2022

Civil Procedure and the New Bar Exam

Jeffrey A. Parness

Civil Procedure and the New Bar Exam

Jeffrey A. Parness[1]

I. Introduction

II. Incomplete Written FRCP and Federal Statutes

III. Key Differences in Civil Procedure Laws Across the United States

IV. Civil Procedure in Integrated Exam Questions

V. Conclusion

I. Introduction

In 2022 the National Conference of Bar Examiners (NCBE) issued its "Content Scope Outlines" for public comment,[2] soliciting input on "significant oversights.[3] 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."[4] One of the eight FCP was "Civil Procedure" (including constitutional protections and proceedings before administrative agencies).[5]

---

[1] Professor Emeritus, Northern Illinois University College of Law. B.A., Colby College; J.D., 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.

[2] The report is found at nextgenbarexam.ncbex.org/csopc-register [hereinafter 2022 NCBE CSO].

[3] 2022 NCBE CSO, at 1.

[4] 2022 NCBE CSO, at 1. The FCP appear in id., at 7-38, and the FS appear in id., at 4-6.

[5] NCBE, "Final Report of the Testing Task Force," April 2021 [hereinafter 2021 NCBE FRTTF], at 21, found at nexgenbarexam.ncbex.org (Reports).

This comment addresses some "significant oversights" (solicited by the NCBE) 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."[6] "Newly licensed" attorneys[7] 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 comment illustrates how that topic could be utilized in "integrated exam questions."[8] 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

[6] 2022 NCBE CSO, at 10.

[7] 2022 NCBE CSO, 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.

comprised of stand-alone terms."[9] In an integrated exam, more than one FCP[10] (e.g., civil procedure, contract, evidence, torts and constitutional law) could be assessed together with more than one FS[11] (e.g., issue spotting, negotiation, client management and legal writing).

II. Incomplete Written FRCP and Federal Statutes

Written federal civil procedure rules and related federal statutes do not reflect a good bit of the reality of Article III district court practices. Absent from these written laws are any guidelines on civil case settlement. 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.[12]

Further absent from the FRCP and related federal statutes are comprehensive guidelines for lawyers (themselves or through others) and for parties who undertake presuit fact investigations.[13] Here, there are some state-promulgated Professional Responsibility Rules for lawyers and some criminal statutes for parties.[14] Amongst the issues that arise with presuit

[9] 2021 NCBE FRTTF, at 20.

[10] Foundational concepts and principles include civil procedure, contract law, evidence, torts, business associations, constitutional law, criminal law, and real property. 2021 NCBE FRTTF, at 21.

[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. 2021 NCBE FRTTF, at 21.

[12] See, e.g., Jeffrey A. Parness, "Principles Guiding Civil Claim Settlements," Lexis Nexis (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., American Bar Association, Model Rules of Professional Conduct (substantially enacted in many states) 1.6(e) (lawyer should make reasonable efforts to prevent access to "information") [hereinafter ABA Professional Conduct Rule, 4.2 (no ex parte contacts with a person represented by another lawyer), and 5.1-5.3 (managerial lawyer's duties regarding information gathering by other lawyers and nonlawyers). Further, see California

investigations are presuit procedural law information preservation duties;[15] a lawyer's responsibility for overseeing subordinate lawyers and private detectives;[16] the ex parte communication rule;[17] and, the substantive laws on (usually tort) recoveries for spoliation of evidence.[18]

There are other gaps in the written federal civil procedure laws beyond the arenas of settlement and presuit fact investigation.[19] 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,[20] though

---

Government Code 12946 ("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, 336-349 (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 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 a FRCP amendment 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., ABA Professional Conduct Rule 5.1-5.3.

[17] See, e.g., ABA Professional Conduct Rule 4.2.

[18] Presuit Lawyer Information Duties, at 945-953.

[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., Arizona Rules of Civil Procedure.

there are some significant variations, as when newly amended FRCP provisions are not added[21] and when state lawmakers exercise rulemaking authority in areas where Congress has set out the guidelines.[22]

In at least some of the FCP, like contracts, torts, business associations, criminal law, and real property,[23] 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).

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 complexity of trial court divisions, departments, and like (e.g., Cook County, Illinois Circuit Court[24]) and of how trial courts can differ from county to county even in the same state.[25]

[21] See, e.g., Lost ESI, 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 Court Adoption Rule 5 (venue in adoption proceedings) and Alaska Civil Procedure Rule 3(b) and (c) (other venue norms).

[23] NCBE FRTTF, at 21.

[24] General Order No. 1 (Organization), Circuit Court of Cook County, Illinois (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, e.g., 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.

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;[26] whether judicial rulemaking processes are spelled out, perhaps with legislature oversight for (some or all) proposed rules;[27] whether judges are selected or elected;[28] whether the subject matter jurisdiction of constitutionally-recognized courts (e.g., "all justiciable matters") is set out constitutionally;[29] and, whether alternative dispute resolving bodies (like Worker's Compensation Boards, Human Rights Commissions, and/or Courts of Claims) have been contemplated or established.[30]

[26] Compare, e.g., Federal Constitution, Article III, Section 1 (Congress ordains and establishes courts "inferior" to the U.S. Supreme Court) and Article I, Section 8 (Congress constitutes Tribunals "inferior to the supreme Court") to Illinois Constitution, Article VI, Section 1 ("judicial power is vested in a Supreme Court, an Appellate Court and Circuit Courts") and Texas Constitution, Article V, Section 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., South Carolina Constitution, Article V, Section 4A (all court rules and rule amendments promulgated by the Supreme Court must be submitted to General Assembly and can be disapproved) to Ohio Constitution, Article IV, Section 5 ("practice and procedure" rules go to General Assembly, with different norms on its ability to express disapproval).

