

STUDY GUIDE

If you are taking this course in your first year of law school, you will be developing study techniques that are likely different from those you used in previous educational settings. Moreover, even within law school, different courses may require different approaches.

One learning technique that has traditionally been fundamental to law school is applying the “Socratic method” to judicial opinions. Under this methodology, students read cases, usually appellate cases, with the professor then asking questions about the cases. The questions are designed to draw out the important principles and the underlying policies and tensions. Although learning to read cases is an extremely important, if not essential, skill to acquire in your first year of law school, it can also be an inefficient way to learn the substantive concepts embedded in the cases.

Civil Procedure is different from most first year classes, in that substantial portions of the class are based on codified rules, not just case law. Accordingly, this book takes a different approach. As part of the Learning Series, this book de-emphasizes cases and focuses more on explanation and short hypotheticals, illustrations, or problems. The vision behind *Learning Civil Procedure* is that because Civil Procedure is in significant measure based on codified rules, it is preferable to teach it by explaining the concepts, then allowing students to explore the contours and parameters of those concepts through studying the rules and illustrative examples, rather than distilling the concepts from cases. Notwithstanding the de-emphasis of cases, there are times when the study of cases may be the optimal learning tool. In addition, there are some classic, key, or famous cases that a literate lawyer should know. Consequently, this book at times includes case excerpts for study.

Civil Procedure is also an opportunity to focus on how to read and construe statutory language, another critical skill for lawyers in almost every discipline. Accordingly, rather than refer you to a supplement, this book sets forth the key language of major Federal Civil Rules and important procedural statutes in text. So while you try to develop and hone your skills in reading cases in your other classes, you can focus on reading statutory language in this class. As you analyze the cases, statutes and rules presented throughout this book, you also should begin to assess the overall fairness and efficiency of the American civil justice system.

Organization of This Book

Learning Civil Procedure starts with some general concepts that apply to civil litigation, then proceeds through the stages of a lawsuit. Look at the table of contents to see the progression

through this material in detail, and also at the flowchart at the end of the book, which depicts the generalized flow of a civil dispute through its various stages.

The initial concepts include:

- **subject-matter jurisdiction** (the types of cases that courts—and particularly federal courts of limited jurisdiction—are permitted to handle);
- **personal jurisdiction** (the ability of a court in one state to force a defendant to participate in the proceedings);
- **notice** (the manner in which a defendant must be served with the papers commencing litigation);
- **venue** (the rules controlling which courts are appropriate and convenient for handling a lawsuit, and for transferring a lawsuit to more convenient courts); and
- **the *Erie* Doctrine** (which determines whether federal or state law applies to cases proceeding in federal court).

The book then proceeds to cover:

- the commencement of a lawsuit and framing of the issues through the complaint and answer;
- early motions to dispose of a case;
- rules controlling which claims and parties may be joined in a single lawsuit;
- amending pleadings;
- the discovery process (where the parties can seek information and evidence relating to the claims and defenses);

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- motions to dispose of a case after discovery;
- trials, including the right to a jury;
- post-trial motions;
- appeals; and
- the effects of the results of the case on future cases involving related issues and parties.

Each chapter addressing these topics follows the same organizational structure.

The chapters start with a list of the **Key Concepts**. This list identifies the important concepts contained in the chapter. As you read the chapter, make sure you are understanding these key concepts.

The chapters next contain an **Introduction**, which provides an overview of the concepts covered in the chapter and puts those concepts in context.

The Rule. Periodically, important portions of the rules and statutes are reprinted in colored boxes. Key language in the rules and statutes is set forth in bolded text. Be sure to look carefully at this bolded language to see the role it plays in the rule or statute and in the explanation that follows.

THE RULE

Rule 20(a)(2)

Defendants

Persons ... may be joined in one action as defendant if:

- (A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or **arising out of the same transaction or occurrence**, or series of transactions or occurrences; and
- (B) any **question of law or fact common to all defendants** will arise in the action.

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Examples and Analysis. One of the fundamental aspects of the approach in *Learning Civil Procedure* is the many problems found throughout the text. Some of these problems are followed by the answers, in the Examples and Analysis sections. These problems or “hypos” are designed to illustrate how the concepts in question apply in different contexts or situations. Look at the example, conduct your own analysis and reach your own conclusions, then look at the analysis.

Example: Parker sells his house to Dan for \$100,000. Dan pays by check, and the check bounces. Parker sues Dan in federal court. Two months after Dan is properly served, he still has not answered the complaint or filed any papers. Can Parker take advantage of Rule 55 default, and if so how?

Sua sponte means that the court did something on its own. It did not respond to a party's motion or request, but instead spotted an issue and requested the parties to respond.

Text Boxes. When words or concepts are discussed in the text that might be unfamiliar, or that warrant some “sidebar” discussion, look to the text boxes nearby for that additional content. Typically, the words tied to the text box will be printed in the same color as the text box background.

From the Court. Although *Learning Civil Procedure* de-emphasizes cases, judicially-created doctrines and interpretation form an important part of the law governing civil litigation. We have excerpted portions of cases that are particularly defining or otherwise important in the evolution this area of the law. Those cases are set out in boxes and contain the caption or “style” of the case at the beginning. Other cases that are important but do not warrant reprinting are described in the text.

IN PRACTICE



This content gives you a window into how the rules and concepts in civil procedure work in practice, in the real world. Often, lawyers and judges routinely handle procedures in a manner that is not necessarily intuitive from the text of the rules themselves. Learning Civil Procedure includes authors with extensive experience in civil litigation who can tell you how things really work.

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Additional Exercises. Near the end of each chapter, we list additional questions. In this section, the answers are not provided. You should test your understanding of the material by attempting to analyze and answer these questions, and you should be prepared to discuss them in class.



Quick Summary. Finally, each chapter ends with a **Quick Summary** of the important principles from the chapter. This section will not contain everything you need to know from the chapter, but you should make sure you have mastered these concepts.

1. How to Prepare for Class

The key to picking up the concepts in *Learning Civil Procedure* lies in the hypotheticals presented in the Examples and Exercises. The explanation of the concepts in the text is quite important, of course, but the essence of legal thinking is applying legal principles to different fact patterns. So it is through the Examples and Exercises that you can test your ability to apply the principles explained in the text.

Study after study has shown that active learning is more effective than passive learning. In other words, if you simply read the material in the book and listen in class, you may have a difficult time comprehending and recalling the material. In contrast, if you process the information actively, by preparing outlines, participating in study groups where you discuss the concepts, and by working through sample problems, you are much more likely to be successful.

