

Overview

Unlike the other courses you take in your first year, civil procedure is the law of court *procedure* rather than *substantive* law. Substantive law establishes the law that will decide an issue in a civil suit. Procedural law determines the rules of law that will govern the manner in which a civil trial is conducted: who has the burden of proof, how preliminary issues are heard by the court, how trials are conducted, the manner in which evidence is presented to the court and jury, and the standard of proof (“preponderance of the evidence” or “clear and convincing evidence” or “beyond a reasonable doubt,” for example). Most civil cases are won or lost on procedural and not substantive grounds, which means that the competent lawyer will spend as much (or more) time researching procedural issues as he or she will researching the substantive law.

Courts have the power granted to them by the Constitution of the jurisdiction, the power delegated to them by the Congress or state legislature, and inherent powers, which vary depending upon the jurisdiction’s constitutional and statutory provisions. Federal and state courts all have granted, delegated and inherent powers, but the scope of the powers differ from state to state and between the federal government and the various states. Indeed, there is little consensus on the proper scope of the federal judiciary’s inherent power, which leaves the researcher in the happy position of arguing for a broad or narrow interpretation of the power, depending on the issue and client.

In researching procedural issues, you must establish whether the question is one regulated by one or a combination of the following: the United States Constitution, a state Constitution, federal statutes, state statutes, rules of the court that will hear the case, or the court’s inherent authority (whatever that is) to regulate its procedure, manage litigation, impose sanctions, and supervise the administration of criminal justice, to name but a few of the topics for which courts have claimed to have inherent authority.

I. The Civil Procedure Research Process

From a practical point of view, the starting point for your research should be the rules of the court before which your case will be heard. Certainly, the Court will look first to its own rules to decide an issue. Rules need interpretation, however, and it is rare that the text of a procedural rule will be sufficient to answer a question. Furthermore, if the issue is not directly addressed by a rule, which happens fairly often, you must know what sources of law you should use to determine the procedure applicable in your jurisdiction and court.

Federal Courts

Before Congress adopted the Federal Rules of Civil Procedure in 1938, practice in the federal district courts conformed to state procedure by virtue of a succession of federal statutes. The adoption of the federal rules in 1938 draws a line between the earlier and later practices. At the same time, however, the 1938 rules created a different “rules history” that can be mined when very difficult issues arise.

In most instances, an examination of the rule in question, the Advisory Comment, and cases interpreting the rule will either resolve the question or make clear how different courts have reached different interpretations.

Scholarly Treatises

The exhaustive scholarly treatment of the federal rules of civil procedure (as well as those of criminal procedure, appellate procedure, and evidence makes *Federal Practice and Procedure*, by Charles A. Wright and others (known as “Wright and Miller”) a key starting point for your research. Wright and Miller is cited more than a thousand times each year in published federal district and appellate court decisions.

Law Library: 3d ed. West, 1998 -. KF8840 W71 (2 copies, one on Reserve). *Westlaw:* FPP

A less scholarly and more practitioner-oriented multi-volume treatise is James W. Moore’s, *Moore’s Federal Practice*, which is cited in published federal opinions about half as often as Wright and Miller (still a respectable number). Although coverage is similar to that of Wright and Miller, *Moore’s* also contains the *Manual for Complex Litigation* and the *Reference Manual on Scientific Evidence*.

Law Library: 3d ed. Matthew Bender, 1997 -. KF8837 M6 1997.

Lexis: Legal > Secondary Legal > Matthew Bender > By Area of Law > Federal Practice >

Most volumes of Wright and Miller and *Moore’s Federal Practice* are organized by rule number, with a number of other volumes covering jurisdiction. Good entry points include the subject indexes and the tables of statutes and rules. Both Wright and Miller and *Moore’s* have online indexes. Indexes are frequently more helpful in quickly identifying the proper area of a multi-volume treatise than is a keyword search of the full-text.

A multi-volume treatise organized by subject is *Federal Procedure, Lawyer’s Edition: A Problem-Solving Textual Analysis of Federal Judicial and Administrative Procedure*. West, 1981 -. *Law Library:* KF8840 .F44.

