

UNIVERSITY OF  
**COLORADO LAW REVIEW**

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*Forum*

2023

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**CIVIL PROCEDURE AND THE NEW BAR  
EXAM**

JEFFREY A. PARNES\*

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INTRODUCTION

In 2022 the National Conference of Bar Examiners (NCBE) issued its “Content Scope Outlines” for public comment,<sup>1</sup> soliciting input on “significant oversights.”<sup>2</sup> The outlines were designed to inform the public “of the scope of the topics to be assessed in the eight Foundational Concepts and Principles (FCP) and the scope of the lawyering tasks to be assessed in the seven Foundational Skills (FS) on the next generation of the bar exam.”<sup>3</sup> One of the eight FCP was “Civil Procedure,” including

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\* Professor Emeritus, Northern Illinois University College of Law. BA, Colby College; JD, The University of Chicago. Some of these thoughts were sent in April 2022 to the National Conference of Bar Examiners in response to its solicitation of comments. 1. NAT’L CONFERENCE OF BAR EXAMINERS, NEXT GEN BAR EXAM CONTENT SCOPE OUTLINES (2022) [hereinafter 2022 NCBE CSO], [nextgenbarexam.ncbex.org/csopc-register](https://nextgenbarexam.ncbex.org/csopc-register).

2. *Id.* at 1.

3. *Id.* The FCP appear in *id.*, at 7–38, and the FS appear in *id.*, at 4–6. See *infra*, notes 10 and 11.

constitutional protections and proceedings before administrative agencies.<sup>4</sup>

This Essay addresses some “significant oversights”<sup>5</sup> on the topic of civil procedure. In doing so, it recognizes that basic law school federal civil procedure courses will need alteration if professors wish to prepare students for a revised exam.

One major problem with the FCP on Civil Procedure is that it generally follows the Federal Rules of Civil Procedure (FRCP) and some related federal statutes which, as written, do not reflect the realities of federal district court civil practices (putting aside the ever-increasing multidistrict cases and reviews of administrative agency adjudications). A second significant problem is that there is no recognition of how one state court’s civil practices differ from federal civil practices and from other state practices, excepting the brief nods to “state courts’ general jurisdiction, as distinct from federal courts’ limited jurisdiction” and to “specialty state courts such as probate courts.”<sup>6</sup> “Newly licensed” attorneys<sup>7</sup> will likely begin and undertake most, if not all, of their civil case practices in state courts, tribunals, commissions, and agencies. The “Next Gen” Bar Exam should reflect this reality.

Beyond reflections on the FCP topic of civil procedure, this Essay illustrates how that topic could be utilized in “integrated exam questions.”<sup>8</sup> The Testing Task Force of the NCBE (TTF) recommended in April 2021 that “an integrated exam permits use of scenarios that are representative of real-world types of legal problems” that newly licensed lawyers encounter in practice. Such an exam is quite distinct from an exam containing “discrete components comprised of stand-alone terms.”<sup>9</sup> In an integrated exam question, more than one FCP<sup>10</sup> could be

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4. NAT’L CONFERENCE OF BAR EXAMINERS, FINAL REPORT OF THE TESTING TASK FORCE (April 2021) [hereinafter 2021 NCBE FRTTF] at 21, nexgenbarexam.ncbex.org (Reports).

5. The NCBE solicited such comments. 2022 NCBE CSO at 1.

6. 2022 NCBE CSO at 10.

7. *Id.* at 1 (the “next generation of the bar exam” should reflect “topics and tasks . . . that are most essential for newly licensed lawyers”).

8. 2021 NCBE FRTTF at 20.

9. *Id.*

10. Foundational concepts and principles include civil procedure, contract law, evidence, torts, business associations, constitutional law, criminal law, and real property. *Id.*

assessed together with more than one FS,<sup>11</sup> as with a question involving negotiating a settlement in a pending civil case, where contract and civil procedure laws are relevant.