[28] Compare, e.g., U.S. Constitution, Article III, Section 1 (judges hold "offices during good Behaviour" upon Senate confirmation) to Illinois Constitution, Article VI, Sections 10 and 12 (terms of judicial officers range from 4-10 years, with only some judges subject to general election and later voter retention).

[29] Compare U.S. Constitution, Article III, Section 2 (upon their creation, federal trial courts can only hear certain types of cases, chiefly federal question and diversity) to Illinois Constitution, Article VI, Section 9 (trial courts "shall have original jurisdiction of all justiciable matters," with limited exceptions).

[30] Compare U.S. Constitution, Article I, Section 8 ("The Congress shall have the Power To . . . constitute Tribunals inferior to the Supreme Court"); Florida Constitution, Article V, Section 1 ("Commissions . . . or administrative officers or bodies may be granted quasi-judicial powers in matters connected with the functions of their offices"); New York Constitution Article VI, Section 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"); Ohio Constitution Article II Section 35 (inviting legislature to pass worker's compensation laws); and New York Constitution Article VI Section 7 ("The court of claims is continued").

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;[31] sanctions arising from lawyer presentations in pleadings, motions or discovery are governed by a single rule;[32] the attorney-client communication privilege is far more limited when corporations are represented by lawyers;[33] presuit settlement talks are mandated after certain information is shared (as in medical malpractice suits in Florida[34]); the norms on judicial review of administrative agency decisions do not follow the Federal Administrative Procedure Act;[35] and, statutory caps on damages are forbidden due to precedents on state constitutional jury trial rights and/or inherent state judicial rulemaking.[36]

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 rules 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

[31] Compare FRCP 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") to Illinois Supreme Court Rule 201(b) (ordinary work product generally is discoverable).

[32] Compare FRCP 11(d) (rule inapplicable to discovery process issues) to Illinois Supreme Court Rule 137 (no discovery process exemption).

[33] Compare Upjohn Co. v. U.S., 449 U.S. 383 (1981) (no "control group" test) to Consolidation Coal Co. v. Bucyrus-Erie Co., 432 N.E.2d 250, 257 (Ill. 1982) ("control group" test).

[34] Florida Statutes 766.106 et seq.

[35] Compare 5 U.S.C. 706 (judicial review of agency rulemaking and adjudication) to 735 Illinois Compiled Statutes 5/3-101 (under Administrative Review Law, only agency decisions in particular cases are reviewable).

[36] See, e.g., Jeffrey A. Parness, "State Damage Caps and Separation of Powers," 116 Penn State L. Rev. 145 (2011).

> 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.[37]

In Illinois, such statutory claims do not include all claims authorized by statute;[38] rather, they include claims created by statute that are not subject to the Illinois constitutional right ot a jury trial.[39] Such claims are plentiful and are described, at times, as involving "special or statutory proceedings unknown to the common law."[40] 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."[41] In the federal district courts, similar causes largely encompass bankruptcy proceedings.[42]

IV. 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.[43] Here, those examined might need to present a "selected response, short answer, and extended constructed response" arising from a "single scenario or stimulus."[44]

---

[37] Illinois Supreme Court Rule 1. The statutory cause of action exemption does notfully carry over to appeals since the Illinois Constitution, Art. VI, Sec. 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 act as it acts only within statutory limits. See, e.g., Struckoff v. Struckoff, 389 N.E.2d 1170, 1172-1173 (Ill. 1979).

[39] Illinois Constitution Art. I, Sec. 13 ("right of trial by jury as heretofore enjoyed shall remain inviolate").

[40] Reed v. Farmers Ins. Corp., 188 Ill.2d 168, 179-180 (1999).

[41] Wisconsin Stat. Ann. 801.01(1).

[42] See, e.g., FRCP 81(a)(2) ("These rules apply to bankruptcy proceedings to the extent provided by the Federal Rules of Bankruptcy Procedure.").

[43] 2021 NCBE FRTTF, at 20.

[44] 2021 NCBE FRTTF, at 20.

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."

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 interepretations/policies/coordinations 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,[45] 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 liability."[46] A tortfeasor who settles with a claimant "in good faith"[47] is "discharged from all liability for any contribution to

[45] Illustrative is 740 Illinois Comp. Stat. 100/0.01 et seq.

[46] 740 Illinois Comp. Stat. 100/2(a) and (b).

[47] 740 Illinois Comp. Stat. 100/2(c).

any other tortfeasor,"[48] but cannot "recover contribution from another tortfeasor whose liability is not extinguished by the settlement,"[49] 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."[50]

V. 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.[51] 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 resolution forums (as under the Federal Arbitration Act). A revised bar exam should reflect these realities.

[48] 740 Illinois Comp. Stat. 100/2(d).

[49] 740 Illinois Comp. Stat. 100/2(e).

[50] 740 Illinois Comp. Stat. 100/2(f).

[51] See, e.g., Teresa Biviano, Note, "Practical Lawyering: Intervention in Law School Curriculum Requirements to Prepare New Lawyers for Ethically Competent Practice," 30 Georgetown J. of Legal Ethics 619 (2017) (reviewing, inter alia, the 1992 ABA McCrate Report and the 2017 Carnegie Report).