Accordingly, when preparing for class, do not just passively read the text and the Examples and Exercises. Rather, test yourself with the Examples and Exercises. In the Examples and Analysis section, cover the provided Analysis and conduct your own, then review the analysis to check your understanding. With the Additional Exercises, conduct your analysis and be prepared to present it in class.

These Exercises will help you develop a fuller understanding of the material, prepare for your exams, and ultimately become a better lawyer.

2. How to Prepare for Exams

Both for your exam in civil procedure and eventually for the bar exam, proper preparation and strategy are instrumental in your success.

Law school exams typically measure your knowledge of the various rules and doctrines that you learn in class and in the class text, and your ability to apply those rules and doctrines to fact patterns, some of which may be close calls or in the “gray area.”

The **Key Concepts** and **Quick Summary** sections should give you a big picture summary of the concepts for which you will be responsible. Make sure you understand these issues and the underlying analysis that is discussed in this book and during class. If you create an outline, which many students find helpful, the issues identified in these sections are a good starting point. Also, pay attention to the language that is bolded in the text of the rules—these are key phrases that you should be familiar with and that you may want to use in your answers.

Your outline and the Key Concepts and Quick Summary will help you to get prepared to discuss the rules and doctrines, but how do you prepare to apply those rules and doctrines to the hypotheticals in your exam questions? That is where the Examples and Exercises come in. If you can absorb how the rules apply in the different contexts presented in the Examples and Exercises, you will be well on your way to understanding how the rules work in practice in different contexts. There are also many good sources of additional questions and answers if you want more practice.

The way that you present your knowledge is also important. A logical presentation of the information, following the IRAC (Issue, Rule, Analysis, and Conclusion) approach (or whatever legal writing approach your law school teaches) can make a big difference in how your exam answers are received and graded.

Finally, be sure to follow general test taking advice: take a deep breath and relax at the outset of the exam; read the instructions carefully and make sure you follow them; read the questions carefully and make sure you answer the actual question; review the issues presented in class and make sure you address all issues raised by the questions; consider all the facts in the question, and make sure to address the facts that work against your conclusion as well as those that favor it; and budget your time.

Enjoy your study of Civil Procedure. It can be fascinating and rewarding, even if you are not headed to a career in the courtroom.

An Overview of Civil Litigation and Dispute Resolution

A. The Study of Civil Procedure

Civil Procedure is regarded by many as the most difficult course in law school. Notwithstanding some possible implicit bias toward this view, we think this perception is largely accurate. Civil Procedure is tough because it involves learning a new language of procedural jargon and an unfamiliar set of procedural rules as well as unfamiliar doctrinal rules and notions of public policy and jurisprudence. While all law school courses involve this to some degree, Civil Procedure seems to do more of this.

Because it involves the litigation process, Civil Procedure, also often intertwines with questions of evidence, as well as touching on dispute resolution generally, which brings to bear another body of work regarding Alternative Dispute Resolution (“ADR”) (discussed further below).

Our goal in this coursebook is to demystify the material by presenting it in the context of both the rules and the practice of law. We believe this coverage allows a better and more practical understanding of litigation and the role civil procedure plays in the litigation process.

Although there may be moments in class or passages in the assigned reading that seem too “ivory tower,” remember that you will be in the hurley-burly of law practice and the real world soon enough. Take this time in law school to learn not only the concepts, technicalities, and mechanics of civil litigation, but also to appreciate the larger historical, economic, social, political, and psychological context of disputing. In that vein, this book will occasionally cite to important secondary literature that you can consult for further reading either in this course or later in law school or in practice.

B. Procedural Rules and the Rulemaking Process

Rules of litigation procedure, such as the Federal Rules of Civil Procedure, also have the force of law and are in effect statutes governing a specialized field. The Federal Rules of Civil Procedure are the statute-like law of Civil Procedure. There are also Federal Rules of Appellate Procedure, Evidence, Bankruptcy, and Criminal Procedure. They should be read and applied in the manner in which you would read and apply statutes even though they generally come into being in a manner different than does a statute.

The Federal Rules are not usually enacted by Congress (although Congress can pass legislation to establish, alter, or abolish a procedural rule applicable in federal courts). Rather, they result from a process in which an Advisory Committee studies issues related to

an aspect of procedure and drafts a new or amended rule. The Advisory Committee members are appointed by the Chief Justice.

The product of a particular Advisory Committee (*e.g.*, on the Civil Rules, the Appellate Rules, the Evidence Rules, etc.) is in turn reviewed by the Standing Committee on Practice and Procedure of the U.S. Judicial Conference. Then comes review by the entire Judicial Conference (a body composed of the Chief Judge of each Circuit Court and a selected District Judge from a district within each Circuit). The proposed Rule or Amendment is then reported to the Supreme Court, which in turn may promulgate the Rule or Amendment to Congress. If Congress does not act within 180 days to stop or alter the promulgated rule, it becomes law as a part of the Rules of Procedure. Ordinarily, it takes four to five years for a proposed Amendment to run the gauntlet of the vetting process and become part of the Rules.

This process is established by the Rules Enabling Act (28 U.S.C. § 2072), originally enacted in 1934. The concept of the Enabling Act was that the judiciary, as the group most familiar with court operations, should have primary authority for propounding the rules that would govern court operations. But to ensure that judicially-promulgated Rules were not too insular and did not favor judicial interests at the expense of other interests, the Enabling Act provided a mechanism by which Congress could step in and stop promulgation of a Rule or revise a promulgated Rule.

For the most part, Congress has not intervened and the rulemaking process has remained largely the province of the judiciary. Arguably, the rulemaking process has become more judge-centric over the years. Lawyers and law professors were heavily represented on the original Civil Rules Advisory Committee and its Reporter, 799Charles Clark, dean of the Yale Law School, along with University of Michigan Law Professor Edson Sunderland were highly influential; Clark regarding pleading, joinder, and motions while Sunderland was the “father” of the discovery rules.

Today, although the Reporters (persons charged with drafting the particulars of a Rule and accompanying Committee notes) of Advisory Committees continue usually to be law faculty, almost all current Committee members are judges, with only four or five practitioners or professors on what is usually a 15-member Committee. Some have criticized this development, which has held sway for 30 years or so. For the past 30 years, as a result of 1988 legislation, the rulemaking process itself has been very open, with mandated public hearings and records of the hearings and submissions by interested parties.