## I. INCOMPLETE WRITTEN FRCP AND FEDERAL STATUTES

Written federal civil procedure rules and related federal statutes do not reflect a good bit of the civil case settlement norms. Written guidelines—chiefly found in lower federal court precedents largely deferential to state laws—reveal differing norms on lawyer settlement authority, secret settlements, assignment of legal claims, the role of (and limits on) insurers’ participation, settlement enforcement, and presentation and resolutions of lienholder interests.<sup>12</sup>

Further absent from the FRCP and related federal statutes are comprehensive guidelines for lawyers (themselves or involving those they supervise, like other lawyers and private detectives) and for parties who undertake presuit fact investigations.<sup>13</sup> Here, there are some state-promulgated Professional Responsibility Rules for lawyers and some criminal statutes for parties.<sup>14</sup> Amongst the issues that arise with presuit investigations are presuit procedural law information preservation duties,<sup>15</sup> a lawyer’s responsibility for overseeing

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11. Foundational skills include legal research, legal writing, issue spotting and analysis, investigation and evaluation, client counseling and advising, negotiation and dispute resolution, and client relationship and management. *Id.*

12. *See, e.g.*, Jeffrey A. Parness, *Principles Guiding Civil Claim Settlements*, LEXISNEXIS (2018) (ISBN 978-1-6328-3-7189).

13. *See, e.g.*, Jeffrey A. Parness, *Presuit Lawyer Information Duties Relevant to Civil Litigation*, 105 MARQUETTE L. REV. 921 (2021) [hereinafter *Presuit Lawyer Information Duties*].

14. *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 1.6(e) (AM. BAR ASS’N) (lawyer should make reasonable efforts to prevent access to “information”), r. 4.2 (no ex parte contacts with a person represented by another lawyer), and r. 5.1–5.3 (managerial lawyer’s duties regarding information gathering by other lawyers and nonlawyers). The Model Rules of Professional Conduct are substantially enacted in many states. *See* Cal. Gov’t Code 12946 (It is an “unlawful practice for employers, labor organizations and employment agencies . . . to fail to maintain and preserve” certain employment records).

15. Breaches of such duties by parties can prompt procedural law sanctions against the parties, as under FRCP 37(e) (lost electronically stored information), reviewed in Jeffrey A. Parness, *The Roberts Court and Lost ESI*, 51 STETSON L. REV. 335, 336-49 (2022) [hereinafter *Lost ESI*]. Presuit information preservation failures can also prompt substantive law claims against those who were prospective parties to later civil litigation, as demonstrated in Jeffrey A. Parness, *State Spoliation Claims in Federal District Courts*, 71 CATHOLIC UNIV. L. REV. 1, 11-22 (2022). By contrast, civil procedure laws on sanctioning authority and substantive

subordinate lawyers and private detectives,<sup>16</sup> the ex parte communication rule,<sup>17</sup> and the substantive laws on (usually tort) recoveries for spoliation of evidence.<sup>18</sup>

There are other gaps in the written federal civil procedure laws beyond the arenas of settlement and presuit fact investigation.<sup>19</sup> New bar exam questions that test civil procedure should not be primarily grounded in a set of written civil procedure laws that do not substantially portray civil litigation practices.

The gaps in written federal procedure laws are likewise generally reflected in written state civil procedure laws. Some state civil procedure rules are modeled on the FRCP,<sup>20</sup> though there are some significant variations, as when newly amended FRCP provisions are not added<sup>21</sup> and when state lawmakers exercise rulemaking authority in areas where Congress has set out the guidelines.<sup>22</sup>

In at least some of the FCP, like contracts, torts, business associations, criminal law, and real property,<sup>23</sup> state laws are far more comparable. Similarities are caused by state lawmakers utilizing suggested uniform laws (like the Uniform Commercial Code and the Model Penal Code) or adopting provisions of the American Law Institute's Restatements of Law (as on contracts and torts).

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law remedies are sometimes less available in written laws when lawyers fail in their presuit investigations. *See, e.g.*, Marilyn G. Mancusi, Comment, *Attorneys, E-Discovery, and the Case for 37(G)*, 97 NOTRE DAME L. REV. 2227, 2228 (2022) (urging an amendment to the Federal Rules of Civil Procedure on sanctioning lawyers for e-discovery misconduct "because courts do not have a reliable, uniform system authorizing them to impose sanctions on attorneys who violate their e-discovery obligations").

16. *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 5.1-5.3.

17. *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 4.2.

18. *Presuit Lawyer Information Duties* at 945-53.

19. Other major civil procedure issues left unaddressed by written federal laws include the purposes and mechanics of a court's contempt authority; the effects of an earlier court judgment on a later, factually-related case (as with issue preclusion and claim preclusion); materials privileged from discovery/testimonial disclosure; the interests of lienholders and the processes for resolving those interests; and, the differing roles played by a plaintiff's and/or a defendant's insurer(s) in a civil action.

