

THE CPLR AT FIFTY: ITS PAST, PRESENT, AND FUTURE

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PREFACE

On March 12, 2013, the *Journal of Legislation and Public Policy* hosted a symposium in partnership with the Dwight D. Opperman Institute of Judicial Administration entitled “The CPLR at Fifty: Its Past, Present, and Future” at New York University School of Law. Moderated by Professor Oscar Chase and featuring Judge Jack Weinstein, the architect of the CPLR, the evening examined this venerable set of rules from historical, academic, and practical angles—and challenged the audience to consider the future development of New York’s civil procedure rules.

We are proud to present the collected remarks from this evening to you here in *Legislation*’s inaugural summer issue. The CPLR is—as the evening’s speakers elucidate herein—a truly remarkable statute, not only in the way it frames the relationship between legislature and courthouse, but in its remarkable resilience in a legal landscape where somewhere on the order of half of the states in the Union have elected to adopt the Federal Rules of Civil Procedure at the state level. It is both a practice point and a historical artifact; central to the practice of law in New York, one of the great legal nerve centers of the world. And it is, through the CPLR’s complex and evolving symbiotic relationship with New York’s legislature, a unique matter of public policy.

Legislation wishes to thank Professor Oscar Chase and the Dwight D. Opperman Institute of Judicial Administration for partner-

ing with us for this event, and wishes especially to thank Judge Weinstein, Chief Judge Kaye, and the other distinguished members of the panel who agreed to have their remarks printed. Remarks appear in the order they were delivered.

With that short introduction, we present “The CPLR at Fifty: Its Past, Present, and Future.”

Peter Dubrowski
Editor-in-Chief

INTRODUCING JUDGE WEINSTEIN

*Professor Oscar G. Chase**

Thank you all for coming. Paul [Brachman], thank you for that very nice introduction. I also want to acknowledge the help and guidance of Paul who is the Editor-in-Chief of the Journal, and to Robert Dahnke who is the Symposium Editor, and is here as well. Many thanks to both of you for helping to put this program together. Thanks also to the editorial staff of the Journal, which, in addition to helping out in programming for tonight, will be editing the papers to be presented. I'm very happy to say that the Journal of Legislation and Public Policy at NYU will be publishing a symposium issue of these remarks and so they will be carried forward in legal history, which I think is very important, given the fifty-year role of the CPLR in New York procedure.

And as Paul mentioned, we are especially honored to have with us tonight the primary author of the CPLR, Judge Jack Weinstein, who labored for many years, as he will tell you, with the Advisory Committee, and who in the end produced this great code. Great in its scope, great in the reforms it made, and I think as Judge Weinstein prefers to say, not great in every detail, because unfortunately the legislature had the nerve to make some edits to this great document.

I also want to say that I had a personal—and I think that Chief Judge Kaye and I share—a personal relationship to the CPLR in that both of us were taking the bar exam around the time that the law changed from the Civil Practice Act to the CPLR. As a result we were told by our bar exam instructors that we had to know both codes in order to pass the exam, which neither of us was very happy about. Somehow we managed to get through nonetheless.

To say a few more words about Judge Weinstein: He was born in Wichita but grew up in Brooklyn. He was educated in public schools, has a B.A. from Brooklyn College, an L.L.B. from Columbia Law School, many honorary doctorates—too many to name. Judge Weinstein was commissioned in the United States Navy and served during the Second World War. Following the war he was the law clerk to Stanley Fuld, an Associate Judge of the New York Court of Appeals. He subsequently had a private practice, taught at Columbia Law School, at Brooklyn Law School, and elsewhere, and was county at-

* Russell D. Niles professor of Law. Co-Director, Institute of Judicial Administration.

torney at Nassau County. He was confirmed as a United States District Judge in 1967. He has now taken senior status on that Court, but carries a full docket. He has written many books, treatises, articles and, most relevant to tonight, the encyclopedia that bears his and his co-author's names, the Weinstein Korn Miller treatise on the Civil Practice Law and Rules. He has of course handled many difficult and famous cases, not the least of which is the great Agent Orange case which he managed to get the parties to settle after many difficult negotiations. Most important, of course, is the enormous contribution he made to the modernization of civil practice in New York, and as Paul Brachman said, this is also an occasion to honor the work of this great man.

CPLR'S GENESIS

*Jack B. Weinstein**

In the mid-1950s Harry Tweed asked me to write a memorandum on the desirability of revising New York civil practice. He was then chairman of the New York State Commission to Improve New York Courts—then in terrible shape on both the civil and criminal side. Delays were unacceptably high.

My qualifications were minimal. I had served as law clerk to the great Stanley Fuld of the New York Court of Appeals; taught medieval legal history at Columbia Law School as an Associate after graduation; in my individual private practice, argued a few appeals and assisted attorneys on civil cases; and drafted legislation as counsel to Senator Seymour Halpern, Chairman of the New York Joint Committee on Motor Vehicle Problems. I was just beginning to teach civil procedure as an Associate Professor at Columbia.

My memorandum to Tweed suggested that a revision would be feasible and useful.

“Are you *interested* in being the Reporter, Jack?”, he asked. Without reflecting, I responded, “Yes.” And he said, “Okay, the Commission is offering you the job.”

That night, in pillow talk, Evie and I discussed what the work might entail. Our marriage would stand the strain of this extra work. But what would the effect be on the lives of our three boys?

The next morning, I asked Bill Warren, Dean of Columbia Law School, to help get me released. He delivered a quick lesson in semantics. “Jack,” he explained, “when you say you’re ‘*interested*’ that means you want the job. You can’t get out now. Good luck! Your teaching load will be the same.”

So then I got a call from the Speaker’s office in Albany. “Come up next Friday, at 10:00. He wants to discuss your work.”

Seth, my nine year old son, and I rode up on the train to Albany. Evie had dressed him in a white turtleneck sweater and white shorts, and he was carrying his little box camera. I was happy to be holding his hand and sharing the view.

In the Capitol, we had to wait. Rockefeller was about to run for governor. A phalanx of trailing photographers and he were going in to see the legislative leaders just before us.

* Senior District Judge, United States District Court for the Eastern District of New York.

When they came out, Seth and I walked into a room with all the leaders and major committee chairmen.

Then the Speaker made the comment that was key to the success of the revision. Nodding to Seth, he smiled and said: "I see, like Rockefeller, you brought your own cameraman!" The room exploded with laughter. The project was approved.