C. The Hierarchy of Construing the Federal Rules

Because the Federal Rules of Civil Procedure are essentially statutes governing litigation, interpreters (lawyers, judges, law professors, policymakers) generally approach them as if construing a statute. Those seeking to apply or understand a Civil Rule consider:

The Text of the Rule. As with statutes, the language of the Rule is the primary source for determining its meaning. But as with statutes, language can be indeterminate, inconsistent, or ambiguous. For the most part, however, a careful reading of the text of the Rules will reward you with a good understanding of the Rules. For beginning law

students, there will be some difficulties presented by technical language in the Rules that cannot be well understood until students become more familiar with the history and traditional application of a textual term in the Rules.

The “Legislative” History of the Rule. Conveniently, each Rule of Civil Procedure is accompanied by notes of the Advisory Committee concerning the Rule, beginning with the notes accompanying the Rule’s original promulgation and including notes accompanying all subsequent amendments. Sometimes, these notes are short and merely state that an amendment made technical but non-substantive changes. But many of the Committee Notes provide an extensive explanation of the background of the Rule and its meaning. In addition, the records of public hearings and the commentary received by the rulemakers are also part of the history and background of the Rule but are less authoritative than the Committee notes.

The Purpose and Objective Underlying the Rule. In addition to the intent of the drafters reflected in the Committee Notes and official record of the Committee, other evidence of the purpose and intent of the rules may be reflected by the context surrounding the drafting of a rule, particularly the perceived problem to which a Rule amendment was responding.

Caselaw Construing the Rule. To the extent that Rule text and drafting history does not provide a definitive construction of the Rules, caselaw interpreting the Rules takes on particular importance. Once established, the cases construing the Rules become, at least as a practical matter, almost as important as the text of the Rules, even more so for parts of the Rules that are not clear on their face. Now that the Civil Rules are more than 75 years old, there is so much interpretive caselaw that precedent has to a large extent supplanted the type of *de novo* analysis of text and drafting history that would normally be important when construing rules or statutes for which there is comparatively little caselaw.

For some Civil Rules (*e.g.*, discovery rules) that are not often the subject of appellate opinions, trial court decisions can take on particular importance. Where the bulk of caselaw is trial-based, this also has the effect of flattening hierarchy because district courts are not bound by the opinions of one another. But because there is not a formal hierarchy, the prominence of particular trial judges can take on additional importance in determining the impact of a district court decision construing a Rule. In addition, informal custom and practice in a given legal community may be particularly important in determining what a rule “means” and how it is applied in litigation.

Where an issue is new or novel and there is little existing precedent, early trial court decisions on the matter become especially influential. For example, in early 2012, a Magistrate Judge’s decision on document production received substantial attention because it was the first opinion approving of the use of predictive coding for the review of electronically stored information that is the subject of a document request. *See Moore v. Publicis Groupe*, 287 F.R.D. 182 (S.D.N.Y. 2012).

For those interested in further examination of approaches to interpretation, leading statutory interpretation texts can be very helpful because the Federal Civil Rules are essentially statutes and because many important Civil Procedure issues such as jurisdiction and venue are governed by statute.

D. Federal Procedural Statutes

National statutes are found in the U.S. Code (which is the government's official publication) and in the U.S. Code Annotated, a West publication. Because the latter also includes citations to cases interpreting Code provisions and reference to drafting history, lawyers generally find this more helpful than merely reading the Code alone. The Code is organized into numbered "Titles" that deal with particular topics. Title 28 governs federal civil litigation procedure.

When you see a citation such as 28 U.S.C. § 1331 you know it is a procedural statute just as you will come to know that sections in Title 42 deal with civil rights and those in Title 29 deal with labor law. The rules and statutory supplement assigned for this course in conjunction with this textbook will almost certainly include selected provisions of Title 28.

There are many good sources of information regarding approaches to interpreting laws, rules, and other legal writings. *See, e.g.:*

- Antonin Scalia & Bryan A. Garner, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012);
- Linda D. Jellum & David Charles Hrcik, *MODERN STATUTORY INTERPRETATION: PROBLEMS, THEORIES, AND LAWYERING STRATEGIES* (2d ed. 2009);
- William D. Popkin, *MATERIALS ON LEGISLATION: POLITICAL LANGUAGE AND THE POLITICAL PROCESS* (5th ed. 2009); and
- William N. Eskridge, Jr., *INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION* (2016).

What you learn about contract interpretation can also be applied to construing the Federal Rules and procedural statutes. *See, e.g.,* Joseph M. Perillo, *CALAMARI & PERILLO ON CONTRACTS* (6th ed. 2009); E. Allan Farnsworth, *CONTRACTS* (4th ed. 2004).

E. The Criminal-Civil Difference

This is a course in civil dispute resolution, not criminal law or procedure. Criminal cases not only involve the obvious difference of prosecution by the government but also involve different standards of proof ("**beyond a reasonable doubt**" rather than civil litigation's "**preponderance of the evidence**" standard) and potential implication of different constitutional issues (*e.g.*, right to counsel, against self-incrimination, and against unreasonable searches or seizures in criminal litigation vs. right to jury trial and due process in civil litigation, although due process is often an issue in criminal litigation as well).

F. Burdens of Proof and Standards of Proof

Before launching into the specifics of civil litigation, it helps to have a good grasp of some basic concepts that are often tossed around but also may be insufficiently explained, especially for those new to the field.

The **burden of proof** is an important concept in law and logic. Law generally is reluctant to depart from the status quo unless the party seeking the departure shoulders the burden of proof to justify the affirmative relief sought (*e.g.*, an injunction or money judgment). In most cases, it is pretty clear that the person bringing the lawsuit has the burden of proof because this litigant (the “plaintiff”) is seeking something from the opposing party (the “defendant”).

For example, if the defendant has breached a contract with the plaintiff, the status quo may be that the defendant has the money and the plaintiff is unpaid. The plaintiff may be entitled to payment for work done or goods supplied, but the plaintiff will need to prove that this is the case before a court will order the defendant to pay funds to the plaintiff. Similarly, the defendant may have negligently driven through a red light and hit the plaintiff in a crosswalk. But the plaintiff will have to prove this to the satisfaction of the legal system—and will have to prove up the amount of damages caused by the defendant’s negligence—in order to gain a judgment in its favor.

More technically, burden of proof in law refers to two distinct concepts. One is the **burden of production**—of coming forward with information or evidence, or at least a response. For example, if a defendant makes a properly supported motion ⁸⁰³for summary judgment as described in [Chapter 16](#), the plaintiff has a burden of production to respond to the motion. If it fails to do so, the motion may be granted.

