Chapter 1

Introduction and Overview

Welcome to the study of Civil Procedure. The co-authors of this book find the study of Civil Procedure both fascinating and challenging. We hope you will as well. The foundations of Civil Procedure consist of big ideas, including justice, power, efficiency, and fairness. At the same time, Civil Procedure is intensely practical, providing the mechanism to resolve millions of disputes each year though civil litigation. For many lawyers, civil litigation makes up a significant portion of their practice.

This chapter is designed to help you succeed in this course by briefly providing background information, fundamental concepts, and a context for the course in these areas:

- Section 1—Context and Practice Series Casebooks
- Section 2—Nature of Civil Procedure
- Section 3—Sources of Law
- Section 4—United States Court System
- Section 5—Characteristics of Civil Litigation
- Section 6—Alternative Dispute Resolution
- Section 7—Professionalism
- Section 8—Legal Reasoning
- Section 9—Timeline of a Civil Lawsuit.

1. Civil Procedure—A Context and Practice Casebook

This book is part of the Context and Practice casebook series. The overarching goal for the Context and Practice casebooks is to create law school textbooks that enable law professors to be more effective as teachers. The series creators are convinced that most law professors want to help their students learn; in fact, law professors frequently say that their primary goal is to teach their students to be experts at learning in the legal field.

In Spring 2007, the Carnegie Foundation's Educating Lawyers: Preparation for the Practice of Law[1] and Roy Stuckey's Best Practices for Legal Education[2] measured the

1. William M. Sullivan, Anne Colby, Judith Welch Wegner, Lloyd Bond, & Lee S. Shulman, Educating Lawyers: Preparation for the Profession of Law (2007).
2. Roy Stuckey & Others, Best Practices for Legal Education (2007).

effectiveness of modern legal education and concluded that legal education often falls short of what it could and should be. Both works criticized the rigid adherence to a single teaching technique and the absence of law practice and professional identity development in legal education.

Inspired by the call to action reflected in these works and by the absence of teaching materials designed in light of these studies and of the hundreds of educational studies in the instructional design field, law teaching experts from around the country envisioned a casebook series responsive to the research on teaching and learning and to the Carnegie and Stuckey studies. The result is this series. Context and Practice casebooks are designed as tools to allow law professors and their students to work together to improve students' learning and better prepare students for the rigors and joys of practicing law.

Accordingly, casebooks in the Context and Practice series:

- Emphasize active learning;
- Make it easier for professors to create multiple opportunities for practice and feedback;
- Use multiple methods of instruction;
- Focus on the application of concepts in simulated law practice contexts with a particular emphasis on problem-solving; and
- Guide students' development of professional identity.

We have structured this text into fifteen chapters. With the exception of Chapter 1 (Introduction and Overview) and Chapter 15 (Integration and Review), each chapter follows a similar format. Each chapter starts with a problem you should be able to analyze and resolve by the end of your study of that chapter. For each new body of law, we summarize or otherwise introduce the law you will be learning and, in many instances, provide a simple example. The introductions are most often followed by a series of cases, with problems and active learning exercises interspersed throughout. Many of the problems and exercises suggest you write a response, and we encourage you to do so. In class, you can expect your professor to ask you many of the questions included in this text. The chapters also include graphics designed to give you a visual sense of the concepts and the overall body of law. Finally, each chapter includes reflection questions designed to further your professional development.

2. The Nature of Civil Procedure

Civil Procedure is a subset of a vast body of American law. Although there are many ways to subdivide and characterize law in the United States, a useful division for present purposes is between criminal and civil law. A criminal lawsuit involves the state or federal government prosecuting a defendant for allegedly committing a crime, such as theft or assault. A civil lawsuit is brought by a plaintiff, such as an in-

dividual or corporation, alleging a claim, such as negligence or breach of contract, against a defendant.

Both criminal and civil law can be subdivided into substance, remedy, and procedure.

Criminal Law	Civil Law
• Substance • Remedy • Procedure	• Substance • Remedy • Procedure

In criminal law, substance includes the definition of crimes and defenses. For example, criminal law could define "burglary" as follows: "A person commits burglary by entering or remaining unlawfully in or on a residential structure with the intent to commit any theft." If the defendant is convicted of a crime, typical criminal remedies include imprisonment of the defendant and fines the defendant must pay to the government. Criminal procedure defines the process through which the government prosecutes the defendant. For example, criminal procedure determines whether the defendant remains in jail after arrest and pending trial, the defendant's right to an attorney, how to compel witnesses to appear at trial, and the manner in which the government and defendant present evidence during sentencing.

Substantive civil law determines the elements of claims and defenses. For example, the substantive law of torts, contracts, and property provide many civil claims and defenses. Likewise, the law of civil remedies prescribes the type of relief the plaintiff can recover if the defendant is found liable. Typical civil remedies include compensatory damages, which the defendant pays to the plaintiff, and injunctions, which are court orders prescribing the defendant's future behavior. Civil Procedure is an elaborate set of rules that governs how the civil litigation system resolves disputes.