20. *See, e.g.*, ARIZ. R. CIV. P.

21. *See, e.g.*, Parness, *supra* note 15, at 343 n. 56 (reviewing how the 2015 version of what is now FRCP 37(e) has not been added, with some states still following the federal rule as first set out in 2006).

22. *See, e.g.*, ALASKA ADOPTION R. 5 (venue in adoption proceedings); ALASKA R. CIV. P. 3(b), (c) (other venue norms).

23. NCBE FRITTF at 21.

## II. KEY DIFFERENCES IN CIVIL PROCEDURE LAWS ACROSS THE UNITED STATES

Recognition of key federal-state and interstate differences in civil procedure laws is important for many entry-level lawyers as is a recognition of the incomplete nature of federal civil procedure laws. Unfortunately, there is little attention paid these days to these differences in law school courses, leaving many new lawyers with little, if any, understanding of the complex trial court structures, as with the divisions and departments of the three-hundred-judge Cook County, Illinois Circuit Court,<sup>24</sup> and of how trial courts can differ from county to county even in the same state.<sup>25</sup>

Here, some understanding of how American state constitutions differ from Article III of the federal Constitution would help the transition from law school to legal practice. Key constitutional differences include whether there is a mandated court structure or whether court establishment is left in some (or large) part to the legislature;<sup>26</sup> whether judicial rulemaking processes are spelled out, perhaps with legislature oversight for some (or all) proposed rules;<sup>27</sup> whether judges are selected or elected;<sup>28</sup> whether the subject matter jurisdiction of

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24. General Order No. 1 (Organization), Circuit Court of Cook County, Ill. (including a County Department with Law, Chancery, Domestic Relations, County, Probate, Criminal, Domestic Violence, and Pretrial Divisions; a Juvenile Justice and Child Protection Division; and a Municipal Department with six districts).

25. Compare, for example, the organization of the Circuit Court of Cook County, Illinois, *supra* note 16, to the organization of the Seventeenth Judicial Circuit (Boone and Winnebago Counties), which has, under its General Order 1.01, Criminal, Civil, Family, Juvenile, and Problem-Solving Courts Divisions.

26. Compare, e.g., U.S. CONST., art. III, sec. 1 (Congress ordains and establishes courts “inferior” to the U.S. Supreme Court), with U.S. CONST., art. I, sec. 8 (Congress constitutes Tribunals “inferior to the supreme Court”) and ILL. CONST., art. VI, sec. 1 (“judicial power is vested in a Supreme Court, an Appellate Court and Circuit Courts”) and TEX. CONST., art. V, sec. 1 (“judicial power . . . vested in one Supreme Court, in one Court of Criminal Appeals, in Courts of Appeals, in District Courts, in County Courts, in Commissioners Courts, in Courts of Justices of the Peace, and in such other courts as may be provided by law”).

27. Compare, e.g., S.C. CONST., art. V, sec. 4A (all court rules and rule amendments promulgated by the Supreme Court must be submitted to General Assembly and can be disapproved) with OHIO CONST., art. IV, sec. 5 (“practice and procedure” rules go to General Assembly, with different norms on its ability to express disapproval).

28. Compare, e.g., U.S. CONST., art. III, sec. 1 (judges hold “offices during good Behaviour” upon Senate confirmation) with ILL. CONST., art. VI, sec. 10, 12 (terms of judicial officers range from 4-10 years, with only some judges subject to general election and later voter retention).

constitutionally-recognized courts—as with “all justiciable matters”—is set out constitutionally;<sup>29</sup> and whether alternative dispute resolving bodies—like Worker’s Compensation Boards, Human Rights Commissions, and/or Courts of Claims—have been contemplated or established.<sup>30</sup>

Beyond constitutional variations related to civil procedure, there are other differences in frequently employed, and important, particular civil practice norms. For example, as compared to the federal district courts, in some state courts, ordinary work product is not protected from discovery;<sup>31</sup> sanctions arising from lawyer presentations in pleadings, motions or discovery are governed by a single rule;<sup>32</sup> the attorney-client communication privilege is far more limited when corporations are represented by lawyers;<sup>33</sup> presuit settlement talks are mandated after certain information is shared (as in medical malpractice suits in Florida);<sup>34</sup> the norms on judicial review of administrative agency decisions do not follow the Federal Administrative Procedure Act;<sup>35</sup> and statutory caps on damages are forbidden due to precedents on

29. *Compare* U.S. CONST., art. III, sec. 2 (upon their creation, federal trial courts can only hear certain types of cases, chiefly federal question and diversity) *with* ILL. CONST., art. VI, sec. 9 (trial courts “shall have original jurisdiction of all justiciable matters,” with limited exceptions).