The other sense in which the phrase is used means the **burden of persuasion**, which is usually what laypersons mean when they talk about the burden of proof. The party seeking a change from the status quo has the burden of persuasion. Unless it shoulders this burden, no change in the status quo will be ordered and hence no relief for the plaintiff. The burden of persuasion differs in law depending on the type of case or claim at issue. **Law recognizes three basic burdens of persuasion.**

- **Preponderance of the Evidence.** Under this standard, the burden of persuasion is met so long as the party bearing the burden has produced at least somewhat more evidence on the issue than the party that does not bear the burden.

The preponderance standard is often described as one in which the burden is satisfied if there is even a feather’s worth more evidence on the side of the party with the burden. Imagine the metaphor of the scales of justice and that the evidence on each side of a question is in equipoise. The addition of a single feather on the scale of the party with the burden satisfies the preponderance standard. Using the yardstick of percentages, the preponderance standard is 50 percent plus a feather.

The preponderance standard is the one most widely used in civil litigation. It applies to tort claims based on negligence, breach of contract disputes, property disputes, and most statutory claims.

- **Clear and Convincing Evidence.** Under this standard, the party with the burden of persuasion must show by clear and convincing evidence that it is entitled to prevail.

The clear and convincing standard means that the party with the burden must have more than a slight advantage when comparing evidence for and against its position. Imagine once again the scales of justice. To satisfy the clear and convincing standard, the scales must not only be uneven but also must tilt distinctly in favor of the party with the burden of persuasion. Using the yardstick of percentages, the clear and convincing standard is usually expressed as 60–70 percent certainty, although there is no uniform agreement for using this measuring stick.

The clear and convincing standard is applied to civil claims where the legal system is more concerned than usual about wrongfully holding the defendant responsible⁸⁰⁴ and tends to be applied in claims that are either disfavored for public policy reasons (*e.g.*, defamation because it chills free speech or requests for punitive damages because this may blur the civil/criminal distinction) or has particularly bad consequences for a losing defendant (*e.g.*, fraud claims that can wreck a reputation as well as creating tort liability in what otherwise would have been a mere breach of contract suit).

- **Beyond a Reasonable Doubt.** This standard, used in criminal prosecutions, requires that the factfinder have no serious doubts about the guilt of defendant.

Juries in criminal cases are commonly instructed that a reasonable doubt is one that would make a person hesitate about an important decision. If you're not sure that a house has a sturdy roof and back out of buying for that reason, you have a reasonable doubt about the home's construction. A reasonable doubt does not require that there be no doubt at all, only that the doubt be sufficient to forgo or delay action.

Prosecutors typically have good conviction rates despite this heightened burden of persuasion. For example, it might be possible that the criminal defendant running from a murder scene holding a blood-soaked knife and showing signs of a scuffle was not the perpetrator but absent other evidence (*e.g.*, the defendant was seen scuffling with others trying to protect the victim), a juror would be unlikely to harbor reasonable doubt about this defendant's guilt. Expressed as a percentage, beyond a reasonable doubt connotes something like 90 percent or better certainty, although there is no universal agreement on this point.

G. Disparate Positions, Disparate Resources, and Their Impact on Litigation

An unfortunate aspect of litigation and law is the maldistribution of legal resources. As with most everything else, legal resources and advantage are disproportionately distributed in society. Certain legal devices such as the contingency fee may partially level the playing field, but the playing field remains fairly slanted in favor of society's "haves" (and "have mores") rather than the "have nots" (or those who have relatively less).

Decades ago, a now-prominent law professor captured this concept well in a now-famous article.

See Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & Soc'y. Rev. 95 (1974). This article has been cited in more than 800 scholarly articles; it's a true classic in that it has affected the thinking of many later writers and has been the subject of its own seminar.

He argued that even where there are legal rules favorable to have-not litigants (such as the minimal requirements for pleading a case provided by Federal Rule 8), the "haves" would nonetheless do well in litigation because they tend to be "**repeat players**" who have substantial ongoing experience with litigation while the "have nots" tend to be "**one shot**" players who litigate perhaps as little as once in a lifetime. As a result, the repeat players develop an expertise, economy of scale, and savvy that permits them to do better in litigation than one might expect judging solely from the merits of a case or the overall structure of the rules or the substance of the applicable law.

This insight, once novel, is now widely accepted. Different socioeconomic and political groups react differently to it, however. Repeat players see nothing amiss and point to potentially countervailing conditions such as sympathy for the underdog. One shot players and their allies find it a regrettable aspect of the status quo in which inequalities are not only the norm but are cumulative. That is, those with less money also tend to have less education, less political power, and fewer options.

While this coursebook is not intended to be a political screed, neither are we blind to the obvious realities of modern society. In assessing the utility of civil litigation and considering any reform or assessing case outcomes, one should always be cognizant of the distributional aspects of a law, rule, case, doctrine, or system. We say this as group of authors with mixed political attitudes. As individuals, we may have our preferences about Democrat vs. Republican, regulation vs. markets, and minimal government vs. comprehensive regulation. But as lawyers and teachers, we all agree that civil litigation should aspire to apply the substantive law accurately (even if it is substantive law that some of us might individually dislike), that litigation procedure should facilitate this, and that unequal litigant resources should not interfere with these goals. This concept is captured well in the very first Federal Rule of Civil Procedure.

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THE RULE

Rule 1

Scope and Purpose

These rules ... should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.

Relatedly, students should realize that the Rules of Civil Procedure, like all legal rules of which we are aware, are **rules of reason**. They are not intended to be applied in isolation but as a whole. They are not to be read so hyper-literally as to bring about an absurd result. Neither should the Rules produce litigation activity and expense disproportionate to the dispute in question in light of the interests of the litigants and the justice system. A sense of **proportionality** is required when construing and applying the Rules. For example, the scope of discovery is broad, extending to anything relevant to any claim or defense in a case—but the courts have substantial power to control and to restrict discovery of even relevant matter in order to apply the rules in a way appropriate to the controversy at hand.

H. Assessing the Case and Mapping Out a Strategy

After prospective client intake, investigation, and research checks out, the prospective client becomes an actual client represented by counsel. Now it's time to strategize about the case and to determine how best to proceed. Initial strategic considerations are discussed below.

- **Figuring out what the case is about.** Every good lawyer thinks it is important to have a “**theory of the case**”—a view as to what really happened, what the law requires or permits under such circumstances, how best to explain the matter to judges and jurors (and perhaps to the outside world if the case is newsworthy), and what relief will be sought. A good theory of the case involves a good narrative.