A simple car accident case can illustrate civil law substance, remedy, and procedure. Assume Pat and Dell are each driving cars that collide at an intersection. Both cars are damaged and Pat and Dell are injured. Pat brings a civil lawsuit against Dell. The substantive law determines the elements of Pat's claim for negligence based on Dell's intoxication and failure to yield the right of way. Substantive law also determines whether Pat's failure to wear a seatbelt provides Dell a defense to Pat's claim. The law of remedies determines the categories of compensatory damages Pat may be entitled to recover if Dell is found to be negligent. These damages may include property damage, medical expenses, lost wages, and pain. Remedies law also governs whether Pat can recover punitive damages based on Dell's reckless behavior.

The law of Civil Procedure addresses issues regarding the civil litigation process, including:

- Can Pat sue Dell in federal or state court?
- How can Dell challenge Pat's choice of court?
- What must Pat include in the complaint to begin the lawsuit?

- How can Dell raise defenses to Pat's claims?
- How can Pat and Dell uncover facts and develop evidence from witnesses and documents?
- Are Pat or Dell entitled to a trial by jury? If so, how are jurors selected?
- What errors by parties, the judge, or jurors will give rise to a new trial?

This course will address those issues and hundreds of others that together make up the "rules of the game" for civil litigation.

The brief summary above oversimplifies the criminal/civil law distinction and the subcategories of substance, remedy, and procedure. The law is more complicated than that. For example, Dell's intoxication could give rise to a criminal prosecution by the government to punish Dell for driving while intoxicated and a civil suit initiated by Pat to recover damages caused by Dell's behavior. Likewise, as we will see in Chapter 6, the distinction between substantive law and procedural law can be quite illusive.

Exercise 1-1. The Importance of Civil Procedure

In most law schools Civil Procedure is a required course, often taught in the first year, along with other foundational courses. Try to articulate why Civil Procedure is so important in real life law practice.

3. Sources of Law

The United States does not have a single legal system. Instead, it has many legal systems that operate simultaneously. There is a legal system for the federal government, one for each of the fifty states, and one for each of the many Native American tribes. The primary focus in this book will be on the federal system; the secondary focus will be on state systems.

In the federal and state legal systems, law comes from four primary sources: constitutions, statutes, regulations, and judicial decisions. Each of those sources are described briefly below, along with examples of the law of Civil Procedure in the federal system.

a. Constitutions

The pinnacle of the U.S. system of law is the federal Constitution. The U.S. Constitution was drafted in 1787 and went into effect in 1789. It consists of seven articles and 27 amendments. The U.S. Constitution creates the Congress, the presidency, and the Supreme Court, identifies their respective powers, and guaranties a variety of individual rights. The Constitution is the supreme law of the land; any state or federal law in conflict with it is invalid. Each state also has its own written constitution, which forms the pinnacle of each state's system of law, but each of these state con-

stitutions is still subordinate to the federal Constitution, along with any federal law that is consistent with it.

The U.S. Constitution establishes fundamental principles of Civil Procedure. For example, Article III creates the Supreme Court, authorizes Congress to establish other federal courts, and defines the types of cases federal courts are allowed to hear. The Seventh Amendment preserves the right to trial by jury in some, but not all, civil cases. The Fifth Amendment and Fourteenth Amendment prohibit the federal and state governments from depriving any person of "life, liberty, or property, without due process of law..." The Due Process Clauses apply to many aspects of civil litigation. And Article VI, clause II, the Supremacy Clause, establishes the supremacy of legitimate federal law over state law—the foundation of the shared system of federal-state governance that we call *federalism*.

b. Statutes

Statutes are the work of legislatures. Federal statutes are enacted by Congress, a process that requires a majority vote of the House of Representatives, a majority vote of the Senate, and approval by the president. If instead the president vetoes the bill, it becomes law only if Congress overrides the veto, which requires a 2/3 vote of each chamber. Most states follow the same general approach: to become law, a bill must pass the state legislature and then be approved by the governor.

Title 28 of the United States Code contains hundreds of statutory provisions governing Civil Procedure in federal courts. Among other statutory topics, this course will explore statutes prescribing the types of cases federal courts are allowed to hear (subject matter jurisdiction), the location of the federal courts in which the plaintiff may initiate the lawsuit (venue), mechanisms the defendant can employ to move a case from state to federal court (removal), a statutory form of action (interpleader), the enforceability of judgments from one state to the other (full faith and credit), and the selection of jurors.

c. Rules and Regulations

The federal government has a variety of executive departments (*e.g.*, the Department of Education) and administrative agencies (*e.g.*, the Environmental Protection Agency), which issue regulations designed to enforce and administer statutes. Federal departments and agencies derive their authority to issue regulations from Congress. Consequently, regulations may supplement or interpret statutes but cannot contradict statutes or exceed the scope of authority granted by Congress. At the state level, a variety of departments and agencies have similar regulatory authority.

