures involving the scope of discovery, electronically stored information, e-discovery, expert disclosures, sanctions, summary judgment, remote video depositions, and distant motion hearings.

This book covers all facets of pre-judicial, pre-arbitration, and pre-administrative case proceedings. Chapter 1 presents an overview of the litigation process, including planning. Chapter 2 covers legal research and factual investigation. Chapter 3 explains complaints and pleadings. Chapter 4 addresses jurisdiction, parties, and defensive motions. Chapter 5 introduces the scope of discovery and disclosure followed by Chapters 6, 7, 8, 9, and 10 that deal respectively with depositions, interrogatories, production of documents and electronic discovery, physical examinations, and requests for admissions. Chapter 11 describes the enforcement of discovery rights. Chapter 12 introduces motion practice. Chapter 13 covers a variety of pretrial motions relating to the merits of cases. Chapter 14 explains oral and written motion presentations. Chapter 15 explains settlement negotiations. Chapter 16 concludes this book with a discussion of pretrial conferences and orders.

Appendix A includes Client Deposition Instructions. The inside back cover contains a chart of pretrial litigation proceedings, a new and helpful addition to the materials providing a litigation overview. Appendix B includes numerous Case Files for use in problems and assignments.

FundamentalsPretrialLitigation.com continues the innovative e-discovery feature of the previous edition and includes web-based electronic information and documents, allowing you to experience modern, real world discovery. This dedicated website contains electronically stored documents and problems specifically designed for e-discovery.

This edition blends the best of traditional litigation approaches with the latest contemporary methods. Modern advancements are interwoven throughout the chapters that combine the best of the past and present. New and innovative materials include the following additions.

Litigation practice today entails more teamwork than in the past, and descriptions of these working relationships appear in this text. In addition to client relationships, litigation work involves cooperation and collaboration with a variety of professionals including colleagues, staff, consultants, experts, and other litigators. Transformative changes are underway that are altering litigation practice. Explanatory materials describe current practice developments and what is likely to happen in the near future.

Civil litigation occurs in personal encounters and physical locations including law offices and court and hearing rooms. This edition recognizes that civil justice is a service and not just a place. Litigation events can occur online, through video streaming, in telecommunications and networks, and in virtual hearings. Recent circumstances have required or encouraged lawyers to conduct remote depositions, and for judges to hold distant hearings. Expanded sections explain how advocates can best take and defend these depositions and effectively engage in video or audio proceedings.

Clients, parties, judges, and arbitrators expect advocates to use both proven litigation methods and evolving approaches. Modern technology and current social network communications provide new methods and sources for factual and legal information. Advocates rely on both successful and novel ways to litigate. This book explores and explains effective and efficient planning, pleading, discovery, and motion practice.

The overall pretrial litigation process involves a sequence of events that typically occur in a reasonably patterned order. The Table of Contents of this book outlines that pattern, although this outlined sequence will not always occur in this order. A motion may be interposed instead of a pleading; discovery may follow the submission of motions. You should not presume—now having reviewed the Contents—that the real world reflects this precise sequence. Much of the litigation process will proceed in a set pattern: pleadings will follow research and investigation; discovery will precede motions; negotiation settlement discussions will likely resolve the case. But it should come as no surprise to you that facets of the litigation process will be as out of “order” as other facets of your life.

CASES, PROBLEMS, ASSIGNMENTS

Reading and reviewing the chapters in this book will explain the whys and wherefores and dos and don'ts of litigation practice. Learning about this practice also requires direct involvement with analyzing problems, planning a case, conducting an investigation, drafting pleadings, engaging

in discovery, presenting motions, and resolving a dispute. These skills can be developed and refined by completing assignments from the problems and exercises that appear at the ends of chapters.

There are different types of assignments and problems. Short, self-contained assignments appear in each chapter and present concise problem scenarios. Case files of various lengths appear at the end of the book and provide factual settings for some of the exercise assignments in the chapters. The adventures of *Hot Dog Enterprises v. Tri-Chem Corporation* in Case File A provide a rich factual and legal background from which a number of exercises (either included in this book or created by the professor) will develop. Relevant substantive laws appear in legal memoranda that provide the basic law necessary to conduct the exercises. Other laws from another jurisdiction may also be applied, as assigned.

