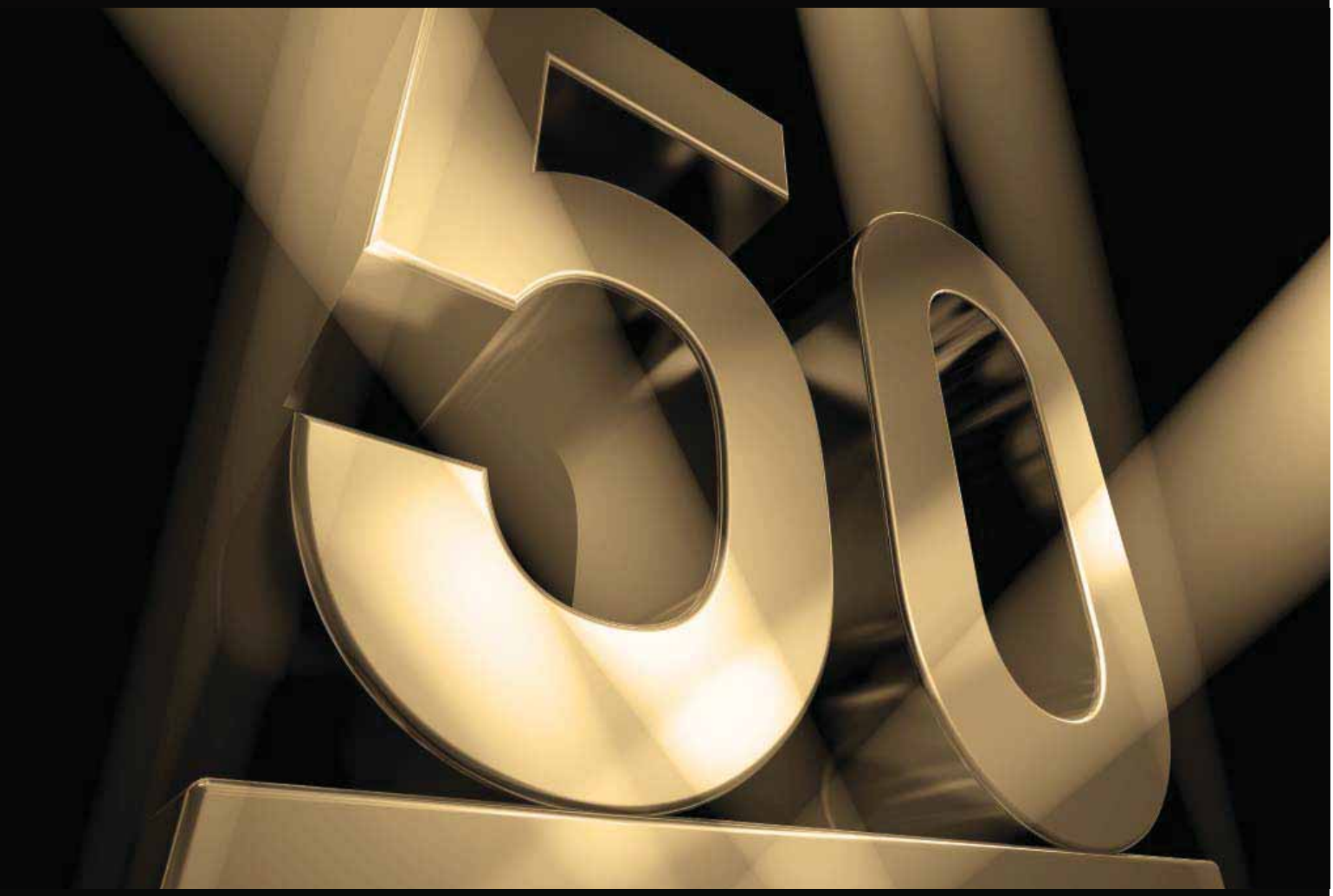
NEW YORK STATE BAR ASSOCIATION

Journal

OCTOBER 2013
VOL. 85 | NO. 8



Celebrate! The 50th Anniversary of the CPLR

Edited by David Paul Horowitz

With Articles by

Jack B. Weinstein
Jay C. Carlisle
John R. Higgitt
David D. Siegel

Art by renowned illustrator Chris Silas Neal.

RENOWNED **COLLABORATION**

For generations, we have partnered with trusted advisors to help solve the most complex wealth issues. To find out how the highest caliber wealth advisory team in the business can complement all you offer your client, **call Kemp Stickney at 302-651-1693, email kemp.stickney@wilmingtontrust.com, or visit wilmingtontrust.com.**

RENOWNED FOR A REASON.℠ WILMINGTON TRUST

WEALTH ADVISORY | INVESTMENT MANAGEMENT | GLOBAL CAPITAL MARKETS | RETIREMENT PLAN SERVICES

BESTSELLERS

FROM THE NYSBA BOOKSTORE

October 2013

Admission to the New York State Bar, 2012

All relevant statutes and rules, an overview of admission procedures, a comprehensive table of statutory and rule cross-references, a subject-matter index and the N.Y. Rules of Professional Conduct.

PN: 40152 / **Member $50** / List $70 / 226 pages

Attorney Escrow Accounts – Rules, Regulations and Related Topics, 3rd Ed.

Provides useful guidance on escrow funds and agreements, IOLA accounts and the Lawyers' Fund for Client Protection. *With CD of forms, regulations and statutes.*

PN: 40269 / **Member $45** / List $55 / 330 pages

Best Practices in Legal Management

The most complete treatment of the business of running a law firm. With forms on CD.

PN: 4131 / **Member $139** / List $179 / 498 pages

Contract Doctrine and Marital Agreements, 2nd Ed.

Completely reorganized, with updated case and statutory law, this is a unique reference essential for this complex and challenging area of law.

PN: 41593 / **Member $175** / List $225 / 2 vols.

Criminal and Civil Contempt, 2nd Ed.

This second edition explores a number of aspects of criminal and civil contempt under New York's Judiciary and Penal Laws, focusing on contempt arising out of grand jury and trial proceedings.

PN: 40622 / **Member $40** / List $55 / 294 pages

Evidentiary Privileges, 5th Ed.

A valuable text of first reference for any attorney whose clients are called to testify. Expanded, with updated case law and statutes.

PN: 409912 / **Member $45** / List $60 / 432 pages

Foundation Evidence, Questions and Courtroom Protocols, 4th Ed.

New edition of this classic text features expanded chapters on Direct and Cross-Examination and new chapters on Objections, Motions to Strike and The Courtroom and the Court.

PN: 41072 / **Member $60** / List $70 / 294 pages

Legal Careers in New York State Government, 10th Edition

Everything you need to know about a career in public service in state and municipal government and the state court system.

PN: 41292 / **Member $50** / List $70 / 360 pages

Legal Manual for N.Y. Physicians, 3rd Ed.

Completely updated to reflect new rules and laws in health care delivery and management, discusses day-to-day practice, treatment, disease control and ethical obligations as well as professional misconduct and related issues.

PN: 41329 / **Member $120** / List $140 / 1,130 pages

Sales and Use Tax and the New York Construction Industry, 2nd Ed.

Provides practical advice and a comprehensive overview of relevant statutes, regulations and applicable case law.

PN: 42211 / **Member $40** / List $50 / 184 pages

Workers' Compensation Law and Practice in New York

Combining academic analysis with practical considerations for the courtroom, this book provides expert guidance on all aspects of workers' compensation law.

PN: 4236 / **Member $125** / List $175 / 720 pages

NEW!

Disability Law and Practice: Book One

This first book in a series that will provide a broad education in all aspects of disability law and practice focuses on special education, assistive technology and vocational rehabilitation.

PN 42153-1 / **Member $60** / List $75 / 382 pages

Impasse Resolution Under the Taylor Law, 2nd Edition

An invaluable resource for attorneys whose practice may involve public sector labor law issues. The Second Edition is current through the end of the 2013 state legislative session.

PN 41223 / **Member $30** / List $40 / 130 pages

In the Arena: A Sports Law Handbook

Discusses all aspects of sports law, including intellectual property and trademark rights, collective bargaining, Title IX, concussions, NCAA, and more.

PN: 4002 / **Member $60** / List $75 / 574 pages

N.Y. Municipal Formbook, 4th Edition

A must-have for attorneys whose practice touches on zoning law, labor issues, real property rights within towns and villages, telecommunications and other public contracts, roads and highways, FOIL requests, and use of public lands. More than 1500 forms on CD.

PN 41603 / **Member $150** / List $185 / 228 pages

Products Liability in New York, 2nd Ed.

A comprehensive text on this challenging and complex area of law.

PN: 41979 / **Member $120** / List $170 / 2 vols.

Public Sector Labor and Employment Law, 3rd Ed., 2013 Revision

The leading reference on public sector labor and employment law in New York State is completely revised with updated case and statutory law.

PN: 42057 / **Member $150** / List $185 / 2 vols.

Practice of Criminal Law Under the CPLR and Related Civil Procedure Statutes, 6th Ed.

This new edition compiles the rules regarding jurisdiction, evidence and motion practice and those applying to criminal law practice found in statutes governing civil procedure.

PN: 40699 / **Member $50** / List $60 / 230 pages

COMING SOON!

N.Y. Lawyers' Practical Skills Series, 2013–2014

N.Y. Lawyer's Deskbook and Formbook, 2013–2014

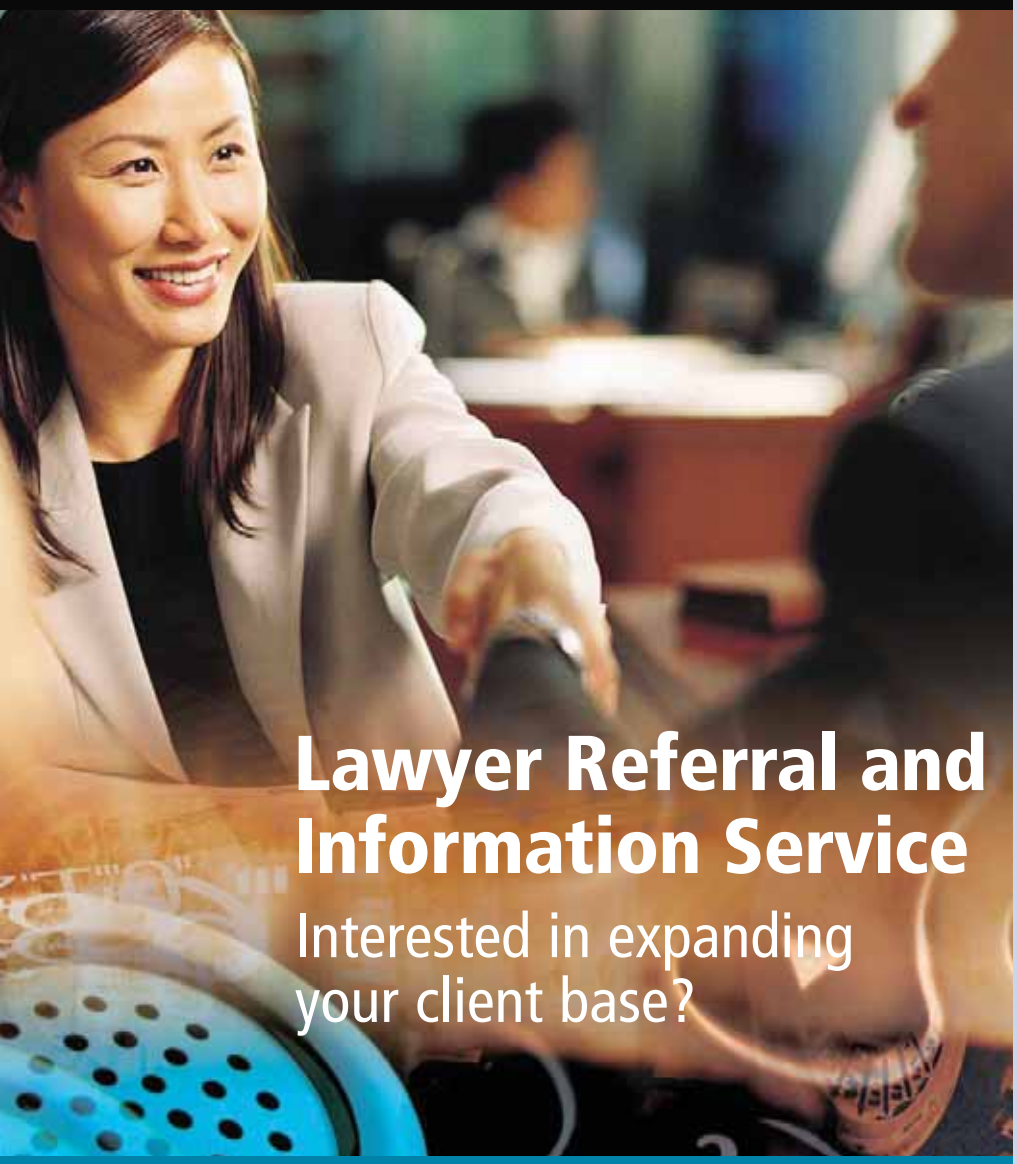
N.Y. Practice Forms, 2013–2014

Expand your professional knowledge

1.800.582.2452 www.nysba.org/pubs **Mention Code: PUB2042**

Order multiple titles to take advantage of our low flat rate shipping charge of $5.95 per order, regardless of the number of items shipped. $5.95 shipping and handling offer applies to orders shipped within the continental U.S. Shipping and handling charges for orders shipped outside the continental U.S. will be based on destination and added to your total.

NYSBA



Join the Lawyer Referral & Information Service

Why Join?

> Expand your client base
> Increase your bottom line
> Benefit from our marketing strategies

Overview of the Program

The New York State Bar Association Lawyer Referral and Information Service (LRIS) has been in existence since 1981. Our service provides referrals to attorneys like you in 44 counties (check our website for a list of the eligible counties). Lawyers who are members of LRIS pay an annual fee of $75 ($125 for non-NYSBA members). Proof of malpractice insurance in the minimum amount of $100,000 is required of all participants. If you are retained by a referred client, you are required to pay LRIS a referral fee of 10% for any case fee of $500 or more. For additional information, visit **www.nysba.org/joinlr**.

Sign me up

Download the LRIS application at **www.nysba.org/joinlr** or call **1.800.342.3661** or e-mail **lr@nysba.org** to have an application sent to you.

Give us a call!
800.342.3661

NYSBA

MEETS ABA STANDARDS FOR LAWYER REFERRAL
AMERICAN BAR ASSOCIATION
THE RIGHT CALL FOR THE RIGHT LAWYER

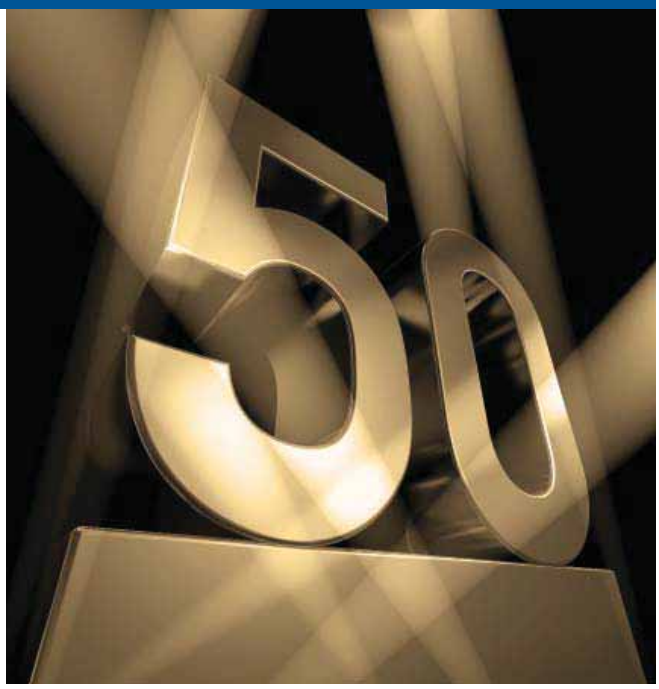
NEW YORK STATE BAR ASSOCIATION
Journal

CONTENTS

OCTOBER 2013

CELEBRATE! THE 50TH ANNIVERSARY OF THE CPLR

EDITED BY DAVID PAUL HOROWITZ



DEPARTMENTS

The *Journal* welcomes articles from members of the legal profession on subjects of interest to New York State lawyers. Views expressed in articles or letters published are the authors' only and are not to be attributed to the *Journal*, its editors or the Association unless expressly so stated. Authors are responsible for the correctness of all citations and quotations. Contact the editor-in-chief or managing editor for submission guidelines. Material accepted by the Association may be published or made available through print, film, electronically and/or other media.

The *Journal* ((ISSN 1529-3769 (print), ISSN 1934-2020 (online)), official publication of the New York State Bar Association, One Elk Street, Albany, NY 12207, is issued nine times each year, as follows: January, February, March/April, May, June, July/August, September, October, November/December. Single copies $30. Library subscription rate is $200 annually. Periodical postage paid at Albany, NY and additional mailing offices. POSTMASTER: Send address changes per USPS edict to: One Elk Street, Albany, NY 12207.

After more than 50 years, we still won't settle.

You can count on this, even after more than 50 years of partnership: USI Affinity and the New York State Bar Association will always insist on quality coverage for NYSBA members - no matter the size of your firm or your area of practice.

That's why we have developed our Lawyers' Professional Liability (LPL) Program to offer you the broad coverage and competitive pricing you deserve. And now, we have enhanced that program with a new **5% Bar Association Membership credit.**

Call 1.855.USI.0100 PIN 660 now for your FREE quote.

Or go to www.mybarinsurance.com

Only USI Affinity is endorsed by the New York State Bar Association.

Our new Lawyers' Professional Liability insurance program is underwritten by a CNA member company. CNA is the largest provider of LPL insurance in the country.

Members will now enjoy:

- *NEW* 5% Bar Association Membership credit. This will be applied to your LPL premium for each attorney enrolled in the program.
- 7.5% credit per attorney for 2 years after completing a qualifying CNA risk-management seminar.
- Broad coverage and policy features designed for New York firms of all sizes.

PREMIER MEMBER NYSBA BENEFIT

The New York State Bar Association
Lawyers' Professional Liability Insurance

Advised and administered by USI AFFINITY

USI Affinity offices: New York | New Jersey | Pennsylvania

DAVID M. SCHRAVER

Pro Bono: Serving the Public, Making a Difference

National Pro Bono Week is October 20–26. Launched in 2009 by the ABA, the goal of the week-long celebration of pro bono is threefold: (1) to recognize the significant contributions made by thousands of attorneys who serve the public by performing pro bono legal services; (2) to educate the public and the legal profession about the ever-growing unmet legal needs of low-income people; and (3) to encourage more attorneys to volunteer.

The Albany kick-off celebration, held on Friday, October 18, recognized area judges who have made significant contributions to pro bono. Honorees included retired U.S. Magistrate Judge George H. Lowe, co-chair of the NYSBA President's Committee on Access to Justice; Hon. Christine Clark (Fourth Judicial District); Hon. Gary Stiglmeier (Third Judicial District); Hon. Richard Littlefield (U.S. Bankruptcy Court); and retired Justice of the Supreme Court George Ceresia (former Administrative Judge of the Third Judicial District). Chief Judge Jonathan Lippman was joined by representatives of the Albany Law School Pro Bono Society to present the awards.

On October 24, the NYSBA will join with the Honorable Fern Fisher, Deputy Chief Administrative Judge for the Civil Courts and Director of the Access to Justice Office of the Courts, representatives from the New York City Mayor's Office, and the leaders of the New York County Lawyers Association at NYCLA's headquarters to recognize the pro bono contributions of New York City attorneys.

We again congratulate those members of the State Bar Association who participated in the Empire State Counsel program. Initiated by Past President Mark Alcott, the Empire State Counsel program recognizes members who have performed 50 or more hours of pro bono service in the preceding year. In 2012, 1,606 NYSBA members enrolled in this program and donated 294,218 pro bono hours.

President-elect Glenn Lau-Kee, Past President Vince Doyle and I are participating in the Chief Judge's Hearings on Civil Legal Services in the four Judicial Departments. Starting in September and continuing through October, these hearings include topics such as the impact of legal services funding on meeting legal needs of the poor and those affected by natural disasters, understanding the economic and social consequences of the lack of sufficient legal services, and exploring the potential for reducing unmet legal needs. It is estimated that less than 20% of the legal needs of low income New Yorkers are currently being met.

Just as an indigent defendant in a criminal case cannot be assured of a fair trial unless counsel is provided, indigent parties in civil cases who appear in court without a lawyer cannot be assured of a fair hearing in matters involving basic issues such as family matters, housing, health care, subsistence income or domestic violence. In this year, we celebrate the 50th anniversary of *Gideon v. Wainwright* and on October 3 we hosted a Civil Gideon Law School Symposium in which all New York law schools, plus the Rutgers, Seton Hall and Yale law schools, participated by linking electronically to the NYSBA for the first half of the event.

By encouraging and supporting pro bono, advocating increased funding for civil legal services, and advancing the concept of "Civil *Gideon*" (the right to legal representation in civil cases involving life's necessities), the State Bar continues its commitment to access to justice. Thanks to all our members for helping to make justice for all a reality.

This month, we also celebrate the 50th anniversary of New York's Civil Practice Law and Rules. This issue of the *Journal* is devoted to a discussion of the history and development of those rules and their status in practice today. We hope you will find this background on the evolution of the CPLR interesting, and we thank our contributors to this special issue for their excellent work. ■

DAVID M. SCHRAVER can be reached at dschraver@nysba.org.

NEW YORK STATE BAR ASSOCIATION

"The best benefit of NYSBA membership is the vast amount of collective knowledge an attorney can tap into at a moment's notice. Also, because I practice in a city where there are many NYSBA members, I can look in the NYSBA directory, pick up the phone, ask a question from another member, and actually receive a useful answer in a short period of time."

Asha Saran Smith, Esq.
NYSBA Member Since 2008
New York, NY

Advance your knowledge, connections and career.

Renew today for 2014 | www.nysba.org/renew

NYSBA

LawPay
CREDIT CARD PROCESSING

THE CORRECT WAY TO ACCEPT PAYMENTS!

Trust your credit card transactions to the only merchant account provider recommended by 37 state and 48 local bar associations!

- ✓ Separate earned and unearned fees
- ✓ 100% protection of your Trust or IOLTA account
- ✓ Complies with ABA & State Bar guidelines
- ✓ Safe, simple, and secure!

Reduce processing fees and avoid commingling funds through LawPay.

Secure web payments

Mobile Swiper iPhone, iPad, Android

VISA MasterCard AMERICAN EXPRESS DISCOVER

Process all major card brands through LawPay

866.376.0950
LawPay.com/nysba

TRUST YOUR TRANSACTIONS TO LAWPAY

THE PREMIER PROCESSOR FOR THE LEGAL INDUSTRY

NYSBACLE

Tentative Schedule of Fall Programs *(Subject to Change)*

The New York State Bar Association Has Been Certified by the New York State Continuing Legal Education Board as an Accredited Provider of Continuing Legal Education in the State of New York.

Practical Skills: Basic Matrimonial Practice
October 21 Albany; New York City

Tax Aspects of Real Property Transactions
(9:00 a.m. – 1:00 p.m.)
October 22 Long Island
October 24 New York City

Litigating the Products Liability Case: Law and Practice
October 22 Buffalo
October 24 New York City
November 1 Albany

Effective Trust Planning and Drafting: Doing the Best for Your Client
(12:00 p.m. – 1:15 p.m.; live & webcast)
October 23 (Intro to Trusts) Albany
November 8 (Revocable Trusts) Albany
November 19 (Medicaid Trusts) Albany
December 6 (Special Needs Trusts) Albany

Protecting Your Practice – Risk Management for Lawyers
(9:00 a.m. – 1:00 p.m.)
October 25 Westchester

Veterans Benefits: Practice and Procedure at the VA and Beyond
(9:00 a.m. – 12:00 p.m.; live & webcast)
October 25 New York City

New York Appellate Practice
October 25 Long Island
October 29 Rochester
November 4 Albany
November 14 Westchester
November 21 New York City

Practical Skills: Introduction to Estate Planning
October 28 Rochester
October 29 Buffalo; Westchester
October 30 Albany; New York City
October 31 Long Island; Syracuse

Henry Miller – The Trial
October 29 New York City

Eleven Steps to Superior Legal Writing With William Bernhardt
October 31 Albany
November 1 New York City

Special Education Law Update 2013
November 1 Buffalo
November 6 Long Island; Westchester
November 13 New York City
November 20 Syracuse
November 22 Albany

Matrimonial Trial Institute IV: A Mock Financial Trial
November 1 Long Island
November 15 Buffalo
December 6 Albany
December 13 New York City

Sharpening Lawyers' Presentation Skills
(9:00 a.m. – 1:00 p.m.; live & webcast)
November 4 New York City

Practical Skills: Basics of Bankruptcy
November 4 Buffalo
November 5 Long Island
November 7 New York City
December 5 Albany
December 6 Syracuse

Representing Entrepreneurial Businesses: Fundamental Litigation and Corporate Issues
(9:00 a.m. – 1:10 p.m.)
November 4 Long Island
November 6 New York City
December 12 Albany

Not-for-Profit Organizations
November 6 Buffalo
November 15 Albany
December 5 Syracuse
December 12 New York City

11th Annual Sophisticated Trusts and Estates Institute
November 7–8 New York City

Hot Topics in Real Property Law
November 8 New York City
November 14 Long Island
November 22 Westchester

To register

or for more information call toll free **1-800-582-2452**

In Albany and surrounding areas dial (518) 463-3724 • Or fax your request to (518) 487-5618
www.nysba.org/CLE (Note: As a NYSBA member, you'll receive a substantial discount)

NYSBA

Advanced Document Drafting for the Elder Law Attorney

November 13	Westchester
November 14	Buffalo
November 20	Long Island
November 22	Syracuse
December 4	Albany
December 10	New York City

Basic Federal Civil Practice

November 13	Long Island
November 14	Albany
December 4	Rochester
December 5	New York City

Starting a Practice Part II – Mini MBA for JDs – Basic Business Skills for Starting and Running a Practice in New York

November 14	New York City

Update 2013

November 14	Syracuse
November 18	New York City

Construction and Surety Law: Basic Skills and Applied Topics
(live & webcast)

November 15	New York City

Practical Skills: Basics of Civil Practice – The Trial

November 19	Buffalo; New York City; Westchester
November 21	Albany; Long Island; Syracuse

Blowing the Whistle on Fraud Against the Government: Litigating New York and Federal False Claims Act Cases
(live & webcast)

December 9	New York City

Cross Examination of Expert Witnesses From A to Z
(1:00 p.m. – 5:00 p.m.; live & webcast)

December 17	New York City

† Does not qualify as a basic level course and, therefore, cannot be used by newly admitted attorneys for New York MCLE credit.

NYSBA CLE Is Pleased to Announce Our Newly Upgraded CD and DVD Product Lines

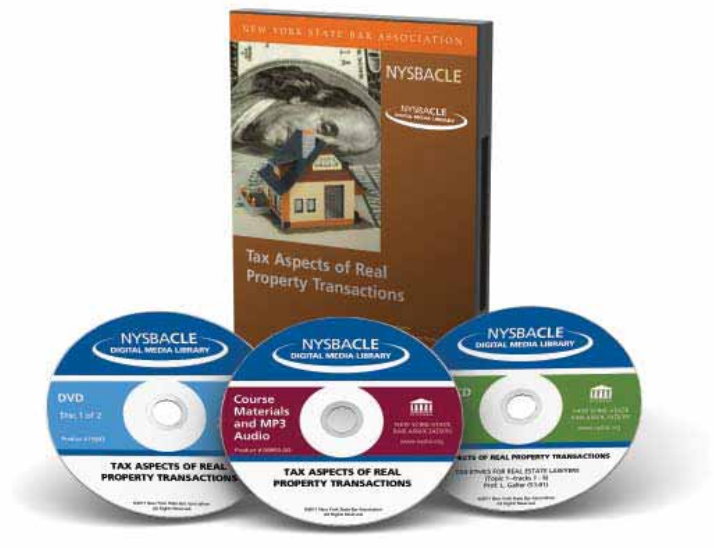
Newly redesigned and expanded to offer you the most complete digital media package available on the market today!

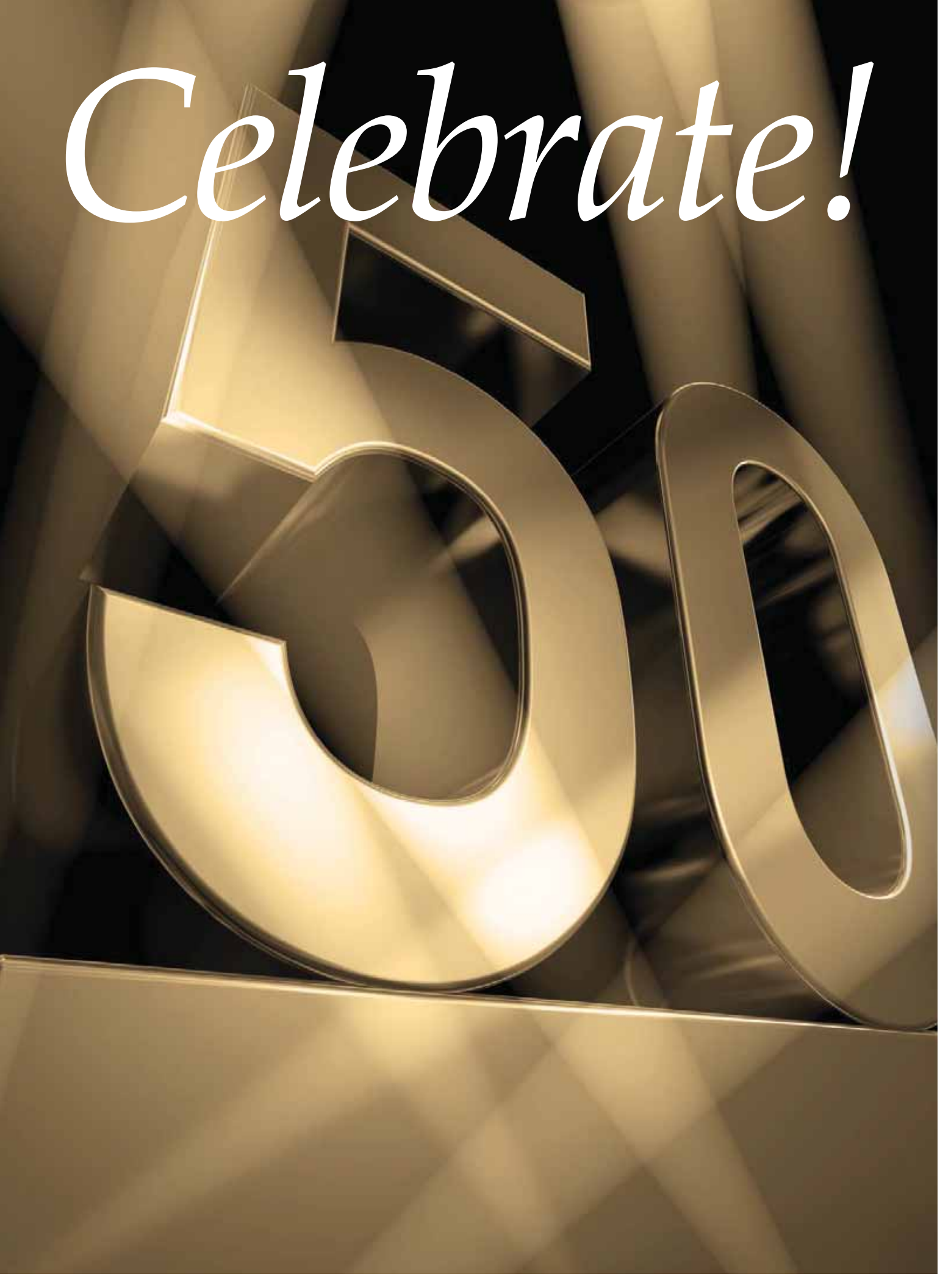
Each stand-alone product contains:

- the complete CLE program on CD or DVD disc
- a downloadable PDF file containing all course materials
- a separate MP3 audio file containing all program panel presentations that can be downloaded to your computer and copied and transferred to other devices, including iPhones, tablets, mp3 players and other computers and laptops
- content can be uploaded to "cloud"-based file-sharing

Fulfill your MCLE requirements at any time with no connection to the Internet required!