I don't remember whether money was mentioned. Our work was financed through the Senate Finance Committee, chaired by Senator Austin W. Erwin. I tried to be frugal, and, as far as I can recall, we never were turned down on any request for expenses. I guess we spent less than half a million dollars.

Seth and I walked over to the beautiful Court of Appeals to say hello to Judge Fuld. I used Seth's camera to take his picture on the bench in the Chief Judge's seat.

Soon afterward, I asked one of the Judges of that Court if he had any suggestions. "Well, Jack," he reflected, "the practice is in good shape except for one section."

"Which one?"

"I won't tell you."

"That means we'll have to do them all."

He walked away with an enigmatic smile.

I went over to McKinney's, the company that published the annotated New York Laws. At my request, they printed all of the New York statutes that might affect the civil practice on thousands of cards.

Then I hired two brilliant graduating members of the Columbia Law Review's Board, Harold Korn and Daniel Distler, as Director of Research and Assistant Reporter, respectively. In the years that followed a large number of Columbia Law School students were paid out of Committee funds for research. We wrote five long reports, articles, and speeches. The first committee report was published in 1957 and the last, in the name of the Senate Finance Committee, in 1962.

Professors and academics from other law schools in New York and elsewhere lent their skills. Professor Thomas E. Atkinson of New York University drafted revisions on joinder of parties and causes of action; Professor Louis R. Frumer of Syracuse University was responsible for jurisdiction and venue; and Professor Louis Prashker of St. John's University provided the draft for statutes of limitation.

The Law Revision Commission, established at the suggestion of Justice Cardozo in the 1920s, had already done cleanup jobs on Article 78 dealing with the old writs and on other matters.

Professor Adolf Homburger of Buffalo Law School revised our class action proposals. After adoption of the CPLR, he was Chairman of the Committee to Advise and Consult with the Judicial Conference of the State of New York on the Civil Practice Law and Rules. And, Professor Willis L. M. Reese of Columbia Law School redid our draft of personal jurisdiction.

Our Advisory Committee was superb. People as well as ideas are critical in such an enterprise. Its members were Jack Dykman, chairman, and other attorneys with extensive and varied experience representing different parts of the state: George G. Coughlin; Austin W. Erwin, Jr.; John F.X. Finn, who died in Albany when the committee was meeting there; S. Hazard Gillespie, Jr.; Samuel H. Hesson; Gilbert R. Hughes; Robert W. Jamison; Harold M. Kennedy; William L. Lynch; John W. MacDonald; and James O. Moore, Jr.

We met once a month for some five years, mostly at the City Bar Building on West 44th Street in New York. Meetings were on Fridays when we could go across the street to the Algonquin Hotel for its famed weekly bouillabaisse. In Albany we met at the State Bar Building in an elegant room furnished at Jack Dykman's expense in colonial style.

Each of the members participated assiduously. Jack Dykman deserves a moment of special recognition. He was referred to as "Colonel" because he had organized and led a regiment in World War I. His office in downtown Brooklyn was a replica of an eighteenth century barrister's, wood-burning fireplace and all. In his youth he had hunted fox on horseback on the prairie-like plain of Hempstead, Long Island. While he was conservative, when I asked him to intercede with the Appellate Division, which was denying admission to one of my former students because he attended a left-wing summer camp, he promptly did so. The applicant was admitted the next day. The Colonel had called the Presiding Justice and told him that his firm, Cullen and Dykman, would take the case to the Supreme Court unless this injustice was promptly rectified.

Originally, I proposed adoption of the Federal Rules with modifications to meet any special New York problems, and a state-level Advisory Committee with authority to recommend amendments to the judiciary, which would have power to adopt. The new Federal Rules seemed to be working well. Having essentially the same procedures would make teaching more effective and practice simpler, and would enable New York to take advantage of a large body of precedents.

This suggestion was rejected out-of-hand: “New York was the leader, not the follower”; “our practice was more developed historically”; and “our judges, court structure and bar had special needs.”

So we started on a revision of the New York practice. I tried to substitute Federal Rules wherever possible. But, even when we recommended them in our reports, the bar, the judges, and the legislature rejected most of them.

I spoke to bar associations throughout the state, from Wyoming County—where there were state prisons and the bar was overwhelmed with habeas petitions (all 28 members showed up in a local saloon on a cold winter day to discuss the subject with me)—to Suffolk County, Long Island, where the Surrogate was insisting on preserving the Dead Man’s Rule to prevent fraud on estates.

Hundreds of lawyers throughout the State served on committees reviewing the material. The most detailed analyses were made by a Joint Committee, representing the New York State Bar Association, the Association of the Bar of the City of New York and the New York County Lawyers’ Association. It was under the chairmanship of William E. Jackson. Its favorable 1960 report concluded as follows:

The revisions proposed by the Advisory Committee . . . constitute a vast improvement on our present procedural statutes and rules. While they may have some slight adverse economic effect on printers, newspaper publishers, and process servers, these matters are minimal as compared to the far greater enhancement of the interests of the public at large, the judiciary, and the bar. Unlike recent proposals for changes in the organization of the courts, these proposals should not engender political controversy. They represent the best hope in years for a modern system of procedure. The proposal for continuing reexamination of the rules by the Judicial Conference assures that the system will be responsive to the needs of the times.¹

Suggestions of individual judges and lawyers and of legal and lay associations throughout the state were considered by the Advisory Committee.

At the 1961 legislative session the Codes Committees insisted on changing “rules” to statutory “sections.” They wanted the legislature—not the courts—to control court procedures, and they insisted on many changes in our proposals. Most important to me were the following:

Reference to forms in the pleading rule was omitted;

1. 1 Jack B. Weinstein, Harold L. Korn & Arthur R. Miller, *New York Civil Practice* xxxiii (1995) (quoting Joint Committee report).

The detailed negligence pleading provision was omitted (the so-called “full disclosure complaint”);

Bills of particulars practice was restored;

The former scope of disclosure was restored;

Examination of nonparty witnesses was provided for only in cases specified in the former practice;

Interrogatories were omitted;

The article on pretrial conferences was omitted;

The provision limiting interlocutory appeals from orders involving disclosure was omitted;

Appeals to the Court of Appeals as of right were continued; and

The Illinois rule for long-arm jurisdiction to the limit of constitutional power was rejected and a much more limited long-arm provision substituted.