By statute (28 U.S.C. §2072), Congress authorized the Supreme Court to prescribe rules of practice and procedure governing federal courts. Using this authority, the Supreme Court created the Federal Rules of Civil Procedure. Those rules provide detailed guidance for the initiation and processing of civil litigation in federal district

- How can Dell raise defenses to Pat's claims?
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courts. Large portions of this course concern the interpretation, analysis, application, and evaluation of the Federal Rules of Civil Procedure. Most states also have rules of procedure that govern civil litigation in state courts.

d. Judicial Decisions: Common Law and Equity

Courts make law. In the process of resolving disputes, both federal and state judges must interpret and apply the provisions of constitutions, statutes, and rules. In addition, state and federal judges may create legal principles in order to decide cases before them. In short, courts create law on a variety of issues on which the legislature had not spoken. This court-made law, also known as common law, has created a vast body of precedent embodied, for the most part, in the written opinions of appellate courts. American judges generally follow precedent in deciding current cases. This is partly because they see no sense in working out a fresh solution to a problem each time it recurs and partly because they are convinced—by notions of fundamental fairness—that like cases should be treated alike and that every person ought to be treated as any other would be under similar circumstances. These practical considerations give shape to the formal doctrine of "stare decisis" (Latin for "let the decision stand"), which counsels courts to follow prior decided cases where a new case presents similar facts and issues.

The notion of common law originated in England, and its fundamental ideas were brought to America by the early English settlers. Historically, what we now regard as the common law was divided into two branches: law and equity. England had two parallel court systems—one for law and one for equity. The monarch's courts dispensed law. These courts would adjudicate disputes—typically through the use of a jury—and enter judgment for one side. If the plaintiff won, the judgment would commonly order the defendant to pay a specified sum of money damages to the plaintiff. If the law was inadequate to do justice, the plaintiff could bring suit in an equity court. There, the judge, acting without a jury, might issue an order for some form of equitable relief (such as an injunction—an order to defendant to return plaintiff's property) because a legal remedy (an award of money) was not adequate under the circumstances. Today the federal and most state court systems have combined law and equity courts into a single court, yet the distinction between law and equity remains relevant. For example, the Supreme Court has interpreted the Seventh Amendment to preserve the right to a jury on "law" issues but not "equitable" issues.

A significant portion of Civil Procedure in federal courts is common law. For example, each year federal courts publish hundreds of opinions in which the judges interpret a provision of Title 28 of the United States Code or a Federal Rule of Civil Procedure. In addition, the United States Supreme Court and lower federal courts have articulated elaborate sets of legal principles to interpret and apply provisions of the U.S. Constitution. For example, an important part of this course focuses on a series of Supreme Court opinions that establish legal principles derived from the "Due Process" clauses of the Fifth and Fourteenth Amendments.

4. United States Court System

The United States judicial system has three levels of courts: trial courts, appellate courts, and the Supreme Court. Most state judicial systems have a similar three-level court structure.

a. United States District Courts

Federal trial courts are called United States District Courts. There are ninety-four district courts, one for each of the judicial districts into which the nation is divided. Each state has at least one U. S. district court; large, populous states have several. For example, California, New York, and Texas each have four districts. In contrast, states with a small population, such as Vermont, and states encompassing a small geographic area, such as New Jersey, have only one district court. In single-district states, district boundaries are coterminous with state boundaries. Whether a district court is staffed by a single judge or by many judges depends upon the population and caseload of the district.

Although state trial courts can hear most types of cases, federal district courts have limited jurisdiction. Article III of the U.S. Constitution establishes the outer limits of federal court jurisdiction. In general, federal district courts hear three classes of cases: prosecutions for federal crimes, civil claims arising under federal law, and civil claims for more than $75,000 based on state law between citizens of different states. With respect to criminal prosecutions and a small group of civil actions, the jurisdiction of the district courts is exclusive, meaning that state courts cannot hear those cases. But for the bulk of civil actions, federal district court jurisdiction is concurrent with that of state courts, so the parties may litigate their dispute in either federal court or in the courts of at least one state. Several federal trial courts have jurisdiction over particular types of cases, such as the bankruptcy courts, court of claims, and tax court.

b. United States Circuit Courts of Appeals

There are eleven numbered intermediate appellate courts, called United States Courts of Appeals, one for each of the circuits into which the nation is divided. There is one circuit court for the District of Columbia, which reviews both matters involving residents of the District and much of the federal administrative action taking place in the national capital. There is one Federal Circuit, which handles appeals primarily on tax and patent matters. Each of the numbered circuits encompasses the geographic area of several states. For example, the Court of Appeals for the Second Circuit hears appeals from federal district courts in New York, Connecticut, and Vermont. In contrast, the Court of Appeals for the Ninth Circuit hears appeals from federal district courts in nine states: Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington.

Each of the eleven numbered circuit courts of appeals hears appeals from all the lower federal courts within the circuit on both civil and criminal matters. In addition,

each reviews the decisions of various federal agencies in cases that involve people who reside in the circuit. The circuit courts have no power to review the decisions of state courts or state administrative agencies. Most cases at the circuit court level are decided by a panel of three judges, but some important issues are heard first by a three-judge panel, and then by all of the judges of the Circuit, sitting "*en banc*."

c. The United States Supreme Court

Decisions of the courts of appeals are subject to further review in the Supreme Court of the United States. All nine justices of the Supreme Court hear every case (although a judge may recuse himself or herself because of a conflict of interest). A few cases go to the Supreme Court as a matter of right, but most only as a matter of the Supreme Court's discretion. The Court exercises its discretion sparingly, usually granting approximately 80 of the petitions for review per term, which is fewer than five percent of the petitions for review submitted to the Court. The Supreme Court is not only the highest federal court but also has power to review decisions of the highest court of each state if the decision is based on federal law, including constitutional law.