Go to www.nysba.org/av to view our complete line of program titles available in CD/DVD and Online Video/Audio streaming and download formats.




Celebrate!
50

The 50th Anniversary of the CPLR

By David Paul Horowitz

It is with great pleasure that I welcome readers of this month's *Journal* to join our celebration of the 50th anniversary of the CPLR. Effective September 1, 1963, New York replaced the Civil Practice Act (C.P.A.), which had served as New York State's code of civil procedure since 1921, with a new code titled the Civil Practice Law & Rules (hence, CPLR).

This anniversary issue contains reprints of previous *Journal* articles addressing the CPLR, and new articles as well – ranging from a piece on the progress of the committee that drafted the CPLR to a look at whether the CPLR is still relevant given the changes in technology and practice in the past half century.

We open with an article titled "Revision of New York Civil Practice," which provided an update on the progress being made in the process of drafting a new code of civil procedure. First published in the *Journal* in 1958 (then the *N.Y. State Bar Bulletin*), the article was written by then Columbia Law School Professor Jack B. Weinstein (now United States District Court Judge of the Eastern District of New York), the captain responsible for steering the draft code through the dangerous shoals that threatened to capsize it. I think it is fair to credit Judge Weinstein as the "father" of the CPLR. What is most remarkable to me is that this achievement, which would be the pinnacle of any lawyer's professional life, came at the beginning of Judge Weinstein's career; it turned out to be but one of many stellar accomplishments.

The second article, "Happy Anniversary to the CPLR," is written by Pace Law School Professor of Law Jay C. Carlisle, one of the leading authorities on, *inter alia*, New York Civil Practice (and, on a personal note, my teacher, mentor, and friend). Professor Carlisle gives us a lively and informative historical perspective of the long, and at times fraught, process of delivering the CPLR. That the code was ever enacted seems, with the benefit of 20-20 hindsight, remarkable.

Next is "CPLR Provided Escape From Common Law Technicalities," which first appeared in the *Journal* in 2001. Written by the Dean of New York Practice, Albany Law School Professor (now Emeritus) David D. Siegel, the article brings readers from the enactment of the CPLR through many of the seismic changes that have occurred throughout the statute's life, including the switch to commencement by filing, expansion of disclosure, and the rise of arbitration.

"The Emergence of 'E-Service' Under CPLR 308(5)" by John R. Higgitt, Esq., principal court attorney-referee to Administrative Judge Douglas E. McKeon, traces the evolution of alternate means of service under CPLR 308(5), from early experiments with alternative methods of mailing and service upon individuals not expressly provided for by CPLR 308(1)–(4), through service by email and beyond. A frequent contributor to the *Journal*, John Higgitt has earned his place alongside the preceding legal luminaries, and I am fortunate to count him too as a friend.

Then, two *Burden of Proof* columns. One, a reprint of the January 2010 column titled "CPR for the CPLR," discusses a number of factors that make the relationship between the bench and bar, on the one hand, and the CPLR, on the other, a complex and often frustrating one. The second, and final piece on this topic, is a new column, "DNR for the CPLR?" considering three alternative paths forward in the 21st Century: maintaining the status quo, retirement or remodeling.

We close the celebration on a lighter note with a reprint of Professor Siegel's essay "To Fly, or Not to Fly…," about how the CPLR got him flying. This piece delighted Professor Siegel's then-current and former students when it was published in the *Journal* in 2005, and we hope it brings a smile to your face.

So, whether you pick up this issue with a pre-disposition to praise the CPLR or to bury it, I hope you will share my enjoyment in our contributors' articles. ■

David Paul Horowitz (david@newyorkpractice.org) writes the "Burden of Proof" column for the *Journal*. He is guest editor of this issue.

Jack B. Weinstein is a United States federal judge in the Eastern District of New York. He received his undergraduate degree from Brooklyn College and his LL.B. from Columbia law School. This article first appeared in Volume 30 of the *N.Y. State Bar Bulletin*, July 1958. It was taken from an address then Columbia University Law School Professor Jack B. Weinstein delivered at the NYSBA Summer Meeting, held at the Saranac Inn on June 28, 1958.

Revision of New York Civil Practice

By Jack B. Weinstein

I am most grateful for this opportunity to tell you about the work being done on revision of the Civil Practice Act and Rules of Practice by the Advisory Committee on Practice and Procedure. For, ultimately, the success of this enterprise will depend upon the Bench and Bar's interest, understanding and support.

Many of you know what we are doing and many of you have helped us by suggestions as well as by friendly expressions of support. But I will have something to say about the genesis of our work and our mode of operation to those who are unfamiliar with it.

The Temporary Commission on the Courts, during its first two years, held hearings and conducted conferences throughout the state soliciting suggestions for the improvement of the administration of justice. On one subject there was a consensus. New York civil practice was in need of a thorough overhaul.

This opinion took account of the fact that since the Field revision of 1848 the history of change in this state has been one of constant accretion of provisions with many fine details but without successfully dealing with the practice as a whole in order to provide an integrated procedure, set out in clear language, designed to vindicate substantive rights as cheaply and quickly as possible.

The Throop code of 1880 was little more than a recodification of the mass of detailed provisions added since 1848. Judge Rodenbeck, working in the first and second decades of this century, did provide a simple draft. His tour de force was admired by many reformers, but the legislature rejected it.

The revision of the early 1920's made little change of substance or language – it was essentially a shifting of the Code sections into the Consolidated Laws, a new act and rules. There were, of course, admirable provisions introduced into the practice. Noteworthy were those on joinder of parties and summary judgment, modeled upon the English practice.

Momentum for reform did develop, partly as a result of the work of the Commission on the Administration of Justice, and in the mid-thirties the Judicial Council was organized. Its procedural studies are excellent and many of its proposals were adopted. But, as you know, the Council restricted itself to amending individual provisions and worked in relatively small areas. Without any denigration of the superb job done by the Council, its efforts can, because of its limited terms of reference, be characterized as "patchwork."

I think that the situation was summarized yesterday when our Chief Judge told us that Court of Appeals Hall, now over a hundred years old and last reconditioned forty years ago, was beginning to crumble and needed a through reconstruction. Substitute the New York Practice for Court of Appeals Hall and his words are still appropriate. (Any relation between Field and his builders of practice and the convict laborers from Sing Sing who quarried the stone for Court of Appeals Hall is, of course; wholly allegorical.)

Early in 1955, the Temporary Commission on the Courts appointed an Advisory Committee on Practice and Procedure under the chairmanship of the late Dean

John F. X. Finn. He has been succeeded by Colonel Jackson Dykman, an outstanding member of the New York Bar, and a former President of this Association. Other members of the Committee are: your President, S. Hazard Gillespie, Jr.; Professor Samuel M. Hesson of Albany Law School, past president of the Schenectady Bar Association; former Federal Judge for the Eastern District Harold M. Kennedy; Professor John W. MacDonald of Cornell Law School, chairman of the New York Law Revision Commission; James O. Moore of Buffalo, former Solicitor General of New York State; and Gilbert Hughes of Utica and George Coughlin of Binghamton, two very sound and experienced practitioners. This representation of upstate and downstate practitioners insures full consideration of the problems of every geographic area as well as every specialty. When we began our discussion of the jury, for example, the reaction of Messrs. Coughlin, Hughes and Moore was immediate and forceful that, "Our people upstate don't want any diminution of the right to jury trial." There was no dispute on the matter because everyone on the Committee shared this view.

I have been honored by being appointed reporter to the Committee. We now have a staff of three full-time people with outstanding academic and professional backgrounds who work at Columbia Law School, using office space supplied by the school. At their head is Dan Distler, a former individual private practitioner. Harold Korn clerked for Judge Stanley Fuld of the Court of Appeals and Milton Schubin clerked for Federal Judge Irving Kaufman. Other attorneys of varied experience and fine scholastic background have worked with us and we also receive the assistance of some of the most competent third-year students at the Law School on a part-time basis.

In some specific areas we have had the help of professors of other law schools: Louis Prashker of St. John's, Thomas E. Atkinson of N. Y. U., David R. Kochery of Buffalo and Louis R. Frumer of Syracuse have been of great help.

Our method of work is this: we first review the New York statutes, cases and literature in the particular field and the experience of other jurisdictions, and confer among ourselves and with outside specialists. The staff then decides in a preliminary way how they think the first draft should be written. After working back and forth through successive drafts, a first mimeographed draft with notes is submitted to the Advisory Committee for study. Then, at monthly meetings, the Committee goes over it word by word.

On the basis of this discussion, a second draft is drawn up with notes, and again submitted for the approval of the Advisory Committee. This continues until a final preliminary draft satisfies the Committee in every detail, and only then is it printed in a preliminary report. This Committee is no rubber stamp group. It has required as many as half a dozen separate drafts before it was willing to permit publication. Each of our published drafts and reports are plainly marked "preliminary" and "tentative" to make it clear that, while they represent the Committee's current thinking, they are not definitive. They are published now to precipitate your comments, criticisms and suggestions.

Our first preliminary report, published last year, covered venue, parties, joinder, pleading, summary judgment and disclosure. It was distributed to law libraries, judges, bar associations and to any attorney who asked for it. There are still some copies of this report and if those of you interested in receiving one will write to me at Columbia, we shall be delighted to place you on our mailing list. Our second report is in the hands of the state printer. Much of it has been published in Pamphlet Number 7 of the 1958 McKinney Session Law News. Incorporated in this second report are drafts on jurisdiction; statutes of limitation; evidence; arbitration; appeals; service, form and filing of papers; motions generally; pre-trial conferences; oaths and affirmations; trial, generally and by court, jury and referee; trial motions; infants, incompetents and poor persons; and actions against a body or officer.

The abolition of the Temporary Commission, which had supplied funds – but which gave the Advisory Committee complete freedom in its deliberations – made us fearful that the work would have to be terminated. However, the legislative leaders and particularly Speaker Heck and Senator Mahoney were most generous in finding funds to permit the job to continue after the legislative session ended. Our financing has been undertaken by the legislative fiscal committees under Senator Erwin and Assemblyman MacKenzie. Both of these latter gentlemen have been most helpful. My failure to mention by name the many others in government and practice who have given us encouragement and assistance – and they included the Governor's Counsel, Judge Daniel Gutman – is due to lack of time and not lack of gratitude.

We expect that, during this year, we will complete a replacement for all of the C. P. A. and Rules except for provisions affecting real property, matrimonial actions, and a few special proceedings such as those for the appointment of the committees of incompetents. We should be in a position to present the entire work to the 1960 Legislature.

There have been some 30 bar association committees set up throughout the state to work on our printed reports. It is contemplated that the Advisory Committee will, on the basis of recommendations of local bar associations and you, as well as hearings throughout the state, make revisions in its proposals in time, as I have already indicated, to be submitted to the 1960 Legislature.

Before giving you some example of what we are doing let me indicate what I think is the philosophy of the Committee doing this work:

First: The test of procedure is the pragmatic one: does it work to permit substantive rights to be vindicated as quickly, inexpensively and justly as possible; is it flexible enough to permit justice to be done when procedure gets in the way of substance.

Second: We ought to preserve what is sound in the practice while taking advantage of the experience in this and other jurisdictions. In other words, change for change's sake is as bad as avoidance of change just because it's new; accordingly, we are examining each provision with our minds as well as our eyes wide open.

Third: The language and organization of the practice provisions should be easily understood so that the lawyer and judge can readily determine what they are supposed to do.

in the pleadings with a demand for a bill of particulars (and there are 10,000 motions a year resulting from such demands in the Supreme Court alone) with still more appeals. He can then begin to use depositions, examinations and notices to admit – which in part serve the same purpose as the bill of particulars. The new readiness rules give the laggard additional protection, for while these preliminary skirmishings are going on, he can keep the case off the calendar where, in many parts of our state, it must thereafter languish for some time before advancing to trial.

The Committee has devoted considerable attention to the rules affecting litigation up to the time of trial. The pleading problem has caused a good deal of needless litigation with its concomitant expense and delay. The

There are no dreamers on the Committee, but sound and experienced practitioners.

In some cases the very piecemeal improvements of procedural devices over the years by the legislature and by the courts to existing procedures served to complicate matters. Let me cite two areas at the opposite ends of a litigation where that is true.

In the area of enforcement of judgments, the same assets of a judgment debtor may be discovered and applied to the satisfaction of the judgment by four complex and overlapping enforcement systems – execution, supplementary proceedings, statutory receivers and judgment creditors' actions. Unfortunately, each of these systems gives only the most cursory recognition to the existence of the others. Thus, different systems of liens and priorities and in some instances different exemptions result from the different procedures. The provisions for each enforcement device are diverse and overly technical and, in some instances, they are inconsistent. When different creditors follow different procedures, the result verges on utter chaos. Our unpublished drafts have faced up to the problems in this field and we hope to provide viable solutions.

In present procedures for shaping a case for trial – pleading, motion and deposition-discover practice – there has been a constant addition of "improvements" but no real attempt to integrate them with existing practice. Superimposing new devices on existing procedures has created unnecessary steps, paperwork and expenses, as well as excessive delays. A litigant bent on utilizing the practice to its fullest extent for delay and harassment can make a series of motions directed at putting the pleadings into technically acceptable form (with appeals to the appellate division from each adverse ruling), then make his motions directed at the substance of the pleadings, with more appeals, then try to limit the allegations

New York concept that one must plead "material facts" constituting a "cause of action" has created a great part of the problem. Too much particularity in pleadings is condemned as an attempt to plead "evidence"; too little particularity becomes "conclusions." In considering all the recently reported pleading cases, we found many motions to strike material that was too detailed and many to compel pleaders to elaborate general statements. We did not find a case definitely disposed of as a result of this motion practice. Almost without exception, the pleader was granted leave to re-plead correctly.

We have attempted to state more clearly the requirements of pleading, phrasing our standard in terms of the particularity required. We hope thereby to avoid the characterizations of "evidence" and "conclusions," while at the same time avoiding the lack of information and the amorphous pleadings possible under the federal rules. The Committee considers that the primary purpose of pleading is fair notice to the parties and court of the transactions or occurrences intended to be proved and of the nature of the cause of action or defense.

In specific types of action the particularity required can be stated explicitly. For example, there is no reason in the average negligence case why a demand for the same bill of particulars – normally a printed or mimeographed form – must be made in every case. These particulars are rightfully a part of the complaint. Having them at once saves a full step with all its paperwork, and may well increase the chance of early settlement and reduce the need for discovery procedures. The proposed rules specify the details required in other specific kinds of cases – contract and defamation, for example – which constitutes the vast bulk of our litigated matters. This change will enable us to propose abolition of the bill of particulars. In

this connection, it is interesting to note that New Jersey, which adopted the Federal pleading rule, has now modified its rule (4:8-1) to require the serving of what amounts to a bill of particulars with the complaint in a negligence action arising out of the operation of a motor vehicle.

Our motion practice in New York, especially with respect to motions designed to dispose of litigation at preliminary stages, contains many obsolete and useless provisions. The restriction of some motions to the original papers while others may be made on affidavit is unnecessary shackle on practitioners and courts alike. Pleading motions, except to clarify pleadings which are so vague as to prevent response, are largely useless. Restriction of summary judgment to nine enumerated grounds has little justification today. It should not even be necessary to await an answer before moving for summary judgment in cases which are, for example, based upon documents. The proposed rules attempt to afford a useful motion practice, but at the same time restrict preliminary motions to those which are essential or have some hope of disposing of the litigation.

The most notable change proposed in motion practice is the abolition of the motion to dismiss for failure to state a cause of action. For many years the Civil Practice Act has stated that "the demurrer is abolished." Our Advisory Committee has proposed that this abolition take place at last. They have done so because they consider that the pertinent question is not whether a pleader has *stated* a cause of action, but whether he *has* a cause of action. If he has a cause of action and has not stated it clearly, in most cases his opponent is not prejudiced or deceived. Experienced attorneys are reluctant to use the motion in such a case, since its only result is to educate a poor pleader. The courts in New York have rightfully permitted such a litigation to proceed despite weaknesses in the drafting of pleadings. The sanction for failure to follow the rules on details of the complaint, where there is a valid cause of action, should be assessment of costs and not dismissal. If, on the other hand, the pleader has failed to state a cause of action because he has none, the appropriate remedy is a motion for summary judgment which would be dispositive of the case on the merits.

The proposed rules on disclosure before trial have been drafted in an attempt to prevent overburdening our courts and lawyers with a large number of motions. But power is given the courts to prevent abuse and to closely supervise deposition practice where the nature of the case or the tactics of the attorneys require supervision. Technical distinctions in our present law, such as those between witnesses and parties and between different types of cases, have been largely abolished. We have come a long way from the sporting-contest theory of litigation, and it is the judgment of experience that when parties are aware of all the facts, more cases are settled, the issues are more clearly drawn, and trials are shorter.

We have also sought to reduce the number of intermediate appeals by permitting such appeals as of right only in specified cases – those that require an appeal at once because there is a substantial chance that it will end the litigation or because fairness dearly requires a prompt review. Permission for all other intermediate appeals will be required. Here again we propose what we conceive to be a sound solution avoiding the drawbacks of the present New York rules permitting an excessive number· of appeals from non-final orders and the federal rule rigidly barring all such appeals.

Time and procedures for appeal have been made uniform in all courts.

The use of the appendix method has also been proposed, to permit substantially shorter reproduced records. The mimeographing of briefs and appendices, permitted by our proposals, should still further reduce the cost of appeals.

Changes such as those I have outlined can be accomplished without any modification of our institutions. No new judges or clerks or courthouses are needed. Such practical considerations are most important to us. Thus, for example, we have not adopted the federal system requiring issuance of summonses by a clerk of court and service by a marshal. We had no hesitancy in rejecting this procedure, for, whatever its advantages, such a change would require addition of a whole corps of new public employees. The so-called "hip pocket" filing system in New York is retained because it works. Required filing of papers patterned on the federal system would result in increased burdens on clerks and necessitate a physical expansion of storage facilities.

Some changes cannot be avoided, and some of them may produce negative reactions from interested groups.

Some printers may, for example, oppose our provisions permitting the use of shorter records and methods of reproduction other than printing.

Some newspapers may be saddened by proposals in our service rules for reducing the required number of publications and their size.

Even some of our doctors may not care for our simplification of the statute of limitations, which proposes treating malpractice actions like other tort cases.

Sheriffs, marshals and constables may not ardently embrace our abolition of unnecessary steps in execution which require their services.

Process servers, too, may be critical of changes that will reduce the expenses of personal service and thus their income, under our proposal abolishing the order for substituted service and utilizing the rule, widely used in this country, permitting delivery to a person of suitable age and discretion at the defendant's home or business. But they will not, we think, object to our erasing of the distinctions between employees to be served in a domestic and foreign corporation, and they may even acknowledge the soundness of our removal of other impediments

to the lawyer, such as the requirement that two county officers be served in a suit against a county.

Lawyers themselves may feel that they have a vested interest in their knowledge of some details of practice. Section 347 of the Civil Practice Act – the dead man's statute – evokes a warm glow for those of us who have spent time mastering it. Defective though it may be, one does not readily cast out a long-time companion. The Committee believes that the substitute proposed is a sound one. It would permit the hearsay declarations of the deceased as well as the testimony of the interested witness to be introduced and require the court and jury to evaluate this evidence in the light of inadequate cross-examination and opportunity to contradict. This proposal has worked exceedingly well in those states that use it. Of course, if this change is adopted, the substantial volume, Greenfield, A Treatise on Testimony under §347, Civil Practice Act, formerly §829, Code of Civil Procedure (published in 1923 and now badly in need of a two-volume revision), will have an interest only for the historian.

In addition to what I would call changes in the substance of procedure designed to increase the quality and efficiency of justice, we have addressed ourselves to the problem of rules versus act. Let me make it clear that there is not the slightest desire on the part of the Committee to deny the legislature control over practice. We think the New Jersey position that the legislature has no power to control procedure is unsound; certainly it would be an impossible position in New York, in view of our history in the matter. On the other hand, much of the details of practice might well be shifted to court-made rules, subject to the supremacy of any inconsistent legislation and the right of legislative veto.

In accordance with these principles, we have shifted many provisions dealing with procedural details to rules, leaving matters involving substantial policies in the Act. Our printed drafts replace 536 sections of the Civil Practice Act plus 126 rules of civil practice with 61 sections and 217 rules. An additional 32 sections of the C.P.A. have been transferred to the Consolidated Laws, and seventy sections of the Consolidated Laws have been amended.

Finally, there are what might be considered the aesthetic aspects of the draft. To some extent we have tried to codify decisional law, which is supplementary to, and even inconsistent with, the language of our present provisions. Everywhere we have tried to simplify language, clarify meaning, make treatment consistent and language uniform, and consolidate subject matter so that an attorney can quickly find the provisions bearing upon his problem. We have been able to reduce verbiage drastically, primarily though excision of overlapping provisions. The proposed draft of both act and rules should be in the order of one half the length of the present provisions. We have tried, too, to avoid the 3000-word, twenty-five subdivision sections in the present act in favor of a more consistent and easily understood organization.

In the course of revision we are, of course, chopping out a good deal of dead wood.

Section 401 is one illustration of the type of piecemeal amendment that has made the Civil Practice Act a confusing and prolix document. The section provided that a certificate of population to be introduced into evidence must be attested by the Secretary of the Interior. In 1935, the phrase "or the Secretary of Commerce" was added. Apparently, someone had discovered that the Bureau·of Census was under the jurisdiction of the Commerce Department. The transfer of jurisdiction had actually taken place in 1903. The provision was not only amended thirty-two years late, but it permitted, and still permits, attestation by the Secretary of the Interior, who has not had this authority for the past fifty-five years.

One provision in the habeas corpus section has remained untouched since 1829, despite the fact that it is clearly inconsistent with a line of United States Supreme Court decisions beginning after the war – I refer, of course, to the Civil War.

I invite those of you who are troubled about the value of the dollar to look at section 686, entitled "Levy upon money." It is there provided that a levy "upon current money of the United States" must be paid over "as so much money collected, without exposing it for sale." Perhaps I'm wrong in thinking we can do without such a provision – they tell me a dollar is only worth about 50 cents today. The provision, incidentally, made some sense in the post-Civil War greenback days when the sheriff was required to sell gold coin. L. 1877, ch. 416.

If you are familiar with the common rule of construction, embodied in section 35 of the General Construction Law, that words in the singular include the plural, perhaps a recital of the opening of section 699 will be interesting:

> Where an action to recover a chattel or chattels hereafter levied upon by virtue of an execution, or several executions, or a warrant of attachment, or several warrants of attachment, or to recover damages by reason of a levy or levies upon detention, sale or sales of personal property hereafter made by virtue of an execution or several executions, or a warrant of attachment, or several warrants of attachment, is brought against an officer, or against a person who acted by his command or in his aid, if a bond or bonds or written undertaking or undertakings indemnifying the officer against the levy or levies, or other act or acts, has been given in behalf of the judgment creditor or the several judgment creditors, or the plaintiff in the warrant or the plaintiffs in the several warrants, either before or after the commencement of the action, the persons or person or the several persons who gave it to them, or the survivors if one or more are dead . . .

Let me conclude by frankly putting to you the major problem our work faces. What I fear is that the scope of the project and the immensity of the burden assumed on

your behalf by the Advisory Committee will cause the project to fail; that the Bar will be too lethargic to stir itself to the thought required if it is to evaluate what is proposed. I have heard it said, "I am for this, but most lawyers won't take the effort to think about these questions. They prefer the difficulties of what we have to something new that *may* be unsound." What we are doing should hold no terror for you. If you will only take the effort to study what the Committee has done and open your minds to the possibility of change you will, I think, agree that what the Committee is proposing is sound and workable, is conservative in the best sense of that word.

There are no dreamers on the Committee, but sound and experienced practitioners. Every word is tested around the table by their collective experience. Repeatedly, in our discussions, the members will say, "I've had a case involving so-and-so that created this or that difficulty. Would this provision solve it?" or "This won't work well because our clerks or our judges are faced with such and such a problem." In short, the Committee is operating on the principle that the important thing with a practice act and rules is that they work well. Moreover, the lawyers on this Committee are well aware that there is an advantage in using tools that lawyers are familiar with where they have proven adequate to their task.

I believe that this project can and will give New York the sound, modern practice it needs. If the Bar, after study, should reject it as not constituting an improvement, we will be satisfied with that decision. If it should, however, be rejected because of the Bar's lack of interest and fear based upon ignorance, then the Bar will have done a grave disservice to itself and to our system of justice.

We have been too long cowed by the Civil Practice Act, by a monster of complexity created by us and for us, so that no one dares – except on an ad hoc basis – reexamine this creature that controls so much of what we do. We now have in the drafts and studies prepared by the Advisory Committee on Practice and Procedure a unique opportunity to reexamine intelligently what we as lawyers are doing. It seems to me that every bar association in the state might well make this work the focus for a major study by its committees, as well as for a series of lectures and debates on this topic of procedural reform.

This is a subject on which only we lawyers and judges can and should speak with authority. For, if we have any special competence and responsibility, surely it is in the procedures by which litigation is handled, the practice under which our judicial system vindicates the substantive rights of all the people of the state.

I submit as a major task of the New York Bar for the years 1958, '59 and '60, the revision of New York civil practice. ■

Jay C. Carlisle (jcarlisle@law.pace.edu) has been a Professor of Law at Pace University School of Law since 1978. He is an elected fellow of the New York State Bar Foundation and a recipient of the ALI-ABA Harrison Tweed Special Merit Award for Contributions to Continuing Legal Education.

Happy Anniversary to the CPLR

A Joint Achievement of the Practicing Bar and the Academy

By Jay C. Carlisle

Introduction

This September, we celebrated the 50th anniversary of the Civil Practice Law and Rules of New York State. The CPLR was the handiwork of the Advisory Committee on Practice and Procedure, appointed in 1955 by the New York State Temporary Commission on the Courts. Under the leadership of the Committee's reporter, then Columbia Law School Professor Jack B. Weinstein, the Committee members, which included former New York State Bar Association presidents Jackson Dykman and S. Hazard Gillespie, spent five years overhauling, revising and reforming the Civil Practice Act of 1920. This remarkable joint venture between the practicing bar and the academy involved thousands of hours of detailed research, two full-day meetings a month, many public hearings, hundreds of draft reports, extensive debate, myriad hours of consultation with the bench and bar and, in 1961, submission of a final report to the Legislature. Although the Legislature did not adopt all of the Committee's proposals, the CPLR was enacted and became effective on September 1, 1963. This impressive document is one of the nation's oldest state procedural codes; it is appropriate to review its origins and to salute those involved in its creation.[1]

Codification of Civil Procedure in New York State

Early procedural rules in New York were contained in The Revised Statutes of 1827/1828. Part III consisted of about 2,500 sections covering most of the substantive and procedural law relating to courts and practice in the Empire State.[2] Modeled on William Tidd's treatises on British civil practice, it became known as the Tidd Revisions.[3]

Twenty years after adoption of the Tidd Revisions, the Code of Procedure of 1848 was enacted by the Legislature.[4] This code was the work of three commissioners who were appointed by the Legislature to revise and simplify the rules and practice for the state's courts.[5] The Field Code, named in honor of its principal draftsman David Dudley Field,[6] was further revised by these commissioners in 1850 but not adopted by the Legislature, although the revision was adopted in whole or in part by 30 states in the nation and the federal court system.[7]

For the next 30 years the bench and bar of New York vigorously debated the need for further procedural reform. Many were critical of the Legislature's failure to implement the 1850 revision of the Field Code. The Legislature passed a series of amendments to the Code until it was a "conglomeration of petty provisions purporting

to reach into every nook and cranny of practice and leading to an intolerable rigidity."[8] Protest by leaders of the bar led to legislative enactment of the Throop Revision, which became known as the Code of Civil Procedure. It consisted of a one volume accumulation of 3,356 detailed sections.[9] This did not satisfy the bench and bar – it merely provided stimulus for further procedural reform.

In 1913, the Legislature directed the Board of Statutory Consolidation, chaired by Judge Adolph J. Rodenbeck, to conduct a thorough reform of civil procedure.[10] In 1915, the Rodenbeck Board proposed a set of 401 rules;[11] this was rejected by the Legislature in 1919.[12] Thus, New Yorkers were left with the 1880 Throop Revision, which was characterized as a "patchwork" of disjointed laws and rules.[13]

In 1920, the Legislature adopted the Civil Practice Act.[14] It made few changes in form or substance to the Throop Revision and "was little more than a recodification of the mass of detailed provisions added since 1848."[15] Momentum for change accelerated in 1938 with the enactment of the Federal Rules of Civil Procedure but the New York State Legislature had little interest in procedural reform. The Judicial Council, created in 1934,[16] successfully sponsored piecemeal amendments to the Civil Practice Act[17] but "was confronted with an overwhelming complex of archaic and disorganized statutes . . . ; the results of 100 years of constant petty amendment, addition and relocation, frequently accomplished with little regard for the whole."[18]

The Advisory Committee on CPLR

Finally in 1955, the Temporary Commission on the Courts, chaired by Harrison Tweed, appointed an Advisory Committee on Practice and Procedure, naming Fordham Law School Dean John F.X. Finn as chair.[19] After Dean Finn's death, the Commission appointed as chair Colonel Jackson Dykman of Brooklyn. Other members of the Advisory Committee included S. Hazard Gillespie, Jr., of New York City; Professor Samuel M. Hesson of Albany Law School; former Federal Judge Harold M. Kennedy; Professor John W. MacDonald of Cornell Law School, chairman of the N.Y. Law Revision Commission; James V. Moore of Buffalo, former Solicitor General of New York State; Gilbert Hughes of Utica; George Coughlin of Binghamton; Austin W. Erwin, Jr., of Geneseo; Robert W. Jamison of Albany; and William L. Lynch, former Counsel to the Temporary Commission on the Courts. Committee members were selected to ensure full representation of upstate and downstate practitioners so that "the problems of every geographic area as well as every specialty"[20] would be addressed. Professor Jack B. Weinstein (now a U.S. Federal Judge in the Eastern District of New York) was appointed as reporter to the Committee. He was assisted by a staff of full-time academics from Columbia Law School, which included Daniel Distler, Harold Korn, and Milton Schubin. Distler and Korn later became law professors at the University of Buffalo and Columbia Law Schools. The working staff received help from Columbia professors Maurice Rosenberg, Paul Hays, and Michael Sovern.[21] Additional assistance in specific areas was provided by law school professors Louis Prashker of St. John's, Thomas E. Atkinson of N.Y.U., David R. Kochery of Buffalo and Louis R. Frumer of Syracuse.[22]

Reform Philosophy and Methodology

The Advisory Committee's philosophy for procedural reform was summarized by its reporter as follows:

> First: The test of procedure is the pragmatic one: does it work to permit substantive rights to be vindicated as quickly, inexpensively and justly as possible; is it flexible enough to permit justice to be done when procedure gets in the way of substance.
>
> Second: We ought to preserve what is sound in the practice while taking advantage of the experience in this and other jurisdictions. In other words, change for change's sake is as bad as avoidance of change just because it's new; accordingly, we are examining each provision with our minds as well as our eyes wide open.
>
> Third: The language and organization of the practice provisions should be easily understood so that lawyer and judge can readily determine what they are supposed to do.[23]

Judge Weinstein and his academic working group defined the tests of procedural reforms as pragmatic ones. Does it work to permit substantive rights to be vindicated as quickly, inexpensively, and justly as possible? Is it flexible enough to permit justice to be done when form gets in the way of substantives? Is it easily understood and administered?[24]

The first issue for the working group was whether to adopt in full or in part the Federal Rules of Civil Procedure. Arguments for adoption in whole included that the federal rules were relatively new; incorporated the best practices of the states, including New York; had proven successful in federal courts and courts of other states; and offered the prospect of uniformity under New York state and federal practice and the promise that practice courses would be easier to teach in New York law schools.[25] Arguments against adopting the federal rules in their entirety included their lack of coverage for many areas of state practice such as venue, statutes of limitations, evidence and enforcement of judgments.[26] More important, the Advisory Committee believed "their adoption would have required a considerable increase in the number of our [the state's] employees."[27] The Committee decided to adopt a hybrid approach.