The disputes were hot. Legislators wanted to continue to fiddle with the details of practice. Some judges and lawyers were reluctant to learn a new practice. And the large downtown firms wanted to make it harder to exercise jurisdiction over their out-of-state clients. The words of Rule 1 of the Federal Rules of Civil Procedure—“to secure the just, speedy, and inexpensive determination”² of legal claims—were almost anathema to a few.

At the 1962 legislative session, we submitted our Sixth—and final—Report (issued in the name of the Senate Finance Committee) containing a full draft of the proposed Civil Rules of Procedure. The Advisory Committee and the Reporter were then discharged while the legislature deliberated.

Both Robert MacCrate, former counsel to the governor, and Robert Bentley, Counsel to the Senate Finance Committee, were instrumental in saving the work from total rejection. Ultimately, a compromise was reached on the rule-making issue, with some provisions of the CPLR denominated rules, and other sections requiring change by statute.

In a critique of the revision, I argued that “New York’s . . . Civil Practice Law and Rules . . . may be characterized as a conservative—in some respects reactionary—restatement of the practice as it had been developing.”³ As I noted, “the metaphor that the law is a seamless web is particularly apt in the area of procedure—almost any sig-

2. FED. R. CIV. P. 1.

3. Jack B. Weinstein, *Trends in Civil Practice*, 62 COLUM. L. REV. 1431, 1431 (1962).

nificant change requires adjustments throughout the whole fabric of litigation.”⁴

When I was later appointed head of research for the 1966 New York Constitutional Convention by Speaker Tony Travia, I tried to save some of our recommended jurisdictional changes such as elimination of interlocutory appeals to the Appellate Division and the granting of full certiorari powers on appeals to the Court of Appeals.

I got nowhere. So, through William Vanden Heuvel, I asked Senator Robert Kennedy not to hold up my nomination to the federal court in the Eastern District. This ended my work on revision of the practice, except for writings on the CPLR, the New York Constitution, and on appropriate methods of revising Procedure, both state and federal.

Later, I referred to the rulemaking process in New York at the time—involving a “Committee to Advise and Consult with the Judicial Committee” made up of practitioners and academics that reported recommendations to the New York Judicial Conference, but whose work ultimately required approval of the legislature—as an effective utilization of expertise, but an “extremely awkward” process.⁵ The same analysis applied to federal revisions.

The treatise written by Harold Korn, Arthur Miller and me on the new New York practice drew heavily on reports, articles, and speeches published while the CPLR was being developed. It, and an accompanying handbook, helped get the practice off to a good a start. Professor Arthur Miller, of Columbia, Harvard and New York University Law Schools, stepped in when Daniel Distler, who was to be a coauthor, died suddenly. Arthur saved the treatise and much of the practice with his contribution.

The writings and teachings of many, including particularly Professor Oscar Chase of the New York University Law School; Professor David Siegel, of Albany Law School; and Professor Vincent Alexander of St. John’s Law School, have encouraged significant improvements over the last fifty years.

In 1980, I ran to be Chief Judge of the State—fortunately being defeated—with the hope that improved administration of the New York courts would improve practice. Two subsequent developments did the job much better than I could have.

4. *Id.* at 1434.

5. Jack B. Weinstein, *Reform of Federal Court Rulemaking Procedures*, 76 COLUM. L. REV. 932, 932–33 (1976).

First, the quality of the bench improved enormously. Judge David Trager was head of a committee that made recommendations for judicial appointments strictly on the merits to Mayor Koch, who followed those suggestions.⁶ Eventually these judges moved to the Supreme Court together with designees from the gubernatorial appointees to the New York Court of Claims. The New York bench is now, I believe, quite good.

Second, Chief Judge Judith Kaye and her successor, Chief Judge Jonathan Lippman, have utilized their powers, together with those of excellent administrative judges, to enormously improve the atmosphere and practice in New York courts.

As a trial judge, my role is to do justice at retail, to decide cases on the merits as quickly and cheaply as possible. The CPLR made this task easier for New York judges.

In the end, the legislature has a critical role in enacting substantive legislation that is as easy as possible to enforce; and, when it expands substantive rights, or encourages litigation, as by providing for counsel fees for successful plaintiffs, it should provide sufficient judicial resources, such as more judges, to do the job. Individual trial judges have the obligation to take charge of each case and robustly bring it to a conclusion as quickly as is practicable. Attorneys have the duty to get on with their litigations without unnecessary quibbles or delays. And appellate courts should stand behind trial judges, avoiding unnecessary interference.

The work for improved justice never ends. It is the task of all of us.

Thank you.

6. See generally Edward I. Koch, *The Independence of the Judiciary?*, 1 N.Y. CITY L. REV. 457 (1996).

REMARKS OF CHIEF JUDGE KAYE

*Judith S. Kaye**

While my assigned subject as part of this illustrious panel is “The Chief Judge’s View of the CPLR,” I begin on a personal note by rolling the clock back to March 1963. That is, by coincidence, the official birth month not only of the CPLR, but also of Judith Smith (later Kaye), Esquire. Having started NYU Law School in the Evening Division, my graduation was delayed a bit, from June to August 1962, and I was admitted to the Bar in March 1963. So you understand my special biological attachment to the CPLR. Professionally, we both came into being in March 1963.

What a joy it was to spend that last summer of law school here with Professor Herbert Peterfreund, learning—what?—the Civil Practice Act (then still the law) or the Civil Practice Law and Rules (effective September 1)? Likely both. Indeed, in the early 1960’s there was a statutory tsunami, with the arrival of the brand new CPLR, Business Corporation Law, General Obligations Law, Family Court Act and goodness knows what else. I was out-of-date virtually from Day One of my law school graduation. Fortunately, statutory climate change thereafter became a bit more gradual.

For approximately half of my life in the law—from September 12, 1983 to December 31, 2008 to be precise—it was my good fortune to serve as a Judge of the Court of Appeals of the State of New York, the state’s high court. I call those years “Lawyer Heaven.” And yes, Judge Weinstein, you were lucky not to have won election to the Court of Appeals—you missed the opportunity for mandatory retirement at age 70! Fifteen of those precious Court years I served as Chief Judge, with two roles, one adjudicative, one administrative (as Chief Executive Officer of the so-called Unified Court System), the CPLR vital to both.

