

WHAT IS THE DIFFERENCE BETWEEN SUBSTANTIVE AND PROCEDURAL LAW? AND HOW DO I RESEARCH PROCEDURE?

BY KRISTIN B. GERDY

Kristin B. Gerdy is a Visiting Assistant Professor of Law at Temple University Beasley School of Law in Philadelphia, Pennsylvania.

Teachable Moments for Students ... is designed to provide information that can be used for quick and accessible answers to the basic questions that are frequently asked of librarians and those involved in teaching legal research and writing. These questions present a "teachable moment," a brief window of opportunity when—because he or she has a specific need to know right now—the student or lawyer asking the question may actually remember the answer you provide. The material presented in this column is not meant to be an in-depth review of the topic, but rather a summary of the main points that everyone should know. It is a companion to the Teachable Moments for Teachers column that gives teachers an opportunity to describe a special moment of epiphany that changed their approach to presenting a particular topic to their students. Readers are invited to submit their own "teachable moments for students" to the editor of the column: Barbara Bintliff, University of Colorado Law Library, Campus Box 402, Boulder, CO 80309, phone: (303) 492-1233, fax: (303) 492-2707.

Civil Procedure. The mere utterance of the phrase strikes fear into the hearts of many American law students. It is generally the most hated and least understood course in the first-year curriculum. While it is true that procedure may not have the drama of torts or the intrigue of constitutional law, why is it that students are almost universally put off or at least confused by procedure? Perhaps the biggest obstacle to understanding procedural law is that students don't have experience with it as they do with other "substantive" law. Before they come to law school, most students can recognize a contract; they understand the concept of torts (even if they don't

label them as such); and, more often than not, they are well versed in many aspects of constitutional law, particularly those aspects addressing due process and equal protection. But they have no experience with procedure. No wonder the question often arises—exactly what is procedural law and how do I research it?

Substantive laws are "the part of the law that creates, defines, and regulates the rights, duties, and powers of parties."¹ Substantive laws govern people and organizations in their daily interactions—they are the "laws" that nonlawyers usually think of when they think about what law is. For example, the substantive law of torts says an uninvited guest cannot intrude upon another person's land; the substantive law of estates governs the formalities necessary to draft an "air-tight" will; and the substantive law of corporations dictates how a limited-liability corporation must be formed. However, a different set of laws, which we call procedural law, governs what happens when a party challenges that will or corporate formation in court.² In other words, procedural laws are the door to litigation.³ They set forth "[t]he rules that prescribe the steps for having a right or duty judicially enforced, as opposed to the law that defines the specific rights or duties themselves."⁴

It may be easier to think of procedural laws as the "rules" that govern litigation—the rules the parties must follow as they bring their case and the rules for the courts' administration. These rules proscribe such things as who gets to bring cases, which courts those cases are brought before, how the cases proceed through the judicial process, the rules of proof, the available remedies, and the manner in which the judgment is enforced. Procedural law is created either by the legislature, by the judiciary, or by a combination of the two. Procedural laws have three major purposes. First,

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¹ *Black's Law Dictionary* (7th ed., West 1999).

² See Fleming James, Jr., et al., *Civil Procedure* § 1.1 (4th ed., Little, Brown & Co. 1992).

³ See Karl N. Llewellyn, *The Bramble Bush: On Our Law and Its Study* 16 (1930). ("[P]rocedural regulations are the door, and the only door, to making real what is laid down by substantive law. Procedural regulations enter into and condition all substantive law's becoming actual when there is a dispute. ... [W]hat substantive law says should be means nothing except in terms of what procedure says that you can make real.")

⁴ *Black's Law Dictionary* (7th ed., West 1999).

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they help courts conduct their business. Second, they establish uniform procedures within the courts. Finally, they provide information and instruction to those appearing before the courts, whether they are attorneys or the parties themselves.⁵

It is not always easy to distinguish substance from procedure. Sometimes courts deem the rules that seem procedural to be of substantive importance. For example, in *Bolton v. Travelers Insurance Co.*,⁶ the court held that a statute of limitations was substantive, but rules governing the time for answer and appearance were procedural.⁷

Researching Procedural Law⁸

Procedural law can be found in legislation, in rules promulgated by courts, and in cases that interpret the rules. Because court rules make up the largest body of procedural law, such laws are often generically referred to as “rules” or “court rules.”

Court rules can be divided into four categories: 1) rules of general application, like the Federal Rules of Civil Procedure and the Federal Rules of Evidence, which are applicable in all federal courts; 2) “local” rules for individual courts within the federal system; 3) statutory rules, rules that are part of the statutory compilation rather than a set of specific “court rules,” the most common being statutes of limitations; and 4) state rules, which are applicable in the courts of the issuing state.