> Both uniformity of federal practice and retention of New York practice, while entitled to considerable weight, should . . . give way where we thought we

could develop a better rule or a modification of a present rule that would serve our purposes better.[28]

Thus, the Committee followed many New York rules under the Civil Practice Act but tidied them up – both in language and organization. If a federal rule or rule of another state was better than New York's practice, and there was no appreciable difference between the two, the working group gave nod to the federal rule.[29] This approach generated an enormous amount of work, as evidenced by the group's published notes.

The academic working group identified 10 key areas of concern.

> (1) easier acquisition of jurisdiction over parties outside the state; (2) free joinder of parties and causes of action; (3) greater exposure of facts before trial; (4) decreased emphasis on pleadings; (5) increased disposition on the merits rather than on procedural points; (6) increased responsibility of the courts to force attorneys to prepare for, and expedite disposition of, cases; (7) relaxation of the technical features in the law of evidence and greater stress on probative force; (8) increased power of appellate courts vis-à-vis trial courts; (9) improved devices for the enforcement of judgments; and (10) increased responsibility of judges for administering an integrated system of courts and procedure.[30]

The academic working group's method consisted first of an examination of statutes, cases and literature in a particular field and a review of the experience of other jurisdictions. The group would confer and seek advice from outside specialists and then would issue a first draft to be edited and internally reviewed before submission to the full Advisory Committee. After further discussion, a record "tentative" draft was written and again submitted to the Advisory Committee, which often required as many as six separate drafts before authorizing publication. The Committee met for at least two full days every month to discuss, debate, criticize, and revise the draft reports. This exchange ensured a proper balance between the academics and the practitioners.[31] Each published draft was marked "preliminary" and submitted to representative members of the bench and bar for comments, criticism, and suggestions. At least 30 bar associations regularly received the drafts. The first preliminary report was published in 1957; it covered venue, parties, joinders, pleadings, and disclosure.[32] The second report, published in 1958, included drafts on jurisdiction, statutes of limitations, evidence, arbitration, appeals, service, form and filing of papers, motions, pre-trial conferences, oaths and affirmations, trial by court and jury and referee; trial motions; infants, incompetents and poor persons; and actions against a body or officer.[33]

The First Preliminary Report of the Advisory Committee, issued in 1957, was followed by succeeding interim reports in 1958, 1959, and 1960. Each report contained proposed rulings on various subjects and supporting critical statutes.[34] The revision as finally proposed appears in Advisory Committee on Practice and Procedure, Final Report (1961) and in the Sixth Report of the Senate Finance Committee for the Proposed Revision of the Civil Practice Act and Rules (1962).[35] The reforms of the New York procedure were classified under three general discussions: "formal rearrangement and manifold minor revisions of the existing rules of procedure; transfer of the principal authority for procedural rulemaking from the legislature to the courts; and adoption of certain major changes, notably broadened discovery machinery, the pretrial conference restriction of interlocutory appeal and some simplification of pleading."[36]

Legislative Response

The Advisory Committee's first reform was enacted with minor revisions by the Legislature. The suggested new provisions of the CPLR were adopted and set forth in a logical and orderly sequence. This provided the bench and bar with an organized recitation of New York procedure and was an essential step for the continued reform of the CPLR in the 50 years subsequent to its adoption.[37]

The second reform objective, conferring a general rule-making power on the courts, was almost completely frustrated by the Legislature.[38] The Advisory Committee had proposed that the judiciary have primary power to formulate and revise rules of procedure with the Legislature exercising supplemental authority.[39] The Legislature rejected this proposal which, in the opinion of one prominent commentator, did procedural reform an enormous disservice. Procedural rules need regular and expeditious review and revision. New rules not subject to the vagueness of legislative deliberation must be enacted without being subject to "political" considerations. The failure of the Legislature to recognize judicial rule-making power was a setback for the Advisory Committee.[40]

Many of the specific major reforms proposed by the Advisory Committee were not enacted,[41] but during the

Judge Weinstein and his academic working group defined the tests of procedural reforms as pragmatic ones.

past 50 years some of the Committee's proposals have been passed by the Legislature.[42] In addition, the Legislature has adopted many innovative revisions to the CPLR that have enhanced the achievement of justice for the citizens of New York.[43] These changes reflect the letter and spirit of the Advisory Committee proposal.

Conclusion

Despite the Advisory Committee's failure to achieve many of its goals for procedural reform, the CPLR, as enacted in 1963, was an impressive document and an impressive achievement, realized through the efforts of the practicing bar and the academy. The CPLR has lasted longer than any prior procedural code in the Empire State; it is one of the nation's oldest codes of civil practice. It is unlikely the 1963 CPLR would have come to fruition without the joint labor of lawyers, judges, and academics. At least 30 bar associations were involved in the review and critique of Advisory Committee drafts. The bar's active involvement in the entire five-year CPLR working project is a reminder that procedural reform is impossible without the constant support and regular input of lawyers throughout the state. ■

1. David D. Siegel & Patrick M. Connors, New York Practice (5th ed.) (2013 Supplement) at iii ("This impressive document has now governed civil procedure in New York for five decades and has easily outlasted the 42 year tenure by the Civil Practice Act, which preceded it.").

2. William H. Manz, ed., Gibson's New York Legal Research Guide 3d ed. 194–96 (Hein 2004).

3. *Id.* at p. 194.

4. 1848 N.Y. Laws ch. 379 (amended form passed as 1849 N.Y. Laws ch. 438).

5. *See* Stephen N. Subrin, *David Dudley Field and the Field Code: An Historical Analysis of an Earlier Procedural Vision*, 6 Law & Hist. Rev. 311 (1988).

6. *Id.*

7. *See* Thomas A. Shaw, *Procedural Reform and the Rule-Making Power in New York*, 24 Fordham L. Rev. 338, 339 (1955) (" . . . it was never adopted completely in New York. Instead, only the first and basic portion of the code, which Field himself later called the 'Field Fragment,' consisting of 473 sections was adopted by the New York Legislature in 1848 and 1849 – the balance was rejected. Instead many of the old 'Revised Statutes' of 1827 and 1828, which were more often than not attempts to codify the absurdities and complexities of common law pleading were continued in force and became part of the Code of Procedure [in 1880]."

8. *Id.* at 339 (citing Hon. Harold R. Medina, Transcript of Public Hearing before the Temporary Commission on the Courts held on June 22, 1954, in Brooklyn, N.Y., p. 133).

9. 1880 N.Y. Laws ch. 178.

10. 1913 N.Y. Laws ch. 713.

11. Report of Board of Statutory Consolidation on the Simplification of Civil Practice in New York, Vol. I (1915).

12. Report of the Joint Legislative Committee on Simplification of Civil Practice 29 (1919) Circuit Judge Charles E. Clark, former dean of Yale Law School and one of the principal authors of the Federal Rules of Civil Procedure, praised the Rodenbeck proposed legislation and remarked, "It contained to a surprising extent the provisions now widespread in operation through their adoption in the Federal Rules and elsewhere." *See* Charles E. Clark, Field Centenary Essays, 55, 62 (1949).

13. Jack B. Weinstein, *Revision of New York Civil Practice*, 30 N.Y.S. B. Bull. 298, 299 (July 1958).

14. 1920 N.Y. Laws ch. 925.

15. Weinstein, *supra* note 13, p. 298.

16. N.Y. Judiciary Law art. 2-A (1934), repealed by 1955 N.Y. Sess. Laws ch. 869, § 2.

17. *See* Shaw, *supra* note 7, p. 340.

18. *Id.*

19. *See* Weinstein, *supra* note 13, p. 299. *See also* Harrison Tweed, *The Temporary Commission Reports on the Courts*, 26 N.Y.S. B. Bull. 77 (Apr. 1954).

20. Weinstein, *supra*, note 13, p. 299 and Jack B. Weinstein, *Proposed Revision of New York Civil Practice*, 60 Columbia L. Rev. 50, 62 note 21 (1960).

21. Judge, then Professor, Weinstein, remarked, "The cost to the law school has been considerable. In addition to making space available . . . [t]he added burden to the library and mimeograph office has been substantial. Moreover, energy that might have been channeled into more directly productive scholarly work has been spent instead on the details of raising money, negotiating with officials, and placating lawyers and judges – all a part of the administrative burden of drafting a new practice." *See* Weinstein *supra* note 20, *Proposed Revision of New York Civil Practice*, p. 64.

22. *Id.* at pp. 60–64. *See also* Weinstein *supra* note 13, p. 300 (discussing academic component of Advisory Committee).

23. Weinstein, *supra* note 13, p. 301.

24. Weinstein, *supra* note 20, *Proposed Revision of New York Civil Practice*, p. 64.

25. *Id.* at pp. 53–54.

26. *Id.* at pp. 54–55.

27. *Id.* at p. 54 (for example, the adoption of the federal rules would require "[h]aving a clerk issue the summons in all cases and providing for service by a marshal . . . [and] requiring an added trip to the county clerk's office in all cases").

28. *Id.* at p. 55.

29. *Id.*

30. Jack B. Weinstein, *Trends in Civil Practice*, 62 Columbia L. Rev. 1430, 1434–35 (1962).

31. *See* Weinstein, *supra* note 21, p. 62 (". . . the committee has devoted an average of two days a month to meetings . . . at which heated discussion and delightful anecdotes almost invariably resulted in a firm consensus").

32. Weinstein, *supra* note 13, p. 300.

33. *Id.* at p. 301.

34. Geoffrey C. Hazard, Jr., *New York Civil Practice*, 78 Harvard L. Rev. 1306 (1965). *See also* Advisory Committee on Practice and Procedure of the Temporary Commission of the Courts, First Preliminary Report (1957).

35. *See* Hazard *supra* note 34, p. 1308.

36. *Id.* at pp. 1307–08.

37. *Id.* at p. 1308.

38. *Id.*

39. *See* Advisory Committee on Practice and Procedure, Third Preliminary Report 452–65, 825–92 (1959).

40. Hazard, *supra* note 34, p. 1308.

41. *Id.*

42. *See* David D. Siegel & Patrick M. Connors, New York Practice, 5th Ed. (Supp. 2013) ("The bench and bar of New York State have been truly blessed to be the beneficiaries of Professor Siegel's guidance and insight during the entire reign of the CPLR" at iii). Professor Siegel's coverage of subsequent developments in the CPLR since 1963 represent his phenomenal devotion to a scholarly recitation of the CPLR's growth. His treatise contains an excellent summary of CPLR revisions, changes and new laws enacted during the last 50 years.

43. *Id.*

CIVIL PROCEDURE — 2001

BY DAVID D. SIEGEL

David D. Siegel is Distinguished Professor Emeritus of Law at Albany Law School. Professor Siegel joined Albany Law School in 1972. His textbooks/treatises include: *New York Practice* (3d Ed.); *Conflicts in a Nutshell* (2d Ed.); annual commentaries on civil practice (McKinney's Consol. Laws) and federal practice (U.S. Code Annotated); editor of *New York State Law Digest* (monthly); *Siegel's Practice Review* (monthly); and co-author of the handbooks, *Appeals to the Court of Appeals and Appeals to the Appellate Divisions*. A graduate of the City University of New York, Brooklyn College, he received a J.D. from St. John's University School of Law and an LL.M. from New York University School of Law. Professor Siegel retired from Albany Law School in 2007.

This article first appeared in the January 2001 issue of the New York State Bar Association *Journal*.

CPLR Provided Escape From Common Law Technicalities

Our task is to survey the major developments in civil procedure between 1950 and 2000, and to do so in the space of only a few pages in the *Journal*. For that mission we will use a flying machine, soar out over the field, seek out each subject in which something significant has happened, alight ever so briefly, make a note, and zoom off to the next subject. In the art world they call this using a broad brush; readers are admonished not to look for any fine strokes.

Those of us alive on August 31, 1963, will remember how difficult it was to control our excitement as midnight approached: the Civil Practice Law and Rules was about to take effect. September 1, 1963, will live in glory: the CPLR replaced the Civil Practice Act, which in the 1920s had replaced the Code of Civil Procedure, which in the 1870s had replaced the Field Code of the 1840s. The Field Code! Look at the CPLR's ancestry!

The CPLR's attainments were many. It was but a fraction of the size of its predecessor, for one thing, choosing to set forth procedure in more general terms and leaving much more to the discretion of the court. Several of the CPLR's more specific attainments need mention.

Special proceedings had been (and continue to be) authorized in various places in and out of the CPLR. The special proceeding is a device designed to produce a judgment with what amounts to nothing more than a motion. The Legislature allows a special proceeding in a variety of contexts in which it feels that expedition is called for. But there were always difficulties about what procedures to follow in a given special proceeding if the particular law supplying it had not furnished enough detail. For that the CPLR offered a new Article 4, supplying the needed detail in just a dozen sections.

In Article 3, the CPLR gave us the long-arm statute, CPLR 302 (on which more below), and through a later amendment gave us Article 9, a detailed procedural framework for the class action.

In Article 30 generally and in CPLR 3013 and 3014 particularly, the CPLR had one of its major achievements: the simplification of pleadings and escape from the lingering technicalities of the common law, which the Field Code tried to dodge but which it took the CPLR to really leave behind.[1]

Other of the CPLR's achievements are noted among some of the individual captions below.

Statute of Limitations

The statute of limitations continues to serve as the ultimate bugaboo of civil procedure. It stands by to punish the dilatory plaintiff with a dismissal, sparing the defendant even the burden of drawing an answer. Under the CPLR it has carried on its satanic mission with undiminished enthusiasm, and with not too many changes.

One change worth noting is the adoption of a discovery rule in the so-called "exposure" cases, in which a plaintiff has been injured through the inhalation, ingestion, injection, etc. of a foreign substance, but with the injury not manifesting itself until years later. Under case law, the statute of limitations had started from the exposure[2] and never mind that the plaintiff would see and feel no injury until years later. The courts and the Legislature were importuned to adopt a rule that would start the time from the manifestation of the injury – i.e., the discovery – but neither would budge, until half a century later. In 1986 the Legislature took the initiative, with the adoption of CPLR 214-c, adopting a discovery rule with this so-called "exposure" statute.

A parallel development was the adoption of a discovery rule in medical malpractice actions in the "foreign object" (i.e., surgery) category, where something unintended was left inside the patient. There the courts led the way, with the Court of Appeals taking the lead and the Legislature following up with a codification.[3]

Adoption of a Filing System for Commencing Actions

Service of the summons, not filing, traditionally marked the commencement of the action in New York. While retaining that rule for the lower courts, the state in the early 1990s adopted the filing rule – as used in the federal courts – but only for the Supreme and County courts, retaining the "service" rule for the lower courts.

The rule has worked out okay, but only through an amendment made in the mid-1990s eliminating an ill-considered feature of the original filing rule. The feature required that proof of service be filed within 120 days after the filing of the summons and complaint, and automatically "deemed" the action dismissed if that filing was not made. The rule proved draconian and unworkable, dismissing by the hundreds cases in which service had been timely and properly made but proof of service had not been filed within the allotted time. Repealing this silly requirement and adopting instead the federal rule that refuses to make the filing of proof of service a critical step, the Legislature restored good sense to the filing system, and it has worked well since.

Expansion of Personal Jurisdiction

The celebrated case of *Pennoyer v. Neff*,[4] a product of the 1870s, which held that the only way for a state court to obtain personal jurisdiction over defendants was to serve process on them while they were physically present in the state, lost its hegemony just before the midway mark of the 20th century. It happened in 1945 with the *International Shoe* case.[5] But it took a good piece of the next half-century before the case's jurisdictional invitation was fully understood, and exploited. *International Shoe* adopted, unequivocally, the concept of "long-arm jurisdiction" – until then just hinted at in collateral developments – in which a non-domiciliary defendant could be subjected to the jurisdiction of a court even if served with its process outside the state, as long as the claim arose out of something the defendant did in the state.

Long-arm jurisdiction, which is in essence a constitutional permission – construing the federal due process clause – to send process beyond state borders, requires a statute or rule to implement it. It took well into the 1950s and 1960s for the states to understand and exploit this huge jurisdictional opportunity. Many other states got started before New York. New York didn't step in until 1963, with the adoption of the CPLR, which contained CPLR 302, now one of the nation's most exploited long-arm statutes. It quickly compensated for its tardiness with a spurt of activity that has not abated.

CPLR 302 has grounded thousands of cases in which jurisdiction could not previously have been obtained because of the *Pennoyer* stricture. It is among the most important statutes on the procedural books. On its application hinges the key question whether a given case can be brought in New York, or must be farmed out to lawyers elsewhere. It is bread and butter not only to the parties but also to the bar.

It is also – if we may be allowed – one of the most colossal bores ever to afflict the law books. Every long-arm case is a mass of papers by both sides, the plaintiff trying to show adequate activity by the defendant within the state to support the long-arm jurisdiction and the defendant trying to show the opposite. The affidavits rise high, with the judge, hidden behind them, summoning forth all his powers to conceal his distaste for the inquiry – which is in almost every instance a *sui generis* immersion into the background facts of a single case to determine whether there's enough there to let the case go forward. One federal judge – the federal courts also apply the state long-arm statute under the adoptive provisions of a federal rule[6] – more candid than most, opened a long-arm inquiry with a statement so quotable that we quoted it.[7] He opened an opinion with the yawn that the case requires yet "another decision in the interminable line of cases applying the New York long-arm statute, CPLR § 302."[8]

CPLR 302 proves the adage that says that which is terribly important is not always terribly interesting.

Curtailment of *Quasi in Rem* Jurisdiction

Just as personal jurisdiction was expanded, the category of *rem* jurisdiction was curtailed, a see-saw effect: as personal jurisdiction went up, the need for *rem* jurisdiction went down. One of the *rem* categories is *quasi in rem* jurisdiction. For just about a century it had served as a possible basis for at least some relief against a non-domiciliary who was beyond personal jurisdiction but had property of some kind in the state. This category was virtually abolished by the U.S. Supreme Court in 1977 in *Shaffer v. Heitner*.[9] *Pennoyer* had allowed it as a kind of consolation for the rigid restrictions it had placed on personal jurisdiction. With *Pennoyer*'s restrictions on personal jurisdiction removed, its alternative concession of *quasi in rem* jurisdiction was a gift the bar no longer needed. Ergo, out went *quasi in rem* jurisdiction.

Rise of Pretrial Disclosure and Discovery

As the technicalities traditionally appended to pleadings were abandoned, the use of the pretrial disclosure devices rose in almost inverse proportion. The expansion of disclosure, inspired in large measure by the Federal Rules of Civil Procedure, was another of the CPLR's prime accomplishments. Narrow restrictions on depositions and on discovery were abandoned, and the whole of the disclosure arsenal was made available to both sides in litigation, with only a few narrow exceptions (mainly for privileged matter and materials prepared for litigation).

This attainment, ironically, was largely the work of the Court of Appeals rather than the Legislature. The Legislature carried forward as the disclosure criterion the requirement that the "matter" sought be

shown to be "material and necessary," a standard that produced constant dispute under prior law. Granted that the information sought was relevant, was it "material"? Did the other side really need it? What the drafters of the CPLR wanted to do was adopt the federal standard, which makes all relevant information available without any brook with materiality or necessity. They failed with the Legislature, which struck the recommendation and just brought forward the "material and necessary" criterion. But with just a brief wave of a magic wand that it saves for special situations, the Court of Appeals itself did the original drafters' bidding. In *Allen v. Crowell-Collier Publishing Co.*,[10] it just *construed* the old – and continued – terminology into the more generous federal standard, and disclosure has been a procedural monarch ever since.

Summary Judgment Motions

The summary judgment remedy as contained in prior law was a narrow and restricted device, available only in a small category of actions. With the adoption of the CPLR, where its place is CPLR 3212, it lost most of its fetters and in due course lost them all. While not easy to get in any action – it has to convince a judge on paper alone that there is no issue of fact in the case that requires a trial – summary judgment is now available in all of them including the matrimonial action, the last of the previously restricted categories.

Trial by Jury

Trial by jury is now before a panel of six in a civil action, as against the traditional 12 of the past, and in some categories of cases the right to trial by jury has itself been shaken up a bit. Under procedures drafted during the last half-century, money cases below certain figures can be directed to mandatory court-annexed arbitration in some parts of the state. Unconstitutionality is avoided by allowing the loser in the arbitration to secure a "trial *de novo*" in court, and with a jury, albeit with some additional expense imposed on the party who seeks the trial *de novo*.

The Rise of Arbitration

Not to be confused with the "court-annexed" arbitration just noted is the regular out-of-court "arbitration," currently governed by Article 75 of the CPLR. This is the better known voluntary system of dispute resolution – as opposed to the court-connected system mentioned, which is compulsory.

Getting its start a few decades into the 20th century, arbitration at first met resistance and had to undergo quite a metamorphosis. Even into the last half of the century it had some significant restrictions, but most of these were gradually overcome.

The trend toward a more generous judicial attitude about recognizing the arbitral remedy as an alternative to a court action can be seen in a Court of Appeals opinion handed down just as the century drew to a close. In 1999, in *Board of Education v. Watertown Education Ass'n*,[11] the Court allowed arbitration in a teacher-firing case in which it had hardly two decades earlier taken a more restrictive view.

Arbitration itself has expanded beyond the commercial realm in which it started and can be seen today in labor, no-fault (tort), and still other cases, in some of which it takes on quasi-compulsory form.

Alternative Dispute Resolution (ADR) is the caption that today governs all devices for resolving disputes short of an ordinary action in court. Arbitration is the most prominent entry here, but not the only one. Mediation is another, and the ADR realm has other devices as well. With its potential for helping judicial calendars by relieving the judiciary altogether of cases which in an earlier age had nowhere else to go, ADR is another development of the late 20th century.

Article 78 and the Prerogative Writs

The disorderly trio of prerogative writs known as mandamus, certiorari and prohibition lost most of their disorder in the 1930s, when the Legislature adopted what has come to be known as the Article 78 proceeding, named after the niche it happened to get in the old Civil Practice Act when the article was first enacted. So great a place did the proceeding then earn for itself in the affections of the bar, that when the CPLR came in to replace the Civil Practice Act in 1963, the one article that the drafters made sure to keep in its same niche was Article 78. Article 78 had become the proceeding's name and it was unlikely that any other could be made to stick in short order.

Lawyers had been confusing the function of the writs for years, bringing on one when the mission was really another's. The result for this relatively innocent mistake was a dismissal. What the Article 78 proceeding did was abolish the three writs and provide instead that if the petitioner was seeking any item of relief previously associated with any of the three writs, all the petitioner had to do was invoke Article 78 and it would do the job. It would not even be necessary to identify which old writ might previously have been the one in point.

The later aspect of the Article 78 proceeding to be credited to the last half of the 20th century is the adoption of a device that would avoid the still lingering prospect of a dismissal

Those of us alive on August 31, 1963, will remember how difficult it was to control our excitement as midnight approached: the CPLR was about to take effect.

in situations involving the old writs. If the petitioner using Article 78 was wholly mistaken, and none of the three old writs was appropriate to the relief sought, the result before the CPLR was adopted was still a dismissal. The proper vehicle was an ordinary action, but it was often now too late for it. The CPLR cured this by including CPLR 103(c), which allows the court to convert the improperly brought proceeding into the should-have-been-brought action.

> The CPLR was but a fraction of the size of its predecessor.

The Age of the Money Sanction

While with few exceptions attorneys' fees remain unavailable as part of the winner's recovery in an ordinary money action, the last half of the 20th century saw the introduction of what has come to be known as the "frivolity" sanction. Begun in earnest in federal practice under Rule 11 of the Federal Rules of Civil Procedure, in due course the federal rule inspired New York counterparts. In the mid-1980s, CPLR 8303-a was enacted, allowing the courts to impose compensatory (recompensing the other side) and punitive sanctions for the interposition of what the court found to be a frivolous claim or defense: that it had no ground whatever in law or fact and was interposed just to harass or threaten.

It was limited to tort cases, however, and since it covered only frivolous claims and defenses, it didn't cover the myriad of other points in a litigation at which a party could be accused of frivolous conduct. This was cured by the court system itself, which decided to act without further invitation from the Legislature. Rule 130-1 was adopted. It allows the court to make a costs assessment and/or impose a punitive sanction for any frivolous conduct at all: frivolous motion, appeal, delay, courtroom conduct, etc.

The rule just about took over the realm, generating scores of cases punishing with monetary assessments frivolous conduct by parties or lawyers. Both are subject to the assessments. With the rule taking over, the statute, CPLR 8303-a, was seldom heard from afterwards.[12]

A later development was the elimination of any limit on the amount of the compensatory assessment. It could be in any sum a party showed it incurred because of the other side's behavior. On the punitive side, however, a $10,000 limit applies.

Enforcement of Judgments

A plaintiff seeking to levy on a judgment or attachment under prior law was confronted with a bewildering list of property interests of the defendant that the plaintiff would be allowed to pursue. The CPLR eliminated the list and eased the creditor's path by authorizing pursuit of any property interest the defendant had which by law he could assign.[13] Since modern property concepts permit the assignment of just about everything, this made just about everything available to the owner's judgment and attachment creditors.

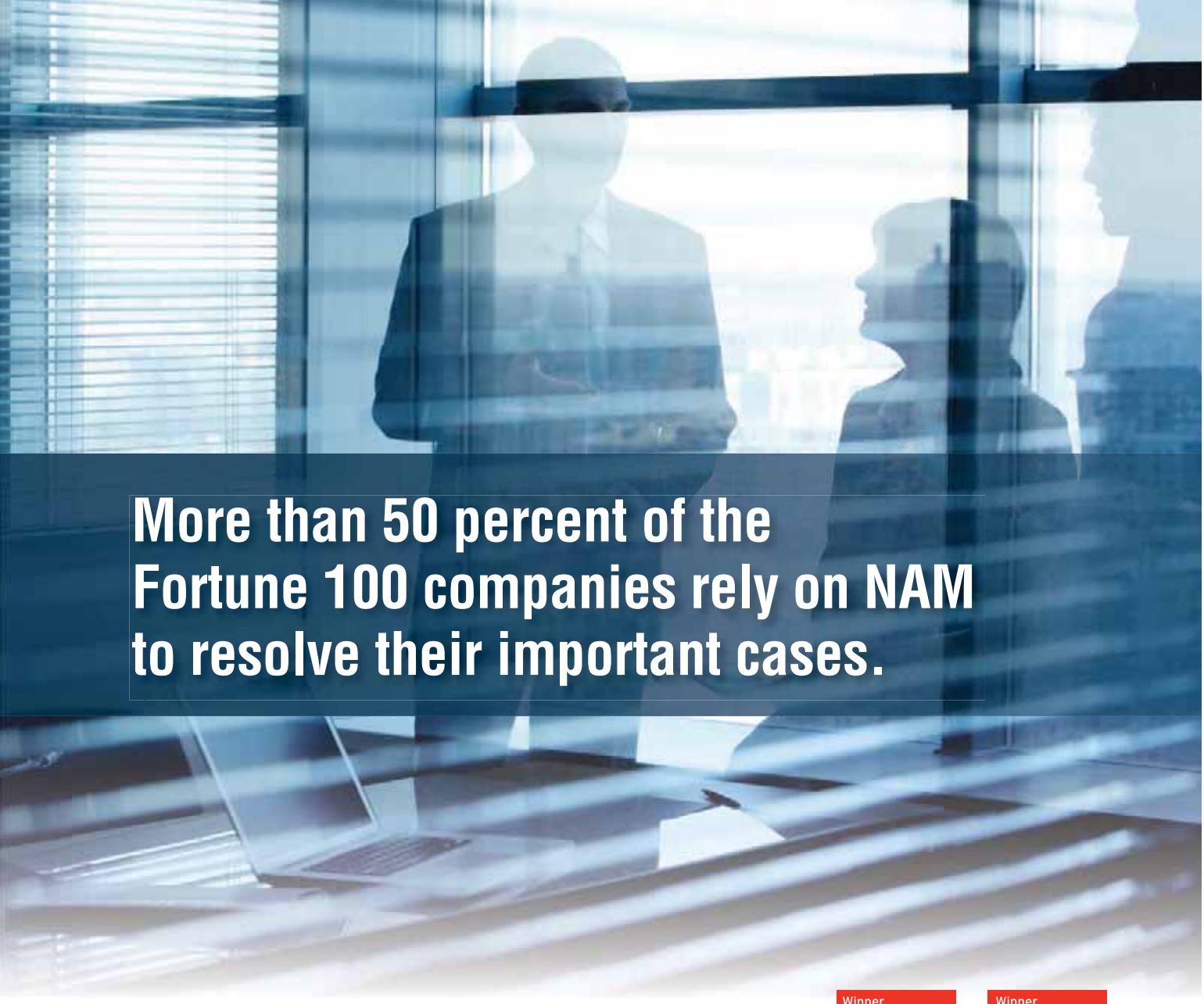
A big and a clearly troublesome exception, however, was the intangible property interest. Where the defendant was owed a debt of some kind by a third person (a garnishee), and the debt would not become due until some contingency occurred, CPLR 5201(a) would not allow the creditor to pursue the debt unless it was shown that the contingency was certain to occur, as by mere passage of time, or upon the death of some designated person.

This made contingent intangibles unavailable to creditors – in an age when contingent intangibles could prove to have enormous value – if there was anything at all in the picture that might prevent the debt from ripening into an economically valuable thing. The Court of Appeals did the system a great service by in essence abolishing this restriction in 1976 in *Abkco Industries, Inc. v. Apple Films, Inc.*[14] P had a contract that entitled it to part of the profits of a Beatles film. It tried to levy against those profits but was met with the argument that since the film could fail, this "debt" turned on a contingency – the success of the film – and it might not be a success. Let me take that chance, pleaded the creditor, and the Court of Appeals did. It held in *Abkco* that the plaintiff could treat the "debt" as "property," and thus bring it within subdivision (b) of CPLR 5201 – which had no contingency restrictions – and thus avoid the bar of subdivision (a), which did. This seemingly narrow holding was a big step in the enforcement of judgments.