* Judith Kaye’s 50 years since her graduation from New York University School of Law have been evenly divided between the bench and the bar. After 21 years as a litigator with New York City firms, in 1983 she was appointed by Governor Mario Cuomo directly to the state’s high court, the Court of Appeals. Ten years later, in 1993, Governor Cuomo appointed her Chief Judge of the Court and Chief Judge of the State of New York, an office she held until mandatory retirement on December 31, 2008 (a total of 25 years). She was the first woman appointed to the Court, and enjoyed the longest Chief Judge tenure in the Court’s history. On leaving the Court, in 2009 Judge Kaye joined Skadden, Arps, Slate, Meagher & Flom as Of Counsel, rounding up to 25 her years as a private practitioner.

For me the most profound of all changes during my quarter-century in Lawyer Heaven was the jurisdiction of the Court of Appeals. What, I thought on arrival in Albany, could be more fundamental, more rock solid and immovable, than the Court's jurisdiction—the key to the courthouse door—decisively articulated in CPLR Article 56?¹ Soon I learned.

Forever memorable is my very first year on the Court, back in 1983, when we faced approximately 800 full appeals. The CPLR at that time provided, among other things, an automatic right of appeal in case of any dissent, or even modification, at the Appellate Division. Fortunately for me—for all of us—the Earth moved shortly thereafter, as Chief Judge Wachtler succeeded in persuading the Legislature that not every raised eyebrow at the Appellate Division warranted automatic appeal to the Court of Appeals. Wonder of wonders, our jurisdiction was completely revamped.

Thankfully, in 1985, we became more of a “cert” court, determining largely for ourselves which were the novel issues of statewide significance deserving a second layer of appeal, thus allowing the Court “to concentrate on the selection for review of cases involving important issues of law and to devote more time and judicial resources to extended deliberations in these cases of wide impact and lasting implication.”² Today the Court of Appeals docket hovers around 200—and believe me, it's a very busy life.

That was, aside from the practical impact of the reform, also a powerful lesson in the role of the Chief Judge in directly reforming codified law.

On the subject of codified law (as contrasted to decisional law), I want to take a small detour from the CPLR to note the existence of a healthy body of judge-made and judge-amended rules that supplement the statute—Chief Judge's Rules, Rules of the Chief Administrator, Uniform Rules for the State Trial Courts, rules, rules, rules addressing matters not specifically covered by the CPLR. By rules, for example, the court system established the commercial division, drug treatment courts and integrated domestic violence courts.³ Not insignificant. Having myself successfully advocated for rules in place of wrangles with the Legislature, I will simply say that not every reform requires a

1. N.Y. C.P.L.R. 5601–15 (McKinney 2013).

2. N.Y. OFFICE OF COURT ADMINISTRATION, EIGHTH ANNUAL REPORT OF THE CHIEF ADMINISTRATOR OF THE COURTS (1986).

3. See generally Judith S. Kaye, *Refinement or Reinvention, the State of Reform in New York: The Courts*, 69 ALB. L. REV. 831 (2006).

trip to Albany (or, more likely, several trips to Albany). That's a subject for another day.

Of course, during my life as a lawyer I have seen many instances of the courts paving the way for legislative reform through judicial decision-making. In that respect I can point to no better example than the 1972 landmark opinion in *Dole v. Dow Chemical Co.*, leading to a whole new article in the CPLR, Article 14.⁴

Typically, however, the business of the Court has been to construe and interpret the words of the CPLR, applying the principle that the Court is charged simply with implementing the will of the Legislature. I cannot imagine how many hundreds of times that phrase, that objective, appears in court opinions. It is engraved on my brain. That is indeed how our Court read statutes. But as you might imagine, given the incredible intricacies of real life, the exercise often includes situations the Legislature could not possibly have foreseen in adopting the provision under consideration. The Court of Appeals, however, always did its best to figure out what the Legislature might have intended, secure in the knowledge that (unlike constitutional adjudication), if the Legislature felt we got it "wrong," it could amend the statute.

Staying with my sense of fraternal bond, and identity, with the CPLR, I have come to think of all the activity over the years as graceful maturation of the statute, as it stays apace with radical societal change, sometimes by judicial construction, sometimes by legislative amendment. In that vital process, there is lively dialogue between the courts and our partners across government and across the profession, most especially through the Advisory Committee on Civil Practice and Bar groups. Innumerable times during my own tenure on the Court of Appeals a letter went out from the Clerk of the Court to the Advisory Committee suggesting matters for study and recommendation, resulting in proposals to the Legislature—and yes, every now and again even an amendment to the CPLR.

I thought I would pick just two examples of the CPLR maturation process—one more internal to the courts, the second more external to the world.

I'm sure it comes as no surprise that my first pick would be *Brill v. City of New York*.⁵ Amazing that it's taken me this long to get to *Brill*, don't you all agree? The question was seemingly simple, given the Legislature's response to the court system's request for assistance

4. *Dole v. Dow Chemical Co.*, 282 N.E.2d 288 (N.Y. 1972).

5. *Brill v. City of New York*, 814 N.E.2d 431 (N.Y. 2004).

in ameliorating the problem of last-minute summary judgment motions. It responded with a provision requiring that the motion be made no later than 120 days after filing the note of issue, unless there is leave of court on good cause shown.⁶ Could the message have been plainer? I think not. Deadlines matter, court-ordered deadlines and statutory deadlines. Don't mess around!

Well, years later I can still get a lively conversation going around *Brill*, and even a chuckle every now and again over the commentary that case continues to generate. It's a guess, but surely no exaggeration, that more hours have been spent on finding ways around specified statutory deadlines than just meeting them. So the point of this first example is that in our beloved, splintered New York State Unified Court System, it's really hard to nail down any deadline absolutely, positively, definitively. The dialogue, the interaction, the pushback, is unending and fascinating. I think of it as part genetic (zealous advocacy) and part cultural (definitely more problematic on the state court side of Foley Square).

Relatedly, I could not help noticing a recent front-page Law Journal article headlined "Advisory Panel Recommends Change in CPLR Dismissal Rule," centering again on deadlines—this time CPLR 3216 deadlines and dismissals for neglect to prosecute.⁷ The article led me back to a 2011 Court of Appeals case, *Cadichon v. Facelle*, where the Court divided four-three, the majority reversing dismissal of a medical malpractice case for neglect to prosecute.⁸ And wouldn't you know, there in the dissent lives *Brill* and a few members of its family, once again underscoring the importance to the CPLR, the litigants and the court system of honoring deadlines. In the words of the dissent: "chronic non-compliance with deadlines breeds disrespect for the dictates of the Civil Practice Law and Rules and a culture in which cases can linger for years without resolution."⁹ In other words: deadlines matter. Don't mess around! But as the Law Journal article reflects, once again debate rages as courts and commentators put their individual gloss on the statutory deadlines.