A Note on Storytelling. Lawyers have to be able to tell a compelling story on behalf of their clients. We don't mean “story” in the negative sense sometimes associated with the term (as in “that's just a story,” or a “storybook” description that defies reality). We mean a realistic account of the matter that makes narrative sense so that those unfamiliar with the matter (like judges, jurors, opponents, and insurance adjusters) can understand what happened, appreciate your client's position, and agree with it in spite of the adversarial opposition. A good theory of the case is not blindly one-sided or self-serving but should tell a compelling story that makes the judge or jury want your client to prevail. An effective narrative does not overstate the case but appreciates both the strengths and the weaknesses of the client's claim and adjusts the narrative and the planned proof accordingly to highlight the strong points of the claim or defense and attempts to defuse the weak points as much as possible.

- **Whether to sue.** This includes not only a comparison of civil litigation and its alternatives (see the discussion of alternative dispute resolution below) but also a determination of whether the matter is reasonably susceptible of a negotiated resolution without taking the step of suing. In addition to the tactical and logistical considerations of dispute resolution, counsel should evaluate the merits of the cases, available remedies and the degree to which they match client objectives, and the costs of litigation as compared to alternatives. In calculating the cost, consider not only monetary expenditures but also the emotional toll on the client and affiliated persons as well as the time, disruption, and inconvenience of litigation.

Counsel may be able to resolve the matter with a phone call or a “demand letter” setting forth the client's situation and suggested resolution of the claim. There may even be insurance adjusters or other representatives of a prospective defendant already trying to achieve an informal settlement.

Part of the mark of a good lawyer is appreciating the degree of formality and detail required for each case or each stage of the case. One goal of effective law practice is to deliver the best outcome for the client in relation to the stakes involved and cost expended. It would not be good lawyering to spend days crafting and supporting a detailed demand letter and exhibits if the defendant was willing to offer the same settlement merely upon receiving a phone call.

- **What To Seek in Relief.** In taking a case, counsel must have at least a rough idea of what the client wants. It could be money, changed behavior, protection, a definitive statement as to fault, or some combination of all of these. Usually a client is primarily

interested in compensation. But the client may also be interested in an order removing the neighbor's swing set from his land or an affirmation that she is the owner of a green 2010 Toyota, or that the fired employee stay away from the workplace and not interfere with the ongoing work of others. Sometimes, the client may want something as simple as an apology—in which case informal action may be more successful than full dress litigation. [Chapter 20](#) discusses **remedies** in more detail.

I. Stages of Dispute Resolution and the Litigation Process

Disputes sometimes lie dormant or unrecognized for a long while, perhaps so long that the applicable statute of limitations has expired and no claim can be made. But once a dispute is recognized, its processing and resolution generally follow a pattern beginning with investigation, informal negotiation, perhaps exploring ADR devices (*e.g.*, arbitration, mediation), and then moving to litigation, although in many cases, commencement of litigation is what serves for prompt negotiation and use of ADR.

Litigation generally follows a pattern and proceeds in the following stages:

- **Pleading.** Litigation always involves the exchange of a **complaint** (Rule 8) and **answer** (also Rule 8) and often a **counterclaim** (Rule 13) and reply to the counterclaim. Where there are multiple plaintiffs or defendants, these co-parties may have **cross-claims** (Rule 13) against one another as well, with answers to the cross-claims. In addition, an existing defendant may implead a third-party defendant through a **third-party complaint** (Rule 14). Rule 11 places certain obligations on the pleadings as well as motions and other papers. Rule 10 governs the captions of pleadings while Rule 15 deals with amendments to pleadings.
 - **“Early” Motion Practice.** A motion is a request that the court enter an order. Motion practice is a substantial part of contemporary civil litigation. Rule 12 provides a list of common **motions to dismiss** or other motions attacking the pleadings. In addition, there are a variety of possible **discovery motions** such as for **protective orders** restricting discovery or **motions to compel** discovery.
 - **Disclosure and Discovery.** Disclosure and discovery is the exchange of information by means other than informal investigation, review of the opposition's disclosures, or the conducting of one's own discovery. Discovery devices (Rules 26–37) include **interrogatories, document requests, depositions, and requests for an admission.**
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- **Additional Post-Discovery Motion Practice.** After discovery concludes, another round of motion practice typically ensues. **Summary judgment** motions (governed by Rule 56) are a common feature of pretrial litigation. On the eve of trial, there may be **motions “in limine”** (Latin for at the threshold) for pretrial evidence rulings. As

trial approaches, there is typically a final pretrial conference with the judge and adoption of a final pretrial order to govern the proceedings.

- **Trial.** At trial, there typically is **jury selection, opening statements, direct examination** of witnesses, **cross-examination** of the witnesses, **closing argument**, and **jury deliberation** prior to rendering a verdict. At trial, the rules of evidence and the custom and practice of trial conduct play an important role. In a jury trial, the jury renders a **verdict** after it concludes its deliberations. In a bench trial, the courtroom proceedings simply adjourn and the judge in the privacy of chambers authors **findings of fact and conclusions of law** pursuant to Rule 52. At trial, there may be many motions regarding the evidence or trial procedure (certainly there will be **objections**). In addition, the parties may move for **judgment as a matter of law** (Rule 50(a)), for the adoption of particular jury instructions, and so on. After trial and verdict or findings, a **judgment** is entered.
- **Post-Trial Motions.** After trial, common post-trial motions may seek a judgment as a matter of law (Rule 50(b)), imposition of costs (Rule 54 and 28 U.S.C. § 1920) and counsel fees (pursuant to various statutes or common law doctrine that do not apply in most cases because, in general, each side bears its own legal fees), or a **new trial** (Rule 59). Further after trial, a party may move to **vacate or modify a judgment** (Rule 60). Posttrial motions under Rules 50 or 59 make the judgment inoperative until the court has ruled on the motions. Once these motions are resolved, a losing party may **appeal** but must do so within 30 days of the judgment in order to be timely. The judgment may be for either monetary relief or injunctive relief or some combination of the two. The winner may engage in the **judgment collection** efforts designed to force payment if payment is not made voluntarily. As discussed in [Chapter 20](#), entry of final judgment operates to preclude repetitive subsequent litigation by the parties or those sufficiently aligned with the parties.

J. Litigation Planning—At the Beginning, Consider the End

Once focused on litigation, counsel needs to address a number of concerns. In mapping out a strategy, counsel should determine what the client wants at the end of the process and how the client’s requested relief will be implemented. Once envisioning the goals and form of a final judgment, counsel can think “backward” as well as “forward” by making sure that there is a plan to achieve each step necessary to obtain the required result.