Conclusion

Those are a few of the developments of the last half of the 20th century. We could of course cite many others, but these are all we've got space for in this article. ■

1. See *Foley v. D'Agostino*, 21 A.D.2d 60, 248 N.Y.S.2d 121 (1st Dep't 1964), which was to be followed throughout the state and cited favorably by the Court of Appeals.
2. *See, e.g., Schmidt v. Merchants Despatch Transp. Co.*, 270 N.Y. 287, 200 N.E. 824 (1936).
3. *Flanagan v. Mt. Eden Gen. Hosp.*, 24 N.Y.2d 427, 301 N.Y.S.2d 23 (1969); CPLR 214-a.
4. 95 U.S. 714 (1877).
5. 326 U.S. 310 (1945).
6. Rule 4(k)(1)(A) of the Federal Rules of Civil Procedure.
7. *See* David D. Siegel, *New York Practice* § 86 (3d ed. 1999).
8. *Orient Mid-East Lines, Inc. v. Albert E. Bowen, Inc.*, 297 F. Supp. 1149, 1150 (S.D.N.Y. 1969) (Tyler, J.).
9. 433 U.S. 186 (1977).
10. 21 N.Y.2d 403, 288 N.Y.S.2d 449 (1968).
11. 93 N.Y.2d 132, 688 N.Y.S.2d 463 (1999).
12. *See* David D. Siegel, *New York Practice* § 414A (3d ed. 1999).
13. CPLR 5201(b).
14. 39 N.Y.2d 670, 385 N.Y.S.2d 511. *See* David D. Siegel, *New York Practice* § 489 (3d ed. 1999).



NAM CHOSEN AS THE #1 ADR FIRM

For the Second Year in a Row in the
New York Law Journal Rankings Survey

Winner
Best ADR Provider
NAM
2011
New York
Law Journal
Reader Rankings

Winner
Best ADR Provider
NAM
2012
New York
Law Journal
Reader Rankings

NAM

NATIONAL ARBITRATION AND MEDIATION

The Better Solution

122 East 42nd Street, Suite 803, New York, New York 10168

Additional Locations: Garden City, Brooklyn, Staten Island, Westchester and Buffalo

(800) 358-2550 www.namadr.com

John R. Higgitt (jhiggitt@courts.state.ny.us) is a principal court attorney-referee to the Administrative Judge for Civil and Criminal Matters of the Twelfth Judicial District (Hon. Douglas E. McKeon), a member of the Advisory Committee on Civil Practice to the Chief Administrative Judge of the Courts of the State of New York, a reporter to the Committee on the New York Pattern Jury Instructions, Civil, and a reporter to the Committee on the Bench Book for Trial Judges – New York. Sophia Rackman, Esq., a law clerk to Justice McKeon, assisted in the editing of this article. The views expressed here are the author's own.

The Emergence of "E-Service" Under CPLR 308(5)

By John R. Higgitt

On September 1, 2013, the Civil Practice Law and Rules celebrated its 50th anniversary as New York's civil procedure charter. Enacted at a time when telephones had rotary dials and televisions had "rabbit ears," the original CPLR did not mention computers, email or "social media." Even now, after many amendments to its provisions, the CPLR contains scarce references to the technological devices and means of today's society. Yet the CPLR has, in large measure, stood the test of time: many of its provisions were drafted to accommodate technological advances, permitting lawyers and courts to apply quinquagenarian statutes to modern procedural issues.[1] One provision that remains in fashion is CPLR 308(5),[2] which, in an appropriate case, allows a court to devise a method of service of process. The statute has been employed to authorize some forms of "e-service" – service effected by electronic processes.

This article will review where CPLR 308(5) has been and where it is now, and will highlight some special considerations both court and counsel should be cognizant of when contemplating e-service of process.

CPLR 308(1)–(4)

Under New York law, personal jurisdiction has three elements: (1) a basis for the exercise of jurisdiction over a person, (2) notice to the defendant of the action and (3) proper commencement of the action.[3] Notice comes from proper service of process, and such service is therefore a critical ingredient of personal jurisdiction.[4] CPLR 308, which was part of the original CPLR, lists the methods that a plaintiff[5] can use to serve process on a competent adult – an "individual."[6]

CPLR 308(1) contains the venerable method of service of process: personal delivery of the process to the defendant in the State. Subdivision 2 provides for the ever-popular "deliver-and-mail" service, which allows a plaintiff to serve process by (a) "delivering the summons within the state to a person of suitable age and discretion at the [defendant's] actual place of business, dwelling place or usual place of abode," and (b) mailing it to the defendant's last known residence or his or her actual place of business. A plaintiff can use either CPLR 308(1) or (2) at the outset; efforts to achieve personal delivery need

not be made before attempting service through deliver-and-mail.[7] The next stop in CPLR 308 is the seldom-used subdivision 3, which allows for service of process on an agent duly designated by a defendant to accept service.[8] CPLR 308(4) is home to the "affix-and-mail" method of service. Under this subdivision, a plaintiff can effect service by (a) "affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode within the state of the [defendant]," and (b) mailing it to the defendant at his or her last known address or actual place of business. A plaintiff cannot use affix-and-mail service in the first instance; it's available only if service cannot, with due diligence, be achieved by personal delivery or deliver-and-mail.

The Basics of CPLR 308(5)

While each of the first four subdivisions of CPLR 308 provides a specific method of service, the fifth permits a court, on a plaintiff's motion,[9] to authorize service in a manner improvised to meet the peculiarities of a given case.[10] CPLR 308(5), colloquially referred to as "alternate," "alternative" and "expedient" service (we'll use "alternate" here), states that service of process can be effected "in such manner as the court, upon motion without notice, directs, if service is impracticable under paragraphs one, two and four of this section."[11]

The meaning of the word "impracticable" in the context of CPLR 308(5) "is not capable of easy definition"; "[i]ts meaning depends on the facts and circumstances surrounding each case."[12] Translation: whether service is impracticable is a sui generis inquiry. To establish that service is impracticable, a plaintiff must make "some showing" that service of process could not be effected through the conventional[13] methods of service.[14] A plaintiff need not attempt service under the methods listed in CPLR 308(1), (2) and (4) before seeking an order authorizing alternate service. Although prior attempts to serve the process on the defendant are useful in demonstrating to the court that conventional service is impracticable, if efforts to serve a defendant by personal delivery, deliver-and-mail, and affix-and-mail would have been futile, a plaintiff may obtain an order permitting alternate service without first undertaking those efforts.[15] Ultimately, though, a plaintiff must ensure that service of process by conventional methods is indeed impracticable, because a defendant can challenge the plaintiff's use of CPLR 308(5) service on the ground that service under those methods was not impracticable.[16] And that challenge may come at a time when the opportunity to commence a new action and effect proper service has lapsed, thanks to the applicable statute of limitations.[17]

In crafting the alternate method of service,[18] a court is required to devise one that is reasonably calculated,[19] under all of the circumstances, to apprise the defendant of the action.[20] The federal Constitution, said the Supreme Court of the United States in *Mullane v. Central Hanover Bank & Trust Co.*, requires nothing less.[21] A court has broad discretion to fashion a method of service adapted to the particular facts of the case before it.[22] But the court and the plaintiff must identify a method suitable for the individual case because, like the issue of impracticability, the issue of the reasonableness of the court-devised method of service may be challenged by the defendant who was subjected to alternate service.[23]

Methods of Alternate Service Under CPLR 308(5) – The Past

During the first several decades of the CPLR's reign, the courts fashioned numerous methods of alternate service of process that passed muster under the *Mullane* standard, including sending the process by ordinary mail to a defendant's last known residence;[24] delivering the process to the New York State Secretary of State for a defendant-driver involved in a motor vehicle accident that occurred in New York, with registered mailing of the process to the defendant's last known residence and publication of the process;[25] sending the process by ordinary mail to the defendant's last known address and delivering the process to the defendant's insurer;[26] delivering the process to the defendant's uncle, who had served as the defendant's attorney;[27] delivering the process to the defendant's son;[28] and delivering the process to the defendant's attorney.[29] Mailing the process, delivering it to a defendant's insurer, attorney or an individual who was likely to pass it along to the defendant, and publishing it in a newspaper:[30] these were the methods of alternate service available for the better part of the CPLR's first 40 years on the scene. Prosaic? Yes. But the court's creativity in devising other methods was stymied by the state of technology.[31] That was then.

> CPLR 308(5) has been employed to authorize some forms of "e-service" – service effected by electronic processes.

Methods of Alternate Service Under CPLR 308(5) – The Present

This is now. Over the last decade, exceptional technological developments in the field of communications have increased dramatically the number of ways people can

correspond with one another.[32] Two of the most popular developments in this regard are email and social media. Not long after these modern modes of transmitting the written word began attracting account users, the courts began considering whether alternate service under CPLR 308(5) could be achieved using email and/or social media.

The first reported decision on the subject from a New York State court was *Hollow v. Hollow*.[33] In *Hollow*, the plaintiff commenced an action against her husband, seeking a divorce. Approximately 20 months before the action was commenced, the defendant relocated to Saudi Arabia where he was employed by an engineering company. The defendant did not return to the United States following his relocation to the Middle East, and the only manner in which he communicated with the plaintiff was by email. The plaintiff retained an international process serving firm, which informed the plaintiff of the significant hurdles in effecting proper service on the defendant in Saudi Arabia: a letter rogatory would have to be submitted to and acted upon by the Saudi government before service in that country could be attempted (a lengthy process); personal service on the defendant could not be achieved because he lived and worked inside a secure compound owned by his employer; and an attempt to serve a member of the security force guarding the compound would expose the process server to criminal charges. The plaintiff attempted to obtain the cooperation of the defendant's employer in effecting service on him, but the employer refused to accept service on his behalf or otherwise assist the plaintiff. The plaintiff subsequently sought to serve the defendant by email under CPLR 308(5).

After acknowledging the novelty of the issue before it, Supreme Court, Oswego County, concluded that the plaintiff had demonstrated that service was impracticable, and that alternate service should be directed. As to the method of alternate service, the court, relying on two federal court decisions,[34] determined that service of process on the defendant by email was a means reasonably calculated to provide him with notice of the action. The court stressed that the defendant had, in effect, "secreted himself behind a steel door, bolted shut."[35] Moreover, the defendant chose to communicate with the plaintiff (and his children) exclusively by email. In addition to sending the process to the defendant's last known email address, the court required the plaintiff to send the process to the defendant by international registered air mail and standard international mail.

The next reported decision from a New York court on e-service was *Snyder v. Alternate Energy Inc.*[36] The plaintiffs in *Snyder* commenced a breach of contract action against multiple defendants. While the plaintiffs were able to serve one of the defendants by a conventional method, the plaintiffs could not serve the remaining two defendants (one individual, one corporation) through conventional methods. Despite a diligent search, the plaintiffs were unable to find a place where either the individual, or the corporation could be served physically with the process, and the corporation was not registered with the New York State Secretary of State. But the plaintiffs' counsel did obtain an email address for the individual and communicated with the individual using that address. Features provided by the email server (America Online) indicated to plaintiffs' counsel that the emails he sent to the individual were opened and notified counsel when the individual (or someone using the individual's log-in information) was online. The plaintiffs moved for alternate service under CPLR 308(5) and proposed to effect service on the individual and the corporation by emailing the process to the email address used by the individual. The court granted the motion.

In *Hollow,* the court concluded that the plaintiff had demonstrated that service was impracticable, and that alternate service should be directed.

Highlighting the plaintiffs' showing that the individual was "regularly on line using an e-mail address that by all indications [wa]s his,"[37] the court concluded that service by email was reasonably calculated to apprise the individual and the corporation of the lawsuit. The court imposed some thoughtful additional requirements to the alternate service: (1) the plaintiffs were to send the email containing the process on two consecutive days; (2) the emails were to "bear a prominent subject line indicating that what was being sent were legal papers in an attachment that was to be opened immediately";[38] (3) the plaintiffs were to mail the process to the individual's and the corporation's last known addresses; and (4) the plaintiffs' counsel was directed to call the individual at a cellular phone number provided to counsel by the individual in one of the emails between them and alert the individual that e-service was being made on him.

Snyder was cited with approval by the Appellate Division, First Department, in *Alfred E. Mann Living Trust v. ETIRC Aviation S.A.R.L.*[39] That court commented that service of process by email is not prohibited by the CPLR, federal law or the Hague Convention and noted that both New York state courts and federal courts have authorized

e-service.[40] *Snyder* and *Alfred E. Mann Living Trust* were in turn cited by the court in *Wang v. TIAA-CREFF Life Insurance Co.*[41] In *Wang*, the court granted a plaintiff's motion for alternate service under CPLR 308(5) and permitted the plaintiff to serve certain of the defendants with the process by email (coupled with additional mailings of the process).

While several New York State trial courts held and the First Department stated that email could be used as a method of alternate service of process under CPLR 308(5), no Department of the Appellate Division so held. That changed in April 2013, when the Fourth Department issued its decision in *Safadjou v. Mohammadi*.[42]

In *Safadjou*, the plaintiff-husband commenced a matrimonial action against the defendant-wife. The defendant left the United States with the parties' child and went to Iran to live with her family. Because the United States and Iran do not have diplomatic relations and Iran is not a signatory to the Hague Convention, the plaintiff obtained an order under CPLR 308(5) permitting him to serve the defendant by (1) personally serving the process on the defendant's parents (with whom the defendant was residing in Iran); (2) mailing the process to the defendant at her parents' address; and (3) serving the defendant through the plaintiff's Iranian attorneys in accordance with Iranian law. After the plaintiff tried but was unable to serve the process in accordance with the court's initial alternate service order, the court permitted the plaintiff to email the process to two email addresses that the defendant maintained.

The Fourth Department affirmed the judgment of divorce that was ultimately entered in the action in the plaintiff's favor, rejecting the defendant's challenges to the efficacy of the e-service employed in the action. The Appellate Division found persuasive the facts that, for several months prior to the motion for alternate service, the parties had communicated by email, the defendant was using the two email addresses subsequently used to effect e-service, and the defendant's acknowledgment that, following the e-service, she received an email from the plaintiff's attorney that the attorney sent to the two email addresses.[43]

An important point that emerges from *Hollow*, *Snyder*, *Alfred E. Mann Living Trust*, *Wang*, and *Safadjou* is that alternate service of process under CPLR 308(5) by email is permissible under *Mullane* if a plaintiff demonstrates that a defendant is reasonably likely to receive the email – that is, that e-service would, under the particular circumstances, be reasonably calculated to provide the defendant with notice. A plaintiff can establish the reliability of an email address as a conduit for service of process by (1) demonstrating that a defendant himself or herself used the address to receive email, and that the address was so used by the defendant in the recent past,[44] or (2) demonstrating that a defendant acknowledged that a particular email address belongs to him or her, and that the defendant likely uses that address to receive email.[45]

Both the court and the plaintiff should consider the following when contemplating alternate service of process by email:

- To which email address or addresses must the process be sent?
- What message must be placed in the subject line of the email?
- What text must be placed in the body of the email?
- How many times must the email be sent, and over what period of time?
- Who can (or cannot) send the email?[46]
- What documents should be attached to the email (e.g., the summons and complaint, the order allowing alternate service)?
- In which format must the documents be attached to the email (e.g., PDF, Microsoft Word)?

To increase the likelihood that alternate service by email will survive a challenge by the defendant on the ground that it was not reasonably calculated to apprise him or her of the action, the court should strongly weigh the use of e-service-plus: one or more emails coupled with a familiar alternate method of service, e.g., sending the process by ordinary mail to the defendant's last known residence, delivering the process to a person who

is likely to pass it along to the defendant, publication of the process. Indeed, in most of the cases authorizing email service under CPLR 308(5), the courts have required e-service-plus.

Over the past 10 years our courts have been receptive to requests under CPLR 308(5) to effect service of process by email. They are now beginning to encounter requests to effect alternate service through that other ubiquitous modern marvel: social media. Facebook, Myspace, Twitter and the like are utilized by millions of people worldwide to share and exchange information and ideas. Is a person susceptible to service of process through social media? Only one court in New York has tackled the issue so far.

In *Fortunato v. Chase Bank USA, N.A.*,[47] the plaintiff alleged that another person fraudulently opened a credit card account using the plaintiff's name and made charges with the card without the plaintiff's knowledge. The defendant, which issued the credit card, obtained a default judgment against the plaintiff for the unpaid balance on the account and garnished the plaintiff's wages until the judgment was satisfied. The plaintiff subsequently commenced an action against the defendant to recover damages, alleging violation of the Fair Credit Reporting Act, abuse of process, and conversion. The defendant impleaded a third-party defendant, the plaintiff's estranged daughter, seeking, among other things, contribution or indemnity from her on the theory that she had opened the account in her mother's name and made the charges with the card. The defendant, third-party plaintiff attempted to locate the third-party defendant but was unable to do so, prompting it to move to effect service under CPLR 308(5).[48] The defendant, third-party plaintiff requested that the court authorize service of the impleader process by email, Facebook message, delivery of the process to the third-party defendant's mother (the plaintiff), and by publication. The request for e-service was predicated on the defendant, third-party plaintiff's discovery of what it believed was the third-party defendant's Facebook profile, which included an email address.

The United States District Court for the Southern District of New York rejected the defendant, third-party plaintiff's request to serve the impleader process by posting a private message on the Facebook profile that purportedly belonged to the third-party defendant or sending the process by email to the address listed on that profile. The court wrote, in relevant part, that

> [s]ervice by Facebook is unorthodox to say the least, and this Court is unaware of any other court that has authorized such service. Furthermore, in those cases where service by email has been judicially approved, the movant supplied the Court with some facts indicating that the person to be served would be likely to receive the summons and complaint at the given email address. Here, [defendant, third-party plaintiff] has not set forth any facts that would give the Court a degree of certainty that the Facebook profile its investigator located is in fact maintained by [the third-party defendant] or that the email address listed on the Facebook profile is operational and accessed by [her]. Indeed, the Court's understanding is that anyone can make a Facebook profile using real, fake, or incomplete information, and thus, there is no way for the Court to confirm whether the [individual] the investigator found is in fact the third-party Defendant to be served.[49]

So what's next? Service by text message? Twitter? Telepathy?

While rejecting too the request to serve the third-party defendant by delivering the process to the third-party defendant's mother (the mother and daughter had no meaningful relationship), the court permitted the defendant, third-party plaintiff to serve the third-party defendant under CPLR 308(5) by publication of the process in several newspapers serving communities in which she may have resided.[50]

The court in *Fortunato* rejected e-service by Facebook because the defendant, third-party plaintiff did not submit evidence indicating that the subject Facebook profile was in fact that of the third-party defendant. The court did not state that such service was *never* available under CPLR 308(5). As one authoritative commentator observed, "[a]lthough the court in *Fortunato* took a dim view of improvised service by means of Facebook, other cases may arise in which a Facebook profile is sufficiently authenticated as being that of the party to be served coupled with a showing that such party actually uses [his or] her Facebook page for communicating."[51] Thus, alternate service by posting of process on a Facebook profile may be authorized by a court, provided the plaintiff makes a showing that a particular Facebook profile is a reliable means of communicating with a defendant, such that a posting would be reasonably calculated to apprise a defendant of the action.[52]

Conclusion

E-service under CPLR 308(5) has come very far, very fast. Methods of alternate service of process that were

unimaginable at the birth of the CPLR 50 years ago are now being used to secure personal jurisdiction over hard-to-find defendants. So what's next? Service by text message? Twitter? Telepathy? Alliteration aside, a new day has dawned with regard to the methods by which service of process can be achieved. ■

1. *See generally* Patrick M. Connors, *The CPLR Turns 50! Taking Stock of Good, Bad and Ugly*, N.Y.L.J., Sept. 11, 2013, p. 3 (reflecting on the impact of the CPLR in its first 50 years and reviewing some of the strengths and weaknesses of it).

2. From the effective date of the CPLR through the early 1970s the alternate service provision in CPLR 308 was subdivision 4. That changed when CPLR 308 was amended to insert ahead of the alternate service subdivision a new provision regarding service on an individual's duly designated agent. Thus, CPLR 308(4) was renumbered to CPLR 308(5).

3. *See* David Siegel, New York Practice §§ 58, 63 (Connors 5th ed.) (Siegel, New York Practice); *see also* Alexander, Practice Commentaries, McKinney's Cons. Laws of New York, Book 7B, CPLR 301, C301:1 (Alexander, Practice Commentaries).

4. While proper service of process is necessary for a court to obtain personal jurisdiction over a defendant, an objection to improper service can be waived by a defendant. *See* CPLR 3211(e); Siegel, New York Practice § 274.

5. This article is couched in terms of a plaintiff using CPLR 308(5) to effect alternate service. Any party, however, who must serve process in accordance with CPLR article 3 may seek relief under subdivision 5 (e.g., a third-party plaintiff).

6. Different provisions govern service of process on defendants other than individuals. *See*, *e.g.*, CPLR 307 (service on New York State or state official), 309 (service on infant or incapacitated person), 310 (service on partnership), 310-a (service on limited partnership), 311 (service on corporation or governmental subdivision), 311-a (service on limited liability company), 312 (service on a court, board or commission); Siegel, New York Practice §§ 69, 70.

7. Siegel, New York Practice § 66.

8. *See id.* at § 73.

9. Some form of motion (a motion under CPLR 2214 or a cross motion under CPLR 2215) must be made by a plaintiff to allow for alternate service; the court lacks the authority to authorize alternate service sua sponte. *See* Alexander, Practice Commentaries, CPLR 308, C308:6.

10. CPLR 308(5) had no antecedent in New York civil procedure. *Hoggard v. Hoggard*, 45 A.D.2d 38 (1st Dep't 1974); Siegel, New York Practice § 75.

11. We are concerned here with alternate service of process on an individual. Where a plaintiff wants the court to devise a method of service of process on a corporate entity, CPLR 311(b), which is similar to CPLR 308(5), should be consulted. *See* Siegel, New York Practice §§ 70, 75; Alexander, Practice Commentaries, CPLR 311, C311:3.

12. *Liebeskind v. Liebeskind*, 86 A.D.2d 207 (1st Dep't 1982), *aff'd*, 58 N.Y.2d 858 (1983).

13. "Conventional" here refers to service under CPLR 308(1), (2), (4).

14. *Markoff v. S. Nassau Cmty. Hosp.*, 91 A.D.2d 1064 (2d Dep't 1983), *aff'd*, 61 N.Y.2d 283 (1984); *see Saulo v. Noumi*, 119 A.D.2d 657 (2d Dep't 1986); *see also Tetro v. Tizov*, 184 A.D.2d 633 (2d Dep't 1992).

15. *See Astrologo v. Serra*, 240 A.D.2d 606 (2d Dep't 1997); *Liebeskind*, 86 A.D.2d 207; Alexander, Practice Commentaries, CPLR 308, C308:6; *see also* Siegel, New York Practice § 75.

16. *See* Alexander, Practice Commentaries, CPLR 308, C308:6 (noting that a defendant can challenge the propriety of the plaintiff's use of CPLR 308(5) service by motion to dismiss under CPLR 3211(a)(8) or by asserting defense of improper service in answer; the issue can arise too on a defendant's motion under CPLR 5015 to vacate a default judgment).

17. *See* Siegel, New York Practice § 75.

18. Although the court has discretion to direct the alternate method of service that it concludes is appropriate on the facts before it, the plaintiff should, in her papers supporting the motion for alternate service, suggest one or more potential methods. *See* Siegel, New York Practice § 75. Thoughtful suggestions on this score may aid the court in selecting a method that can

withstand a subsequent challenge by the defendant to the reasonableness of the method under *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

19. The method of service devised by the court need not guarantee that the defendant will receive notice of the lawsuit. *See Dobkin v. Chapman*, 21 N.Y.2d 490 (1968); *Harkness v. Doe*, 261 A.D.2d 846 (4th Dep't 1999). Rather, the method must be one that is reasonably calculated to provide the defendant with notice.

20. *Mullane*, 339 U.S. 306; *see Dobkin*, 21 N.Y.2d at 502 n.5.

21. 339 U.S. 306.

22. *Dobkin*, 21 N.Y.2d 490.

23. *See* Alexander, Practice Commentaries, CPLR 308, C308:6. Should the alternate method of service devised by the trial court prove offensive to an appellate court, the reviewing court may, in lieu of dismissal of the action for want of proper service, grant an extension of time to serve the defendant under CPLR 306-b and designate a proper method. Siegel, New York Practice § 75 n. 20; *see* Alexander, Practice Commentaries, CPLR 308, C308:6.

24. *Dobkin*, 21 N.Y.2d 490.

25. *Id.* (*Sellars v. Raye*).

26. *Id.* (*Keller v. Rappoport*); *Esposito v. Ruggerio*, 193 A.D.2d 713 (2d Dep't 1993); *see also Rego v. Thom Rock Realty Co.*, 201 A.D.2d 270 (1st Dep't 1994); *Gibson v. Salvatore*, 102 A.D.2d 861 (2d Dep't 1984); *Maloney v. Ensign*, 43 A.D.2d 902 (4th Dep't 1974); *Kropf v. King*, 30 A.D.2d 327 (2d Dep't 1968).

27. *Osserman v. Osserman*, 92 A.D.2d 932 (2d Dep't 1983).

28. *Sybron Corp. v. Wetzel*, 61 A.D.2d 697 (4th Dep't 1978); *see Morgan Guar. Trust Co. of N.Y. v. Hauser*, 183 A.D.2d 683 (1st Dep't 1983) (delivery of process to person bearing same last name as defendant who apparently knew defendant); *but see U.S. Bank Nat'l Ass'n v. Patterson*, 63 A.D.3d 1545 (4th Dep't 2009) (service of process on defendant's ex-wife and publication of process insufficient under *Mullane*).

29. *See Franklin v. Winard*, 189 A.D.2d 717 (1st Dep't 1993).

30. Publication of the process in one or more newspapers (or periodicals) will, standing alone, rarely constitute notice reasonably calculated to alert a defendant of an action. *Mullane*, 339 U.S. 306; *cf. Fortunato v. Chase Bank USA, N.A.*, 2012 WL 2086950 (S.D.N.Y. 2012) (authorizing alternate service under CPLR 308(5) by publication). Generally, its utility lies as an additional source of potential notice of the action, a measure prescribed by the court as one of several acts constituting alternate service.

31. A glimmer of the imaginative methods of alternate service on the horizon came in *New England Merch. Nat'l Bank v. Iran Power Generation & Transmission Co.*, 495 F. Supp. 73 (S.D.N.Y. 1980). In *New England Merchants*, the court, applying Rule 4 of the Federal Rules of Civil Procedure, which allows for court-devised service, authorized service of process by telex message to the defendants, coupled with a mailing of the process and delivery of it to the defendants' attorneys (N.B.: telex is a communication service employing teletypewriters connected to a telecommunications network that facilitates text-based messages).

32. As the court in *Snyder v. Alternate Energy Inc.*, 19 Misc. 3d 954, 963 (Civ. Ct., N.Y. Co. 2008), put it:

> Over the last decade, the world has seen technology advance on a scale and at a speed that staggers the imagination; what is the latest technological innovation one year is outmoded the next. And nowhere have these advances been greater felt than in the area of communications. Ten years ago we communicated largely by telephone, mail or fax. Now it is e-mail that is the preferred method of communication, both locally and globally.

33. 193 Misc. 2d 691 (Sup. Ct., Oswego Co. 2002).

34. *Id.* at 694–95. The court cited and quoted *Rio Props., Inc. v. Rio Int'l Interlink*, 284 F.3d 1007 (9th Cir. 2002) and *In re Int'l Telemedia Assocs., Inc.*, 245 B.R. 713 (N.D. Ga. 2000), two of the leading decisions concerning service of process by email under Rule 4 of the Federal Rules of Civil Procedure. Both *Rio Properties* and *International Telemedia* endorsed service of process by email in conjunction with additional means of affording the defendant notice of the lawsuit (e.g., facsimile transmission of process, mailing of process to defendant's last known address). Numerous federal district courts in New York have addressed the issue of e-service, most concluding that email service was an appropriate method of service under the facts of the case. *See, e.g.*, *Shamoun v. Mushlin*, 2013 WL 91705 (S.D.N.Y. Jan. 13, 2013) (applying CPLR 308(5); authorizing email service); *Philip Morris USA Inc. v. Veles Ltd.*, 2007 WL 725412 (S.D.N.Y. Mar. 12, 2007) (applying Rule 4 of Federal Rules of Civil Procedure; authorizing email service); *Tishman v. The Associated Press*, 2006 WL 288369 (S.D.N.Y. Feb. 6, 2006) (applying CPLR 308(5); authorizing email service); *D.R.I. v. Dennis*, 2004 WL 1237511 (S.D.N.Y. June 3, 2004) (applying CPLR 308(5); authorizing email service); *see also Ryan v. Brunswick Corp.*, 2002 WL 1628933 (W.D.N.Y. May 31, 2002) (finding that email service under Rule 4 of the Federal Rules of Civil Procedure is constitutionally permissible); *cf. Ehrenfeld v. Mahfouz*, 2005 WL 696769 (S.D.N.Y. Mar. 23, 2005) (noting that email service under the Federal Rules of Civil Procedure is constitutionally permissible in some cases, but declining to authorize it because plaintiff did not establish that defendant was likely to receive email sent to the address suggested by plaintiff).

35. 193 Misc. 2d at 695.

36. 19 Misc. 3d 954.

37. *Id.* at 962.

38. *Id.* at 962–63.

39. 78 A.D.3d 137, 141–42 (1st Dep't 2010).

40. The court did not have to determine whether alternate service under CPLR 308(5) by email was proper in the case before it, as the court held that, in the guaranty that was the subject of the litigation, the defendants had consented to the jurisdiction of the New York courts and waived both formal service of process and any objection based on lack of personal jurisdiction. Nevertheless, the opinion contained the first significant discussion by the Appellate Division on the subject of e-service.

41. 2012 WL 6707320 (Sup. Ct., N.Y. Co. 2012).

42. 105 A.D.3d 1423 (4th Dep't 2013).

43. *See N.Z. v. A.G.*, 40 Misc. 3d 696 (Fam. Ct., Onondaga Co. 2013).

44. *Safadjou*, 105 A.D.3d 1423; *Snyder*, 19 Misc. 3d 954; *Hollow*, 193 Misc. 2d 691; *see Rio Props., Inc.*, 284 F.3d 1007; *Shamoun*, 2013 WL 91705; *Philip Morris USA Inc.*, 2007 WL 725412.

45. *See Alfred E. Mann Living Trust*, 78 A.D.3d 137 (defendants acknowledged in contractual document that documents could be served on them by email at specified email addresses); *see also Tishman*, 2006 WL 288369; *In re Int'l Telemedia Assocs., Inc.*, 245 B.R. 713.

46. *See* CPLR 2103(a) (prohibiting service by a party to the action).

47. 2012 WL 2086950 (S.D.N.Y. June 7, 2012).

48. A federal district court in New York may apply CPLR 308(5) because service of that court's process can, under certain circumstances, be effected under the methods provided by New York law. *See* Siegel, New York Practice § 624.

49. 2012 WL 2086950 at *2 (internal citation omitted).

50. The court's selection of service by publication is notable because that form of service, "the least likely to be efficacious in conveying actual notice," Alexander, Practice Commentaries, CPLR 308, C308:6, at 213, is so rarely endorsed as a permissible method of alternate service. *See supra* note 30.