My second example of the graceful aging of the CPLR relates to our modern globalized, technological world being neatly accommo-

6. C.P.L.R. 3212(a).

7. Christine Simmons, *Advisory Panel Recommends Change in CPLR Dismissal Rule*, N.Y. L.J. (Mar. 4, 2013), <http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202590584654>.

8. *Cadichon v. Facelle*, 961 N.E.2d 623 (N.Y. 2011).

9. *Id.* at 630 (Graffeo, J., dissenting) (quoting *Gibbs v. St. Barnabas Hospital*, 942 N.E.2d 277, 281 (N.Y. 2010)).

dated in a statute dating back to typewriters and carbon paper. What does it take to be jurisdictionally “present” here these days? Not much.

Reasonable minds may disagree whether an internet purchase can ever replace the exquisite thrill of spotting the perfect shoe in the window of a bricks-and-mortar store—and then discovering it is on sale! However, the Court of Appeals long ago acknowledged that under the CPLR, “technological advances in communication enable a party to transact enormous volumes of business within a state without physically entering it.”¹⁰

Jurisprudence adapts and changes with the times as do the judges, such that one’s physical presence has actually become, in the Court’s word, “immaterial.”¹¹

I have watched the drama unfold from my new perch at Skadden Arps, where far-flung arbitrations are now commonplace, the CPLR nicely accommodating New York’s desire to be an attractive site for international transactions, wherever on Earth the parties, or their assets, might be. I can tell you for sure that, as the long arm of the law has grown longer and longer, some of the exotic issues now being routinely resolved under the CPLR were unimaginable back in 1963.

Having begun by disclosing my personal bias on the subject of the CPLR, I conclude with the hope you would agree that, as it reaches its golden anniversary and beyond, the CPLR has served the profession and the public well.

10. *Deutsche Bank Secs., Inc. v. Mont. Bd. of Invs.*, 850 N.E.2d 1140, 1142–43 (N.Y. 2006).

11. *Fischbarg v. Doucet*, 880 N.E.2d 22, 27 (N.Y. 2007).

REMARKS: THE HISTORY OF NEW YORK CIVIL PROCEDURE

William Nelson

Why are we—a group of busy people—holding an anniversary party for the CPLR? When Professor Chase asked me to attend, my initial answer was that I was busy and that I didn't know anything about the CPLR. He responded that the party needed historical background. His response led me to focus on the historical precedent about which I happen to know a little: the Field Code of 1848.

Several weeks ago Judge Kaye asked me what I planned to say about the Field Code. I responded that the Field Code had much greater national influence than the CPLR has had. The Field Code was copied in approximately thirty other states;¹ the CPLR, as far as I can determine, has not been specifically copied anywhere. It will not surprise those of you who know Judge Kaye that she was not pleased when I reported this data.

My purpose tonight, however, is not to transform an anniversary party into an evening of mourning about New York's current lack of national influence. My aim is to provide historical background. Hopefully that background will help us better understand why the fiftieth anniversary of the CPLR is important, despite the CPLR's comparative lack of national influence.

Let me begin by focusing on why the Field Code was so influential. One reason the Field Code was widely copied was the political, legal, and economic importance of New York in the second half of the nineteenth century and the beginning of the twentieth. In the mid-nineteenth century, New York contained one-sixth of the population of the United States.² Between 1881, when Chester Arthur became president, and 1945, when Franklin Roosevelt died, New Yorkers occupied the presidency for one out of every two years.³ New York also was disproportionately represented on the Supreme Court; during most of the 1930s, for example, three New Yorkers—Cardozo, Hughes, and

1. LARRY L. TEPLY, RALPH U. WHITTEN & DENIS F. McLAUGHLIN, *CASES, TEXT, AND PROBLEMS ON CIVIL PROCEDURE* 18 (2002).

2. See *United States Resident Population by State*, N.J. DEP'T OF LAB., <http://lwd.dol.state.nj.us/labor/lpa/census/1990/poptrd1.htm> (last visited July 21, 2013).

3. *Presidents of the United States*, ENCYCLOPAEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/1846696/Presidents-of-the-United-States> (last visited July 21, 2013).

Stone—constituted one-third of the Court.⁴ It was during this era that the New York bar became preeminent. No wonder that other states copied whatever New York did.

By the 1960s, when the CPLR was adopted, almost everything had changed. California had equaled New York in economic and political importance, and Texas was on the rise. Major national law firms had been created in Los Angeles, San Francisco, Dallas, and Houston. For thirty of the forty-eight years between 1961 and 2009, residents of either California or Texas have occupied the White House, and no president came from New York.⁵ Above all, there is the federal leviathan. In the nineteenth century, state law and especially New York law governed America. Since the middle third of the twentieth century, in contrast, federal law has become increasingly dominant.⁶ The federal leviathan undoubtedly made the great competitor to New York practice—the Federal Rules of Civil Procedure—centrally important. Depending on precisely how one defines adoption, somewhere between twenty and thirty states have adopted the Federal Rules.⁷

But I want to turn to something deeper that will help explain the historical significance of the Field Code and the Federal Rules and thereby give context to the CPLR.

In the eighteenth century, common law procedure constituted the substance of law.⁸ Rights depended on whether a common law writ existed to provide a remedy, or a defense could be pleaded in response to a writ's filing. It was impossible to conceive of law as distinct from the writ system and from pleas responsive to writs. Substance and procedure were intertwined; they were one and the same thing. As a result, any wholesale changes in procedural rules would have brought revolutionary change to the substance of the law as well.

In *Americanization of the Common Law*, I traced in detail how lawyers in early nineteenth-century Massachusetts developed a concept of substantive law and categories of law separate from the distinctions contained in the *Register of Writs*.⁹ I assume that parallel

4. See G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES* 163–64 (2007).

5. *Presidents of the United States*, ENCYCLOPAEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/1846696/Presidents-of-the-United-States> (last visited July 21, 2013).