For example, if the goal is a large money judgment to compensate for breach of a contract, counsel should consider:

- what the judgment will look like;
- what the jury verdict form and answers will look like; what closing arguments should be made;
- what jury instructions should be given;

- what evidence should be in the record;
- what discovery is necessary to obtain that evidence and avoid pretrial dismissal;
- how the pleadings should be crafted to facilitate that discovery; and
- what informal investigation is necessary to craft those pleadings satisfactorily.

While doing this, counsel should also have in mind potentially effective means of settling the dispute, including “win-win” situations in which the defendant can provide satisfactory recompense to the client in a relatively painless manner. For example, if the breach of contract was shrinkage of the client’s sales territory, perhaps the client would be better off with a reinstated, redrawn or expanded territory, something the defendant is willing to provide because this allows it to avoid having to immediately pay cash to your client. Or perhaps a tort plaintiff will accept a series of compensatory payments, which is easier for the defendant to afford, rather than insisting on lump sum compensation.

With these long-term perspectives, counsel then can better execute the following steps required for pursuing client goals through civil litigation.

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1. Determining Who to Sue

This is often not as easy as it sounds. Sure, you know who generally wronged the client. But what is the legal entity that owns or operates the sandwich shop that engaged in discriminatory hiring or left the floor in a dangerous condition resulting in the client’s fall and injury? Presumably, counsel has traced the relevant business records and identified relevant individuals or organizations at fault. But there may be gaps in knowledge that can only be closed, if at all, with the aid the litigation process and discovery. Some defendants may need to be named as “John Doe” or “Jane Doe” parties until you get enough information to identify them.

Even when you know who everyone is, you still might not want to sue everyone. For example, some arguably culpable people might be important witnesses that can incriminate more culpable people. Why sue the bar patron who simply failed to shout “duck” and risk making him defensive when what you really want is for him to implicate the other bar patron who hit the client with a beer bottle? Likewise, you might wish to concentrate on parties with insurance or sufficient wealth to compensate the client. For example, in a barroom brawl case, your best target financially is often the bar that failed to provide adequate security or served liquor to obviously drunk patrons. The bar ordinarily has more liability insurance and more money than the physical perpetrator of the assault.

Conversely, you may in some cases make a special effort to sue some parties not because they are especially culpable or wealthy but because their presence in the case confers certain procedural advantages. For example, as you will see in [Chapter 1](#), in a state court action naming a defendant from the same state as the plaintiff can prevent out-of-state defendants from removing the lawsuit from state court to federal court. Plaintiffs who prefer state court to federal court frequently do this—and it is perfectly ethical as long as your decision to

name the in-state defendant comports with Fed. R. Civ. P. 11 (See [Chapter 5](#)) even if the in-state defendant is not your primary target on the merits.

2. Determining Where to Sue

Forum selection (often discussed under the pejorative of “**forum shopping**”) is a significant part of lawyering. In many cases, a prospective plaintiff may sue in more than one jurisdiction (*e.g.*, state or federal, New York or New Jersey). In choosing between different states, counsel needs to consider the degree to which certain possible forums lack sufficient contact with certain defendants ([Chapter 2](#) on personal jurisdiction fleshes this out). Assuming that several different states would all be permissible locations for the lawsuit, counsel must then consider practical factors such as the composition of the bench and jury pool as well as the venue within the state that would obtain (*e.g.*, rural v. urban). Some places are more plaintifffriendly and others tend to be more supportive of defendants. Some jury pools are known for high awards and others are stingy.

State Courts tend to be organized on a county basis. Urban state court districts are usually one county, but some state court districts in rural areas can encompass several counties. But even the largest state court districts are usually not as large as federal court districts. This means that the federal jury will usually, but not always, be drawn from a larger geographic area. Because state court districts are usually smaller and more compact, you have a better idea of the demographic characteristics of the jury pool and whether they match up with the demography you would prefer for a jury that hears your client’s case.

Federal court judges are appointed. District court trial judges and appellate court judges are appointed for life and can only be removed for misbehavior such as conviction of a crime. Bankruptcy judges and magistrate judges (who often preside over discovery disputes and other pretrial matters) are appointed for a term of years rather than for life but otherwise enjoy similar job security. State court judicial selection varies. Although several states follow something close to the federal model, 80 percent of the states have judicial elections of some type and in perhaps 20 states judicial elections seem close to indistinguishable from modern electoral politics. State judges, having less insulation from electoral politics, may be less independent and lawyers always have concerns that a judge’s rulings may be influenced by the power, prominence, and wealth of a litigant or counsel—particularly if the litigant has been a substantial contributor in the past or can retaliate against a disliked judge at the next election through campaign contributions, attack ads on television, and the like.

And, of course, there may be differences in the rules of procedure and their application. If, for example, state rules of civil procedure provide broader discovery and you are at an informational disadvantage relative to the defendant, you may prefer state court. Or the federal procedural rules may permit you to join more claims and defendants in one action than do the state rules. If you want to ensure that everyone connected with the dispute is brought into the action and that all claims are aired, this weighs in favor of selecting federal court—provided there are not other factors weighing more heavily in favor of state court. Or state law precedent may make it easier for a plaintiff to survive a Rule 12 dismissal motion or a summary judgment motion.

3. Judge vs. Jury

Once within a chosen forum, one needs to decide whether a bench trial with the judge not only presiding over case presentation but also making findings of fact is preferable to a jury trial, assuming that you otherwise have right to a jury trial (*See Chapter 16*). If one of the other parties to the case demands its right to jury trial, your desire for a bench trial is ineffective. In spite of bilateralism of the right to jury trial, there may be agreement on a bench trial (or at least a failure to make a timely demand for a jury trial). The conventional wisdom is that plaintiffs want juries while defendants are inclined more toward judges—but again, be careful of the conventional wisdom. Consider the type of case, the jury pool, and the characteristics of the bench. You may even know the identity of the specific judge assigned to the before the time for demanding jury trial has lapsed.

4. Considerations of Applicable Law

Courts do not ordinarily apply general legal principles but usually apply specific federal law or the law of a particular state. The applicable state law may not be that of the court's home state but in deciding what law to use, the court will use the "choice of law" approach of the state in which the court is located. In addition, the conventional wisdom is that if the issue is close, most judges opt for applying forum state law because it is the law with which they are more familiar and comfortable and because this creates less work and reduced risk of error (e.g, a good judge can learn a lot about a different state's law in a relatively short time but will almost certainly be more proficient in applying familiar law). In many cases, state-to-state differences in law are minimal. But where there are material differences in potentially applicable state law, counsel must think harder about which law will apply and whether the choice of law rules of one court are more likely to yield favorable law than those of another court.