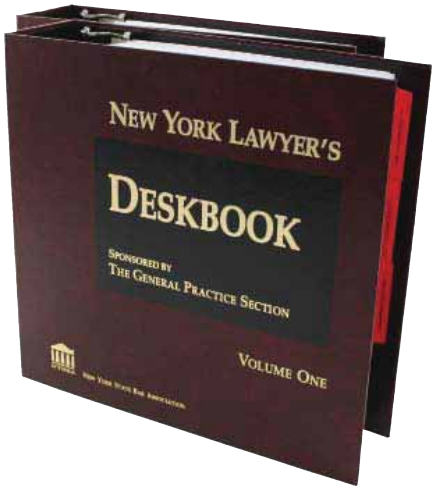
51. Alexander, Practice Commentaries, CPLR 308, C308:6, p 48 (2013 pocketpart).

52. *See Federal Trade Comm'n v. PCCare247 Inc.*, 2013 WL 841037 (S.D.N.Y. 2013) (applying Rule 4 of the Federal Rules of Civil Procedure and authorizing plaintiff to serve documents other than summons and complaint on defendants by, among other means, posting messages on their respective Facebook profiles); Michael C. Lynch, *You've Been "Poked"! "PCCare247" and Service of Process by Social Media*, N.Y.L.J., May 23, 2013.

NYSBA**BOOKS**

Winner of the ABA's Constabar Award

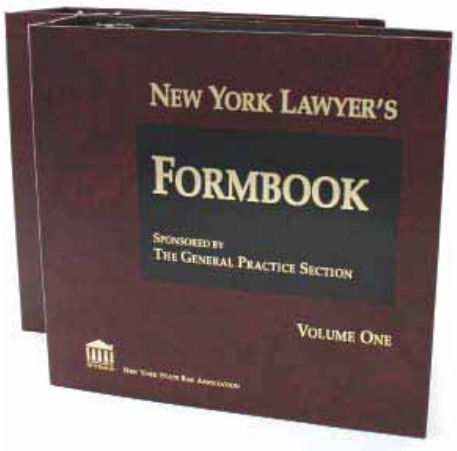
New York Lawyer's Deskbook



Written and edited by leading practitioners, the *New York Lawyer's Deskbook* is a three-volume, 3,000 page resource, covering 27 different areas of practice. Each chapter offers a clear, basic review of its subject and the necessary steps for handling basic transactions in that area, giving both new and seasoned practitioners a solid footing in practice areas that may be unfamiliar to them.

2012 • PN: 4150 • 2,960 pages • List Price: $375 • **Member Price $295**

New York Lawyer's Formbook



The *New York Lawyer's Formbook* is a 4-volume, 4,000 page companion to the *Deskbook*. *Formbook*'s 23 sections, covering 23 different areas of practice, familiarize practitioners with the forms and various other materials used when handling basic transactions in each area. Many of these forms and materials are referenced in the *Deskbook*.

The *Deskbook* and *Formbook* are excellent resources by themselves, and when used together, their value is substantially increased. Annual revisions keep you up to date in all 27 areas of practice.

2012 • PN: 4155 • 3,970 pages • List Price: $375 • **Member Price $295**

To order call **1.800.582.2452**
or visit us online at **www.nysba.org/pubs**

Order multiple titles to take advantage of our low flat rate shipping charge of $5.95 per order, regardless of the number of items shipped. $5.95 shipping and handling offer applies to orders shipped within the continental U.S. Shipping and handling charges for orders shipped outside the continental U.S. will be based on destination and added to your total. Prices do not include applicable sales tax.

Mention code: PUB2043 when ordering.

NYSBA

BY DAVID PAUL HOROWITZ

David Paul Horowitz (david@newyorkpractice.org) has represented plaintiffs in personal injury cases for over 25 years and is of counsel to Ressler & Ressler in New York City. He is the author of *New York Civil Disclosure* and *Bender's New York Evidence* (both by LexisNexis), as well as the 2008 and 2013 Supplements to *Fisch on New York Evidence* (Lond Publications). Mr. Horowitz teaches New York Practice at Columbia Law School, and Professional Responsibility and Electronic Evidence & Disclosure at Brooklyn Law School. In addition to presenting NYSBA's Annual CPLR Update Program statewide, he serves on the Office of Court Administration's CPLR Advisory Committee, as Associate Reporter to the New York Pattern Jury Instruction (P.J.I.) Committee, and is a frequent lecturer and writer on these subjects. This column first appeared in the January 2010 issue of the New York State Bar Association *Journal*.

CPR for the CPLR

Introduction

My breaking point arrived along with my 2010 New York State Court Rules. Two volumes. Neither containing the CPLR.

Imagine. In order to ascertain the rules of practice in our state courts, three volumes of material must be referenced. That's three volumes, none of them annotated. Just rules!

I have practiced in our state courts for over 20 years and taught New York Practice for almost 10 years, yet frequently I find myself saying, when a judge or colleague mentions a particular rule, "I didn't know that."

I used to be thrilled that I could go into any court in the state, from Riverhead to Buffalo, confident that I knew the general rules of practice and, with relatively little effort, could learn the quirks of a particular court or judge. Now I find myself worrying when I take the subway two stops from 60 Centre Street in Manhattan to 360 Adams Street in Brooklyn that I no longer know which rules are followed, modified, superceded, or simply ignored.

What happened?

What It Was

No doubt, the passage of time has played a role. The CPLR took effect on September 1, 1963, replacing the CPA.[1] John F. Kennedy was president. Hawaii had been a state for just over four years. And the Yankees were coasting toward the playoffs.[2] Oops, some things don't change.

It was a simpler time, illustrated by an early treatise covering the CPA, by A.L. Sainer, Esq., titled *The Adjective Law of New York*.[3] In a scant 300 pages, Mr. Sainer addressed civil pleadings and practice forms, evidence, criminal procedure, surrogate's practice, damages, and the Canons of Ethics. Disclosure did not warrant a section, or even chapter of its own. It was covered in just 10 pages, as a subtopic of evidence.

The function and goal of the new CPLR was simply and eloquently set forth in CPLR 104: "The civil practice law and rules shall be liberally construed to secure the just, speedy and inexpensive determination of every civil judicial proceeding."

What Changed

In that long ago, simpler time, both the Legislature and the New York Judicial Conference were empowered to make necessary changes in the CPLR. This is no longer the case:

> CPLR 102 provides that all changes to the CPLR must be done by the State Legislature. The CPLR cannot be changed via rule making authority, as was the case in the past when the New York Judicial Conference was authorized to enact changes to civil practice rules. That authority was rescinded in 1978. Even the legislature is limited in its ability to modify or amend the CPLR. The legislature may not adopt any amendment or new provision to the CPLR, which abridges substantive rights.[4]

With the CPLR solely the province of the Legislature, rulemaking by the Chief Administrator of the Courts has become the primary basis for implementing changes in civil practice:

> While the CPLR itself cannot be altered except by legislation, there are "Uniform Rules" of court promulgated by the Chief Administrative Judge for each court in New York State. These rules contain important provisions not covered by the CPLR, governing such matters as engagement of counsel, motion practice, notes of issue, and compulsory arbitration of certain disputes. These rules may not be inconsistent with the CPLR, but can only supplement it. The rules are found at 22 NYCRR 202 *et seq.*
>
> In addition, individual judges sometimes have their own rules of proceeding for cases assigned to them. These rules can be located in a publication such as the *New York Law Journal* or from the clerk of the court in which that judge sits. These individual rules also may not conflict with either the CPLR or the Uniform Rules. To the extent that they do, they are invalid.[5]

"Not that there's anything wrong with that," to quote Jerry Seinfeld, but the present system is a response to a problem rather than a solution crafted to offer the optimal method for making necessary changes to civil practice.

What It Has Become

An almost impenetrable maze or, to borrow Karl Llewellyn's title, a procedural "Bramble Bush."[6]

Some rules are merely hard to find. Suppose, for example, your case is dismissed for failure to prosecute pursuant to CPLR 3216. It might be of interest to the attorney whose case was just dismissed to know that the judge dismissing your case is required to "set forth on the record the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation."[7] The failure of the judge to do so may form the basis for reviving the action (allowing the client's case to be decided on the merits, and sparing the attorney a steep increase in malpractice premiums).

Where in CPLR 3216 does this important mandate appear? Nowhere. Is there a reference or cross-citation in CPLR 3216 to direct you to this language? No. Instead, you have to know to look in CPLR 205(a) for this language, which was added to that statute in 2008.

Some rules are impossible to find. They lurk, hidden from view, until you are confronted with a mistake based upon the violation of the rule. Practitioners statewide know that a party seeking expedited relief may move by order to show cause. An order to show cause is typically utilized when the hearing of a notice motion will not take place before the relief sought is needed or if interim relief, such as an order to preserve evidence, is required. However, in at least one downstate county, there are, in fact, two kinds of orders to show cause: "regular" orders to show cause and "emergency" orders to show cause. The difference? Emergency orders to show cause are put to the head of the line and are reviewed in an expedited manner. The problem? An emergency order to show cause requires a special affidavit or affirmation explaining the "emergency" nature of the application. Putting aside the question of whether a non-emergency order to show cause is an oxymoron, an attorney who doesn't know about the special form and has a clerk or service submit the order will have the papers returned, unreviewed and unsigned, causing unexpected delay in what is supposed to be an expedited process.

Some rules are unintelligible. Read CPLR 208. Seriously. Imagine you are reading it for the first time, are fairly new to practice, and are trying to calculate how much time an infant has to sue for a medical malpractice case (and, to make your task easier, you do not have to consider whether continuous treatment extends the time to sue). Good luck!

Some rules aren't even rules. For years, my colleagues have been describing the practice in the Commercial Division, which routinely includes the exchange of expert reports and depositions of experts. This, of course, is heresy in traditional New York State practice. After spending a considerable amount of time unsuccessfully searching for the Commercial Division Rules authorizing this expansion of expert disclosure, I was informed by a commercial division judge that there are no such rules. Instead, it is the practice in the Commercial Division, encouraged by the bench, acquiesced to by the bar, and accomplished by agreement between the parties, "so ordered" by the court. There is even a form stipulation in Robert L. Haig's *Commercial Litigation in New York State Courts*.

Like a first-year law student, I can spot the issue, but a solution eludes me.

What to Do?

I don't know. Like a first-year law student, I can spot the issue, but a solution eludes me.

Tinkering around the margins is likely to increase rather than decrease confusion, and with such a vast and complex set of rules, the specter of the law of unintended consequences lurks if changes are made piecemeal. Witness our hapless Note of Issue.[8]

Under the heading "Current Processes and Institutions Relevant to Amending CPLR and Improving Civil Practice," Weinstein, Korn & Miller set forth the current mechanism for effecting changes in the rules:

> The legislature is the first institution to look to for amendment and improvement of the CPLR. The Chief Judge of the State of New York and the Chief Administrator of the Courts, however, play an increasingly important role in recommending legislation to the legislature and in promulgating rules for the administration of the courts. The Chief Judge and the Chief Administrator are assisted in the legislative efforts by their Advisory Committee on Civil Practice and by the Law Revision Commission. More relevant to the upkeep of the CPLR are the Office of Court Administration's CPLR Advisory Committee and the New York State Bar Association's CPLR Committee.[9]

A top-to-bottom overhaul of the rules of practice appears impossible under our current system. Since the CPLR may be amended only by the Legislature, and is not a topic with much of a constituency in good times, let alone the tough economic climate of 2010, help from this direction is unlikely. The ability of the Chief Administrator of the Courts to promulgate rules of practice to supplement the CPLR, while useful as an interim measure, cannot effect a systemic revision of the rules governing civil practice. It is, at best, CPR for the CPLR.

Conclusion

Change may be unwelcome to those comfortable with current New York practice. While I count myself in that group, I believe change is needed, provided it is systemic and is arrived

Continued on Page 40

BY DAVID PAUL HOROWITZ

David Paul Horowitz (david@newyorkpractice.org) has represented plaintiffs in personal injury cases for over 25 years and is of counsel to Ressler & Ressler in New York City. He is the author of *New York Civil Disclosure* and *Bender's New York Evidence* (both by LexisNexis), as well as the 2008 and 2013 Supplements to *Fisch on New York Evidence* (Lond Publications). Mr. Horowitz teaches New York Practice at Columbia Law School, and Professional Responsibility and Electronic Evidence & Disclosure at Brooklyn Law School. In addition to presenting NYSBA's Annual CPLR Update Program statewide, he serves on the Office of Court Administration's CPLR Advisory Committee, as Associate Reporter to the New York Pattern Jury Instruction (P.J.I.) Committee, and is a frequent lecturer and writer on these subjects.

DNR for the CPLR?

Introduction

In this 50th year of the CPLR, it seems reasonable to ask whether this now-venerable statute has outlived its usefulness, or at least its useful life. At 50, the CPLR has already been in effect longer than its predecessors, the C.P.A. (42 years [1921–1963]), the Throop Code (41 years [1880–1921]) and the Field Code (32 years [1848–1880]). While it is true that 50 may well be the new 30, the life span of the CPLR has coincided with earthshaking changes in the practice of law. Has it kept up? Can it keep up? If the answer to one or both of these questions is "no," then what to do? In short, has the CPLR reached that stage in its life where no effort to resuscitate it should be made? Is it time for a DNR for the CPLR?

For civil litigators practicing in New York state courts, the CPLR is our procedural home, the framework and structure around which we practitioners build our cases. So, like a homeowner confronted with an antiquated yet sound, functioning home, albeit one that lacks *en suite* baths for each bedroom, a 12-burner stove in the kitchen, and LEED-certified fixtures and appliances throughout, the bench and bar are confronted with three possible paths forward:

1. Just live with it.
2. Demolish it and rebuild.
3. Remodel.

Each of these alternatives will be considered, beginning with the easiest, "just live with it."

Just Live With It

Keeping the existing CPLR and its appurtenances (Uniform Rules, Judicial District Rules, Individual Judges' Rules, to name but a few) "as is," is attractive on any number of levels. Unfortunately, none, in the end, has anything to do with improving the practice of law in New York state courts.

First and foremost, doing nothing[1] means that none of us have to learn a new procedural language. And, make no mistake, I am a terrible language student. Even a modest re-working of the CPLR, with or without amalgamating other civil practice rules, will result in changes, large and small, and an inevitable learning curve for all, from least to most experienced.[2]

Second, like the old cardigan I keep draped over a chair in my office,[3] though frayed and somewhat moth-eaten, it accomplishes its task. The sweater keeps me warm. The CPLR works for me. I know it, I am comfortable with it, and I have invested a substantial amount of time learning some of its many nuances, omissions, and contradictions. Because the totality of New York's civil practice rules often constitutes a trap, the little procedure I have mastered gives me a tactical advantage in some cases, and I am loath to give that up.

However, as I mentioned at the outset of this section, none of these reasons serves the commonweal goal of improving the practice of law in New York State's civil courts. So, without further comment, let's dispense with option one.

Demolish It and Rebuild

The second alternative, scrapping the CPLR and starting over with a new statute drafted from scratch, is not as easy to dismiss out of hand. Like that shiny new automobile in the dealer showroom, with its intoxicating new car smell, a brand new code of civil practice, tailored to address the vexing legal issues of our day, has a certain allure.

Many do support the idea of completely re-drafting the CPLR. With 50 years of experience and 20-20 hindsight, we know there are many sections and rules that need serious attention, some that would probably not make it into a new code, and problems and difficulties that we encounter in practice today that are not directly addressed by the CPLR. Some of today's issues could not have been imagined in 1963.

If we focus on these criticisms, then a wholesale replacement of the CPLR might seem like the most appropriate course. However, there are other reasons not to undertake a complete revision – the inherent complexity of the CPLR, its interconnectedness with other statutes, and the almost inevitable politicization of the exercise.

To understand just how complex a complete revision of the CPLR would be, consider the time, energy, and resources, coupled with more than just

a bit of serendipity, invested in drafting and enacting the CPLR. Remember the article by Judge Weinstein that opened this issue? Written in 1958, at about the mid-point of the drafting of the CPLR, one gets a sense of the herculean effort involved. Professor Carlisle's article, which follows Judge Weinstein's, with its overview of the entire drafting and enactment process, completes the picture, leaving us with the sense that "but for" any number of intervening events, the CPLR would never have been enacted.

Judge Weinstein and the other principal drafters received significant assistance from the faculty and staff at Columbia Law School. The New York State Law Revision Commission played a crucial role in drafting the CPLR, but today simply does not have anything approaching the resources it once did.[4] It is not clear what resources could be brought to bear today on such a project. And who would fill the critical role played by Judge Weinstein?

For these reasons, and many others, developing and implementing an entirely new code seems far-fetched.

Remodel

So, what about remodeling? Actually, the process of revising the CPLR has been going on since its effective date. The Court of Appeals illustrates this nicely in *Chase v. Scavuzzo*.[5] There, the Court traces the evolution of CPLR 3216 from its original form in 1963, through its amendment in 1964, its repeal and reenactment in 1967, and its further amendment in 1978 when the statute attained its present form. The changes in CPLR 3216 detailed in *Chase* were all enacted by the Legislature.

Coincidently, 1978 was the year that the Legislature repealed the previously co-extensive authority of the Judicial Conference (now the Office of Court Administration) to revise those items in the CPLR designated as "Rules" (the Legislature had, from the enactment of the CPLR, retained sole power to revise those items in the CPLR designated "Sections").

The Legislature has, both before and after the 1978 legislation, enacted changes, large and small, to the CPLR. However, since 1978, the general consensus is that reliance on the Legislature as the sole vehicle for adjusting New York's civil procedure rules to changes in case law, practice, and technology, is not enough. The Office of Court Administration has stepped into the breach, and many rules of civil practice, including some that are very significant, are the creation of our courts, not the Legislature.[6] Going forward, it seems reasonable to assume that judicial rulemaking will continue as a necessary adjunct to and, at times, the main mechanism for updating New York's rules of civil practice.

So, having rejected leaving well enough alone and repeal as reasonable paths forward, what can we, as members of the bench and bar, do to equip the CPLR (and appurtenances) to accomplish for the next 50 years the salutary goals set forth in CPLR 104?

> The civil practice law and rules shall be liberally construed to secure the just, speedy and inexpensive determination of every civil judicial proceeding.[7]

We Can All Have an Impact

Clearly, attempting to enact changes to the CPLR should be the first step. If that avenue is foreclosed, input into formulating court rules directed towards achieving these goals should be the next. Finally, attorneys often have the ability to impact rules through litigation they are engaged in. There are many avenues available to anyone willing to make the effort.

The Office of Court Administration has a number of standing committees, one of which is the Advisory Committee on Civil Practice.[8] What is the role of the Committee?

> The Advisory Committee on Civil Practice, one of the standing advisory committees established by the Chief Administrative Judge of the Courts pursuant to sections 212(1)(g) and 212(1)(q) of the Judiciary Law, annually recommends to the Chief Administrative Judge legislative proposals in the area of civil procedure that may be incorporated in the Chief Administrative Judge's legislative program. The Committee makes its recommendations on the basis of its own studies, examination of decisional law, and recommendations received from bench and bar. The Committee maintains a liaison with the New York State Judicial Conference, committees of judges and committees of bar associations, legislative committees, and such agencies as the Law Revision Commission. In addition to recommending measures for inclusion in the Chief Administrative Judge's legislative program, the Committee reviews and comments on other pending legislative measures concerning civil procedure.[9]

To understand just how complex a complete revision of the CPLR would be, consider the time, energy, and resources, coupled with more than just a bit of serendipity, invested in drafting and enacting the CPLR.

The reference to "recommendations received from bench and bar" is not lip service, and during the time I have been involved with the Committee many proposals have had their genesis in letters and emails from judges and lawyers.

The Law Revision Commission, established in 1934, is "the oldest continuous agency in the common-law

world devoted to law reform through legislation."[10] Its home page explains it mission:

> The Purpose of the Commission
>
> The Commission is charged by statute with the following duties:
> To examine the common law and statutes of the State and current judicial decisions for the purpose of discovering defects and anachronisms in the law and recommending needed reforms.
>
> To receive and consider proposed changes in the law recommended by the American Law Institute, the commissioners for the promotion of uniformity of legislation in the United States, any bar association or other learned bodies.
>
> To receive and consider suggestions from judges, justices, public officials, lawyers and the public generally as to defects and anachronisms in the law.
>
> To recommend, from time to time, such changes in the law as it deems necessary to modify or eliminate antiquated and inequitable rules of law, and to bring the law of this state, civil and criminal, into harmony with modern conditions.[11]

As with the Advisory Committee on Civil Practice, the Law Revision Commission's mechanism "[t]o receive and consider suggestions from judges, justices, public officials, lawyers and the public generally" is a genuine and meaningful one.

Many bar associations have committees, standing or *ad hoc*, devoted to civil practice issues. While the ranks of CPLR geeks is larger than one might think, these bar association committees are generally very welcoming of new members and certainly are receptive to the submission of comments, and complaints, from the bench and bar. Many legislative initiatives have had their origins in recommendations recommended by bar associations.

Conclusion

As the CPLR enters its second half-century, there are certainly areas of civil practice procedure in need of attention. While immediate legislative fixes are often suggested when a problem is first encountered, time and time again our courts, through that glorious invention, the common law, have, over time, furnished solutions. And, given the complexity of our civil practice rules in their totality, slow and steady is often the right course, because it is less likely to cause dreaded unintended consequences.

I cannot think of a better example of a statute that has proved adaptable to our changing times than CPLR 3101(a), titled the "Scope of Disclosure," which begins:

> (a) Generally. There shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof . . .

With only a single modification over the years to its key introductory language,[12] this one statute has successfully spanned the period of time when lawyers moved from carbon paper to the cloud. This is no small feat.

If the CPLR could speak, it might well croak out the line made famous by 1975's *Monty Python and the Holy Grail*: "I'm not dead yet!" So, no DNR for the CPLR. With some help from all of us, New York's stalwart CPLR, coupled with our court rules, has sufficient flexibility and resiliency to make its golden anniversary the beginning of a golden age in civil practice. ■

1. Anyone who knows me knows that doing nothing is generally the first course of action (sic) I consider when confronted with any issue.
2. Of course, this is one of those situations where a newly minted lawyer has the incredible advantage of imprinting any new or revised rules upon a blank slate.
3. I know, I know, this makes me sound like I am at least a hundred years old. However, it gets cold in my office.
4. A good start to learning about the law revision commission is John W. MacDonald's article *The New York Law Revision Commission: The Past and the Future*, 13 St. Louis U. L.J. 258 (1968–1969).
5. 87 N.Y.2d 228 (1995).
6. I leave it for others to weigh in on the long-lived debate on whether this new status quo is desirable, or even constitutional.
7. CPLR 104.
8. Spoiler alert: I have been a member of the Committee since 2000.
9. *Report of the Advisory Committee on Civil Practice*, January 2013.
10. http://www.lawrevision.state.ny.us.
11. *Id.*
12. The 1991 amendment substituted "matter" for "evidence" to comport with the holding of the Court of Appeals in its seminal decision on the scope of disclosure, *Allen v. Crowell-Collier Publishing Co.*, 21 N.Y.2d 403 (1968).

BURDEN OF PROOF — 2010
CONTINUED FROM PAGE 37

at in a thoughtful and systematic manner. However it is accomplished, the process will likely be difficult, as illustrated by the children's rhyme that gave *Bramble Bush* its title:

> There was a man in our town
> and he was wondrous wise;
> he jumped into a bramble bush
> and scratched out both his eyes –
> and when he saw that he was blind,
> with all his might and main
> he jumped into another one
> and scratched them in again.[10] ■

1. Civil Practice Act, enacted in 1921.
2. In that simpler time there was a single round of league playoffs.
3. In *A Dictionary of Modern Legal Usage*, Bryan Garner offers this definition: "[A]djective law is not a set of rules governing words that modify nouns, but rather the aggregate of rules on procedure."
4. Weinstein, Korn & Miller ¶ 102.00.
5. *Id.*
6. Karl N. Llewellyn, The Bramble Bush: On Our Law and Its Study 1930.
7. *See* CPLR 205(a); *see also* Siegel, McKinney's Practice Commentary, NYCPLR 3216 (2008).
8. The Note of Issue was the subject of the May 2009 column, "It's the Note of Issue, Stupid."
9. Weinstein, Korn & Miller ¶ Intro.02.
10. Llewellyn, The Bramble Bush, *supra* note 6.

To Fly, or Not to Fly. . .

By David D. Siegel

It was the Civil Practice Law

David D. Siegel is Distinguished Professor Emeritus of Law at Albany Law School. Professor Siegel joined Albany Law School in 1972. His textbooks/treatises include: *New York Practice* (3d Ed.); *Conflicts in a Nutshell* (2d Ed.); annual commentaries on civil practice (McKinney's Consol. Laws) and federal practice (U.S. Code Annotated); editor of *New York State Law Digest* (monthly); *Siegel's Practice Review* (monthly); and co-author of the handbooks, *Appeals to the Court of Appeals and Appeals to the Appellate Divisions*. A graduate of the City University of New York, Brooklyn College, he received a J.D. from St. John's University School of Law and an LL.M. from New York University School of Law. Professor Siegel retired from Albany Law School in 2007.

and Rules that got me flying.

Perhaps not altogether figuratively. The CPLR took to the books in 1962 and took effect a year later. A new practice act jars the bar as few other pronouncements can. All the lawyers were looking for a quick education in the new act. But there were few educators. I was one of the lucky ones. I was just starting in law teaching, and New York practice was my subject. I read the CPLR through twice. That alone can't make the reader an expert. But I also thought about it. That helped. And I studied its background reports closely. That helped more.

I quickly found myself in demand all around the state as a lecturer, speaking at many locations for our State Bar Association and the Practising Law Institute and before myriad local bar groups. I accepted almost any invitation. This was heady exposure for a young law teacher. (I ask our readers to accept that I was once young.)

I also remembered that all work and no play make Jack a dull boy. I was so enmeshed in the CPLR that it started to come out of me more as an ooze than a lecture. I needed escape.

Escape took the form of flying lessons at the Staten Island airport, a charming little field in almost the center of Staten Island, now long since become a shopping center, or something like that. The starting plane was a Piper Cub, a small high-wing tandem two-seater. My instructor sat in one seat, I in the other, both of us in earphones. Off we went. Delightful. I later realized that it's always delightful when you have an experienced and confident pilot in the other seat. I learned this best through the doctrine of Stark Contrast, when I was finally allowed to solo and had only myself to guide me.

I soloed all around the Staten Island airport, a number of times. I forget whether I did this because it was the rule (until I got further clearance) or instinctively, as a matter of self-preservation. My instructor now began to prepare me for the next step: clearance for cross-country flying. This means going far from base and landing at airports elsewhere. More significantly, it means leaving the warm security of the Staten Island airport.

All of this was in the air, however. Meanwhile, back on the ground, I continued to talk CPLR to all comers.

One of the comers was John Real, at the time the president of the Mount Vernon Bar Association. Would I give his members an after-dinner CPLR talk? Why sure. It was now early in 1963. I sat at John's right on the dais during dinner. We didn't know each other well, so scraping up conversation was some effort. All at once he blurted out, "Are you a pilot?" This astounded me. I wasn't quite a pilot – no license yet – but how could he even guess at my flying activities? I asked him that. He said, "Your watch."

I was wearing a complicated-looking calendar/stopwatch. On the left wrist. It was a Rolex that I ordered from Switzerland while I was in the army in Stuttgart, in Germany, way back in 1954. It was a beauty. Had I happened to be wearing it on my right wrist, there'd be no story to tell here.

John's assumption that I was a pilot came from the watch, which had nothing to do with it. It just happened to prove a catalyst for my next flying adventure. (Actually, for a lot more than that in my life, but that's another story.)

He said he had a plane and would I like to go up with him. Of course I would, and in a month or so I did. I had lunch at John's home in Katonah, after which he telephoned the Westchester airport and then drove us there. His plane had been taxied out of the hangar and was waiting for him.

It was a single-engine Piper Apache (retractable gear), and now here we were on a warmish day in mid spring, floating in the skies above Westchester, he piloting, and I just a bemused spectator – a status I should have stayed with forever, but didn't. I did on this trip, though.

He said, "Would you like to go to Great Barrington?" I'd never heard of it, but it proved to be a small and inviting town in southwestern Massachusetts, in the Berkshires. I looked at my watch. It was after 3 p.m. I said, "John, isn't it a little late for that?" He looked at me with surprise, maybe contempt, and said condescendingly, "You're in a plane."

We arrived at the Great Barrington airport in well under an hour. It's a charming airfield, nestled in the foothills of the Berkshires, just down the road a mile and a half from where I have now been living for the past 30+ years (that's another story). He had a beat-up old station wagon parked at the field and off we went down Route 71 to the house of his brother, Ray, the last house in Massachusetts before the New York border. A nice visit, and after an hour to two, back to Westchester.

This Berkshires airport was where I wanted to continue my flying lessons. I would now drive up on weekends, staying at a motel and learning more about flying from the late Walt Koladza, the airport's founder. (It's now named for him.) Walt convinced me to buy my own plane. (He was very convincing. He also happened to be the seller's agent.) I bought a Piper Cherokee 180. Fourseater, low-wing, stationary gear, and steady as an aircraft can be. I wish I could say the same for its new pilot. I parked it ("tied it down" in the jargon) at Linden airport in New Jersey, commuting distance from my Brooklyn apartment. I flew it to Great Barrington on weekends for continued lessons towards my license.

I was ultimately cleared for cross-country flying – solo only, no license yet – and off I went on a number of cross-country missions. I could write a book about those experiences. (Each of them is another story.) I would call it *A Fool and His Airplane*. I can't believe now, in retrospect, that I ever had the guts to chart those flights. On one of them, on July 11, 1964 – 160 years to the day after Burr killed Hamilton in Weehawken (that's another story) – I flew from Linden in New Jersey, to Scranton in Pennsylvania, to Binghamton and Cooperstown in New York, to the Great Barrington airport, and then back to Linden. All in a day.

On the last leg of that journey, guided on my special radio by the WOR transmitter (710 on the AM dial) that stood almost next to the Linden airport, I "flew the needle," just steadily aiming for the WOR antenna. While over the area of the George Washington Bridge, I saw a peculiar sight ahead, around midtown: a cloud starting at eye level but moving down instead of up. Nobody at Great Barrington had warned me of bad weather, so, dependent novice that I was, I continued my trek to Linden.

That peculiar cloud, my friends, was fog, and I flew right into it. (As an expert on civil procedure, I can tell you that an act of that kind makes one eligible for treatment as an incapacitated person under the Mental Hygiene Law, if not as a decedent under the Estates, Powers, and Trusts Law.) I had all kinds of sophisticated radio equipment in the plane that could have helped me avoid or evade the fog, but hadn't yet learned how to use it. I learned how to afterwards, from an instruction manual. The more immediate lesson came from another book. I learned that thou must honor fog with no less fervor than thy father and thy mother.

The 30 minutes or so that followed, in which I lost all orientation, felt like 30 years. It was a rapid series of events that should by all odds have resulted in the common death of my plane and me. But through a series of minor miracles – God bless WOR and its transmitter – I found the airport and landed, appreciative as never before of what it means to be alive.

Because the fool and his plane were not parted, I continued cross-country flying. I finally got my license. (I attribute this to government error.) Now I could take others up with me. Who would volunteer for this dangerous mission? My wife, some cousins, and at last my parents. My mother sat in the front passenger seat, hands held tightly in her lap lest she touch a button and destroy her family.