Another multi-volume treatise organized by subject is the *Cyclopedia of Federal Procedure*, first published in 1928. 3d ed. West. *Law Library:* KF8835 C85 1951.

Both the *United States Code Annotated* (West) and the *United States Code Service* (Lexis) have annotated versions of the Federal Rules of Civil Procedure, with annotations to treatises, journals and case law. Because the two publishers provide annotations to their own materials, you should look at both if you have access to both.

Shorter analytical treatises include:

Jack H. Friedenthal, et al., *Civil Procedure*. 4th ed. 1999). *Law Library*: KF 8840 .F72 2005 (Reserve).

Fleming James, Jr., et al., *Civil Procedure* (5th ed. 2001). *Law Library*: KF 8840 .J3 2001

Larry L. Teply, Ralph U. Whitten, *Civil Procedure* (3d ed. 2004). *Law Library*: KF 8840 .T46 2004) (has a more historical perspective of the development of the rules of civil procedure than the other hornbooks)

Journals

John Marshall journal of practice and procedure: from 1967 to 1979 in [Hein-On-Line](#)
Review of litigation: from 03/01/2000 to present in [Wilson OmniFile: Full Text Mega Edition](#);
from 1980 to 2004 in [Hein-On-Line](#); from Spring 1994 to present in [LexisNexis Academic](#)

Tennessee journal of practice & procedure: from 1997 to 2002 in [Hein-On-Line](#); from Spring 1997 to present in [LexisNexis Academic](#)

Case Services

Federal Rules Decisions (West). The FRD has cases from the United States District Courts regarding the FRCP. Coverage begins in 1938. In addition, the FRD contains articles, speeches, and reports of judicial conferences. *Law Library*: KF105 .F44.

Westlaw: FRD (cases, articles and court rules); FRD-ART (articles); FRD-CS (cases); FRD-Rules (versions of FRCP and amendments; coverage starts with 1944).

Federal Rules Service (West). The *Federal Rules Service* contains federal cases that address FRCP issues. Irrelevant issues are omitted. A separate FINDEX index helps locate cases. The general organization of the set is by FRCP Rule. *Law Library*: KF8830 .F4.

Rules Histories

Review the Legislative History research guide. Amendments are sent to Congress, which may or may not decide to postpone enactment and look at the amendments.

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Rules of civil procedure for the District Courts of the United States microform : Hearings before the Committee on the Judiciary, House of Representatives, Seventy-fifth Congress, third session, with regard to the Rules of civil procedure ... adopted by the Supreme Court of the United States pursuant to the act of June 19, 1934 (48 Stat. 1064) and on H.R. 8892
Law Library: Mif 10.1 no.172 (Microform Room)

The [U.S. Courts \(Federal Judiciary\) Homepage](#) contains information about the United States federal court system, publications and reports regarding the system, statistics, etc. Of particular interest are the [rulemaking documents](#). The [Federal Judicial Center](#), the education and research arm for the federal courts, also has useful information.

Notes to the Rules for the District Courts of the United States, March 1938. Supreme Court Advisory Committee on Rules for Civil Procedure. Law Library: KF8820 A2 1938.

Bibliographies and Research Guides

Baker, Thomas E. **Federal Court Practice and Procedure: A Third Branch Bibliography.** Rothman, 2001. Law Library: KF8810 .B35 2001.

Washington University in St. Louis School of Law, [Advanced Civil Procedure Research Guide](#).

University of Minnesota Law Library, [Researching Civil Procedure in Federal & Minnesota Trial Courts](#)

New York University School of Law, [Researching Comparative Civil Procedure](#)

University of Arizona College of Law Library, [Federal Court Links](#)

Duke University Law Library, [Court Rules](#)

Florida

Florida Civil Practice. KFF530 F558 1999

Florida Civil Practice Damages. KFF195 A75 F55 2005

Florida Civil Practice Guide. KFF 530 G472 1997-. Reserve

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