5. Deciding What Claims to Bring

After having investigated and conducted a Rule 11 analysis, you know what claims you are permitted to bring. But do you want to bring all of them? Some may create side issues you don't want. Or they may be weaker, thus consuming your resources or detracting from your strong claims. On the other hand, as discussed in *Chapter 12*, the scope of discovery in federal court and many state courts is linked to the claims and defenses that have been pleaded. If you don't plead a claim, you may be denied discovery that is generally helpful to your case.

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Realize as well that you are not required to give each claim the same attention. You can plead a claim and then leave it relatively undeveloped. For that reason, most lawyers plead all non-frivolous claims, at least at the outset. Later on, you might amend the complaint and delete some claims or stipulate to dismissal. But you do not want to unwittingly omit a claim and then later realize it was a strong basis for recovery. As noted in *Chapter 20's* discussion of claim preclusion, if a claim is not brought, it often cannot be brought later after the conclusion of the matter.

6. Drafting the Complaint

Having thought through the matter in light of investigation and research, you are now ready to draft the complaint. In addition to determining the claims you will make, think about whether you want a bare bones document (as discussed in [Chapter 6](#), relatively little detail is required in most cases) or one that provides more of a narrative or even a “settlement brochure” for opposing counsel. Or, if what you really want is a detailed document likely to prompt a settlement offer from the opponent, this might be more effectively done through a well-drafted (and not excessively bellicose) letter containing supporting documentation tabbed for easy reading.

7. Crafting Disclosures

As you will learn in [Chapter 13](#), federal courts require each party to make basic disclosures at the outset of the case regarding information such as witnesses, documents, damages sought, and applicable insurance. One advantage of being a plaintiff is that you know the lawsuit is coming and can begin preparation. By contrast, the defendant usually must wait until it receives the complaint and then begin reacting to the claim.

Plaintiffs’ pre-complaint investigation will reveal a good deal—but not everything. Plaintiffs must also be ready to examine defendants’ initial disclosures (required under Fed. R. Civ. P. 26 as discussed in [Chapter 13](#)) for confirmation and study the new information provided by the disclosures.

8. Seeking Discovery

After assessing the disclosures on top of the information you acquired informally, you will know what information you still need and can craft a discovery plan for attaining it. Will you need expert consultants or witnesses in order to prevail in the matter? This is part of the discovery you must provide but it helps to think about retention and deployment of experts in the context of the overall discovery plans (and battles) of the case.

In similar fashion, you can visualize the other side of the case and anticipate defendant’s information requests and prepare to respond. Often the response will be simply to provide what is requested. But there are different means of providing requested information. Select the type that is most economical for your client and reflects positively on your client—but remember that you have ethical obligations. You cannot distort or destroy information that is validly subject to discovery.

Finally, along these lines, consider whether to seek protective orders limiting discovery as well as motions to compel discovery you wish to obtain. Think about which protective orders are likely to be necessary. What types of protective orders? How do you support your position? Will additional research be required?

9. The Potential Utility of Pretrial Motions

As a plaintiff, the practical goal in most cases is to avoid pretrial dismissal or trimming of the case and to obtain a settlement or judgment after trial. Defendants typically hope for pretrial dismissal of at least some claims and thus will do more planning of Rule 12 motions to dismiss, Rule 56 motions for summary judgment, and the like, while plaintiffs will devote efforts to planning the defense of such motions. Remember, however, that not every case

requires extensive motion practice. This may not be cost effective, particularly if a motion is not likely to succeed.

10. Assembling the Legal Team

Should you retain co-counsel for the case? On that note, should you prosecute the case yourself—or is this the type of case on which you should affiliate co-counsel or even refer the matter to other counsel? The Rules of Professional Conduct in most cases permit fee-sharing between referring counsel and trial counsel so it is less excusable than ever for a lawyer to take on a client if the lawyer is not competent to handle the matter. In the past when referral fee-sharing was banned, lawyers had a financial incentive to hold on to cases that might be outside their competence and resource level. But today, a lawyer can serve as an intake lawyer, refer matters to specialized counsel if necessary, and still be compensated provided the client consents and other conditions of ABA Model Rule of Professional Conduct 1.5 are satisfied.

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11. Litigation as a Subset of Civil Dispute Resolution

Disputes often arise and are resolved without invocation of the courts. Although civil litigation remains an option when less formal methods fail, it is important to remember that most disputes are resolved through informal methods such as shrugging off small slights and injuries, **negotiated resolution, administrative tribunals, mediation, arbitration**, or another form of ADR.

“Alternative” Dispute Resolution (ADR). Many in the legal profession (and laypersons involved in dispute resolution) may object to our labeling non-litigation outcomes as “alternative” dispute resolution and argue that the correct term is “dispute resolution” so as not to implicitly favor or promote litigation as the dispute resolution norm, which to some extent occurs whenever we label anything but litigation to be the “alternative.”

Although we understand the sentiment and concede that most dispute resolution in the world does not involve complete adjudication, we continue to believe that ADR is the correct term both because of its historical roots (the non-adjudicatory dispute resolution movement arose as a proposed alternative promoted by critics of litigation) and because in most cases litigation is in fact the default method of resolving disputes when the disputants cannot agree on another method. Further, much successful ADR occurs “in the shadow of the law” to use a memorable phrase popularized by two early ADR scholars.

When upset with the conduct of another person or entity, the “victim” has a number of options ranging from simple endurance or forgiveness to full scale litigation. The most prevalent form of ADR is direct **negotiation** leading to compromise and resolution. Where the disputants are unable to reach an accommodation by themselves, they may invoke the aid of a neutral third-party for **mediation** of their disputes. Or they may submit the matter to arbitration, a less ritualized form of adjudication. **Arbitration** may also be agreed upon by contract prior to the arising of an actual dispute. In addition, there are several common variants or hybrids of these major ADR devices.

Negotiation is the most common form of dispute resolution. Just as the name implies, it involves disputants discussing means of resolving their dispute without resort to trial or trial substitutes. There is a substantial emerging literature regarding effective negotiation, mediation, arbitration, and other ADR methods that is well worth consulting for any lawyer.

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The book inaugurating the modern negotiation discipline is Roger Fischer & William Ury's *Getting to Yes: Negotiating Agreement without Giving In* (1981), a classic, with several subsequent or revised editions. Key insights of the book are that people (not only disputants but prospective collaborators) should bargain over interests rather than positions and that more information and greater trust often improves the odds for successful negotiation.

The illustration they used was one of two persons fighting over the rights to an orange. If bargaining over positions, the likely outcome is splitting the orange down the middle, a result that gets each 50 percent of what they want. But what if it turns out that one wants the orange for the pulp to make juice while the other wants it for the rind to bake a pie? If the parties know this, they can each get 100 percent of what they want, a true win-win situation. But to develop this information, the parties will need enough trust and candor to produce this information that can lead to a better result.