My father was in the plane, too. He feared flying, but had to show this confidence in me. He sat in the back seat, desperately feigning a smile and holding tightly to the little strap on his right. His expectation was that if the plane should suddenly go down, he would be saved by his little strap, which he assumed was independently attached to heaven. The plane didn't go down, but I did have a brush with a commercial airliner in the Bronx, just north of LaGuardia Airport. My folks didn't know it was a brush, however, and I didn't tell them. (Pilots are taught merely to smile in these circumstances.)

Planes don't turn on a horizontal. They bank in the direction of the turn. When my wife Rosemarie flew with me – again just a gesture of loyalty – she devised her own defenses. She was committed at all costs to the vertical. When the plane banked to the right, she leaned to the left, pressing into me. When the plane banked to the left, she leaned to the right, pressing into the door. While the plane was banking, in other words, Rosemarie wasn't. Any plane anywhere within my vision concerned me. I wanted a commitment from all potential aircraft in North America that they would not go up until I was both up and down. No takers, however. My lookout for other planes was therefore a salient and always frightening part of my flying.

After several months of cross-country flying, I came to a shocking realization. This exhilaration that I thought I felt every time I flew was not exhilaration at all. It was terror. I came finally to acknowledge that my joy of flying depended unambiguously on a condition precedent: that someone else be flying the plane.

The clincher that got me to sell the plane (in 1965, about a year after I bought it) was another brush with an aircraft. Another nice Saturday morning, and here I am flying up to Great Barrington once again. Alone this time.

I'm looking left and right for any sign of any movement in the air. Suddenly I draw a heavy intake of breath: a huge plane is rapidly closing in on me from the left. I'm done for.

Do you know what that huge plane was, my friends, coming at me from the left? It wasn't a plane at all. It was a minuscule bug climbing up the left window, catapulted by my peripheral vision and my imagination into an enemy aircraft.

Who needs this? Or this plane? I continued my flight to Great Barrington, landed, and told Walt Koladza to sell the plane for me. He did, and with the proceeds I bought the big farm my family and I have now owned since 1965, and permanently resided on since 1972.

The great advantage of a farm is that it requires no pilot and is never threatened by the flying farms of others. ■

Thomas A. Dickerson, an Associate Justice of the Appellate Division, Second Department of the New York State Supreme Court, is the author of, among other titles, *Class Actions: The Law of 50 States* (Law Journal Press 2013); *Travel Law* (Law Journal Press 2013); "Consumer Protection" in *2 Commercial Litigation in New York State Courts* ch. 98 (3d ed. 2013); *Litigating International Torts in United States Courts* (co-author) (Thomson Reuters West 2013); "Consumer Law 2013: The Judges' Guide to Federal and New York State Consumer Protection Statutes," available online. **Daniel D. Angiolillo** is an Associate Justice of the Appellate Division, Second Department of the New York State Supreme Court. Justice Angiolillo has co-authored several articles on consumer law, class actions and tax certiorari and eminent domain. **Cheryl E. Chambers** is an Associate Justice of the Appellate Division, Second Department of the New York State Supreme Court. Justice Chambers has co-authored several articles on consumer law, class actions and jurisdiction. **Leonard B. Austin** is an Associate Justice of the Appellate Division, Second Department of the New York State Supreme Court. Justice Austin is an Adjunct Professor of Law at Hofstra University, School of Law and the author of many articles on commercial law.

New York State Consumer Law and Class Actions: 2012–2013

By Thomas A. Dickerson, Daniel D. Angiolillo, Cheryl E. Chambers and Leonard B. Austin

Recently, New York courts have ruled on a variety of important consumer law issues involving mortgage settlement conferences and sanctions, educational services and law school employment statistics, insurance overcharges and repair-shop steering, medical success rates and debt collections.

In addition, the Court of Appeals, the Appellate Divisions and several trial courts have continued to respond to the need for a more accessible class action statute.

Mortgage Settlement Conferences and Sanctions

In 2008, "[t]he New York State Legislature endeavored to cope with the dramatic increase in mortgage foreclosures by enacting a variety of statutes that are known, in omnibus form, as the Subprime Residential Loan and Foreclosure Laws."[1] CPLR 3408 was enacted as part of this legislation. In November 2009, the Legislature amended the statute to, *inter alia*, mandate settlement conferences in all residential mortgage foreclosure actions in which the defendant is a resident of the property subject to foreclosure.[2] The amendment also, *inter alia*, added the following requirement: "Both the plaintiff and defendant *shall negotiate in good faith to reach a mutually agreeable resolution*, including a loan modification, if possible."[3] In addition, 22 N.Y.C.R.R. § 202.12-a(c)(4) directs the court to "*ensure* that each party fulfills its obligation to negotiate in good faith." It stands to reason that the court cannot "ensure" compliance with CPLR 3408(f) without the authority to impose some type of a sanction. Yet neither CPLR 3408(f) nor 22 N.Y.C.R.R. § 202.12-a provides sufficient guidance and as a result the courts, *inter alia*, have upon a finding of a lack of good faith, "barred them from collecting interest, legal fees, and expenses, imposed

exemplary damages against them, stayed the foreclosure proceedings, imposed a monetary sanction pursuant to 22 NYCRR part 130, dismissed the action, and vacated the judgment of foreclosure and sale and cancelled the note and mortgage."[4] In an effort to add clarity, the Appellate Division, in *Wells Fargo Bank, N.A. v. Meyers*, noted that "it is beyond dispute that CPLR 3408 is silent as to sanctions or the remedy to be employed where a party violates its obligation to negotiate in good faith" and "the courts must employ appropriate, permissible, and authorized remedies, tailored to the circumstances of each given case."[5]

Educational Services: Working for Free

In *Apple v. Atlantic Yards Development Co., LLC*,[6] student-trainees asserted "that in exchange for their participation in the training program, they were promised membership in a labor union and construction jobs at the Atlantic Yards construction project in Brooklyn, New York." When they completed the program, providing two months of unpaid construction work, the promised union membership and jobs were not provided. The court found that the plaintiffs asserted a deceptive business practice covered by N.Y. General Business Law § 349 (GBL), and "[i]n addition . . . the Plaintiffs were not strictly employees in the traditional sense, but consumers of a training program offered by the Defendants. [GBL] § 349 [has been applied] to claims brought by consumers of educational or vocational training programs."[7]

Law School Employment Statistics

Law school graduates, in *Gomez-Jimenez v. New York Law School*,[8] alleged that their law school misrepresented post-graduation employment data and violated GBL § 349. The Appellate Division found that the plaintiffs adequately alleged consumer oriented conduct but failed to establish that the data were sufficiently deceptive or misleading. "[A]lthough there is no question that the type of employment information published by defendant (and other law schools) during the relevant period likely left some consumers with an incomplete, if not false, impression of the school's job placement success, Supreme Court correctly held that this statistical gamesmanship, which the ABA has since repudiated in its revised disclosure guidelines, does not give rise to a cognizable claim under [GBL] § 349."[9]

Insurance Overcharges

In *Partells v. Fidelity National Title Insurance Services*,[10] (FNTIC), consumers alleged that the defendant "unlawfully overcharged them and other consumers for title insurance." In sustaining a GBL § 349 claim, the court found "that in charging the rate that it did FNTIC implicitly represented that the rate – which, it bears repeating is set by law – was correct. . . . [I]t is not simply that FNTIC failed to disclose the correct rate, rather, it deceived the Partells into . . . thinking the charged rate was correct. . . . [I]t is enough to conclude that a jury could find that a reasonable consumer, while closing on a mortgage, would believe that the rate he or she was charged for title insurance (to the benefit of the lender) would be the lawful rate."[11]

Insurance: Auto Repair Steering

In *North State Autobahn, Inc. v. Progressive Insurance Group*,[12] the court held that GBL § 349 may be used by businesses that allege deceptive practices which have an indirect impact upon consumers and, hence, are consumer oriented. The court noted,

> [The] plaintiffs sufficiently alleged that they were directly injured by [Progressive's] deceptive practices in that customers were misled into taking their vehicles . . . to competing repair shops that participated in the [Progressive's DRP (direct repair program)]. The allegedly deceptive conduct was specifically targeted at . . . independent [auto repair] shops in an effort to wrest away customers through false and misleading statements. . . . Thus, plaintiffs adequately alleged that as a result of defendant's misleading conduct, they suffered direct business loss of customers resulting in damages of over $5 million.[13]

Medical Success Rates

The court, in *Gotlin ex rel. County of Richmond v. Lederman*,[14] sustained a GBL § 349 claim alleging "that the defendants – in their brochures, videos, advertisements, seminars, and internet sites – deceptively marketed and advertised FSR [Fractionated Stereotactive Radiosurgery] treatment by making unrealistic claims as to its success rates . . . plaintiffs contend that defendants' claims that FSR treatment had 'success rates' of greater than 90% in treating pancreatic cancer were materially deceptive."

Debt Collections

In *Midland Funding, LLC v. Giraldo*,[15] the court found that debt collection procedures involving the filing of a lawsuit without proof stated a GBL § 349 claim.

> Addressing the first element – "consumer oriented" conduct – defendant's General Business Law counterclaim is plainly sufficient . . . "the conduct complained of" at its heart involves the "routine filing" of assigned debt lawsuits by plaintiff "despite a lack of crucial, legally admissible information" or "sufficient inquiry" into whether the claims are meritorious.
>
> . . .
>
> [T]his court holds that deceptive conduct by a debt buyer in the course of civil litigation may violate a consumer's legal rights under [GBL] § 349. When a debt buyer seeks the court's aid in enforcing an assigned debt claim, the debt buyer should not

> commence the action unless it can readily obtain admissible proof that would make out a prima facie case. Such proof should include evidence that it actually owns the debt, that the defendant was given notice of the assignment, and that underlying debt claim is meritorious. It commences such an action without having such readily available proof, and if it turns out that such proof is not readily available, the debt buyer may end up not only losing the case, but may also be found liable for substantial compensatory damages, punitive damages, and attorney's fees to the extent allowed by law.[16]

GBL § 349 may be used to allege deceptive practices which have an indirect impact upon consumers.

Positive Developments in New York Class Actions

Since the publication of *New York State Class Actions: Make It Work – Fulfill The Promise*[17] (*Make It Work*) in 2010 and the Court of Appeals's game-changing decision in *Koch v. Acker, Merrall & Condit Co.*[18] in 2012, there has been a noticeable change in the enthusiasm of New York courts in applying our salutary class action statute, CPLR 901–909.[19]

Expansive Language

In *Corsello v. Verizon New York, Inc.*,[20] the Court of Appeals found that the owners of a building upon which the defendant attached a box "to transmit telephone communications to and from Verizon's customers in other buildings"[21] stated an inverse condemnation cause of action. As for class certification, the Court found that it "seems on its face well-suited to class action treatment" in that "*it would be reasonable to infer that the case will be dominated by class-wide issues – whether Verizon's practice is lawful, and if not what the remedy should be*" and that "*expert testimony*" could be used to "*support an inference*" of typicality.[22]

Sua Sponte Certification

The Second Department, in *Globe Surgical Supply v. GEICO*,[23] a class action by medical equipment suppliers challenging denial of their claims under no fault because they exceeded so-called prevailing rates, denied certification without prejudice to reapplying for class treatment after locating an adequate class representative. In *Amer-A-Med Health Products, Inc. v. GEICO*[24] and *O'Brien v. GEICO*,[25] the trial court found a proposed intervenor to be an adequate class representative and *sua sponte* certified the class noting that "[i]t would be illogical and redundant for plaintiff to again bring a further motion to demonstrate the . . . criteria set forth in 901 and 902 when the Appellate Division already ruled upon them." On appeal, the Appellate Division, Second Department approved of the concept of *sua sponte* class certification but remitted for the entry of a CPLR 903 order describing the certified class.[26]

Stockbroker Overtime Claims

In *Thomas v. Meyers Associates, L.P.*,[27] a class of employees of a broker-dealer in the financial industry sought monetary and injunctive relief alleging defendants "'engaged in a systemic practice of failing to properly compensate stockbrokers' in violation of the New York Labor Law § 650 *et seq.* . . . by . . . failing to pay overtime, making unlawful deductions from paychecks, failing to pay timely and failing to pay minimum wage."[28] In granting certification, the court allowed the class representative to waive the statutory penalty of liquidated damages (with opt-out notice to class members) thus circumventing CPLR 901(b).[29] The court also noted that the "[p]laintiff and the [class] seek to vindicate rights accorded them by statute and regulation, and allegedly violated by uniform policies and practices, including . . . [defendant's] admitted failure to pay overtime." Of particular interest was the court's earlier denial of defendant's motion to compel mandatory arbitration pursuant to the rules of the Financial Industry Regulatory Authority (FINRA).[30]

Rent Overcharges

In *Downing v. First Lenox Terrace Associates*,[31] a class of tenants or former tenants of a residential complex alleged that the owners "unlawfully deregulated their apartments under the luxury decontrol provisions of the Rent Stabilization Law (Administrative Code of City of NY) § 26-501 *et seq.*) [RSL] while receiving tax incentive benefits under the City of New York's J-51 program. Plaintiffs seek . . . a declaration that all apartments in the complex are subject to rent stabilization, injunctive relief and a money judgment."[32] In denying the defendant's motion to dismiss based upon CPLR 901(b) the Appellate Division, First Department expanded the application of CPLR Article 9 to allow class actions seeking actual damages consisting of rent overcharges plus interest pursuant to RSL § 26-516(a).[33]

In *Casey v. Whitehouse Estates, Inc.*,[34] a class of tenants alleged rent overcharges and sought reimbursement. Evidently, the landlord sought to deregulate its apartments, pursuant to the luxury decontrol amendments under the RSL, and to obtain, under the J-51 program, "tax abatements and exemptions for rehabilitative work done to" its building. Allegedly the defendant landlord illegally charged market rents, violating the J-51 program.[35] In granting class certification, the court found that class treatment was not prohibited under CPLR 901(b) by the penalty provisions of the RSL because they could be waived[36] and, in any event, the penalty provisions were

not triggered because the defendant was acting in good faith. The court noted that the named plaintiffs and class members share a common goal to ensure "that the landlord charges tenants . . . no more than the maximum legal rent" and that the tenants be compensated for the rent overcharges.

County as Class Representative

Nassau County, in *County of Nassau v. Expedia, Inc.*,[37] sought to enforce its Hotel and Motel Tax Law and other similar taxing statutes throughout New York State on behalf of a class of 56 other local governmental agencies. "Defendants purchase blocks of rooms from hotels and motels at discounted rates and then resell the rooms to members of the public via the internet. The County alleges that the tax owed under the Hotel and Motel Tax Law is correctly calculated as a percentage of the price that occupants pay to the defendant resellers. The County further alleges that the online sellers collect the 3% hotel tax from consumers based on retail room rates but remit to the County only the portion of the tax based on defendants' lower 'wholesale' rate." In certifying the class action with Nassau County as the class representative, the trial Court relied upon the Court of Appeals's recent decision in *Overstock.com v. Department of Taxation and Finance*[38] and found a predominance of common questions despite noting "that there is some variation in the tax rate among the different taxing authorities." Accordingly, the court concluded that the "'means and manner' of collecting the taxes is sufficiently similar." ■

1. *See* Mark C. Dillon, *Newly-Enacted CPLR 3408 for Easing the Mortgage Foreclosure Crisis: Very Good Steps, But Not Legislatively Perfect*, 30 Pace L Rev 855, 856 (2010).

2. CPLR 3408(a).

3. CPLR 3408(f) (emphasis added).

4. *Wells Fargo Bank, N.A. v. Meyers*, 108 A.D.3d 9, 20 (2d Dep't 2013) (citations omitted).

5. *Id*. at 23. For subsequent cases see *Deutsche Bank Nat'l Trust Co. v. Izraelov*, 2013 WL 4799151 (Sup. Ct., N.Y. Co. 2013) (failure to negotiate in good faith; remedy: tolling of interest on note and mortgage, fees and costs); *U.S. Bank N.A. v. Shinaba*, 2013 WL 4822396 (Sup. Ct., N.Y. Co. 2013) (failure to negotiate in good faith; remedy: interest, late fees and loan modification fees barred and/or refunded; attorney fees application severed for independent review for reasonableness); *JP Morgan Chase Bank v. Butler*, 40 Misc. 3d 1205 (Sup. Ct., Kings Co. 2013) (failure to negotiate in good faith; remedy: interest, legal fees and expenses barred; hearing ordered pursuant to 22 N.Y.C.R.R. § 130-1.1 (frivolous conduct)).

6. 2012 WL 2309028, *1 (E.D.N.Y. 2012).

7. *Id*. at *5. *See, e.g.*, *Drew v. Sylvan Learning Ctr.*, 16 Misc. 3d 836 (Civ. Ct., Kings Co. 2007); *People v. McNair*, 9 Misc. 3d 1121(A) (Sup. Ct., N.Y. Co. 2005); *Andre v. Pace Univ.*, 161 Misc. 2d 613 (Yonkers City Ct. 1994), *rev'd on other grounds*, 170 Misc. 2d 893 (App. Term, 2d Dep't 1996); *Brown v. Hambric*, 168 Misc. 2d 502 (Yonkers City Ct. 1995); *Cambridge v. Telemarketing Concepts*, 171 Misc. 2d 796 (Yonkers City Ct. 1995).

8. 36 Misc. 3d 230 (Sup. Ct., N.Y. Co.), *aff'd*, 103 A.D.3d 13 (1st Dep't 2012). *See also Austin v. Albany Law Sch.*, 38 Misc. 3d 988 (Sup. Ct., Albany Co. 2013) (law school graduates allege law school misrepresented post-graduate employment and salary data; complaint dismissed); *Bevelacqua v. Brooklyn Law Sch.*, 39 Misc. 3d 1216 (Sup. Ct., Kings Co. 2013) (law school graduates claim law school misrepresented post graduate employment and salary data; GBL § 349 claims dismissed).

9. *Gomez-Jimenez*, 103 A.D.3d at 17.

10. 2012 WL 5288754, *1 (W.D.N.Y. Oct. 24, 2012).

11. *Id*. at *6.

12. 32 Misc. 3d 798 (Sup. Ct., Westchester Co. 2011), *aff'd*, 102 A.D.3d 5 (2d Dep't 2012).

13. *North Star Autobahn*, 102 A.D.3d at 6–7.

14. 483 Fed. App'x 583, 588 (2d Cir. 2012).

15. 39 Misc. 3d 936 (Dist. Ct., Nassau Co. 2013).

16. *Id*. at 945–46, 950–51 (citations omitted).

17. Thomas A. Dickerson, *New York State Class Actions: Make It Work – Fulfill the Promise*, 74 Alb. L. Rev. 711, 725–26 (2011) (Make It Work).

18. 18 N.Y.3d 940 (2012). *See* Thomas A. Dickerson, *Ruling in GBL 350 Claims Serves as Game Changer*, N.Y.L.J. (Apr. 19, 2012), p. 4.

19. For a complete discussion of CPLR 901–902 see Thomas A. Dickerson, Article 9 of Weinstein Korn Miller, New York Civil Practice: CPLR (David Ferstendig, ed., Lexis/Nexis 2012) (WKM).

20. 18 N.Y.3d 777 (2012).

21. *Id*. at 781–82.

22. *Id*. at 791 (emphasis added). The purported class representative was subject to unique defenses such as waiver rendering his claims atypical and, by implication, an inadequate class representative. *See Globe Surgical Supply v. GEICO*, 59 A.D.3d 129, 143–45 (2d Dep't 2008).

23. *Globe Surgical Supply*, 59 A.D.3d 129.

24. 2011 WL 1464145 (N.Y. Sup. 2011).

25. Index No. 009808/04, Decision July 19, 2011 (J. Phelan).

26. *O'Brien v. GEICO*, 99 A.D.3d 683 (2d Dep't 2012).

27. 39 Misc. 3d 1217(A) (Sup. Ct., N.Y. Co. 2013).

28. *Id*. at *1.

29. *See* WKM at § 901.28. *See also* Thomas A. Dickerson & Leonard B. Austin, *New York State Class Actions: Making It Work – Fulfilling the Promises: Some Recent Positive Developments and CPLR § 901(b) Should Be Repealed* scheduled for publication in Albany Law Review: New York Appeals in 2014.

30. *Thomas*, 39 Misc. 3d at *10. *See Abed v. John Thomas Fin., Inc.*, 107 A.D.3d 578, 578 (1st Dep't 2013) ("The arbitration agreement in the Form U4 signed by plaintiff provides for the arbitration of disputes 'under the rules, constitutions or by-laws of [the Financial Industry Regulatory Authority (FINRA)]'. Accordingly, under the plain terms of the agreement, 'arbitration shall be governed by the rules promulgated by FINRA' including former FINRA rule 13204(d) . . . which 'prohibits arbitration of class action claims'"; motion to compel arbitration of class action denied).

31. 107 A.D.3d 86 (1st Dep't 2013).

32. *Id*. at 88.

33. *Id*. at 88–89 ("While plaintiffs demanded treble damages pursuant to Rent Stabilization Law § 26-516(a) in their amended complaint, they have since waived that request and seek only reimbursement of the alleged rent overcharges plus interest. . . . However, even where a statute creates or imposes a penalty, the restriction of CPLR 901(b) is inapplicable where the class representative seeks to recover only actual damages and waives the penalty on behalf of the class and individual class members are allowed to opt out of the class to pursue their punitive damages claims (*see Cox v. Microsoft Corp.*, 8 A.D.3d 39 (1st Dep't 2004); *Pesantez v. Boyle Envtl. Servs.*, 251 A.D.2d 11, 12 (1st Dep't 1998); *Ridge Meadows Homeowners' Ass'n v. Tara Dev. Co.*, 242 A.D.2d 947 (4th Dep't 1997); *Super Glue Corp. v. Avis Rent A Car Sys.*, 132 A.D.2d 604, 606 (2d Dep't 1987)).")

34. 36 Misc. 3d 1225(A) (Sup. Ct., N.Y. Co. 2012).

35. *See Roberts v. Tishman Speyer Props., L.P.*, 13 N.Y.3d 270 (2009).

36. *See* WKM at § 901.28; *see also Cox v. Microsoft Corp.*, 8 A.D.3d 39 (1st Dep't 2004).

37. *Cnty. of Nassau v. Expedia, Inc.*, No. 013818/2011 (Sup. Ct., Nassau Co. 2013) (J. Bucaria).

38. 20 N.Y.3d 586 (2013).

BY ELLIOTT WILCOX

Elliott Wilcox is a professional speaker and a member of the National Speakers Association. He has served as the lead trial attorney in over 140 jury trials, and teaches trial advocacy skills to hundreds of trial lawyers each year. He also publishes *Trial Tips*, the weekly trial advocacy tips newsletter <www.trialtheater.com>.

The Importance of Time

Please make it stop. You're in agony, and convinced that it will never end. The meeting was scheduled to end at 10 AM, but now it's 10:15, and the speaker shows no signs of stopping. Your mind walked out of the room twenty minutes ago. Your body would have followed, but the speaker is a senior partner, so you don't dare. Instead, you look at your watch every few seconds, fold and unfold your arms, and attempt to send a telepathic message to the speaker: "Shut up. Shut Up! SHUT UP!!!"

Time. It's our most valuable commodity. Rich or poor, smart or dumb, fit or fat, it doesn't matter. When it comes to time, we all get the same amount. 86,400 seconds every day. No more, no less. When you speak, you are asking the audience to give you this precious asset. In return, they hope that what you'll say is *at least* as valuable as their hourly rate. Is it? If not, do you at least mitigate the theft of time by finishing punctually? Here are some tips to help you.

Finish on time. Please re-read that last sentence. Then read it again. Commit it to memory, and practice its simple message. If you respect your audience, you ***must*** finish on time. Even if the meeting starts late, you should finish on time. Even if the introducer chews up half of your allotted time, *finish on time.* Even if you still have two points and fifteen PowerPoint slides left, ***finish on time.***

The reason many speakers don't finish on time is because they think that they (or their message) are too important to obey this rule. They're not. Compare these average speakers to the best professional speakers in the world. The professionals can command fees of $50,000 for a keynote address. That's a valuable hour. When a group pays that much, you can bet they think the speaker and the message are important. Yet those same speakers will cut short their presentations if a meeting runs late. They know the importance of ending on time. Is your message worth $50,000 per hour? If not, don't let your ego get in the way. Respect your audience, and finish on time.

How much time do you have? Respecting your audience's time starts before you rise to speak. Ask the meeting planner, "How long would you like me to speak? What time do I need to finish?" Also, look at the meeting agenda or the program. If nothing else, ask an audience member, "How much time do your speakers normally take?" If you don't know when you should end, you will go over your allotted time.

Keep an eye on the clock. The audience is watching you. If you conspicuously look at your watch, most of the audience will look at their watches, too. It's kind of like watching someone yawn – you feel compelled to yawn, too. But if you want to finish on time, you need to keep an eye on the time. How can you do it? Here's one solution: Before you rise to speak, slide your watch around so that the watch face is on the bottom of your wrist. Now you can inconspicuously glance at your watch, but won't trigger a response from everyone else in the room.

Joel Weldon, a recipient of Toastmasters International's Golden Gavel award, goes even further than that. Whenever he speaks, he brings a gigantic digital clock with him. He places the clock on the lectern, so he knows at a glance how much time remains. The audience never sees his clock, so they're only aware that he finished on time.

Ask for help. If you speak to a large group, such as at a luncheon address or a CLE seminar, you might want to ask someone from the organization to help keep you on time. Meeting planners, program directors, and event chairs are already praying that you will keep them on schedule, so don't be shy about requesting their help. Print four 8.5" x 11" posters with these phrases: "10 minutes," "5 minutes," "1 minute," and "SHUT UP!" Ask your helper to hold up the first sign when you have ten minutes left, etc. With their help, you'll finish the presentation on time.

Outline in "chunks." When you see that you're running out of time, ask yourself, "What can I cut?" In the heat of the moment, a speech written word-for-word looks too complicated to edit. Looking at the mass of words on the page, you forget which parts were essential and which parts could be eliminated. By contrast, if the speech is organized in "chunks," you can discard entire sections on-the-fly. You know

that not every part of your speech is equally important. Pre-determine the most important parts that you want your audience to remember or act upon, so you can edit your speech at the lectern.

Offer to take questions after you finish. Initially, your introducer said that you would take questions following the presentation. That was fifty-seven minutes ago. Now you're crushed for time. Should you still take questions? No, not right now. Eliminating the Q&A session is an easy way to get the program back on track. But keep your promises: stick around afterwards or during the break to answer their questions. Tell the audience exactly where and how long you will stay to answer questions, so they can find you afterward.

Have an exit line. Oh, no. You're only two-thirds of the way through your speech, but your guest helper is standing in the back of the room, waving the "1 minute" sign. What should you do?

As you've figured out by now, the answer is not, "keep talking." Instead, jump to your exit line. Exit lines are prepared comments, typically less than sixty seconds long, which conclude your presentation with poise and power. Invest the time to prepare these lines in advance.

Like a safety net, you can jump to your exit line no matter where you are in your presentation. The exit line quickly summarizes the presentation, creates an emotional high note, and leaves your audience wanting more.