In addition to the rules themselves, the thorough researcher will want to locate cases interpreting relevant rules and possibly

commentary on the rules. She may also want to locate model forms that give examples of documents that comply with the rules. Finally, she will want to ensure that the rules she has found are still in force. Let’s explore the various tools she might consult.

Rules of General Application

Four sets of rules make up the federal rules of general application. They are the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure, the Federal Rules of Criminal Procedure, and the Federal Rules of Evidence. These rules govern practice before all courts within the federal system.

Perhaps the most readily accessible source of federal rules of general application is a specific rules pamphlet, which is sometimes called a “deskbook.” This single-volume, unannotated pamphlet typically contains the text of all four sets of federal rules and any related statutory provisions.

Federal rules of general application are also included in the *United States Code*. The Federal Rules of Criminal Procedure is located in the Appendix to Title 18, while the Federal Rules of Civil Procedure, Federal Rules of Appellate Procedure, and the Federal Rules of Evidence are located in Title 28.

In addition, the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure are available in their unannotated form in the “Finding Aids” volume of *Federal Rules Service*, a West Group publication available in many law libraries.

While the text of the rules themselves is vital information for the researcher, often it is not enough. Fortunately, annotated versions of the rules are readily accessible in the annotated versions of the *United States Code*. In addition to the text, the rules’ annotations contain Advisory Committee comments, editorial annotations, and references to commentary on the rules. In LEXIS® Publishing’s *United States Code Service*, the Federal Rules of Evidence are located in the Appendix to Title 28; other rules are located in numerous “Court Rules” volumes at the end of the set. West’s *United States Code Annotated*[®] follows the same schema used in the *United States Code*—with the Federal Rules of Criminal Procedure following

⁵J. Myron Jacobstein et al., *Fundamentals of Legal Research* 251 (7th ed., Foundation Press 1998).

⁶475 F.2d 176 (5th Cir. 1973).

⁷*But see* Sun Oil Co. v. Wortman, 486 U.S. 717, 736 (1988) (Brennan, J., concurring). (“Statutes of limitations, however, defy characterization as either purely procedural or purely substantive. The statute of limitations a State enacts represents a balance between, on the one hand, its substantive interest in vindicating substantive claims and, on the other hand, a combination of its procedural interest in freeing its courts from adjudicating stale claims and its substantive interest in giving individuals repose from ancient breaches of law.”)

⁸Many legal research texts provide in-depth explanations of procedural law research, typically under the heading “Court Rules.” See, e.g., Robert C. Berring & Elizabeth A. Edinger, *Finding the Law* (11th ed., West Group 1999); Morris L. Cohen & Kent C. Olson, *Legal Research* (7th ed., West Group 2000); J. Myron Jacobstein et al., *Fundamentals of Legal Research* (7th ed., Foundation Press 1998); Christina L. Kunz et al., *The Process of Legal Research* (4th ed., Little, Brown 1996).

Title 18 and the Rules of Civil Procedure, Federal Rules of Appellate Procedure, Federal Rules of Evidence, Supreme Court Rules, Claims Court Rules, and the Rules of the Court of International Trade following Title 28.

The rules are also available electronically on both Westlaw® and LEXIS. Consult a current database directory to locate the appropriate database within the service.

Local Rules

In addition to the generally applicable rules, the thorough researcher must identify any rules that govern the particular court in which she will appear, rather than the entire court system. For example, there are rules for the U.S. Court of Appeals for the Tenth Circuit or for the district courts. These rules are called “local” rules, and often they are supplemental to the rules of general applicability, which are also enforced within the courts.

While pamphlet editions of local rules are sometimes available, the best source for local rules is *Federal Local Court Rules*. A part of the Federal Rules Service, *Federal Local Court Rules* includes rules for each of the federal district courts. Among the district court provisions are civil, criminal, bankruptcy, general and calendar matters, admiralty, and magistrate judge rules. In addition, *Federal Local Court Rules* includes the individual rules for the 13 courts of appeals and the internal operating procedures for the courts of appeals.

Statutory Provisions

Because the legislature has the power to enact procedural law, and often does, provisions that include procedural requirements can be found scattered throughout the *United States Code*. The most obvious examples are the provisions relating to habeas corpus in Title 28. Although these procedural laws can be located by using the general index to the *Code*, the more approachable source for these provisions is the jurisdictional rules pamphlet edition mentioned above.

State Rules

Typically state procedural law is quite similar to federal procedural law. In fact, often the language of the rules, as well as their organization and numbering, closely track the corresponding federal compilations. However, it is critical that

researchers working in state courts locate and follow state rules.

State procedural law is either incorporated into the state’s statutory compilation or published in supplemental “rules” volumes. Sometimes a single state uses both methods. For example, Utah’s Rules of Criminal Procedure are incorporated into Title 77 of the Utah Code. However, the Utah Rules of Civil Procedure are located in a separate “Court Rules” volume at the end of the code.