30. *Compare* U.S. CONST., art. I, sec. 8 (“The Congress shall have the Power To . . . constitute Tribunals inferior to the Supreme Court”) *with* FLA. CONST., art. V, sec. 1 (“Commissions . . . or administrative officers or bodies may be granted quasi-judicial powers in matters connected with the functions of their offices”), *and* N.Y. CONST., art. VI, sec. 7(b) (“If the legislature shall create new classes of action . . . the supreme court shall have jurisdiction . . . but the legislature may provide that another court or other courts shall also have jurisdiction”), *and* OHIO CONST. art. II, sec. 35 (inviting legislature to pass worker’s compensation laws), *and* N.Y. CONST. art. VI, sec. 7 (“The court of claims is continued”).

31. *Compare* FED. R. CIV. P. 26(b)(3) (to discover ordinary work product (i.e., no mental impressions, etc.), there is a need to show “substantial need” and “undue hardship”), *with* ILL. SUP. CT. R. 201(b) (ordinary work product generally is discoverable).

32. *Compare* FED. R. CIV. P. 11(d) (rule inapplicable to discovery process issues), *with* ILL. SUP. CT. R. 137 (no discovery process exemption).

33. *Compare* *Upjohn Co. v. United States*, 449 U.S. 383 (1981) (no “control group” test), *with* *Consolidation Coal Co. v. Bucyrus- Erie Co.*, 432 N.E.2d 250, 257 (Ill. 1982) (“control group” test).

34. FLA. STAT. 766.106, *et. seq.*

35. *Compare* 5 U.S.C. § 706 (judicial review of agency rulemaking and adjudication), *with* 735 ILL. COMP. STAT. 5/3101 (under Administrative Review Law, only agency decisions in particular cases are reviewable).

state constitutional jury trial rights and/or inherent state judicial rulemaking.<sup>36</sup>

Beyond variations in constitutional and particular civil practice norms, there are more overarching differences between federal and state civil case litigation. One important distinction involves what state courts often characterize as statutory causes of action. For example, an Illinois Supreme Court rule says:

General rules apply to both civil and criminal proceedings. The rules on proceedings in the trial court, together with the Civil Practice Law [Article II of the Code of Civil Procedure] . . . shall govern all proceedings in the trial court, except to the extent that civil procedure in a particular kind of action is regulated by a statute other than the Civil Practice Law. The rules on appeals shall govern all appeals.<sup>37</sup>

In Illinois, such statutory claims do not include all claims authorized by statute;<sup>38</sup> rather, they include claims created by statute that are not subject to the Illinois constitutional right to a jury trial.<sup>39</sup> Such claims are plentiful and are described, at times, as involving “special or statutory proceedings unknown to the common law.”<sup>40</sup> Such proceedings typically include, *inter alia*, probate, adoption, juvenile, and marriage dissolution matters. In Wisconsin, the statutory chapter on civil procedure comparably says: “Proceedings in the court are divided into actions and special proceedings.”<sup>41</sup> In the federal district courts, similar special causes largely encompass bankruptcy proceedings.<sup>42</sup>

New lawyers familiar with federal district court practices will have significant difficulties in representing clients in state

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36. *See, e.g.*, Jeffrey A. Parness, *State Damage Caps and Separation of Powers*, 116 PENN STATE L. REV. 145 (2011).

37. ILL. SUP. CT. R. 1. The statutory cause of action exemption does not fully carry over to appeals since the Illinois Constitution, Article VI, Section 4, only expressly recognizes high court judicial rulemaking power in matters on appeal.

38. Such statutory claims involve cases wherein a court has less inherent power to act as it acts only within statutory limits. *See, e.g.*, *Struckoff v. Struckoff*, 389 N.E.2d 1170, 1172–73 (Ill. 1979).

39. ILL. CONST. art. I, sec. 13 (“[R]ight of trial by jury as heretofore enjoyed shall remain inviolate.”).

40. *Reed v. Farmers Ins. Corp.*, 188 Ill.2d 168, 179–80 (1999).