5. Characteristics of Civil Litigation

Civil litigation is an elaborate public dispute resolution system. This course will examine the complexities of the civil litigation system, explore the theories and public policy that underlie the system, evaluate the strengths and weakness of the system, and begin to prepare you to practice effectively and ethically. This section is a brief introduction to several characteristics of the civil litigation system.

a. Goals of the Civil Litigation System

What basic goals should drive the civil litigation system? Consider Federal Rule of Civil Procedure 1, which provides in part: "These rules govern the procedure in all civil actions and proceedings in the United States district courts.... They 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."

Exercise 1-2. Articulating and Achieving the Goals of the Civil Litigation System

1. Make a list of at least five important goals that the civil litigation system should try to achieve.
2. What can lawyers and judges do to ensure that the civil litigation system achieves those goals?

b. Volume and Types of Civil Cases in Federal and State Court

To get a sense of the types of civil cases that make up the dockets of federal district courts, consider these statistics from the fiscal year ending in September 2017 (http://www.uscourts.gov/statistics-reports/us-district-courts-judicial-business-2017).

- Plaintiffs filed 267,769 civil cases, including:
  - prisoner petitions—58,000
  - personal injury—54,000
  - civil rights—39,000,
  - contracts—24,000
  - social security—19,000
  - labor—18,000
  - real and personal property—12,000
  - intellectual property—11,000.
- District courts terminated 289,901 civil cases.
- District courts held 2,663 civil trials.

In contrast, during the 2015–2016 fiscal year, in the California state courts:

- Plaintiffs filed 1,270,919 civil cases
- Superior courts terminated 1,121,081 civil cases
- Superior courts held 179,835 civil trials.

(http://www.courts.ca.gov/documents/2017-Court-Statistics-Report.pdf.)

c. Adversary System

A central feature of civil litigation in the U.S. is the adversary system. The parties present their cases to a judge or jury who decides which party prevails. In the adversary system, the parties and their lawyers control many aspects of the litigation. The plaintiff decides whether to bring a civil suit. Then the parties raise claims and defenses, request remedies, investigate facts, produce evidence, present issues to the court via motions, and articulate arguments. In the traditional adversary system, the judge's role is primarily reactive—ruling on motions before and after trial, ruling on the admissibility of evidence during trial, and ultimately deciding which party prevails and the appropriate remedy. Although the judge's reactive role remains a feature of modern civil litigation, judges also manage cases by establishing schedules and deadlines to move the case along and by encouraging parties to resolve their dispute through a negotiated settlement.

A set of assumptions underlies the adversary system. First, plaintiffs will make good choices about which suits to bring for resolution in the civil litigation system.

Second, the parties and their lawyers have relatively equal abilities and resources to investigate and present their cases. Third, truth will emerge when both sides to a dispute vigorously present their cases to an unbiased decision maker.

The adversary system is not a license for parties and lawyers to engage in "win at all costs," abusive litigation tactics. The Federal Rules of Civil Procedure contain a number of provisions designed to ensure cooperation and fair play among parties and lawyers. For example, Rule 26 requires parties and lawyers to meet and develop a plan to govern discovery in the lawsuit. Rule 11 places an obligation on parties and lawyers to ensure that every paper filed in the lawsuit has a legal and factual basis and is not presented to harass other parties, cause delay, or increase the cost of litigation. Rules 26 and 37 give judges broad authority to sanction lawyers and parties who abuse or obstruct the discovery process.

Exercise 1-3. Evaluating the Adversary System

Throughout the course, as you learn about the theory and practice of civil litigation, you should evaluate and re-evaluate the adversary system. Begin that process now. What do you perceive to be the strengths and weakness of the adversary system? Identify several potential strengths and several potential weaknesses.

6. Alternative Dispute Resolution

Although millions of civil disputes lead to lawsuits filed in state and federal courts each year, most disputes are resolved outside of the civil litigation system. Many people resolve their disputes informally without ever consulting a lawyer. When potential clients come to lawyers seeking help in resolving conflicts, an important role for lawyers is to guide clients in selecting an appropriate mechanism for addressing the dispute. Civil litigation is one possible mechanism. Other dispute resolution mechanisms include negotiation, mediation, and arbitration (addressed in more detail in Chapter 14). To help clients make appropriate choices, lawyers must be able to explain the characteristics of each dispute resolution mechanism.

a. Civil Litigation

Four characteristics of civil litigation help define whether it is an appropriate mechanism to resolve a dispute. First, civil litigation provides a binding decision resolving the dispute. Civil lawsuits end in a judgment, enforceable through the power of the state or federal government. Second, civil litigation generally is a zero-sum game. The judge or jury decides who wins and who loses. Third, the civil litigation process can be quite lengthy. Although some civil lawsuits end within months of their filing,

many take years to resolve. Fourth, civil litigation is often expensive for the parties. They pay to file the case, investigate the facts and law, and hire expert witnesses. The largest expense for most parties is attorney's fees. Under the American Rule, the parties pay their own attorney's fees, regardless of whether they win or lose the case. There are some exceptions to the American Rule, allowing prevailing parties to recover their attorney's fees from the losing parties.