Regardless of how wonderful your speech was, when you speak beyond your allotted time, the audience leaves with negative impressions of you and your presentation. Instead, surprise them. Be the speaker who respects their time. ■

NEW MEMBERS WELCOMED

FIRST DEPARTMENT
Jessica-Wind Pia Abolafia
Pouneh Aravand
Clarice Baldim Alvarenga
Joshua Elroy Barza
Jeffrey Eric Blum
Justin Bobko
Stephanie Maxine Brooks
Allison M. Burbage
Nicole Lynn Buseman
Ryan James Byrnes
Ronny Rahoneli Castro
Patrick Christopher Cento
Jason Chamikles
Courtney Frances Chenette
Timothy Paul Childress
Edward Young Choi
Vanessa Nicole Clarke
Joanna Rebecca Cohen
Michael James Comstock
Lisa Connolly
James Thomas Corcoran
Michelle Hardie Cox
Mark Peter Curtis
Joseph Francis De Metro
Michael Benjamin Dolgow
Donnalee Keisha-ann Donaldson
Patrick Serge Dorime
Joshua Timothy Ebersole
Michelle A. Flahive
Michael Galvin
Charles Thomas Gibbons
Melissa Nicole Girvan
Vanessa Turner Gottfried
Michelle Suzanne Greenacre
Sandra Marie Gresl
Ingrid He
Newman Joseph Hoffman
Jayne Catherine Huckerby
Rommel Von Bismark Hueck
Joseph G. Jansen
David Michael Kelly
Sarai K. King
Tyler J. Korff
Todd Bennett Kornreich
Zachary Ford Levin
Ronald Joseph Mangiacapra
Dinneen Ann Mazzone
Anthony Philip McCready
Jonathan Richard Metallo
Vladimir Mironenko
James Joseph Nally
Nicole Ashley Nussbaum
Alexandra Kate O'Donohue
Ronnie Isaac Ollo
Alan Kenneth Pollack
Adrienne Walker Porter
Li Qian
Allison Patricia Reid
Michael Benjamin Richards
Colleen Wynne Riley
Shane Judith Rosen-Gould
Bret Robert Salzer
David Scott Sasser
Nan Sato
Daniel Philip Schumeister
Matthew P. Schwartz
Saish Radhakrishna Setty
Zaid Saad Shukri
Robert N. Shwartz
Thomas McNamara Sisson
Gajan Sivakumaran
Carol Ann Soderquist
Daniel J. Studin
Jessica Stukonis
Xin Su
Meghan Joan Summers
Danielle-Ann Allison Thomas
Nicole Carol Thompson
Angela Antonia Torregoza
Louis Allan Turgel
Christian Michael Van Buskirk
John Vito Vincenti
Daniel Brian Weiss
Dashika R. Wellington
Douglas James Widmann
Adam Charles Yaeger
Christopher Masao Yamaguchi
Xiaojing Yang
Manju Zacharias
Xiaodan Zhang
Ariella Renee Zoltan

SECOND DEPARTMENT
Ade Ademola
Julie Adler
Heather Delene Casteel
Jacob Seth Claveloux
Matthew Harris Covey
Sara Zoe Sankar Cullinane
Mitchell Paolo Corpuz Esteller
Nyasha Kalisia Ann Griffith
Stella Kestell Hirsch
Ed-peter Jones
Jonathan Kingston
Daniel Heejun Ko
Ernest Lee
Itamar Levy
Shelly Diane Mitchell
Alexis Nichole Riley
Takira Smith
Ned C. Thimmayya
Raymond Patrick Tolentino
Jiwon Yoon

FOURTH DEPARTMENT
Christina Pearson
Michael L. Vild

FIFTH DEPARTMENT
Benjamin Ethan Brockman-Hawe
Timothy Pertz

SIXTH DEPARTMENT
Erin Elizabeth McElroy

SEVENTH DEPARTMENT
Donald George Rehkopf

NINTH DEPARTMENT
Paul-palok Camaj
Michael William Costa
Rachael L. Doud
Lauren Peretz Eisen
Brian Royce Elliott
Neil Aaron Fox
Jared Lawrence Gilman
Shari B. Hochberg
Ryan Peter Houck
Ben Hutman
Anna Kentros
Theresa Alexandra Omansky
Christopher Westberg

TENTH DEPARTMENT
Carrie C. Adduci
Mark Jason Agin
Ronald M. Bernstein
Pamela Bingcang
Daniel Marc Boyle
John David Byrne
William Timothy Cavanagh
Jonathan Charles Clarke
Kaitlyn Anne Costello
Jeffrey Bentsi Datikashvili
Elizabeth Jane Elias
Michael Dennis Elliott
Jaquay Bruce Felix
Desiree Mia Gargano
Warren C. George
Daniel Joseph Gilley
John E. Glennon
Samantha Ashley Goetz
James H. Gomez
Thomas P. Gorton
Joanne M. Hawthorne
Jessica H. Hoffman
Lars O. Husebo
Kyu Bok Kim
Jessi Lauren Kleinman
Edward Martin Knoedler
Erick Daniel Kraemer
Joseph C. Lobosco
Tiffany Marie Lozano
Steven Miranda
Melissa Mary Moran
Nikolas Peter Nartowicz
Joey Elizabeth Pegram
Kevin Scott Polikoff
Joan M. Quinn
Omer Shahid
David Anthony Verni
David Wagman
Kevin Andrew Wakefield

ELEVENTH DEPARTMENT
Samuel Oluseyi Akingboju
Brittney Rose Bennett
Isis Danette Davidson
Ifeanyichukwu Nnenna Ike
Sue Jean Jhun
Yelena Khaitova
Jean Marie Krowicki
Adelaida Leon-Murillo
Julia Erin Lesh
Karen Fallon Levit
Xiaoyong Luan
Matthew Kerry Macaulay
Mordechai Mendlowitz
Christopher Justin Quvus
Steve Samandarov
Sophia Schepitsky
Tara Sheoran-Khaimov
Jessica Shirinian
Robin Vishal Singh
Arunesh S. Sohi
Callistus Emele Uwakwe

TWELFTH DEPARTMENT
Katherine Vance Hynes
Megan Allyson Luzier
Kathleen Elizabeth Maitland
Adam Nicholas Shoop
Nelson Torres
Hilary Wolecki

THIRTEENTH DEPARTMENT
Vladimir Nikhman

OUT OF STATE
Charles Lincoln Abbott
Massumeh Ilham Abdal-sabur
Gina Addamo
Nicole Marie Adler
Amy Jane Agnew
Jacob Lee Agron
Yuri Aldrich
Allyson Faye Amster
Jill Anne Anderson
Troy Robert Anderson
Elisabeth Vanessa Assae-bille
Evelyn Mara Atkinson
Rishi Singh Bagga
Brandy Elaine Baker
Tamar Bakhbava
Ross Begelman
Lauren Margaret Blas
Laura Vera Julie Blondel
Rebecca Rae Bodfish
Peter Jackson Bogard
Nickolas Arlauckas Bohl
Timothy Duffy Brennan
Peter Hans Bruhn
Jocelyn Louise Buckley
David Marc Buckner
John Casimir Burzynski
Burke Morley Butler
Samantha Christine Calloway
Jennifer Shasky Calvery
Ricky Michael Capozza
Caitlin Elise Carey
Frank J. Carmel
Nanci K. Carr
Caitlin Petry Cascino
Thomas B. Caswell
Elizabeth Ann Cervenak
Vanessa Chabrier-Davis
Katherine Ashworth Chamblee
Tinchi Dennis Chan
Chengjie Chen
Elizabeth J. Chen
Heather Lynne Cherry
Kwan-ho Chung
Erin Michelle Close
Jonathan Adam Cohen
Stefanie Lynn Colella-Walsh
Peter Shields Coleman
Christopher Michael Corsini
Gianna Elissa Cricco-Lizza
Anjali Sudhir Dalal
Mark S. Danek
Vincent Darras
Vanessa Marie Delaney
Joseph Gunnar Devine
Sheila Selene Di Pillo Ranieri
Jessica Claire Diamond
Pamela Joy Diedrich
Shannon Pouran Dobson
Bonnie Cochran Doyle
Babatola Adeagbo Durojaiye
Josefina Eizayaga
Jedediah Smith Ela
Gregory Daniel Emond
Akili Lucilla Estrella
William Herman Ettenger
Zhibin Fan
Joel Thomas Faxon
Nicole White Feinberg
Katharine Michelle Felluca
Michael Steven Fettner
Savio Donvez Figaro
Helen Aurelia Flaster
Stephanie Lynn Frank
Donald Edward Frechette
Marik Angelo Frens-string
Rudolph Clarence Gabriel
Yee-Min Gan
Rebecca Elizabeth Garibotto
William Tomas Garrett
Matthew Evan Gartenberg
Joseph Mead Gesley
Sasha Lyn Gibbons
Julio Enrique Gil De Lamadrid
Brett Ryan Gilbert
Brad D. Goldberg
Brian Robert Goldberg
Frank Gonnello
Paul Jeffrey Greene
Lindsey Erin Greising
C. J. Griffin
Megan Geary Gubbins
Carolina Martins De Azeredo Guerra
Yue Guo
Sonia Haerizadeh
Evan David Haggerty
Jonathan Edward Handelman
Jonathan Robert Hankin
Lydia Caroleene Hardee
Farah Hasanli
Jiayun He
Alison Rosemary Heinze
Benjamin Joseph Hochberg
Jongwan Hong
Christina Leslie Hooker
Kathleen S. Huang
Yung Ching Mitzi Huang
Johnnie M. Jackson
Tracy Lynne Jackson
Kristi Lynn Jobson
Jennifer Kirsty Johnson
Dan Comfort Jordan
William Sullivan Joyner
Yianni Gikas Kaiafas
Michelle Beth Kalas
Hisashi Kato
Ron Kendler
Matthew Theodore Kitzman
Nadav Charles Klugman
Sam Matthew Koch
Sung Min Koh
Anna Kordan
Gidae Kwon
Maurice Michael Labrie
Jennifer Michelle Lahm
Sean Satish Lal
Emma Lance
Daniel Ray Lasar
Jeremy Andrew Lawrence
Kyungseok Lee
Yun Joh Lee
Katherine Rachel Leisch
Theresa Marie Levine
Long Li
Myoung Ok Lim

Yen-yu Lin
Elizabeth Marie Locher
Audrey Anne Loehr
Chrystia Losianovich
Joshua Matthew Lurie
Aisling Aine Lynch
Edward Brian Macmahon
Alexander Manganiello
Gregory George Mangini
Aaron Lee Marcus
Megumi Matsuo
Rochelle McAllister
Bryson Francis McDonald
James Douglas McGinnis
Celia Anne McLaughlin
Tyler Loree Middleton
Kiyotaka Minato
Ken Mochizuki
Mark Lenny Mohammed
Gustavo Luis Morales Oliver
Brian Eugene Moran
Drake Anthony Morgan
Mark Salah Morgan
Yoshikazu Motomura
Magdalena Krystyna Mozdzierz
Christopher K. Munoz
Matthew Kyle Myer
Nila Amanda Natarajan
Katsumi Nishimoto
Siobhan Anne Nolan
Catherine Anne O'Hanlon
Natalia Okoniewski
Murat Erol Ozkan
Donald Anthony Papcsy
Mun Eon Park
Saerom Park
Michael Thomas Parker
Juan Jose Gonzalez Perez
Thomas William Perez-Lopez
Jeremy Rakusin Peterman
Joseph Petro
Edward Joseph Piasecki
Michael Yoon Sung Pih
Emily Nicole Pittman
Thomas Vance Powers
Judith Lynn Raines
Peter Slatin Ratner
John Francis Regina
Bradley Philip Reiss
Benjamin Richard Righthand
Narciso Alejandro Rodriguez-Cayro
Kerrie Ann Sylvia Rowan
Shiohban Royster
Timothy Robert Ryan
Sergey Savitskiy
William Henry Schmidt
James Craig Shah
Shu Shang
Kathleen Marie Shay
Edward M. Slaughter
Sophia Soraya
Judith Neyra Soto
Dennis Damonn Spurling
Jacqueline Sierra Stabnow
Zachary Allan Stokes
Nathaniel Lane Strand
Trevor Porter Stutz
Fradyn Suarez
Mallory Ashton Sullivan
Jiahui Sun
Charles Solomon Sutton
Sebastian Amadeus Swett
Deborah Ko Sy
Steven Chen Syverud
Lei Tang
Mary Anne B. Tillona
Reina Tschoe
Lee Anna Tucker
Rafael Urena
Katherine Grace Van Akin
Fang Wang
Lei Wang

In Memoriam

Robert R. Clobridge
Binghamton, NY

Jack E. Earnest
Houston, TX

Matthew L. Lifflander
New York, NY

Robert G. McCarthy
Rochester, NY

Francis J. Offermann
Buffalo, NY

Kevin C. Reilly
Mt. Vernon, NY

Michael Thomas O'Callaghan
Pasadena, CA

John M. Sipos
Geneva, NY

Previn Ajit Waran
Matthew Edward Waters
Brad Michael Weintraub
Michael Daniel Willinger
Brian Patrick Wilson
James Robert Windon
Burton Daniel Witman
Alexandra Wolff
James Dillard Woltmann
Sze Ming Wong
Le Yi
Yuan Yuan
Yoichiro Yukimura
Benjamin Adam Zalman
Mengyi Zhao
You Zhou
Tiantian Zhuang
Patrick Michael Zielinski

motion must have a notice of motion.[19] You'll also need an affidavit or affirmation that you've made a good-faith effort to resolve your disclosure dispute with your adversary.[20] You may also include any other supporting affidavit or memorandum of law. A copy of the disclosure request and the response, if a party responded to disclosure,[21] will help the court resolve your disclosure dispute.

Good-Faith Affirmation

Every disclosure motion must be accompanied by an attorney affirmation explaining your good-faith efforts to resolve the disclosure dispute with your adversary.[22] The good-faith affirmation must "indicate the time, place and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held."[23]

Telling the court in the affirmation that you've sent a few letters and made a few telephone calls to your adversary might not be enough to show your good-faith effort.[24] It's wise to allege that you and your adversary have had "significant, intelligent and expansive contact and negotiations."[25]

Motion to Extend or Expedite Disclosure

Practitioners often need more time to respond to disclosure than what the CPLR provides. To extend your time to respond, ask your adversary for an extension. If your adversary agrees, stipulate to a date certain. Comply with the deadline. If your adversary won't agree to an extension, move for a protective order. Doing so automatically stays your obligation to comply with the disclosure demand until the court resolves your motion.[26]

You might want to move to expedite disclosure with respect to some items or with the entirety of disclosure.[27] If you're seeking to expedite disclosure, move by order to show cause to get the court to hear your motion quickly.

Motion for Supervision of Disclosure

Although the parties usually consent to disclosure without court supervision, the court may also assign a judge, law clerk, special master, or referee, such as a judicial hearing officer (JHO),[28] to supervise any part of disclosure.[29] A JHO is a retired judge who serves under article 22 of the Judiciary Law.[30] Referees have all the powers of a court in supervising disclosure, "expect the power to relieve [themselves] of [their] duties, to appoint a successor, or to adjudge a[] person guilty of contempt."[31]

Because courts often have congested calendars and limited personnel, a court will only rarely appoint a judge, special master, or referee, such as a JHO, to supervise disclosure.[32] A court might require you to show special circumstances before granting your motion for supervision.[33]

The parties to the litigation may also "stipulate to name a[] [private] attorney to act as a referee" to supervise disclosure.[34]

You may ask the court that appointed the referee to review the referee's order.[35] But the "evidentiary rulings made in advance of trial constitute, at best, an advisory opinion which is neither appealable as of right nor by permission."[36]

Motion for a Protective Order

To guard against your adversary's abuse of disclosure, move for a protective order under CPLR 3103. A "protective order is the law's perpetual guard against disclosure abuses."[37] Protective orders are "designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts."[38]

You may move for a protective order under CPLR 3103(a) even if you're not a party to the litigation but someone is seeking disclosure from you as a non-party witness. This includes a non-party from whom an examination before trial (EBT) is sought by a party to the litigation. It may also include "the custodian of a paper or thing from whom discovery is sought."[39]

Under CPLR 3103(a), the court "may at any time on its own initiative [sua sponte] . . . make a protective order." The court might issue a protective order sua sponte if it sees that a party is taking advantage of another attorney who might lack "talent or experience,"[40] if the court notices that during disclosure an attorney is taking advantage of a party who isn't represented by an attorney,[41] or if the court detects disclosure abuse "before a party or witness has complained of it by motion."[42]

Disclosure is suspended when you move for a protective order until the court decides the motion. The "mere making of the motion suspends the scheduled disclosure."[43] If the disclosure involves a non-party witness, you, as the moving party, must notify the witness that disclosure is suspended.[44] The stay applies to the "particular disclosure demand."[45] The court may direct that all disclosure continue or that all disclosure be stayed pending the motion.[46]

You may move for a protective order any time.[47] Preferably, move for a protective order before your deadline to respond to your adversary's disclosure request expires.[48] Consult the appropriate CPLR deadlines relating to disclosure.[49] Moving before your deadline shows the court that you're aware of your disclosure obligations. Ignoring deadlines isn't smart. Neither is sending a late response to your adversary. Courts might "overlook such defaults if they are of short duration and nonprejudicial, [but] counsel shouldn't count on it."[50]

Move for a protective order to guard against your adversary's abusing disclosure.

You may move for a protective order irrespective of the disclosure device implicated.[51]

Regardless who initiates the motion, the court in its protective order may deny, limit, condition, or regulate a disclosure device.[52] The drafters of CPLR 3103(a) enumerated a list of things a court may do in fashioning a protective order. That list isn't exhaustive. The court may regulate "the time, order, and place" of an EBT.[53] The court may regulate "the time and names of persons to be questioned."[54] The court may regulate "the time within which the information must be obtained."[55] The court may regulate "the number, kinds of questions, or specific questions that may be asked."[56] The court may regulate "the disclosure device or combination of devices that may be used."[57] The court may regulate "the matters that may or may not be inquired into."[58] And the court may limit the number of disclosure devices a party may use.[59]

The court's granting or denying disclosure is discretionary.[60]

Motion to Compel Disclosure

Move to compel disclosure under CPLR 3124 when your adversary has ignored all or some of your disclosure requests, has withheld information from you, or has refused to submit to an EBT.[61]

Move to compel disclosure as soon as you learn that your adversary hasn't responded to your disclosure request.[62] Don't wait too long to move to compel.

All disclosure devices apply to motions to compel under CPLR 3124 except for notices to admit. Notices to admit — a disclosure-like device — under CPLR 3123 have their own built-in remedies.

No penalty exists under CPLR 3124 if you've disobeyed the court's order compelling you to comply with disclosure: "CPLR 3124 is a weak section."[63]

Pre-Action Disclosure

Only by court order may you obtain disclosure before commencing an action.[64] As a "prospective plaintiff," you can't ask the court for disclosure to help you determine whether you have a viable cause of action.[65] Nor may you seek pre-action disclosure to "assist [you] in weighing the validity of the claim rather than in drafting the complaint."[66] The purpose of obtaining pre-action disclosure by court order is to protect innocent parties from disclosure — an intrusive, annoying, and often expensive procedure[67] — on the basis of your suspicion that someone committed a wrong.[68]

Commence a special proceeding to get pre-filing disclosure.

A court will permit you to get pre-action disclosure to draft a complaint, to preserve evidence, or to aid in arbitration.[69] Moving for pre-action disclosure can secure for you the names of prospective defendants.[70] Moving for pre-action disclosure to draft a complaint is also helpful to obtain facts not within the plaintiff's knowledge.[71]

You must demonstrate that you have a meritorious cause of action.[72] You'll also need to show that the information you seek is "material and necessary."[73]

Commence a special proceeding to get pre-filing disclosure. As the party commencing the special proceeding, you're the petitioner. The party from whom you seek disclosure is the respondent. In your petition for pre-action disclosure in a court of limited jurisdiction — such as Civil Court, which has a $25,000 jurisdictional limit for claims (with unlimited monetary jurisdiction for counterclaims) — allege that you intend to commence an action in that court and demonstrate that the court will have subject-matter jurisdiction over the contemplated action.[74]

You may move by order to show cause (OSC).[75] Serve the OSC on the respondent. The respondent can file an opposition to your OSC on the OSC's return date.

You may move ex parte for pre-action disclosure.[76] After the court signs the ex parte order for disclosure, the party subject to the disclosure order may move for a protective order under CPLR 3103.[77]

If the court grants pre-action disclosure by signing a subpoena, a disclosure-like device, for the disclosure you seek (documents, testimony, or both), the witness or entity named in the subpoena may move to quash the subpoena.[78]

In the *Journal*'s upcoming issues, the *Legal Writer* will continue with motions to compel, motions for sanctions under CPLR 3126, disclosure in special proceedings, and moving to quash subpoenas. We conclude this column by acknowledging that September marked the 50th anniversary of the CPLR. Happy anniversary, and many more. ■

Gerald Lebovits (GLebovits@aol.com), a New York City Civil Court judge, teaches part time at Columbia, Fordham, and NYU law schools. He thanks court attorney Alexandra Standish for researching this column.

1. CPLR 3102(c).
2. CPLR 3102(d).
3. CPLR 3106(c).
4. David D. Siegel, New York Practice § 352, at 593 (5th ed. 2011) (explaining that Supreme and County Court rules require a motion demonstrating "unusual and unanticipated circumstances" before obtaining disclosure).
5. CPLR 408 ("This section shall not be applicable to proceedings in a surrogate's court, nor to proceedings relating to express trusts pursuant to article 77, both of which shall be governed by article 31.") Notices to admit under CPLR 3123 don't require a court order.
6. The Legal Writer discussed notices to admit in Parts XXV and XXVI of this series. *See Drafting New York Civil-Litigation Documents: Part XXV — Notices to Admit*, 85 N.Y. St. B.J. 64 (June 2013); *Drafting New York Civil-Litigation Documents: Part XXVI — Notices to Admit Continued*, 85 N.Y. St. B.J. 64 (July/Aug. 2013).
7. 1 Michael Barr, Myriam J. Altman, Burton N. Lipshie & Sharon S. Gerstman, New York Civil Practice Before Trial § 31:11, at 31-6 (2006; Dec. 2009 Supp.).
8. *Id.*
9. *Id.*
10. *Id.* § 31:13, at 31-6.

Continued on Page 56

11. *Id.* § 31:10, at 31-6.

12. *Id.*

13. *Id.*

14. *Id.* § 31:12, at 31-6.

15. *Id.* § 31:31, at 31-8.

16. *Id.*

17. *Id.* § 31:30, at 31-8.

18. *Id.* § 31:13, at 31-6 (citing *Postel v. New York Univ. Hosp.*, 262 A.D.2d 40, 41, 691 N.Y.S.2d 468, 470 (1st Dep't 1999)).

19. CPLR 2214(a), (b).

20. Barr et al., *supra* note 7, § 31:21, at 31-7.

21. Some courts prohibit you from filing interrogatory responses. Check your local court rules for any prohibition.

22. 22 N.Y.C.R.R. 202.7(a) (noting the good-faith requirement in Supreme and County courts).

23. 22 N.Y.C.R.R. 202.7(c).

24. Siegel, *supra* note 4, at § 353, at 598 (citing *Eaton v. Chahal*, 146 Misc. 2d 977, 983, 553 N.Y.S.2d 642, 645 (Sup. Ct. Rensselaer County 1990)).

25. *Id.*

26. Barr et al., *supra* note 7, § 31:32, at 31-9 (citing CPLR 3103(b)).

27. *Id.*

28. CPLR 3104(b).

29. Barr et al., *supra* note 7, § 31:40, at 31-9; CPLR 3104(a), (b).

30. Siegel, *supra* note 4, at § 353, at 597; Judiciary Law § 852(1) (explaining compensation for JHOs).

31. Barr et al., *supra* note 7, § 31:43, at 31-9 (citing CPLR 3104(c)).

32. Siegel, *supra* note 4, at § 353, at 597.

33. Barr et al., *supra* note 7, § 31:40, at 31-9 (citing *Di Giovanni v. Pepsico, Inc.*, 120 A.D.2d 413, 414, 502 N.Y.S.2d 23, 25 (1st Dep't 1986)).

34. Siegel, *supra* note 4, at § 353, at 597; CPLR 3104(b); Barr et al., *supra* note 7, § 31:45, at 31-10.

35. CPLR 3104(d).

36. 1 Byer's Civil Motions § 24:25, at 291 (Howard G. Leventhal 2d rev. ed. 2006; 2012 Supp.) (citing *Weiss v. Indus. Enter., Ltd.*, 7 A.D.3d 518, 518, 776 N.Y.S.2d 322, 323 (2d Dep't 2004)).

37. Siegel, *supra* note 4, at § 353, at 595.

38. CPLR 3103(a).

39. Siegel, *supra* note 4, at § 353, at 596 (noting the 1994 amendment to CPLR 3103(a)).

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* (citing CPLR 3106(b)).

45. Barr et al., *supra* note 7, § 31:112, at 31-16.

46. *Id.*

47. Siegel, *supra* note 4, at § 353, at 596.

48. Barr et al., *supra* note 7, § 31:23, at 31-7.

49. CPLR 3122, 3123, 3133.

50. Barr et al., *supra* note 7, § 31:32, at 31-8.

51. Siegel, *supra* note 4, at § 353, at 596 ("In the lower courts the protective order is also available against a bill of particulars if the bill is being used for harassment, although the bill is not officially a disclosure device.").

52. CPLR 3103(a).

53. Siegel, *supra* note 4, at § 353, at 596 (quoting State of N.Y., First Prelim. Rep. Advisory Comm. on Pract. & Proc. No. 6(b), at 124 (1957)).

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at § 353, at 597.

60. Byer's Civil Motions, *supra* note 36, at § 24:23, at 289.

61. Siegel, *supra* note 4, at § 366, at 626.

62. Barr et al., *supra* note 7, § 31:23, at 31-7.

63. Byer's Civil Motions, *supra* note 36, at § 24:48, at 314.

64. CPLR 3102(c).

65. Barr et al., *supra* note 7, § 31:51, at 31-10.

66. *Id.* at § 31:56, at 31-11 (citing *Hoffman v. Batridge*, 155 Misc. 2d 862, 866, 590 N.Y.S.2d 676, 679 (Sup. Ct. Nassau County 1992)).

67. Byer's Civil Motions, *supra* note 36, at § 24:20, at 287.

68. Barr et al., *supra* note 7, § 31:51, at 31-10.

69. *Id.* (citing CPLR 3102(c); *Liberty Imports, Inc. v. Bourguet*, 146 A.D.2d 535, 536, 536 N.Y.S.2d 784, 786 (1st Dep't 1989) ("[D]isclosure in advance of service of a summons and complaint is available only where there is a demonstration that the party bringing such a petition has a meritorious cause of action and that the information being sought is material and necessary to the actionable wrong.").

70. Byer's Civil Motions, *supra* note 36, at § 24:20, at 287.

71. *Id.*

72. *Id.*

73. Barr et al., *supra* note 7, § 31:51, at 31-10.

74. *See In re Wallace*, 239 A.D.2d 14, 16, 667 N.Y.S.2d 768, 770 (3d Dep't 1998) ("Under the circumstances, there can be little question that Surrogate's Court lacks subject matter jurisdiction to entertain wrongful death claims . . . . Lacking jurisdiction over the underlying action, it necessarily follows that Surrogate's Court lacked the authority to grant the incidental relief [pre-action disclosure] sought by petitioner.").

75. Barr et al., *supra* note 7, § 31:52, at 31-10.

76. *Id.*

77. Byer's Civil Motions, *supra* note 36, at § 24:20, at 287.

78. Barr et al., *supra* note 7, § 31:52, at 31-10 (citing CPLR 2304).

WWW.NYSBA.ORG

IT'S ALL NEW

RESPONSIVE DESIGN

NYSBA's new website and Communities feature responsive design – so when you access our site using a tablet or smartphone you get to view the site in a way that is optimized for your device. If you prefer the full view, that's always an option.

When you need information fast while using a mobile device, NYSBA's at your fingertips.

TAKE YOUR COMMUNITIES WITH YOU TOO!

Take your Communities with you using the new MemberCentric mobile app and make the most of NYSBA meetings using NYSBA's new EventSential mobile app. Both apps are available in the Apple and Android App stores.

NYSBA

ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I have always been curious about what conduct outside of legal practice could potentially affect my ability to practice law. Recently, for whatever reason, I have done a number of things that some people have told me are unbecoming. For example, last year my home suffered damage after Super Storm Sandy. My insurance claim listed not only items of direct loss, but also some items that needed repair even before the storm, but which "may" have been exacerbated by it. In addition, I currently own real estate for investment. Several of these properties display numerous building code violations and fines. Lastly, a month or so ago, I submitted an application for a bank loan, and I may have said on the application that I attended Yale Law School, rather than my true alma mater, "Yala" Law School.

My question for the Forum: Do any of these constitute violations of the Rules of Professional Conduct that could lead to disciplinary charges?

Sincerely,

Risk E. Behavior

Dear Risk E. Behavior:

Although we suspect that there are some who may believe that a firm divide should exist between the personal and professional lives of an attorney, the fact is that we are officers of the Court with specific ethical and legal responsibilities. Attorneys should know that they are representatives of our profession and that conduct outside the practice of law can result in disciplinary action.

While this may seem basic, lawyers should be mindful of Rule 8.4 of the Rules of Professional Conduct which states that "a lawyer or law firm shall not engage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer . . ." *See* Rule 8.4(b). Furthermore, "a lawyer or law firm shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation . . ." *See* Rule 8.4(c).

The question whether an attorney's conduct outside of a professional practice can be subject to disciplinary action has been subject to much debate. In New York, conduct or dishonesty in an attorney's business or personal dealings may give rise to a level warranting professional discipline. *See* Hal R. Lieberman, *Discipline for 'Private Conduct': Rationale and Recent Trends*, N.Y.L.J., Feb 19, 2013, p. 3, which gives several examples where attorneys were disciplined for certain acts of misconduct outside of their respective legal practices, including:

> • falsely accusing a state trooper of having uttered anti-Semitic slurs against him, and reaffirming those accusations on more than one occasion, in an attempt to get out of a speeding ticket;
>
> • willfully refusing, in violation of court orders, to timely pay child support;
>
> • pursuing vexation litigation as a "party-litigant, not as an attorney";
>
> • telling the coexecutor under a will executed by the lawyer's uncle that the lawyer needed a power of attorney ("POA") from the uncle to reinstate dormant bank accounts but instead used the POA to restructure, and to attempt to restructure, his uncle's accounts for the lawyer's personal benefit; and
>
> • fraudulently occupying a rent-regulated apartment for two years after the death of the tenant of record.
>
> *Id.* (internal citations omitted).

Suspensions were deemed an appropriate sanction for an attorney who pled guilty to possessing and engaging in the distribution of narcotics (*see In re Silberman*, 83 A.D.3d 95 (1st Dep't 2009)) as well as for another attorney who pled guilty to operating a motor vehicle under the influence of alcohol and leaving the scene of an accident (*see In re Clarey*, 55 A.D.3d 209 (2d Dep't 2008), *cited in* Lieberman, *supra*, at p. 3). A more drastic penalty – immediate disbarment – was imposed where an attorney was convicted of forging a medical prescription form (*see In re Felsen*, 40 A.D.3d 1257 (3d Dep't 2007)); in another case an attorney's conviction for felony assault resulted in automatic disbarment (*see In re Ugweches*, 60 A.D.3d 125 (1st Dep't 2009)). Lieberman, *supra*.

This year, an attorney was disciplined for impersonating someone on a dating website that resulted in criminal charges (*see In re O'Hare*, 968 N.Y.S.2d 394 (1st Dep't July 17, 2013)), and another for disregarding an order of protection by sending text messages to an estranged spouse (*see In re Knudsen*, 109 A.D.3d 94 (1st Dep't 2013)). Outside of this state, one disciplinary authority cited an attorney for violating the equivalent of Rule 8.4(c) by misrepresenting the condition of his home in connection with alleged water damage which occurred in his basement. *See* Edward J. Cleary, *Accountability or Overkill: Disciplining Private Behavior*, available

The Attorney Professionalism Committee invites our readers to send in comments or alternate views to the responses printed below, as well as additional hypothetical fact patterns or scenarios to be considered for future columns. **Send your comments or questions to: NYSBA, One Elk Street, Albany, NY 12207, Attn: Attorney Professionalism Forum, or by e-mail to journal@nysba.org.**

This column is made possible through the efforts of the NYSBA's Committee on Attorney Professionalism. Fact patterns, names, characters and locations presented in this column are fictitious, and any resemblance to actual events or to actual persons, living or dead, is entirely coincidental. These columns are intended to stimulate thought and discussion on the subject of attorney professionalism. The views expressed are those of the authors, and not those of the Attorney Professionalism Committee or the NYSBA. They are not official opinions on ethical or professional matters, nor should they be cited as such.

at http://www.mnbar.org/benchandbar/2001/feb01/prof-resp.htm.

The situations presented in your inquiry, though perhaps not as egregious as the conduct noted above, could potentially subject you to disciplinary action. Here's why.

"[A]ny lawyer who commits a 'serious crime,' as defined in the statute, is subject to professional discipline whether or not the conviction has anything to do with the attorney's law practice." *See* Hal R. Lieberman and Richard Supple, *Private Conduct and Professional Discipline*, N.Y.L.J., July 23, 2002, p. 20; *see also* Judiciary Law § 90(4)(d).

Judiciary Law § 90(4)(d) defines the term "serious crime" as

> any criminal offense denominated a felony under the laws of any state, district or territory or of the United States which does not constitute a felony under the laws of this state, and any other crime a necessary element of which, as determined by statutory or common law definition of such crime, includes interference with the administration of justice, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, or an attempt or conspiracy or solicitation of another to commit a serious crime.

Inflated insurance claims are likely a crime under New York Penal Law §§ 176.00 – 176.35. Whether it is a misdemeanor or a felony will depend on the amount of money involved but should you be convicted of a felony, you would be subject to automatic disbarment under Judiciary Law § 90(4)(a). At a minimum, there is also the possibility of automatic suspension from practice under Judiciary Law § 90(4)(f), which provides that

> [a]ny attorney and counsellor-at-law convicted of a serious crime, as defined in paragraph d of this subdivision, whether by plea of guilty or nolo contendere or from a verdict after trial or otherwise, shall be suspended upon the receipt by the appellate division of the supreme court of the record of such conviction until a final order is made pursuant to paragraph g of this subdivision.

Lawyers should not submit inflated insurance claims. It subjects you to possible disciplinary action, almost certainly jeopardizing your professional career in the short term and possibly permanently.

Turning to your real estate with numerous building code violations and fines, although your obvious neglect of these properties may not be something that would get you prosecuted for a serious crime, why are you taking the risk that someone might file a complaint against you? The kind of conduct you describe could be viewed as conduct reflecting on your "honesty, trustworthiness or fitness as a lawyer." Therefore, if you do engage in a business which would subject you to scrutiny by administrative authorities, you would be well advised to comply with all necessary regulations, especially building codes.

The false statement in your loan application that you went to Yale Law School instead of "Yala" Law School is something that you most certainly realize was not the right thing to do. Obviously, you know that you had an obligation to be completely accurate when you applied for a loan and that any material misstatement in the application could be a federal criminal offense (*see* 18 U.S.C § 1014 (2013)), which would be likely to result in disciplinary action. Furthermore, as discussed above, at a minimum, an act of misrepresentation, fraud or deceit qualifies as a serious crime under Judiciary Law § 90(4)(f) that would subject you to automatic suspension from practice and could even result in automatic disbarment under Judiciary Law § 90(4)(a). As we have stated above, you would be wise not to engage in any action of misrepresentation, fraud or deceit, such as misstating where you went to law school, since it would place your professional career at risk.