41. WIS. STAT. ANN. 801.01(1).

42. *See, e.g.*, FED. R. CIV. P. 81(a)(2) (“These rules apply to bankruptcy proceedings to the extent provided by the Federal Rules of Bankruptcy Procedure.”).

courts. Federal and state procedural law differences must be studied and examined before these lawyers go to courts.

### III. CIVIL PROCEDURE IN INTEGRATED EXAM QUESTIONS

As noted, the NCBE is now suggesting that its new exam may contain at least some “integrated exam questions” wherein both foundational concepts and foundational skills are simultaneously assessed.<sup>43</sup> Here, those examined might need to present a “selected response, short answer, and extended constructed response” arising from a “single scenario or stimulus.”<sup>44</sup> The NCBE now contemplates that such questions would contain “scenarios that are representative of the real world types of legal problems” that newly-licensed lawyers “encounter in practice.”<sup>45</sup>

Such “integrated” questions within a “single scenario” should be utilized. The NCBE suggests a scenario could be accompanied by “a closed universe of appropriate legal resources (e.g., statutes, cases, rules, regulations),” which would include laws involving some of the eight FCP. Related questions could involve the interpretations, policies, and coordination of the provided legal resources, as well as an outline of a strategic plan on behalf of a particular client. The plan would necessitate utilization of certain FS, like legal research (e.g., what additional laws will need to be considered); issue spotting (e.g., what benefits and possible pitfalls accompany the suggested strategy and why is it preferred to alternative strategies); negotiation (e.g., how should a proposed settlement on behalf of a client be presented); and client advising (e.g., explaining the risks as well as the benefits the client can expect if the suggested strategy is taken).

One such scenario could involve one plaintiff’s claims in a civil action against two tortfeasors who are subject to joint and several liability, where the plaintiff is considering settling with one of the tortfeasors. Under the relevant Joint Tortfeasor Contribution Act,<sup>46</sup> each person subject to liability has a right of contribution against another person subject to liability if that person “has paid more than his pro rata share of the common

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43. 2021 NCBE FRTTF at 20.

44. *Id.*

45. 2021 NCBE FRTTF at 20.

46. Illustrative is 740 ILL. COMP. STAT. 100/0.01, *et. seq.*

liability.”<sup>47</sup> A tortfeasor who settles with a claimant “in good faith”<sup>48</sup> is “discharged from all liability for any contribution to any other tortfeasor,”<sup>49</sup> but cannot “recover contribution from another tortfeasor whose liability is not extinguished by the settlement,”<sup>50</sup> making contribution available then to a tortfeasor who extinguishes his own and the other tortfeasor’s liability. One who discharges part or all of a tortfeasor’s liability “is subrogated to the tortfeasor’s right of contribution.”<sup>51</sup>

The difficult questions facing civil case lawyers are typically not pigeonholed in that they involve several different procedural and substantive law issues. Lawyers must be prepared to assess the varied legal sources to answer many of the questions for their clients.

## CONCLUSION

The American Bar Association and others have urged that lawyers be trained to be practice-ready so as to be able to hit the ground running upon graduation.<sup>52</sup> The NCBE seeks a new bar exam that better assures entry-level lawyers do not face “serious consequences” due to lack of “knowledge” of common topics. A reformulation of the civil procedure portion of the bar exam should reflect more everyday issues arising in civil litigation, whether or not addressed in the FRCP, the Federal Judicial Code, or U.S. Supreme Court precedents. Reforms should go beyond recognizing “specialty courts such as probate courts.” A new exam should reflect the reality that civil cases in the United States are chiefly resolved outside of federal district courts, with many resolved outside of general jurisdiction state courts. Many civil disputes, in fact, are resolved in adjudicatory bodies originating outside of constitutional judicial articles, including in alternative governmental dispute resolution forums (as with commissions, tribunals and agencies) and in private dispute

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47. *Id.* 100/2(a) and (b).

48. *Id.* 100/2(c).

49. *Id.* 100/2(d).

50. *Id.* 100/2(e).

51. *Id.* 100/2(f).

52. *See, e.g.*, Teresa Biviano, *Practical Lawyering: Intervention in Law School Curriculum Requirements to Prepare New Lawyers for Ethically Competent Practice*, 30 GEO. J. LEGAL ETHICS 619 (2017) (reviewing, inter alia, the 1992 ABA McCrate Report and the 2017 Carnegie Report).

resolution forums (as under the Federal Arbitration Act). A revised bar exam should reflect these realities.