6. See generally LAWRENCE FRIEDMAN, *AMERICAN LAW IN THE TWENTIETH CENTURY* (2004).

7. John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1377–78 (1986).

8. See generally WILLIAM NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760–1830* (1994).

9. *Id.*

developments occurred in early nineteenth-century New York as well. It was this separation of substance from procedure that made it possible for David Dudley Field to propose his mid-nineteenth-century procedural reforms that replaced arcane and technical common law pleading—pleading that no one really wanted—with much simpler pleading of facts.¹⁰ Field was merely codifying a powerful idea that most likely had already transformed legal practice. And, when numerous states copied the Field Code in the second half of the nineteenth century, they were likewise adopting its idea of procedure as something separate from substance, as well as the specific rules that put the idea into effect.

Perhaps because of the ancient tie between substance and procedure, the Field Code was legislatively enacted; there may have been a thought that only the legislature could enact a procedural statute that might have ripple effects on substantive law. But legislative enactment of the Field Code created a problem. Within thirty years of the Code's enactment, changes in the nature of law practice necessitated change in the Code, and in 1880 the initial Field Code was replaced in New York by a new Code of Civil Procedure.¹¹ This new code lasted only forty years, until 1920, when the legislature revised and recodified it as the Civil Practice Act.¹² These recodifications, however, presented a problem: namely, that every legislative revision required political mobilization, and every mobilization became increasingly difficult as other political needs consumed more and more of the legislature's time and interest groups opposed to change gained greater legislative power. As a result, procedural recodification always lagged behind the need for procedural change.

The Rules Enabling Act, which Congress adopted eighty years ago, addressed this problem at the federal level.¹³ It recognized fully the non-substantive nature of procedure, and accordingly removed procedural reform from the legislative process and delegated the making and revision of rules of judicial housekeeping to the judiciary, which, in turn, delegated the task to a committee of experts.¹⁴ As a result, the federal courts and numerous states have functioned for nearly seventy-five years under Rules of Civil Procedure that are sub-

10. Adam M. Moline, Comment, *Nineteenth-Century-Principles for Twenty-First-Century Pleading*, 60 EMORY L.J. 160, 166 (2010).

11. N.Y. Code of Civil Procedure (N.Y. C.C.P.) (enacted 1880) (repealed 1920).

12. 1920 N.Y. LAWS ch. 925 (repealed 1962).

13. Rules Enabling Act of 1934, Pub. L. No. 73-415, 48 Stat. 1064 (codified as amended at 28 U.S.C. §§ 2071-72) (2006).

14. 4 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1004 (3d ed. 2013).

ject to continuous study and regular revision, as needed, without going through a difficult political process of full reconsideration and recodification every few decades. This fundamental, creative change that depoliticized procedure undoubtedly helps explain why so many states have adopted the Federal Rules.

In short, two factors caused numerous jurisdictions to copy the Field Code in the nineteenth century and the Federal Rules in the twentieth: (1) the political, economic, and legal importance at the time they were adopted of the polity that first adopted them and (2) the creative conceptions, in the case of the Field Code, of procedure as separate from substance and, in the case of the Federal Rules, of procedure as nonpolitical. As a result, American law for the most part has now arrived at a stasis in which procedural rules can be elaborated and modified by the judiciary and the profession as needs and circumstances require without periodic political interference and legislative revision.

Except in New York, where the legislature continues to play an important role. Initially the CPLR placed the preservation and revision of rules of procedure at least partially in the hands of the bench and bar, where they belong.¹⁵ Although the ability of the judiciary to control procedure was somewhat limited by the 1978 repeal of section 229 of the Judiciary Act, judges, as Professor Alexander has noted, still do possess some power, which they strive to use to keep the rules abreast of emerging procedural needs.¹⁶ In doing so, however, the judges often need to proceed by indirection, and the result of their indirection is a complex and obscure procedural system that increases litigation costs.

Increased litigation costs, in turn, could place New York's pre-eminence as a legal center at risk, and that risk suggests a need to place the processes of procedural revision back into judicial hands so as to respect the professional and efficiency needs of judges and litigators. Does the legislature's almost unique power over procedure serve any significant purpose? How did it come to pass that the New York legislature retained such power?

I think that the legislature's retention of power is a matter of historical accident. The 1920 Civil Practice Act was adopted a little more than a decade before Congress put procedural revision on a new course through the Rules Enabling Act. In 1920, the New York legis-

15. David D. Siegel, *What's the Difference Between CPLR Provisions Denoted "§" and Those Labeled "Rule?"*, 28 SIEGEL'S PRAC. REV. 3 (1995).

16. Vincent C. Alexander, *The CPLR at Fifty: A View from Academia*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 664, 677 (2013).

lature never thought about that new course. The Civil Practice Act came up for revision forty years later, and the CPLR was adopted in 1963, just as the Federal Rules were undergoing a major revision that culminated in the 1966 amendments. The 1966 amendments, however, especially those dealing with class actions and discovery, changed how we think about procedure: they profoundly affected the outcome of litigation and undercut conceptions of procedure as nonpolitical and sharply distinct from substance.¹⁷ This new awareness of the substantive significance of procedure tended to make the legislatures of 1963 or 1978, when New York last addressed its procedural rules, far less willing than a legislature of the 1930s, 1940s, or 1950s to surrender its control of the processes of procedural reform. In short, the concept of judicial control of procedural reform reached its apogee at a time when New York was not considering reform; New York engaged in its reforms before the concept had developed and after reform became politicized.

Thus, the fiftieth anniversary of the CPLR is a time not to celebrate but to begin thinking anew about how to fix what is wrong with New York procedure. The longer the CPLR and the obscure and sometimes confusing rules enacted under it remain in force the greater the risk that New York will lose its preeminence as a center of legal practice. The bench and bar need to get their act together and press the legislature to give them control of procedure before it is too late. There is no good reason for the legislature to keep control.