b. Negotiation

People can attempt to resolve their dispute through negotiation. There is no guarantee that the negotiation will resolve the dispute—the parties may be unable to agree on a resolution. On the other hand, a negotiated settlement will rarely be a zero-sum game. The parties are free to structure the resolution to meet the needs of all parties. Parties can negotiate their disputes without lawyers or can have their lawyers participate in the negotiations. Negotiations can take place before a lawsuit is filed or during the suit. Judges often strongly encourage parties to negotiate a settlement to a lawsuit. Many lawsuits end when the parties and their lawyers negotiate a solution and dismiss the lawsuit. Negotiation plays a significant role in more formal alternative dispute resolution mechanisms including mediation (trying to reach an agreement with the assistance of a mediator) and arbitration (deciding in a negotiated contract that an arbitrator will resolve the dispute).

c. Mediation

A mediator attempts to help people resolve their disputes through communication and negotiation. The mediator does not have the power to decide the dispute or compel the parties to negotiate a solution. Instead, the mediator listens to the parties and facilitates communication among the parties, which may lead to a voluntary resolution of the dispute. Like negotiation, parties in a mediation are free to structure creative solutions that satisfy important goals of each party. Participation in mediation is often voluntary—the parties decide to engage in the mediation process. However, some state courts require that parties in civil litigation attempt to resolve the dispute via mediation before the suit continues.

d. Arbitration

Many collective bargaining agreements, commercial contracts, and consumer transactions require that the parties submit their dispute to an arbitrator. Many arbitrators have substantive expertise; for example, an arbitrator may be an expert in medical malpractice. Parties, with or without lawyers, present their cases to the arbitrator, who decides the case. Many arbitration agreements set out the process for choosing the arbitrator and the rules governing presentation of the case. Those rules are often more flexible than the rules of evidence and procedure that apply in court. Many arbitration agreements provide that the arbitrator's decision is binding. Some

state courts require that the parties submit their dispute to non-binding arbitration before initiating a lawsuit.

Exercise 1-4. Selecting Dispute Resolution Mechanisms

1. Think about civil disputes you have experienced. Were any of the disputes resolved via civil litigation, arbitration, mediation, or negotiation? Did the mechanism turn out to be appropriate to effectively resolve the dispute?
2. For each of the disputes below, decide which type of dispute resolution system (arbitration, litigation, mediation, negotiated settlement) would work best. Articulate your reasons.
   a. Two married adults agree to separate but disagree about custody of their kids, ages 7 and 13.
   b. Two drivers are seriously injured in a car accident; they disagree about which of them was at fault.
   c. Labor and management disagree about how the layoff provisions of a contract should be applied as the company downsizes.

7. Professionalism

Lawyers are professionals. Issues of professionalism arise frequently for all lawyers involved in civil litigation. To help prepare you for practice, this book will ask you to think about professionalism issues often.

Many state and local bar associations have adopted codes of civility and professionalism. The following example from the Spokane County Bar Association is typical.

Spokane County Bar Association Code of Professional Courtesy

As a lawyer, I recognize my first duty is to ardently and conscientiously represent my client. Yet, each lawyer also has the responsibility for making our system of justice work honorably, fairly, and efficiently. To accomplish this end, I will comply with my profession's disciplinary standards, and be guided by the following creed when dealing with clients, opposing counsel, the courts and the general public.

A. My Client:

1. I will be loyal and sensitive to my client's needs, but I will not permit that commitment to block my ability to provide objective and candid advice.

2. I will try to achieve my client's lawful objectives as quickly and economically as possible.
3. I will advise my client that civility and courtesy are not to be equated with weakness.
4. I will abide by my client's ethical decisions regarding the client's goals, but nevertheless will advise that a willingness to engage in settlement negotiations is consistent with ardent, conscientious and effective representation.

B. Opposing Parties and their Counsel:

1. I will try to act with dignity, integrity, and courtesy in oral and written communications.
2. My word is my bond, not only with opposing counsel, but in all my dealings.
3. In litigation, I will agree with reasonable requests for extensions of time, stipulate to undisputed facts to avoid needless costs or inconvenience, and waive procedural formalities when the interests of my client will not adversely be affected.
4. I will facilitate the processing of all reasonable discovery requests.
5. I will not ask colleagues for the rescheduling of court settings or discovery proceedings unless a legitimate need exists; nor will I unreasonably withhold consent for scheduling accommodations. I will try to consult with opposing counsel before scheduling depositions, hearings, and other proceedings or meetings.
6. I will promptly respond to oral and written communications.
7. I will avoid condemning my adversary or the opposing party.