This edition includes revised and contemporary problems, including many that focus on electronic discovery. Two brand new cases present challenging discovery and motion issues that reflect modern forms of communications and relationships. Emails, texts, tweets, blogs, websites and other sources of computer, smart phone, tablet, and laptop devices provide a plethora of potential documents and information. The rules and case law continue to develop in this evolving litigation milieu.

We have again responded to these developing areas of modern pretrial practice by including in this Eleventh Edition a unique e-discovery website. This specially developed website, that West Academic hosts at FundamentalsPretrialLitigation.com, contains a variety of electronic documents that are ordinarily involved in litigation and that form the bases for electronic discovery. You will have an opportunity to locate, identify, search, and analyze these types of documents to better prepare you for current litigation experiences. No other law school text provides this opportunity and experience. You'll be given instructions on how to access and use it, when your instructor assigns this practical work.

Some of the problems, including the discovery exercises, may require additional detailed information that does not appear in the problems or case files in this book. Confidential information may be available through supplemental materials from your instructor. Further, you and your opponent may add such facts if it is reasonable that an attorney, party, witness, or client would know of such facts and would remember them. These added details must be consistent with the facts given and cannot distort or exaggerate the situations.

Fact situations have been designed and included that mimic typical and common cases civil lawyers face. Alternative fact scenarios are provided that raise the same or similar issues in different contexts. This variety allows the professor and the students the option to select and assign specific problems and exercises and exclude others from coverage.

ADDITIONAL FEATURES

Forms, examples, sample pleadings, discovery documents, and motions are included throughout the text and case files. A caveat needs to be added to your use of these forms. They provide illustrative examples. We offer them as visual illustrations of what the process looks like and to assist you in drafting your own documents. They are not perfect or comprehensive examples of what should be done in every case.

Readily available sources provide more forms than any reasonable litigator needs. The Internet contains many websites that provide a variety of form documents. Additional sources include West's Federal Forms, Moore's Federal Forms, and state court form books. Some of these proposed forms are unduly verbose, others needlessly formalistic. Sample documents should not be adopted unless the form applies directly to the specifics of the particular case involved. The examples in this book or any source need to be modified and adapted for use in each individual case.

Each chapter also contains references to sources of more complete and detailed information. This doesn't mean that this book does not contain absolutely everything you need to know about litigation. Some of you, in your lonelier moments, may wish to peruse other materials and articles and you can do so at your leisure.

Dashes of humor appear throughout this book. These occasional comments may seem out of place to some of you, irrelevant to others, and even humorous to still others. We only encourage the last response. Sometimes we take ourselves and the practice of law too seriously (just think of law school exams and the bar examination) and an occasional guffaw, sigh, or laugh helps put things in perspective.

LITIGATION PRACTICE

Other sources of litigation know-how and learning exist beyond the pages of this book. Professional videos of depositions and motion hearings provide demonstrative examples of effective lawyering. Instructive skills videos freely appear at

<https://eproducts.westacademic.com/Public/LawyeringSkills>.

One video includes demonstrations of client interviewing and counseling. Another video demonstrates negotiation and mediation. And a third video illustrates experienced lawyers conducting depositions. Many of the skills, tactics, and techniques explained in this book appear on these videos. CLE programs in your community often involve litigators discussing and demonstrating lawyering skills. Professional websites and video sharing sites reveal various types of litigation events.

Deposition, court, and hearing rooms are obviously real places to observe litigation events. Many lawyers, judges, arbitrators, law clerks,

and administrators are willing and eager to help you learn and can provide information on scheduled events. These efforts may lead you to develop a litigation internship or law school externship.

We now begin this book with the hope that you have or will discover the excitement and adventure that accompanies litigation practice. If you don't believe us, you may return this book (easy now). If you do, read on.

Correspondence may be sent to the authors at:

Professor Roger S. Haydock
roger.haydock@mitchellhamline.edu
Mitchell Hamline School of Law
875 Summit Avenue
Saint Paul, Minnesota 55105-3030

David F. Herr, Esq.
david.herr@maslon.com
MASLON LLP
3300 Wells Fargo Center
90 South Seventh Street
Minneapolis, Minnesota 55402-4140

Professor Jeffrey W. Stempel
jeff.stempel@unlv.edu
Doris S. & Theodore B. Lee Professor of Law
William S. Boyd School of Law
University of Nevada Las Vegas
4505 Maryland Parkway
Box 451003
Las Vegas, Nevada 89152-1003

R.S.H.

D.F.H.

J.W.S.