17. See, e.g., Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem"*, 92 HARV. L. REV. 664, 664-65 (1979).

THE CPLR AT FIFTY: A VIEW FROM ACADEMIA

Vincent C. Alexander*

My guess is that most of the distinguished guests in this audience, and certainly those on the panel, believe that rules of civil practice and procedure such as those embodied in New York's Civil Practice Law and Rules—the CPLR—can and should play a central role in the administration of justice. But lest we assume the universality of this belief, let me share with you a contrasting view expressed by Benjamin N. Cardozo, then Chief Judge of the New York Court of Appeals, in his 1928 commencement address to the first graduating class of St. John's University School of Law. In exhorting the graduates to devote themselves to the noble, even spiritual, ideals of justice, he cautioned them, "You will need to know much more than the piffle-paffle of procedure."¹ The "*piffle-paffle*" of procedure? Having devoted the last 36 years of my professional life to the teaching of procedural "piffle-paffle," I was utterly deflated when I first came upon this line from the Judge's speech. Cardozo was speaking, I hope, with tongue in cheek. While the primary focus of civil dispute resolution must be the substantive law, the "piffle-paffle" of procedure is the only means of implementing it.²

My role this evening is to reflect upon the CPLR from the viewpoint of those of us who use it in our law school teaching as the centerpiece of the course commonly called New York Practice. I will do so from the three perspectives that govern the life of a legal academic: classroom teaching, legal scholarship, and service to the legal community.

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1. Benjamin N. Cardozo, *Our Lady of the Common Law*, 13 ST. JOHN'S L. REV. 231, 241 (1939).

2. See Fleming James, Jr., Geoffrey C. Hazard, Jr. & John Leubsdorf, *CIVIL PROCEDURE* 2 (5th ed. 2001).

I.
CLASSROOM TEACHING

First and foremost, teaching students in an advanced civil procedure course that concentrates on the CPLR helps them prepare for civil litigation in all of the state courts of New York. As we all know, New York has numerous civil courts of original subject matter jurisdiction—a distressing feature for students and litigants alike.³ What is sometimes overlooked, however, is that the CPLR governs the procedure in all of those courts unless some specific statute says otherwise.⁴ Even for students who intend to practice law in other states, an in-depth study of the CPLR will enhance their ability to cope with complicated procedural issues, regardless of the applicable code.

Furthermore, an analysis of the CPLR indirectly gives students a deeper understanding of the Federal Rules of Civil Procedure, the code that is presented to them in their first-year civil procedure course as the ideal. Students in a CPLR course have an opportunity to compare and evaluate solutions to procedural issues that may be quite different from the Federal Rules. Although many CPLR provisions, by design, are identical in substance to the Federal Rules,⁵ the CPLR has a fair number of eccentricities. For example, when studying the CPLR, students must consider whether the ability to commence an action in New York with only a summons and sparsely-worded “notice,” rather than a summons and complaint, still makes sense in the word-processing age.⁶ Does the New York pleading standard in CPLR 3013, in effect, mirror that of the current federal standard imposed by *Twombly*?⁷ What is the continuing utility of verifying a pleading if a

3. The New York trial courts having civil jurisdiction are the Supreme Court, the County Courts, the New York City Civil Court, the District Courts (Nassau and Suffolk Counties only), City Courts outside New York City, the Justice Courts, the Family Court, the Court of Claims, and the Surrogate’s Court.

4. N.Y. C.P.L.R. 101 (McKinney 2013).

5. See Jack B. Weinstein, *Proposed Revision of New York Civil Practice*, 60 COLUM. L. REV. 50, 55 (1960).

6. See CPLR 305(b); David D. Siegel, Practice Commentaries, C3012:1, in CPLR 3012; Adolf Homburger & Joseph Laufer, *Appearance and Jurisdictional Motions in New York*, 14 BUFF. L. REV. 374, 393–95 (1964). If acting under time pressure, it should be easy enough for a plaintiff’s attorney to generate a passable barebones complaint that can be readily amended later pursuant to CPLR 3025(a)–(b).

7. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); see CPLR 3013 (in addition to giving notice of the transaction or occurrence sued upon, plaintiff must also give notice of “the material elements of each cause of action or defense”); Edward D. Cavanagh, *The Impact of Twombly on Antitrust Actions Brought in the State Courts*, ANTITRUST SOURCE, Feb. 2013, available at <http://www.abanet.org/antitrust/at-source/13/02/Feb13-Cavanagh>.

lawyer's signature certifies the pleading is non-frivolous?⁸ What is the value today in having bills of particulars as well as interrogatories?⁹ Are there no compulsory counterclaims under the CPLR?¹⁰ Is any valid purpose served by the cumbersome "demand" prerequisite to a motion to change venue?¹¹ Why should depositions of nonparty witnesses and the adversary's expert witnesses be essentially off-limits?¹² In light of the delays and costs involved, what justifies New York's liberal policy in taking interlocutory appeals?¹³ Through a process of comparative analysis, the dedicated student will complete the CPLR course with a deeper understanding of both the CPLR and the Federal Rules. The student who masters the CPLR will be well positioned to maneuver through the procedural thickets that lurk both in New York and other jurisdictions.

A CPLR course also enables students to reflect upon the entire breadth of New York civil substantive law. Most students taking the New York practice course are seniors, and the course offers a useful capstone to their study of the substantive law. Many of the Court of

8. CPLR 3020–23 (verification of pleadings); N.Y. COMP. CODES R. & REGS. tit. 22, § 130-1.1a (West 2013) (attorney for party must sign all papers, thereby certifying absence of frivolous content and purpose). See CPLR 105(u) (verified pleading may be used as affidavit); CPLR 3215(f) (verified complaint may be used as proof of claim for entry of default judgment).

9. See CPLR 3041–3044 (bills of particulars); CPLR 3130–3133 (interrogatories); Joseph M. McLaughlin, *Civil Practice*, 15 SYR. L. REV. 381, 383–84 (1964); Weinstein, *supra* note 5, at 71–72. See generally Kenneth P. Taube, Note, *Limiting the Scope of Litigation: Bills of Particulars, Interrogatories, and Requests for Admission in Illinois and Federal Courts*, 1979 UNIV. ILL. L. FORUM 211.

10. CPLR 3011 ("An answer may include a counterclaim against a plaintiff . . ."); see also CPLR 3019(a). See *Henry Modell & Co. v. Minister, Elders & Deacons of the Reformed Dutch Church of the City of New York*, 502 N.E.2d 978, 981 (N.Y. 1986) (noting that although New York has no compulsory counterclaim rule, *res judicata* principles will preclude an unsuccessful defendant from later asserting a factually related claim seeking relief that would be inconsistent with a judgment awarded to the plaintiff in the prior action).