C. The Courts and Other Tribunals:

1. I will be candid with and courteous to the Court and its staff.
2. I will be punctual in attending court hearings, conferences and depositions; I recognize that tardiness is demeaning to me and to the profession.
3. I will stand to address the Court, and dress appropriately to show my respect for the Court and the law.
4. I will refrain from condemnation of the Court

D. The Public and our System of Justice:

1. I will remember that my responsibilities as a lawyer include a devotion to the public good and the improvement of the administration of justice, including the contribution of uncompensated time for those persons who cannot afford adequate legal assistance.

2. I will remember the need to promote the image of the profession in the eyes of the Public and be guided accordingly when considering advertising methods and content.

Exercise 1-5. Professionalism

1. What incentives do you have to comply with a code of professionalism, such as the example above?
2. What types of circumstances may make your compliance with a professionalism code particularly challenging?

8. Legal Reasoning

A course in Civil Procedure can encompass a wide variety of goals, including legal doctrine and theory, professionalism, and skills. As noted above, this course will explore four sources of Civil Procedure law—constitutions, statutes, rules, and judicial opinions—along with the theory and public policy behind that law. Further, the course will address professionalism and strategy in the context of modern civil litigation. Finally, the course will focus on analytical skills essential for the successful practice of law. This section briefly introduces two types of analytical skills that run throughout the course: case analysis and statutory analysis.

a. Case Analysis

Effective lawyers and successful law students read judicial opinions both carefully and critically. Case analysis involves identifying and summarizing essential components of the opinion. Case analysis also includes evaluation of the opinion and synthesis of a line of opinions on the same topic. As you read the cases in this text, you should pick out the various parts of the case in order to properly prepare for class. The chart below summarizes the case analysis process.

b. Statutory Analysis

Effective lawyers and successful law students also read statutes and rules both carefully and critically. The elements of statutory analysis differ somewhat from case analysis. Regardless of whether you are analyzing a statute (a provision of Title 28 of the U.S. Code) or a rule (a provision of a Federal Rule of Civil Procedure), the same five elements of analysis apply.

Chart 1-1. Case Analysis Components

Citation	*Hickman v. Taylor*, 329 U.S. 495 (1947). The citation identifies parties to the lawsuit (Hickman and Taylor), the court deciding the case (the U.S. Supreme Court), and the year the opinion was issued (1947).
Facts	Identify all of the parties to the lawsuit — the case citation often names only two of the parties. Summarize what happened to the parties that gave rise to the lawsuit to provide a real-life context for the opinion. Identify the key facts that affect the outcome of the case.
Procedural History	This is especially important in Civil Procedure. Identify the parties' claims and defenses. Note the procedural device that led to the trial court's decision, such as a motion to dismiss, a jury verdict, or a motion for a new trial. Identify the result at the trial court level and at the intermediate appellate court, if applicable. Finally, note which party appealed to the court issuing the opinion.
Issue	Set out the legal question or questions the court addresses to decide the appeal. For example, in *Hickman v. Taylor* the Court framed the issue as: "This case presents an important problem under the Federal Rules of Civil Procedure as to the extent to which a party may inquire into oral and written statements ... secured by an adverse party's counsel in the course of preparation for possible litigation...."
Holding	Give the court's answer to the question presented in the issue. For example, in *Hickman v. Taylor* the Court held that witness statements and other "work product" prepared by a lawyer in anticipation of litigation were protected from discovery by an opposing party who is unable to show a substantial need for the statements and substantial hardship in getting equivalent information through the opposing party's own investigation.
Reasoning	This often is the most important component of case analysis both in law school and in practice. The reasoning component usually includes three subparts: (1) the legal principles on which the court is relying (these principles could come from constitutions, statutes, rules, or case law); (2) application of the facts to the relevant legal principles; and (3) the policy supporting the decision (social, economic, or philosophical reasons for the decision).
Concurring and Dissenting Opinions	Why read beyond the majority opinion? Because the concurring and dissenting opinions help us understand the majority opinion. Dissenting opinions often point out weaknesses in the majority opinion, offer alternative analysis, and convey facts that the majority opinion did not mention. Further, the approach articulated in concurring and dissenting opinions may be adopted by a majority of the court in future cases. So summarize key points from the dissenting and concurring opinions.
Evaluation and Synthesis	This is the critical thinking aspect of case analysis. To evaluate the opinion and synthesize it with related opinions, ask yourself questions such as: Is the opinion logical and consistent? Is the result fair and just? Will the opinion make sound precedent? How does the opinion fit with other opinions addressing the same issues?

