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COMPLEX LITIGATION

A Context and Practice Casebook

James M. Underwood
BAYLOR LAW SCHOOL



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Author's Preface

I have joked with my students that a possible subtitle for my Complex Litigation course could be called “Litigation for Dummies.” In a very tangible way, this book (like my course) is designed to familiarize students with concepts—tools—to help them become better lawyers. The course tends to be self-selecting because the title causes many students to believe the elective will be a difficult one. But ironically, this text is designed to simplify doctrines and rules that might otherwise appear confusing. This reminds me of a mentor at the law firm of Thompson & Knight in Dallas where I learned how to be a lawyer. Jerry Jones was a grandfatherly figure in the offices when I arrived in 1987 armed with my still-hot-off-the-press diploma. I’ll never forget standing in the hallway with Jerry (he insisted that all call him by his first name) as I was preparing to go take my first deposition of an expert witness—it seemed awfully daunting to me. Jerry’s advice was simple and sincere: “Jim, just go in there with your Big Chief legal tablet and a no. 2 pencil and ask the expert ‘why.’” He had taken a task that seemed insurmountable and revealed that, reduced to its fundamentals, the episode merely involved finding out the various bases for the expert’s opinions. In showing me the big picture, he gave me courage, freedom, and confidence that I could handle it. I would love for this book to cause future trial lawyers to experience a similar sensation.

The genesis of this book lies at the intersection of (a) changing views of how legal education should look and (b) the perceived need for new coverage in the area of Complex Litigation in a legal textbook. I have been teaching complex litigation (advanced civil procedure) for nearly fifteen years, following fifteen years of practicing mostly complex litigation. As the introductory chapter will elaborate upon, complex litigation—properly defined and understood—is actually all around us. Lawyers handling lawsuits are every day confronting issues introduced and analyzed in this book and yet only a handful of casebooks on this subject exist. But is another one needed, you might ask?

The traditional casebook is full of long cases, often strung together in an unbroken fashion and then occasionally followed by many pages of notes. In such treatment, students may learn a doctrine or legal principle in the pages of the principle case and then have all of that understanding shot down with the introduction of vagaries and inconsistent holdings in the many following notes. As a reader of others’ books on this subject, I too would often scratch my head at the end of section and wonder, “what was the point of all of that?” If an experienced lawyer and legal educator can be so easily confused, imagine the plight of the student still trying to gain a simple foundation in the law. This book is designed to present the same substance of the law but in a way that has a more logical flow, offers the student reader some real-life context for grappling with the concepts, and keeps the post-case notes to a minimum. After all, I do not believe that the typical student will remember the nuances from a note in this book years later. But if the material is presented well, that student might remember important principles in this area of the law and be able to quickly immerse themselves back into the details again when necessary.

I typically advise my students on the first day of class of my love for the subject of complex litigation. Viewed in a macro sense, complex litigation involves learning the gamesmanship aspects of litigation. Complex litigation involves daily judgment calls and strategic maneuvers designed to position one's client in a procedurally advantageous position while anticipating similar competing moves by their opponent. It's chess at the courthouse. Good lawyers put their clients in the best position to win or settle their legal disputes through understanding and application of the principles, doctrines, rules, and statutes covered in these materials. And placing one's client in that position of positive leverage should bring a smile to any lawyer's face. That is a job well done.

Like my past books, this book has taken several years to come together. Even before being approached by Carolina Academic Press, I was working to pull my own course materials together for my class at Baylor, having become increasingly dissatisfied with the existing materials available on the market. (There are some good materials out there but like many other law professors, I felt I could put together better ones myself.) But it is still tremendous work to go from one's own course materials to preparing a final casebook for use by others. I am thankful to many people for their help directly and indirectly in this endeavor, including editors at Carolina Academic Press, former partners in practice such as Bill Hankinson, Greg Meece, and Mike Berry who helped me learn the ropes of litigation, colleagues and deans at Baylor Law School (where I first encountered an entire faculty dedicated to the single-minded goal of training law students for the effective practice of law), student assistants such as Patrick Fang who poured through this entire text in a zealous effort to find every flaw I created, and previous students (including my son Travis and niece Jessica) who shared with me their own thoughts on the materials as they began taking shape. But behind all of that assistance, was the love and encouragement of my entire family. I am indebted to my wife Carol who is my partner in facing all that this world has to offer (both very good and very bad), my oldest son Travis who took every one of my classes at Baylor with a smile on his face, my son Tyler (who is sitting in my office with me as I write this Preface, while on break from his own graduate school studies keeping me company) who keeps us all smiling, and my youngest son Tanner whose life recovering from a traumatic brain injury can serve—when I allow it—as a kind of winnowing fork to separate the important from that which will be ultimately meaningless.

James M. Underwood
Waco, Texas

Series Editor's Preface

Welcome to a new type of casebook. Designed by leading experts in law school teaching and learning, Context and Practice casebooks assist law professors and their students to work together to learn, minimize stress, and prepare for the rigors and joys of practicing law. **Student learning and preparation for law practice are the guiding ethics of these books.**

Why would we depart from the tried and true? Why have we abandoned the legal education model by which we were trained? Because legal education can and must improve.

In Spring 2007, the Carnegie Foundation published *Educating Lawyers: Preparation for the Practice of Law* and the Clinical Legal Education Association published *Best Practices for Legal Education*. Both works reflect in-depth efforts to assess the effectiveness of modern legal education, and both conclude that legal education, as presently practiced, falls quite short of what it can and should be. Both works criticize law professors' rigid adherence to a single teaching technique, the inadequacies of law school assessment mechanisms, and the dearth of law school instruction aimed at teaching law practice skills and inculcating professional values. Finally, the authors of both books express concern that legal education may be harming law students. Recent studies show that law students, in comparison to all other graduate students, have the highest levels of depression, anxiety and substance abuse.

The problems with traditional law school instruction begin with the textbooks law teachers use. Law professors cannot implement *Educating Lawyers* and *Best Practices* using texts designed for the traditional model of legal education. Moreover, even though our understanding of how people learn has grown exponentially in the past 100 years, no law school text to date even purports to have been designed with educational research in mind.

The Context and Practice Series is an effort to offer a genuine alternative. Grounded in learning theory and instructional design and written with *Educating Lawyers* and *Best Practices* in mind, Context and Practice casebooks make it easy for law professors to change.

I welcome reactions, criticisms, and suggestions; my e-mail address is mhschwartz@ualr.edu. Knowing the author(s) of these books, I know they, too, would appreciate your input; we share a common commitment to student learning. In fact, students, if your professor cares enough about your learning to have adopted this book, I bet s/he would welcome your input, too!

Michael Hunter Schwartz, Series Designer and Editor
Consultant, Institute for Law Teaching and Learning
Dean and Professor of Law, William H. Bowen School of Law,
University of Arkansas at Little Rock

