

# INTRODUCTION

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## **What this book is, and is not about**

The purpose of this book is to introduce you to concepts, strategies and skills necessary to become an able litigator. Though the litigation process is intended to produce fair resolutions of disputes, outcomes frequently are affected by the relative skills of counsel. Indeed, sometimes those skills determine outcomes.

This book will introduce you to a conceptual framework for thinking strategically and tactically about case development and discovery. It will also guide you through the thicket of rules that govern civil litigation. Not least, this book is intended to make you think about civil litigation in a holistic way: case development and discovery are made up of many interrelated functions, each of which, depending upon how they are executed, will support or undermine the entire enterprise.

This book is *not* a book on civil procedure. You will have studied the subject during your first year of law school. The rules of civil procedure are just part of the whole. They do not tell you how to litigate. Though we delve into many of the rules out of necessity, this is not a survey course of those rules.

Nor does this book delve into the intricacies of pleading practice, jurisdictional questions, choice of law, or remedies. Each of these subjects could (and do) fill volumes of legal texts, compendia and scholarly articles. This is a book about developing the story you wish to tell and creating a record that allows you to tell it.

## **Litigators are storytellers**

Good litigators know that a story, well told and with a compelling narrative, is more likely to carry the day than subjecting the listener to a bland recitation of the evidence. Will the judge be persuaded to rule your way? Does the story convince *opposing counsel* that the case should be resolved in a manner favorable to your client? And barring settlement or dismissal, the key question is: Will the jury be persuaded to find in favor of your client?

Yet you can't tell the story you wish to tell without a record that supports every part of it. The litigator must *develop* the story and *develop* the evidence upon which the story will be based. Meanwhile, your opposing counsel is (or at least should be) developing a story and the record that likely differs from yours. Who has the better story? Who has developed the record necessary to fully tell the story? It doesn't just happen: it takes thought, planning and careful execution. Hence, the title of the book.

One of the many challenges all litigators face is that disputes are not black and white, even though it may seem that way to the client. Rather, there is uncertainty throughout the course of any lawsuit. As a litigator, you must become comfortable dealing with shifting facts and changing circumstances. In addition, you must be able to candidly advise the client based upon a dispassionate evaluation of the case as it develops.

Discovery practice is central to case development. It is where most litigators spend the bulk of their time. Discovery is more than just an exercise in gathering information; it is essential to developing a compelling case. Depending on how effectively it is conducted, the discovery phase of litigation can make the difference between winning and losing. This book will introduce you to strategic and tactical approaches to discovery practice geared toward:

- Developing an evidentiary record to support your case;
- Probing the adverse party's case in a thorough and efficient manner;
- Narrowing and clarifying the issues;
- Valuing the case; and, if necessary;
- Trying the case.

### **Ultimately, the goal is to “win” your client’s case**

Let's be clear: It isn't your case; it's the client's. Your job is to “win” your client's case. But what does it mean to win? Winning may come in the form of a favorable settlement, or dismissal of the case, or receiving a dispositive ruling in your client's favor, or, ultimately, convincing the finder of fact that your client should prevail. It may mean vindication for the client; it may be that justice is served.

For the lawyer, at the end of the day, winning is serving your client well. Your job is all about maximizing the chances of a successful outcome. This book is about helping you to help your client win their case. With this in mind, we begin.

### **A note about gender references**

Throughout this book you will see references to “he” or “him,” “she” or “her,” or “they.” None of the gender references are intended to imply a substantive difference among those references in the book.