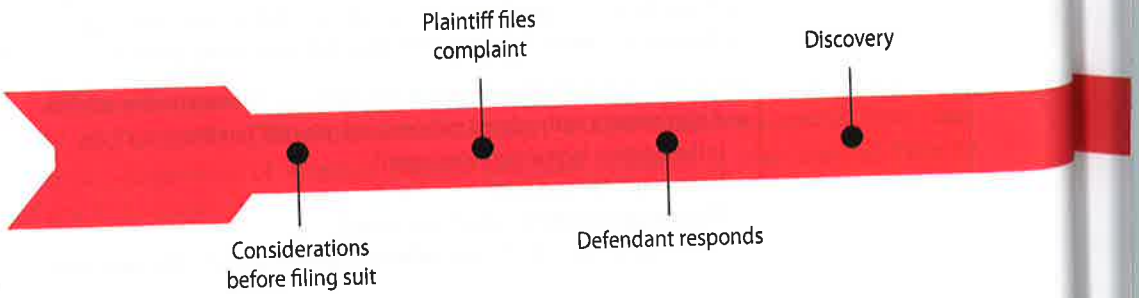
Statutory Interpretation Elements

- Closely read the *words* of the statutory provision at issue. Read the provision again. See if the statutory scheme has a definition section that may define key words in the provision at issue.
- Identify the statute's *purpose.* Some statutory schemes have a purpose section. For example, Federal Rule of Civil Procedure 1 identifies fundamental goals for the federal civil litigation system.
- Fit the statute in the broader statutory *scheme.* Read the statutory provisions related to the section at issue. How does the provision at issue fit with the rest of the statute? The relevant statutory scheme might include an entire title, chapter, or subchapter of the U.S. Code. The Federal Rules of Civil Procedure constitute an overall statutory scheme and a series of titles, each of which has its own mini-scheme.
- Use *legislative history.* Research how the statutory provision at issue changed over time. What do the amendments tell you about the meaning of the current version of the statute? Many statutes include legislative reports that detail the purpose of the statute. For example, helpful Advisory Committee notes accompany the Federal Rules of Civil Procedure.
- Use *cases* interpreting the statute. Many statutes have been interpreted multiple times in published opinions. In fact, many of the cases that we have included in this casebook illustrate judicial interpretations of specific statutes and rules. Once set down in an authoritative way, an interpretation of a statute or rule effectively becomes "part" of that statute or rule.

Exercise 1-6. Statutory Analysis

Assume that the Spotted Owl has been listed as an endangered species under the Endangered Species Act (ESA). It lives and breeds primarily in old growth forests in the Pacific Northwest. Your client owns 40 acres of old growth forest in Oregon, which your client would like to harvest to generate income to meet basic needs of your client's family. Does the ESA prohibit your client, a private landowner, from cutting 40 acres of old growth forests on his property?

Your research reveals the following about the ESA.



Words of the statute.

ESA section 9. "It is unlawful for any person to take any endangered species." ESA section 2. "The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect."

Purpose of the statute.

ESA section 1. "The purposes of this chapter are to provide a means to conserve the ecosystems on which endangered species depend...."

Statutory scheme.

ESA section 4. "Concurrently with making a determination that the species is endangered, the Secretary shall designate the critical habitat of the species."

Legislative history.

The Senate Report for the ESA states: "The term 'take' is to be given the broadest possible meaning consistent with the conservation goals of the Act."

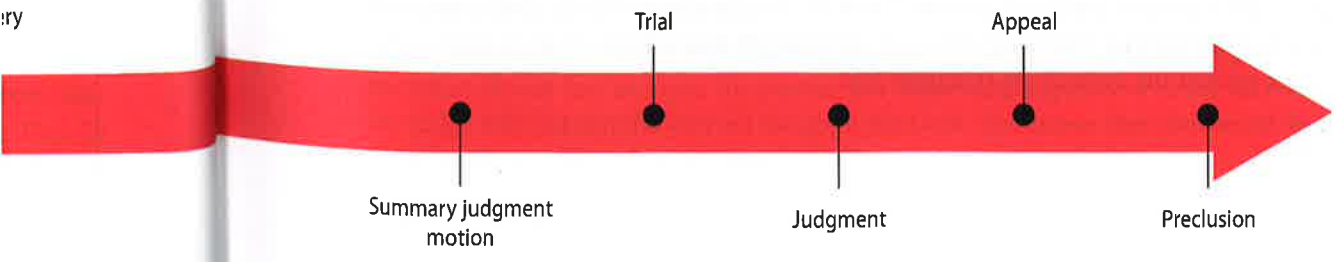
Case interpreting the statute.

Sierra Club v. Yeutter involved the U.S. Forest Service's practice of allowing clear cuts on land owned by the U.S. government. The Sierra Club sued on the grounds that the practice violated the ESA because clear cuts destroyed the critical habitat of the red cockaded woodpecker, an endangered species. The court held that the destruction of critical habitat was a "taking" in violation of the ESA.

After completing your research, you meet with your client who would like an answer to the question above. Answer the question. Explain your reasoning in a paragraph.

9. Timeline of a Civil Lawsuit

The graphic below represents a streamlined, linear view of a typical timeline for a civil lawsuit. Many lawsuits roughly follow this timeline. Civil litigation can be quite complex, however, so some lawsuits travel a more circuitous path. For purposes of this introduction to Civil Procedure, what follows is a brief description of each phase in the timeline with references to the chapters in this book where each phase is covered in detail.



a. Considerations before Filing Suit

When a client seeks a lawyer's help resolving a dispute, the lawyer usually engages in legal and factual investigation. Eventually, the lawyer and client will decide what type of dispute resolution mechanism may be best to address the client's dispute. Although civil litigation is one possible mechanism, some form of alternative dispute resolution may be appropriate, such as mediation or arbitration (Chapter 14).