Although this should go without saying, an attorney should never make any inaccurate disclosure of information concerning himself or herself because even an attorney's misrepresentation of his or her own professional background can result in discipline. Indeed, one jurisdiction has disciplined an attorney for misrepresenting which law school he attended on the resume he sent to a prospective employer. *In re Hadzi-Antich,* 497 A.2d 1062 (D.C. 1985). In another jurisdiction, an attorney was suspended from practice for three years for falsifying grades on his law school transcript. *In re Loren Elliotte Friedman*, 2009 Ill. Atty. Reg. Disc. LEXIS 75, *aff'd*, 2010 Ill. Atty. Reg. Disc. LEXIS 126 (Ill. 2010).

Attorneys "should know better" even when acting outside the office. We are not setting an unreachable bar, but only wish to remind attorneys that when dealing with others, even outside of the attorney-client relationship, it is necessary for attorneys to always act with common sense and candor in their dealings outside of their professional world.

Sincerely,
The Forum by
Vincent J. Syracuse, Esq. and
Matthew R. Maron, Esq.,
Tannenbaum Helpern Syracuse &
Hirschtritt LLP

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I have always been curious if there are any specific ethical considerations that one needs to comply with when conducting or defending depositions. I know that court rules exist in New York which specify how an attorney is supposed to conduct or defend a deposition, but I have found that a number of my adversaries do not follow these rules. In addition, I have noticed various examples of bad behavior by attorneys in the context of depositions. What rules do I need to be aware of and what behaviors should I avoid the next time I am either conducting or defending a deposition?

Sincerely,
Conscious Counsel

LANGUAGE TIPS

BY GERTRUDE BLOCK

Question: Which is correct to indicate that statements will be mailed twice monthly: bi-monthly or semi-monthly? If meetings are scheduled for twice a week, same question: bi-weekly or semi-weekly?

Answer: The best tactic is to avoid these responses altogether. According to surveys, the majority of Americans believe that both *bi-weekly* and *semi-weekly* mean "twice a week." The same people understand that the terms *bi-monthly* and *semi-monthly* mean "twice a month." However, members of that majority are usually unaware that a sizable minority of Americans believe the opposite: that the prefixes *bi-* and *semi-* mean "every other" (week or month), not "twice a week or month." That can cause a significant confusion.

Dictionaries agree that the phrases *bi-* from the Latin "two" and *semi-* Latin for "half" are synonyms. But until the public also thinks they are, better substitute phrases like "every two months" and "twice a month" for the *bi-* and *semi-* compounds. (However, in the publishing industry, the phrase "bi-monthly" is unavoidable if a journal is published every other month.)

The reader who sent this valuable question added that she had read my column about the ambiguity of the word *next* ("What do you mean by 'next Friday?'"). Can you imagine the confusion, she asks, when someone writes, "Next Friday will be the bi-monthly meeting of the 'Society to Avoid Ambiguity.'"

Question: Norristown, Pennsylvania, reader Charles Campbell writes that the improper use of the phrase, "One hundred and fifty dollars" disturbs him. Instead, he urges, avoid that phrase. Say, "One hundred fifty dollars." He points out that one should never use the word "and" when stating numbers greater than 99. He is right because adding "and fifty" to those words usually implies that one means "fifty cents." (Even clearer would be "One hundred fifty dollars and fifty cents.")

However, *The Gregg Reference Manual*, Eighth Edition (at page 108), disagrees, saying, "In whole dollar amounts the use of *and* between hundreds and tens of dollars is optional." (It is, however, less clear, and clarity in legal documents is most important.)

Question: Increasing numbers of my graduate students have adopted the phrase *backwards* and choose it instead of *backward*, which used to be common in both speech and writing. Which form is preferable – or are they both acceptable?

Answer: The *s-less* form is preferable for *backward* and all similar pairs (like *forward, upward, onward, outward*, and *toward*), certainly in written and non-colloquial English. The *s-less* form is older – and it indicates educated usage. The *-s* ending is new and grammatical only when it is an adverb modifying a verb. ("He walked backwards"). It is ungrammatical as an adjective modifying a noun ("His backwards position . . ."). So it is simply better to choose *backward* in all cases.

Another reader asked about the acceptability of a different pair of forms: *anyway* and *anyways.* Here in the Southeast one seldom hears *anyways*, and I think that form is used chiefly in the Northeast, but that's only a guess. At best, however, *anyways* is acceptable only as slang, and seems to be widely disliked by educated speakers. The online journal *Daily Writing Tips* welcomes reader response, and its readers have vehemently responded against the term *anyways.*

Among the negative responses, these two were characteristic. One reader wrote, "I hate *anyways*; it is in the same category of 'Alls you have to do is . . .'" Another wrote, "[Anyways] is like *alot*, which bothers me a lot." A third correspondent wrote: "I am so happy to know that my mother did teach me correctly! I think *anyways* sounds like some fourteen-year-old Valley girl."

Given that strong majority and the strong dislike of *anyways*, it seems obvious that *anyway* is the preferred form.

But then one might ask about the choice of *any way* versus the merged form *anyway*. These two forms look similar, but are quite different in category and in meaning. The compound *anyway* is an adverb meaning "nevertheless" or "at any rate." The phrase *any way* is an adjective plus a noun phrase. It would occur in "I am glad to help in any way I can."

Both forms follow the usual progression of English usage, the first from a phrase composed of two words that due to wide usage become a hyphenated two-word phrase and finally become a single-word compound. Here are a few: *ball park* to *ball-park* to *ballpark; mail man* to *mail-man* to *mail-man; loop hole* to *loop-hole* to *loophole; iced cream* to *ice-cream* to (in some contexts) *icecream* – though my computer refuses to accept that final stage.

The hyphen sometimes changes the meaning of a sentence. Consider the difference between "a little-used car" and "a little used car"; "a re-covered sofa" and "a recovered sofa"; and "extra-judicial duties" and "extra judicial duties." In speech, that difference is expressed by intonation; in writing, by hyphens. Hyphenation indicates that the two-word phrase is to be read as a unit. For example, in the phrase "a large, well-lighted room," the word *large* is obviously a single-word modifier, but *well-lighted* is also to be read as a single modifier.

Potpourri

A television journalist recently asked this question of the president of a large jewelry firm that had been in business for 50 years: "In your opinion, do current additional regulations designed to protect consumers from unethical business practices indicate that busi-

CONTINUED ON PAGE 61

GERTRUDE BLOCK (block@law.ufl.edu) is lecturer emerita at the University of Florida College of Law and the author of *Effective Legal Writing* (Foundation Press), *Legal Writing Advice: Questions and Answers* (W. S. Hein & Co.) and co-author of *Judicial Opinion Writing* (ABA).

CLASSIFIED NOTICES

RESPOND TO NOTICES AT:
New York State Bar Association
One Elk Street
Albany, NY 12207
Attn: Daniel McMahon

DEADLINE FOR SUBMISSIONS:
Six weeks prior to the first day of the month of publication.

NONMEMBERS:
$175 for 50 words or less; plus $1 for each additional word. Boxholder No. assigned—$75 per insertion.

MEMBERS:
$135 for 50 words and $1 for each additional word. Payment must accompany insertion orders.

SEND ADS WITH PAYMENT TO:
Network Media Partners
Executive Plaza 1, Suite 900
11350 McCormick Road
Hunt Valley, MD 21031
(410) 584-1960
mschwartz@networkmediapartners.com

INDEX TO ADVERTISERS

HELP WANTED

Associate Attorney – Securities & Corporate Governance: New York, NY. Provide legal advice to US public companies & foreign issuers in connection w/securities & corporate governance matters. Reqs JD deg or foreign equiv. Must have 4 yrs of exp as an attorney advising US public companies & foreign issuers, incl Brazilian companies, in connection w/ preparation & review of SEC filings, compliance w/ SEC & US stock exchange rules, corporate governance matters, listings on US stock exchanges, equity & debt SEC-registered offerings & private placements, & analysis of local reqmts to confirm compliance w/ securities & stock exchange rules & to coord simultaneous offerings in different jurisdictions. Must be fluent in written & spoken Portuguese, incl legal & fin'l terminology. Send resume to Amy Claydon, Simpson Thacher & Bartlett LLP, 425 Lexington Ave., NY, NY 10017 or AttorneyRecruiting@stblaw.com.

LLM IN TRANSNATIONAL COMMERCIAL PRACTICE

Two-week sessions in Salzburg, Budapest, and Warsaw. www.legaledu.net.

INCORPORATION SERVICES

Add business formation services to your practice without adding demands on your resources.

Help clients incorporate or form limited liability companies with America's leading provider of business formation services. We can also assist in out-of-state qualifications.

Call us today at 800-637-4898 or visit www.incorporate.com to learn more.

VISITING PROFESSORSHIPS

Pro bono teaching assignments East Europe and former Soviet Republics. Requires 15+ years' practice experience.

www.seniorlawyers.net

LEGAL NURSE CONSULTING

Experienced legal nurse consultant (LNC) with successful independent practice seeks full time in-house LNC position with a busy medical malpractice law firm.
Skilled behind the scenes case analysis for liability, causation and damages, organize medical records, chronologies, summaries, medical literature searches, cite standards, obtain and prepare experts, develop questions for deposition & trial, prepare charts & timelines.
Attorney references provided.
Susan Carleo
Carleo Legal Nurse Consulting
carleomedlegal@gmail.com
315-569-8370
Syracuse, N.Y.
Part time in-house position with work from home office the remainder of the week possible.

MEMBERSHIP TOTALS

NEW REGULAR MEMBERS
1/1/13 – 9/17/13 _____ 7, 739

NEW LAW STUDENT MEMBERS
1/1/13 - 9/17/13 _____ 749

TOTAL REGULAR MEMBERS
AS OF 9/17/13 _____68,563

TOTAL LAW STUDENT MEMBERS
AS OF 9/17/13 _____2,776

TOTAL MEMBERSHIP AS OF
9/17/13 _____71,339

LANGUAGE TIPS
CONTINUED FROM PAGE 60

ness engages currently in more unethical practices than it used to?"

Here is the unedited answer offered by the president of the jewelry firm: "Well, you see, the problem from all this government regulation – and I'm sure there may have been some good results – is that businesses are forced by government to keep so many records that the products consumers buy have had to increase drastically in cost to pay for all these regulations."

So, is the answer to the question "yes" or "no"?

HEADQUARTERS STAFF EMAIL ADDRESSES

Executive
Patricia K. Bucklin
Executive Director
pbucklin@nysba.org

Teresa Schiller
Associate Executive Director
tschillller@nysba.org

Richard J. Martin
Assistant Executive Director
rmartin@nysba.org

Executive Services
Andria Bentley, *Executive Services Counsel*
abentley@nysba.org

Kevin Getnick, *Executive Services Counsel*
kgetnick@nysba.org

Mark Wilson, *Manager, Bar Services*
mwilson@nysba.org

Media Services and Public Affairs
Lise Bang-Jensen, *Director*
lbang-jensen@nysba.org

Mark Mahoney, *Associate Director*
mmahoney@nysba.org

Patricia Sears Doherty, *Editor, State Bar News*
psearsdoherty@nysba.org

Brandon Vogel, *Media Writer*
bvogel@nysba.org

Lawyer Assistance Program
Patricia F. Spataro, *Director*
pspataro@nysba.org

Meetings
Kathleen M. Heider, *Director*
kheider@nysba.org

MIS
David Adkins, *Chief Technology Officer*
dadkins@nysba.org

Paul Wos, *Director of Management Information Services*
pwos@nysba.org

Jeffrey Ordon, *Network Support Specialist*
jordon@nysba.org

Lucian Uveges, *Database Administrator*
luveges@nysba.org

Web Site
Barbara Beauchamp, *Manager of Internet Services*
bbeauchamp@nysba.org

Governmental Relations
Richard Rifkin, *Senior Director*
rrifkin@nysba.org

Ronald F. Kennedy, *Director*
rkennedy@nysba.org

Kevin M. Kerwin, *Associate Director*
kkerwin@nysba.org

Continuing Legal Education
H. Douglas Guevara, *Senior Director*
dguevara@nysba.org

CLE Programs
Jean E. Nelson II, *Associate Director*
jnelson@nysba.org

Carl Copps, *CLE Program Attorney*
ccopps@nysba.org

Kimberly Francis, *CLE Program Coordinator*
kfrancis@nysba.org

Cindy O'Brien, *Program Manager*
cobrien@nysba.org

CLE Publications
Daniel J. McMahon, *Director*
dmcmahon@nysba.org

Kirsten Downer, *Research Attorney*
kdowner@nysba.org

Patricia B. Stockli, *Research Attorney*
pstockli@nysba.org

Joan Fucillo, *Publication Manager*
jfucillo@nysba.org

Law Practice Management
Katherine Suchocki, *Director*
ksuchocki@nysba.org

Finance
Kristin M. O'Brien, *Senior Director*
kobrien@nysba.org

Cynthia Gaynor, *Associate Director of Finance*
cgaynor@nysba.org

General Counsel Services
Kathleen R. Mulligan-Baxter, *General Counsel*
kbaxter@nysba.org

Law, Youth and Citizenship Program
Eileen Gerrish, *Director*
egerrish@nysba.org

Lawyer Referral and Information Service
Eva Valentin-Espinal, *Coordinator*
evalentin@nysba.org

Pro Bono Affairs
Gloria Herron Arthur, *Director*
garthur@nysba.org

Human Resources and Customer Service
Paula M. Doyle, *Senior Director*
pdoyle@nysba.org

Sonja Tompkins, *Manager*
stompkins@nysba.org

Member Services Division
Richard J. Martin, *Assistant Executive Director*
rmartin@nysba.org

Marketing

Membership Services
Patricia K. Wood, *Senior Director*
pwood@nysba.org

Megan O'Toole, *Membership Services Manager*
motoole@nysba.org

Section Services
Lisa J. Bataille, *Chief Section Liaison*
lbataille@nysba.org

Print and Facilities Operations
Roger E. Buchanan, *Senior Director*
rbuchanan@nysba.org

Building Maintenance

Design Services

Graphics

Print Shop
Gordon H. Ryan, *Director of Design, Printing and Fulfillment Services*
gryan@nysba.org

The New York Bar Foundation
Deborah Auspelmyer, *Foundation Administrator*
dauspelmyer@tnybf.org

THE NEW YORK BAR FOUNDATION

2013-2014 OFFICERS
Cristine Cioffi, *President*
2310 Nott Street East, Niskayuna, NY 12309

Lesley Rosenthal, *Vice President*
70 Lincoln Center Plaza, 9th Floor
New York, NY 10023

Patricia K. Bucklin, *Secretary*
One Elk Street, Albany, NY 12207

Lucia B. Whisenand, *Assistant Secretary*
1 Nursery Lane, Syracuse, NY 13210

Richard Raysman, *Treasurer*
31 West 52nd Street, New York, NY 10019

DIRECTORS
James R. Barnes, *Albany*
Honorable Ralph A. Boniello, III, *Niagara Falls*
Earamichia Brown, *New York*
Marion Hancock Fish, *Syracuse*
Sheila A. Gaddis, *Rochester*
Sharon Stern Gerstman, *Buffalo*
Michael E. Getnick, *Utica*
John H. Gross, *Hauppauge*
Robert L. Haig, *New York*
Stephen D. Hoffman, *New York*
John R. Horan, *New York*
William J. Keniry, *Albany*
Susan B. Lindenauer, *New York*
Edwina Frances Martin, *New York*
Joseph V. McCarthy, *Buffalo*
Elizabeth J. McDonald, *Pittsford*
Martin Minkowitz, *New York*

EX OFFICIO
James B. Ayers, *Albany*
Chair of The Fellows

Emily F. Franchina, *Garden City*
Vice Chair of The Fellows

THE NEW YORK BAR FOUNDATION

JOURNAL BOARD MEMBERS EMERITI

Howard Angione
Immediate Past Editor-in-Chief

Rose Mary Bailly
Richard J. Bartlett
Coleman Burke
John C. Clark, III
Angelo T. Cometa
Roger C. Cramton
Willard DaSilva
Louis P. DiLorenzo
Philip H. Dixon
Maryann Saccomando Freedman
Emlyn I. Griffith
H. Glen Hall
Paul S. Hoffman
Judith S. Kaye
Charles F. Krause
Philip H. Magner, Jr.
Wallace J. McDonald
J. Edward Meyer, III
Gary A. Munneke
John B. Nesbitt
Kenneth P. Nolan
Eugene E. Peckham
Albert M. Rosenblatt
Lesley Friedman Rosenthal
Sanford J. Schlesinger
Robert J. Smith
Lawrence E. Walsh
Richard N. Winfield

2013-2014 OFFICERS

David M. Schraver
President
Rochester

Glenn Lau-Kee
President-Elect
New York

David P. Miranda
Secretary
Albany

Sharon Stern Gerstman
Treasurer
Buffalo

Seymour W. James, Jr.
Immediate Past President
New York

VICE-PRESIDENTS

First District
Catherine A. Christian, *New York*
Jay G. Safer, *New York*

Second District
Manuel A. Romero, *Brooklyn*

Third District
Lillian M. Moy, *Albany*

Fourth District
Rebecca A. Slezak, *Amsterdam*

Fifth District
Thomas E. Myers, *Syracuse*

Sixth District
Mark S. Gorgos, *Binghamton*

Seventh District
June M. Castellano, *Rochester*

Eighth District
Cheryl Smith Fisher, *Buffalo*

Ninth District
Hon. Arlene Gordon-Oliver, *White Plains*

Tenth District
Scott M. Karson, *Melville*

Eleventh District
Richard M. Gutierrez, *Forest Hills*

Twelfth District
Steven E. Millon, *Bronx*

Thirteenth District
Michael J. Gaffney, *Staten Island*

MEMBERS-AT-LARGE OF THE EXECUTIVE COMMITTEE

Samuel F. Abernethy
James B. Ayers
James R. Barnes
T. Andrew Brown
David Louis Cohen
Hon. Margaret J. Finerty
Evan M. Goldberg
Ira S. Goldenberg
Edwina Frances Martin
Sherry Levin Wallach
Oliver C. Young

MEMBERS OF THE HOUSE OF DELEGATES

First Department

Aaron, Stewart D.
Abdelhamid, Reema Salah
Abella, Zachary J.
Abernethy, Samuel F.
+ * Alcott, Mark H.
Alden, Steven M.
Arenson, Gregory K.
Baum, Simeon H.
Blessing, Peter H.
Brown, Terryl
Chakansky, Michael I.
Chambers, Hon. Cheryl E.
Christian, Catherine A.
Clark, Jason Myles
* Cometa, Angelo T.
Davino, Margaret J.
Davis, Megan P.
Davis, Tracee E.
Dean, Robert S.
Donaldson, Xavier Robert
Dunne, Carey R.
Ellerin, Hon. Betty Weinberg
Eng, Gordon
Eppler, Klaus
Fahey, Stacey O'Haire
Feinberg, Ira M.
Feinman, Hon. Paul G.
Finerty, Hon. Margaret J.
Fontaine, R. Nadine
* Forger, Alexander D.
Freedman, Hon. Helen E.
Friedman, Richard B.
Galligan, Michael W.
Goldberg, Evan M.
Green, Prof. Bruce A.
Haig, Robert L.
Hayes, Vilia B.
Honig, Jonathan
Hoskins, Sharon T.
Jaglom, Andre R.
+ * James, Seymour W., Jr.
Kahn, Michele
Kenney, John J.
Kiernan, Peter J.
* King, Henry L.
Kobak, James B., Jr.
Kornfeld, John A.
+ Lau-Kee, Glenn
Lawton-Thames, Lynnore Sharise
+ * Leber, Bernice K.
Lessard, Stephen Charles
Lindenauer, Susan B.
Ling-Cohan, Hon. Doris
* MacCrate, Robert
Maltz, Richard M.
Marino, Thomas V.
Martin, Deborah L.
McNamara, Michael J.
Miller, Michael
Minkoff, Ronald
Morales, Rosevelie Marquez
Moses, Barbara Carol
Needham, Andrew W.
Otis, Andrew D.
Parker, Bret I.
* Patterson, Hon. Robert P., Jr.
Prager, Bruce J.
Radding, Rory J.
Reed, Thomas A.
Reitzfeld, Alan D.
Richter, Hon. Rosalyn
Robb, Kathy Ellen Bouton
Robertson, Edwin David
Rosner, Seth
Rothstein, Alan
Safer, Jay G.
Scanlon, Kathleen Marie
Schwartz, Jodi J.
Sen, Diana Sagorika
* Seymour, Whitney North, Jr.
Siegel, Charles J.
Sigmond, Carol Ann
Silverman, Paul H.
Smith, Asha Saran
* Standard, Kenneth G.
Stenson Desamours, Lisa M.
Stern, Mindy H.
Swanson, Richard P.
Tesser, Lewis F.
Ugurlayan, Anahid M.
Valet, Thomas P.
Walsh, Susan J.
Wiig, Daniel K.
Wilkey, Alison
Wolk, Lawrence J.
+ * Younger, Stephen P.

Second Department

Ajaiyeoba, Abayomi O.
Cohn, Steven D.
Fallek, Andrew M.
Gerber, Ethan B.
Kamins, Hon. Barry
Klass, Richard A.
Lonuzzi, John A.
Lugo, Betty
Napoletano, Domenick
Richman, Steven H.
Romero, Manuel A.
Simmons, Karen P.
Slavin, Barton L.
Sunshine, Hon. Nancy T.
Yeung-Ha, Pauline

Third Department

Ayers, James B.
Barnes, James R.
Bauman, Hon. Harold J.
Beckford, Marie B.
Burke, Walter T.
Cahill, Richard T., Jr.
Collura, Thomas J.
Crummey, Hon. Peter G.
Gold, Sarah E.
Griesemer, Matthew J.
Higgins, John Eric
Hines, Erica M.
Hutter, Prof. Michael J., Jr.
Kretser, Hon. Rachel
Kruse, Rachael E.
Meacham, Norma G.
Meislahn, Harry P.
Meyers, David W.
Miranda, David P.
Moy, Lillian M.
Pettit, Stacy L.
Rivera, Sandra
Schofield, Robert T., IV
Silver, Janet
* Yanas, John J.

Fourth Department

Canary, Kyle
Coffey, Peter V.
Coseo, Matthew R.
Hoag, Rosemary T.
McAuliffe, J. Gerard, Jr.
McNamara, Matthew Hawthorne
Nowotny, Maria G.
Rodriguez, Patricia L. R.
Slezak, Rebecca A.

Fifth Department

DeMartino, Nicholas
Gall, Hon. Erin P.
Gerace, Donald Richard
+ * Getnick, Michael E.
Graham, Richard J.
John, Mary C.
Larose, Stuart J.
Myers, Thomas E.
Oliver, Donald D.
Pellow, David M.
Perez, Jose E.
Pontius, Nancy L.
* Richardson, M. Catherine
Stanislaus, Karen
Virkler, Timothy L.
Westlake, Jean Marie
Woronov, Howard J.

Sixth Department

Denton, Christopher
Gorgos, Mark S.
Grossman, Peter G.
Hamm, Denice A.
Kiley, Lauren Ann
Lanouette, Ronald Joseph, Jr.
Lewis, Richard C.
+ * Madigan, Kathryn Grant
McKeegan, Bruce J.

Seventh Department

Baker, Bruce J.
Bleakley, Paul Wendell
Brown, T. Andrew
Buholtz, Eileen E.
+ * Buzard, A. Vincent
Castellano, June M.
Cecero, Diane M.
Giordano, Laurie A.
Lawrence, C. Bruce
McCafferty, Keith
McDonald, Elizabeth J.
Modica, Steven V.
* Moore, James C.
Moretti, Mark J.
Murray, Jessica R.
* Palermo, Anthony Robert
Quinlan, Christopher G.
+ Schraver, David M.
Stankus, Amanda Marcella
Tennant, David H.
Tilton, Samuel O.
* Vigdor, Justin L.
Walker, Connie O.
* Witmer, G. Robert, Jr.

Eighth Department

Brown, Joseph Scott
Convissar, Robert N.
+ * Doyle, Vincent E., III
Edmunds, David L., Jr.
Fisher, Cheryl Smith
* Freedman, Maryann Saccomando
Gerber, Daniel W.
Gerstman, Sharon Stern
Habberfield, Kevin M.
+ * Hassett, Paul Michael
O'Donnell, Thomas M.
Ogden, Hon. E. Jeannette
Russ, Arthur A., Jr.
Ryan, Michael J.
Smith, Sheldon Keith
Sweet, Kathleen Marie
Young, Oliver C.

Ninth Department

Abraham, Merry L.
Barrett, Maura A.
Brown, Craig S.
Curley, Julie Cvek
Dorf, Jon A.
Enea, Anthony J.
Epps, Jerrice Duckette
Fay, Jody
+ Fox, Michael L.
Goldenberg, Ira S.
Gordon-Oliver, Hon. Arlene
Hilowitz-DaSilva, Lynne S.
Kirby, Dawn
Klein, David M.
McCarron, John R., Jr.
* Miller, Henry G.
* Ostertag, Robert L.
Pantaleo, Frances M.
Preston, Kevin F.
Protter, Howard
Ranni, Joseph J.
Riley, James K.
Ruderman, Jerold R.
Sachs, Joel H.
Sapir, Donald L.
Singer, Rhonda K.
Valk, Rebecca Ann
Wallach, Sherry Levin
Welch, Kelly M.

Tenth Department

* Bracken, John P.
Chase, Dennis R.
Collins, Richard D.
Cooper, Ilene S.
DeHaven, George K.
England, Donna
Ferris, William Taber, III
Franchina, Emily F.
Genoa, Marilyn
Gross, John H.
Harper, Robert Matthew
Helfer, Cheryl M.
Hillman, Jennifer F.
Karson, Scott M.
Lapp, Charles E., III
Leventhal, Steven G.
+ * Levin, A. Thomas
Levy, Peter H.
McCarthy, Robert F.
McEntee, John P.
* Pruzansky, Joshua M.
* Rice, Thomas O.
Schoenfeld, Lisa R.
Shulman, Arthur E.
Tollin, Howard M.
Tully, Rosemarie
Warshawsky, Hon. Ira B.
Weinblatt, Richard A.
Zuckerman, Richard K.

Eleventh Department

Alomar, Karina E.
Cohen, David Louis
DeFelice, Joseph F.
Gutierrez, Richard M.
Kerson, Paul E.
Risi, Joseph J.
Taylor, Zenith T.
Terranova, Arthur N.
Wimpfheimer, Steven

Twelfth Department

Calderon, Carlos M.
DiLorenzo, Christopher M.
Friedberg, Alan B.
Marinaccio, Michael A.
Millon, Steven E.
* Pfeifer, Maxwell S.
Weinberger, Richard

Thirteenth Department

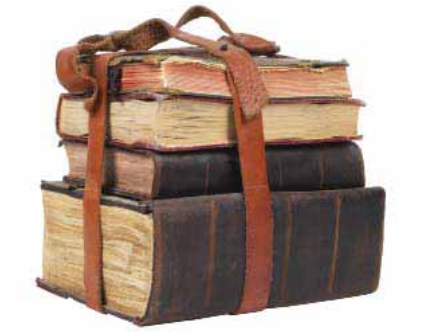
Behrins, Jonathan B.
Cohen, Orin J.
Gaffney, Michael J.
Marangos, Denise
Marangos, John Z.
Martin, Edwina Frances
Mulhall, Robert A.

Out-of-State

Keschenat, Dr. Heidi
Perlman, David B.
Sheehan, John B.
* Walsh, Lawrence E.
Weinstock, David S.

† *Delegate to American Bar Association House of Delegates* * *Past President*

BY GERALD LEBOVITS



Drafting New York Civil-Litigation Documents: Part XXVII — Disclosure Motions

In the last issue, the *Legal Writer* took a break from the series on civil-litigation documents to discuss legal-writing courses in the practice-ready law school.

We resume our series on drafting. In this and the following issues, we'll discuss disclosure motions and motions involving disclosure-like devices.

Disclosure is a process between you and your adversary to exchange information before you go to trial. Disclosure prevents surprise at trial, expedites cases, encourages settlement, and outs the truth.

Practitioners usually use the terms "disclosure" and "discovery" interchangeably. In New York courts, the proper term is "disclosure." In federal court, its counterpart is called "discovery." Because this column is for New York State practitioners, the *Legal Writer* uses "disclosure."

Article 31 of the CPLR addresses disclosure. CPLR 3101 sets out what is discoverable.

You obtain disclosure by sending a notice to your adversary specifying what information you're seeking. You may then agree with your adversary — by preparing and signing a stipulation — to exchange information by a date certain. If no agreement is forthcoming, you'll need a court order to obtain disclosure. You'll also need a court order to get disclosure (1) before commencing an action,[1] (2) during or after trial,[2] (3) from a prisoner,[3] (4) after the note of issue and certification of readiness have been filed,[4] or (5) in a special proceeding.[5]

The disclosure process should be amicable. Always try to work out disclosure disputes with your adversary.

If your adversary didn't comply with a notice to admit, consult CPLR 3123. Notices to admit have their own built-in sanctions under CPLR 3123. The *Legal Writer* discussed the nuances to notices to admit in earlier columns.[6]

Familiarize yourself with Article 31 before asking the court to intervene: CPLR 3103 (motions for a protective order); CPLR 3124 (motions to compel disclosure); CPLR 3115 (motions to challenge the qualifications of the person taking an EBT); and CPLR 3126 (motions for sanctions for nondisclosure).

Request a preliminary conference to involve the court in disclosure.

Preliminary Disclosure Conference

In some courts, particularly in Supreme Court, you may request a preliminary conference to involve the court in disclosure. At the conference, you can explain your disclosure disputes to the court.[7] You and your adversary can agree to deadlines concerning disclosure.[8] If a complicated disclosure issue arises and the court needs additional information or legal precedent, you and your adversary may set a briefing schedule.[9] Some judges may require you to file a motion on notice for a contested disclosure issue.

If you're seeking to strike pleadings, preclude evidence, or dismiss the case, you'll need to move for sanctions under CPLR 3126. The court won't entertain the drastic relief provided in CPLR 3126 at a preliminary conference.[10]

Any party may request a preliminary conference after issue has been joined but before disclosure is complete.[11] The request must contain the title of the action, the index number, the attorneys' names (including their addresses and telephone numbers), and a brief statement of the nature of the action.[12] If the court has yet to assign a judge to the case, file a request for judicial intervention (RJI).[13]

At the conference, the parties must agree to complete disclosure within 12 months unless the court determines a different deadline.[14]

The court will issue a preliminary conference order setting out your disclosure obligations and deadlines. Some courts in the court's preliminary conference orders may vacate the statutory stay of disclosure under CPLR 3211, 3212, and 3213.

Check court rules if you're seeking to modify a preliminary conference order. Some judges allow the parties to stipulate to extend the disclosure time limits.[15] Other judges require a formal motion to modify or vacate the preliminary conference order.[16]

Preliminary conference orders — also known as scheduling orders[17] — aren't appealable.[18] They don't stem from a motion made on notice.

Disclosure Motion Papers

The CPLR's formal motion rules apply to disclosure motions. Your disclosure

CONTINUED ON PAGE 54

Periodicals

ADDRESS CHANGE – Send To:
Records Department
NYS Bar Association
One Elk Street
Albany, NY 12207
(800) 582-2452
e-mail: mis@nysba.org