Limits of class time will prevent most civil procedure instructors from doing anything more than touching on negotiation theory or particular ADR techniques. Excellent sources for further information include:

- Stephen J. Ware & Ariana Levinson, *PRINCIPLES OF ARBITRATION LAW* (2017);
- Maureen Arellano Weston & Stephen K. HUBER, *ARBITRATION: CASES AND MATERIALS* (3d ed. 2011);
- Carrie Menkel-Meadow, et al., *DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL* (2d ed. 2012);
- Leonard Riskin, et al., *DISPUTE RESOLUTION AND LAWYERS* (5th ed. 2014);
- Stephen J. Ware, *PRINCIPLES OF ALTERNATIVE DISPUTE RESOLUTION* (3d ed. 2016);
- James J. Alfini, et al., *MATERIAL ON MEDIATION THEORY AND PRACTICE* (3d ed. 2013);
and
- Robert H. Mnookin, et al., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* (2000).

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Important to negotiation is each respective party's "**BATNA**" (**best alternative to a negotiated agreement**). For most disputants, this means the realistic range of likely outcomes if the matter is fully litigated. Determining this requires counsel to assess both the chances of winning, the likely damages awarded at trial, any proportional assignment of fault that may affect the award, and additional potential items of recovery such as prejudgment interest, costs, counsel fees, or possible punitive damages. In addition, counsel must assess the realistic odds of collecting a judgment from the opponent. If the opponent is trending

toward bankruptcy, a “bird in the hand” settlement now might be better than a larger award after trial that becomes uncollectible or reduced because of bankruptcy.

A common approach to evaluating a case is to calculate the likely amount of damages that can be proven at trial multiplied by the probability of winning on the merits regarding a negligence, contract breach, or statutory violation claim. For example, an unperformed contract may have cost plaintiff \$100,000 in lost revenue but there is a 50–50 shot that defendant can persuade a judge or jury that the nonperformance was excused by the “**force majeure**” events beyond its control. Assuming a 50–50 shot at winning at trial, the value of the claim is \$50,000.

If, however, the breach of contract is clear and there is no defense with a possibility of succeeding and the contract contains a **liquidated damages** clause stipulating that in the event of breach, \$100,000 will be paid, the plaintiff appears to have a claim with an almost ironclad value of \$100,000. But even in such cases, the value of the claim may need to be discounted by the costs of pursuing the claim to even an almost certainly successful judgment, the possibility that collecting the judgment will be difficult (*e.g.*, if the defendant heads to a foreign country that refuses to honor U.S. legal claims or files bankruptcy), and the possibility, however miniscule, that even when the claim is very strong, things could go wrong at trial.

In a case this strong, plaintiff would ordinarily not take much of a discount—but as always, the totality of the circumstances is important.

Mediation involves use of a neutral third party to facilitate discussion between the parties and attempt to achieve a negotiated resolution through the aid of the mediator. Although it is controversial in some academic circles, most practitioners agree that it is permissible for the mediator to express views about the relative strength of various party positions and arguments so that they can better gauge the likely outcomes from litigation if the mediation is not fruitful.

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Mediators add value by meeting separately with the parties to build trust and help develop information in order to improve the odds for settlement. They can also (unless it is prohibited as too evaluative) provide a useful, arms-length assessment of the claim in serving as a sounding board for the disputants.

This divide over apt approaches to mediation is generally labeled a clash between “**facilitative**” mediation (the type most favored by most ADR scholars) and “**evaluative**” mediation, which appears to be common and perhaps even dominant in practice. Some have argued that the best mediation is inherently “**eclectic**” and should combine and alternate between the two styles as demanded by the needs of the case.

Early Neutral Evaluation involves an expressly evaluative process by a neutral third party, one who advises the parties as to the neutral’s impressions of the case. This provides the parties with a dose of reality that can be useful in dialing down the expectations of the parties. For example, a plaintiff may not be impressed that defendant thinks the claim is worthless. But if former Judge Smith, serving as a neutral evaluator, tells the plaintiff that his

damage estimate is too high, this is likely to bring the plaintiff's demands to a lower range that may in turn encourage a serious offer by the defendant.

Arbitration is a determination of the dispute conducted not by judge and jury but by an arbitrator or a panel of arbitrators. A single arbitrator must be **neutral**. Where there is a panel of arbitrators (usually three), all may be neutral or the procedure may call for each disputant to select a "**partyappointed**" arbitrator, with these arbitrators subsequently selecting a neutral "**umpire**." Arbitration operates in practice much like a bench trial but with relaxed evidentiary standards.

In addition, the Rules of Evidence do not as a technical matter apply to arbitrations although they may be used as a guide to admissibility. Also, arbitration providers such as the American Arbitration Association (AAA) and Judicial Arbitration & Mediation Services (JAMS) often have their own rules of procedure and evidence that differ from those applicable in court.

Pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1–16, arbitration awards can be turned into enforceable judgments upon proper presentation to the courts. An arbitration award may also be vacated or modified, but only according to the provisions of the Act, which provides for far narrower and more deferential review than one finds in an appeal from a district court trial. State versions of the Uniform Arbitration Act are to the same effect.

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These Acts provide that agreements to arbitrate are specifically enforceable and that the parties to such agreement can be compelled to arbitrate. Since the 1980s, the U.S. Supreme Court has shown strong support for compelling arbitration even when the arbitration clause in question was contained in a standardized, complex contract that was not expressly negotiated or perhaps not understood by one or more of the parties to the contract.

Mixed Methods or Hybrids. A variety of combination methods of dispute resolution exist.

- **High-low arbitration** involves the parties stipulating to a range of acceptable awards and the arbitrators making a decision within that range. The type of arbitration used in Major League Baseball requires the arbitrators to choose either the player's proposed salary or that of the owner. The idea is that this should encourage both sides to be reasonable rather than taking extreme positions in an effort to anchor the arbitrator's thinking on one end or another of the continuum.
- Some courts have found success with a **summary jury trial** in which persons from the jury pool are brought in (and usually not told that their verdict will not be binding) and presented with opening arguments, a witness and key documents from each side, and then closing arguments. The jury's experimental verdict is then used in a manner similar to early neutral evaluation to attempt to make the parties reasonable in their negotiation positions.
- In **Med-Arb** (short for mediation combined with arbitration), the mediator attempts a facilitated negotiated settlement but in the event of disagreement is permitted to morph into an arbitrator and decide some or all of the dispute.