Sometimes publishers assist researchers by publishing both the state and federal rules for the jurisdiction in one set. California has two versions of its annotated code. Each has supplemental rules volumes. West’s version has two volumes, *California Rules of Court—Federal and California Rules of Court—State*. The LEXIS version combines the state and federal rules into one volume, titled *Rules of Court and Ninth Circuit Rules*.

Judicial Interpretations of Procedural Law

In addition to the text of the rules themselves and any commentary found in annotations, it is often necessary to locate judicial interpretations of procedural law. As with any case law, judicial interpretations and applications of procedural law are mandatory in the courts where they originate and in lower courts within that jurisdiction; they also may be persuasive elsewhere, particularly in jurisdictions with similarly worded or identical provisions. So, in order to thoroughly research procedural law, the researcher must go to the cases.

Because procedure is integral to every lawsuit, more often than not procedural issues are intermingled with substantive issues in a lawsuit. This being true, many interpretations of federal procedural law are found in the general federal reporters (the three reporters containing United States Supreme Court decisions, the *Federal Reporter*® for U.S. courts of appeals decisions, and the *Federal Supplement*® for U.S. district courts decisions). However, when a federal district court case specifically addresses the Federal Rules of Civil Procedure or the Federal Rules of Criminal Procedure, it is published instead in the *Federal Rules Decisions*® (FRD). Part of West’s National Reporter System®, the FRD has all the features of other West reporters, such as headnotes and key numbers. It also contains proposed changes to the

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rules and commentary on the rules, which are written by judges and law professors.

Often the first place federal cases involving procedural issues appear is West’s *Federal Rules Service*. A section of the Service contains federal cases construing the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure.

Cases interpreting state procedural rules are seldom published because such issues are usually resolved at the unreported trial level. However, those cases that do reach the appellate courts are published in the general state reporters—either the National Reporter System regional reporters or other state reporters.

Commentary on Procedural Law

When a researcher confronts a particular procedural issue for the first time, commentary can help her understand its requirements and identify areas that may require further analysis. Numerous treatises and hornbooks provide commentary on procedural law, particularly on the rules of general applicability. Commentary sources typically contain the text of the statutes and rules followed by analysis of the rules, citations to cases, and other explanatory material.⁹

Citations to additional commentary on procedural law can be found through the rules sections of *Shepard’s® Federal Law Citations in Selected Law Reviews*.

Form Books

Because procedural law provides the requirements for all documents filed in court, researchers can benefit from sets of model forms that illustrate the documents used in federal

practice. Major federal form sets include *Bender’s Federal Practice Forms*, which contains cross-references to *Moore’s Federal Practice 2d*; *Nichols Cyclopedia of Federal Procedure Forms*; *West’s Federal Forms*, which includes both civil and criminal forms that are annotated with references to *Federal Practice and Procedure*; and *Federal Procedural Forms, Lawyers Edition*.

Citators

Finally, before concluding procedural law research, the researcher must make sure that the rules she has found are still valid. *Shepard’s Federal Rules Citations* includes citations to the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Federal Rules of Appellate Procedure, the Federal Rules of Evidence, and corresponding state rules, as well as all state and federal cases involving procedural issues. Citations to procedural rules can also be found in *United States Citations–Statutes* and individual state Shepard’s compilations.

Conclusion

Procedural law doesn’t have to be scary, and it doesn’t have to be dry, but it does have to be strictly followed. Legal researchers and law students simply need to understand that procedural laws are the rules for the legal “game” and they open the door for litigation. When students are equipped with the basic sources for finding and learning these rules, they are ready to enter!

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⁹Major treatises on civil procedure include *Cyclopedia of Federal Procedure* (West); *Federal Procedure, Lawyers Edition* (West); Stephen W. Feldman, et al., *West’s Federal Practice Manual* (3d ed., West 1996); James Fleming, Jr., et al., *Civil Procedure* (4th ed., 1992); James W. Moore, et al., *Moore’s Federal Practice* (3d ed., 1997); Charles A. Wright, *The Law of Federal Courts* (5th ed., West 1994); and Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure*® (2d ed., West 1982). Major treatises on criminal procedure include Wayne R. LaFare, et al., *Criminal Procedure* (2d ed., West 1999); and *Orfield’s Criminal Procedure Under Federal Rules* (2d ed., West). Major treatises on evidence include Jack B. Weinstein & Margaret A. Berger, *Weinstein’s Evidence: Commentary on the Rules of Evidence for the United States Courts and State Courts* (Matthew Bender 1975); and *McCormick on Evidence* (John W. Strong ed., 5th ed., West 1999).