If alternative dispute resolution is inappropriate or unsuccessful, the lawyer and client may decide to pursue civil litigation. Before initiating the suit, the lawyer will need to determine which court or courts can hear the lawsuit. This "proper court" analysis consists of subject matter jurisdiction, personal jurisdiction, and venue. Subject matter jurisdiction concerns whether a state or federal court has the power to hear the type of suit (Chapter 4). Personal jurisdiction deals with two fundamental issues: (a) basis—whether the courts of a given state have power to render a binding judgment against the defendant (Chapter 2) and (b) service—how the defendant receives proper notice of the suit (Chapter 3). Finally, venue determines which federal district courts or which courts within a state are the proper geographic location to file the suit (Chapter 5).

Choice of law issues arise before the lawsuit is filed as well. Part of the lawyer's pre-suit legal research will address the question of which law applies in the courts of the particular state where he or she files the lawsuit. Will state or federal law apply? If state law, the law of which state? Choice of law issues are addressed in Chapter 6.

b. Plaintiff Files the Complaint

The first substantive document filed in a civil lawsuit is the complaint. In the complaint, the plaintiff names the parties (plaintiffs and defendants), asserts claims, and requests remedies. The sufficiency of complaints is addressed in Chapter 7. Joinder of multiple claims and parties in one lawsuit is the subject of Chapter 8.

c. Defendant Responds

Defendants have two basic options in responding to a complaint. Defendants can raise a pre-answer motion, such as a motion to dismiss because the court lacks jurisdiction or because the plaintiff's complaint is insufficient (Chapter 10). Defendants can respond through an answer, in which the defendants respond to the allegations in the complaint, raise defenses, join additional parties, and assert claims against the plaintiff and other parties (Chapters 7 and 8). If defendants default (fail to respond to the complaint by answer or motion), the plaintiff may ask the court to enter judgment against the defendants (Chapter 10).

d. Discovery

The rules of civil procedure create an elaborate system that the parties can use to investigate facts and develop evidence (Chapter 9). Discovery devices include:

- Initial disclosures (parties identify for each other the people and documents the party may use to support its claims and defenses)
- Interrogatories (written questions from one party to another that must be answered under oath)
- Requests to produce documents and things (parties request to inspect another party's documents and things relevant to claims and defenses in the suit)
- Depositions (oral testimony given under oath by a party or non-party witness)
- Subpoenas (parties can subpoena a non-party witnesses for a deposition and can request to inspect a non-party's documents and things relevant to claims and defenses in the suit)
- Requests for admission (parties request other parties to admit the truth of statements set out in the request)
- Mental and physical exams (parties can ask the court to order another party to submit to an exam of a condition that is in controversy in the lawsuit, such as the plaintiff's injuries caused by an accident).

The discovery rules also contain robust sanctions provisions that courts can employ to police the discovery process.

e. Summary Judgment Motion

Before a lawsuit goes to trial, usually after discovery is complete, one or more of the parties may ask the court to enter summary judgment on all or part of the case. Courts grant summary judgment when there is no genuine dispute as to material facts and a party is entitled to judgment as a matter of law on an issue. Summary judgment is addressed in Chapter 10.

f. Trial

The decision maker in a civil trial may be the judge or a jury. Parties have a right to a jury trial on some, but not all, issues in civil litigation. If the case is to be decided by a jury, the judge and lawyers select a jury at the beginning of the trial. The parties then make opening statements to the jury and present their evidence. At the close of the evidence, either party may ask the judge to grant judgment as a matter of law on the grounds that no reasonable jury could decide the case for the opposing party. If the court denies that motion, the parties will make final arguments to the jury and the judge will instruct the jury on the applicable law. The jurors then deliberate and try to reach a verdict. Trial is covered in Chapter 11.

g. Judgment

If the jury reaches a verdict deciding the case, the judge will enter judgment for the prevailing party. Likewise, if the judge decides the case before trial via a motion (to dismiss or for summary judgment) the judge will enter judgment. Parties who lose at trial can make post-trial motions to undo the judgment, including a motion for judgment as a matter of law (no reasonable jury could have found for the verdict winner), for a new trial based on errors made by the judge or jury, or for relief from judgment based on newly discovered evidence or fraudulent conduct by the opposing party. Post trial motions are addressed in Chapter 11.

h. Appeal

In the federal system and in many states, the party who loses at the trial court has the right to appeal to an intermediate appellate court. Although a few decisions may be appealed even before the end of the lawsuit, in general the parties cannot appeal until the trial judge enters a final judgment. Appellate courts review errors that the appealing party identifies as the grounds for appeal. Appellate courts do not hear new evidence; instead they review the record that was developed at the trial court. Depending on the type of issue raised on appeal, the court of appeals will apply a standard of review, varying from no deference to the trial court's decision (de novo review) to upholding decisions unless the appealing party can demonstrate that the trial court abused its discretion. Appeal is the subject of Chapter 12.

i. Preclusion

A final judgment in civil litigation limits the parties in subsequent litigation. The doctrine of claim preclusion prevents the same parties from relitigating claims that were or could have been litigated in the first case. The doctrine of issue preclusion prevents a party from relitigating an issue that was litigated and decided in the first suit even if that issue is part of a different claim in a subsequent suit. Preclusion doctrines are covered in Chapter 13.