11. CPLR 511(a)–(b). Cardozo's "piffle-paffle" terminology aptly describes the convoluted demand procedure. See, e.g., *HVT, Inc. v. Safeco Ins. Co. of Am.*, 908 N.Y.S.2d 222 (App. Div. 2010).

12. CPLR 3101(a)(4); *Kooper v. Kooper*, 901 N.Y.S.2d 312 (App. Div. 2010) (precluding deposition of non-party witness unless the information sought is not available from other sources). See also CPLR 3101(d)(1)(iii) (no deposition allowed of opposing party's expert witness except upon a showing of special circumstances).

13. CPLR 5701(a)(2)(iv)–(v) (allowing appeal as of right from Supreme Court to Appellate Division from any order that "involves some part of the merits" or "affects a substantial right"). See The Chief Judge's Task Force on Commercial Litigation in the 21st Century, Report and Recommendations to the Chief Judge of the State of New York 21 (June 2012) ("The liberal availability of interlocutory appeals from Commercial Division rulings is rare among competitor courts [in other states] and is generally considered by practitioners to be beneficial.").

Appeals decisions contained in Professor Oscar G. Chase's authoritative casebook¹⁴ arise in a context that facilitates a quick review of major substantive concepts. For example, in *Lacks v. Lacks*¹⁵ (subject matter jurisdiction in general), *Kagen v. Kagen*¹⁶ (subject matter jurisdiction of the Supreme Court and Family Court), and *Carr v. Carr*¹⁷ (in rem jurisdiction), students get a snapshot of important principles of New York domestic relations law. Cases on the statute of limitations span the broad field of tort law, including modern problems of products liability¹⁸ and medical malpractice,¹⁹ as well as property law,²⁰ estate law,²¹ and general contract law.²² Many of the cases on personal jurisdiction, forum non conveniens, and venue touch upon issues of agency, partnership and corporate law.²³ Important principles of indemnity and contribution are embodied in cases on third-party practice, especially the landmark decision of *Dole v. Dow Chemical Co.*²⁴ Statutes and cases on provisional remedies introduce the student to creditors' rights²⁵ and often serve to reinforce their understanding of the principles of equity.²⁶ The motions to dismiss for failure to state a cause of action²⁷ and for summary judgment²⁸ inherently implicate the substantive law. A good example is Chief Judge Judith S. Kaye's decision in *Weissman v. Sinorm Deli, Inc.*²⁹ In the context of explaining the unavailability of CPLR 3213's hybrid action/motion for summary

14. OSCAR G. CHASE & ROBERT A. BARKER, CIVIL LITIGATION IN NEW YORK (5th ed. 2007).

15. 359 N.E.2d 384 (N.Y. 1976).

16. 236 N.E.2d 475 (N.Y. 1968).

17. 385 N.E.2d 1234 (N.Y. 1978).

18. *E.g.*, *Blanco v. Am. Tel. & Tel. Co.*, 689 N.E.2d 506 (N.Y. 1997).

19. *E.g.*, *LaBarbera v. New York Eye and Ear Infirmary*, 691 N.E.2d 617 (N.Y. 1998); *Nykorchuck v. Henriques*, 577 N.E.2d 1026 (N.Y. 1991).

20. *E.g.*, *Buran v. Coupal*, 661 N.E.2d 978 (N.Y. 1995).

21. *E.g.*, *Caffaro v. Trayna*, 319 N.E.2d 174 (N.Y. 1974).

22. *E.g.*, *Global Fin. Corp. v. Triarc Corp.*, 715 N.E.2d 482 (N.Y. 1999).

23. *E.g.*, *First Am. Corp. v. Price Waterhouse LLP*, 154 F.3d 16 (2d Cir. 1998); *Delagi v. Volkswagenwerk AG*, 278 N.E.2d 895 (N.Y. 1972); *Hart v. Gen. Motors Corp.*, 517 N.Y.S.2d 490 (App. Div. 1987).

24. 282 N.E.2d 288 (N.Y. 1972). *See* Richard T. Farrell & Diane S. Wilner, *Dole v. Dow Chemical Co.: A Leading Decision—But Where?*, 39 BROOK. L. REV. 330 (1972).

25. *E.g.*, N.Y. C.P.L.R. art. 62 (McKinney 2013) (attachment); *ABKCO Indus., Inc. v. Apple Films, Inc.*, 350 N.E.2d 899 (N.Y. 1976) (attachable property).

26. *E.g.*, *Credit Agricole Indosuez v. Rossiyskiy Kredit Bank*, 729 N.E.2d 683 (N.Y. 2000) (injunction).

27. CPLR 3211(a)(7). *See, e.g.*, *Foley v. D'Agostino*, 248 N.Y.S.2d 121 (App. Div. 1964) (claim for breach of fiduciary duties).

28. CPLR 3212, 3213. *See, e.g.*, *Ugarizza v. Schmieder*, 386 N.E.2d 1324 (N.Y. 1979) (negligence).

29. 669 N.E.2d 242 (N.Y. 1996).

judgment in the case at hand, the reader benefits from a very helpful summary of the law of commercial paper.

Teaching New York Practice also allows the professor to help students refine their skills of statutory interpretation. The operation of the CPLR's two main statutes on personal jurisdiction, CPLR 301 and 302, illustrate this point. CPLR 301 states simply that "a court may exercise such jurisdiction over persons, property or status as might have been exercised heretofore." This was an ingenious mechanism for codifying New York's traditional bases of general personal jurisdiction, such as presence, doing business and domicile within the state. The "heretofore" to which CPLR 301 refers, of course, is the totality of the jurisdiction law that existed prior to September 1, 1963, the CPLR's effective date. CPLR 302, in contrast, introduced long-arm jurisdiction to New York, with a list of specific categories of New York-related activity that would subject a nondomiciliary defendant to personal jurisdiction despite the defendant's lack of a New York presence or its functional equivalent.³⁰

One of the intriguing questions raised by CPLR 301 is whether the statute's "heretofore" language was intended to restrict the doing-business basis of jurisdiction to those circumstances that were recognized by the courts as of August 31, 1963. Under pre-CPLR law, the doing-business basis of jurisdiction—general jurisdiction based on systematic and sustained business activity in New York—could be applied only to corporate defendants, not individuals.³¹ Does this mean, today, that a sole proprietor or some other unincorporated organization from another state that opens up a business in New York cannot be served outside New York and subjected to New York jurisdiction for claims that arose elsewhere? Students are asked to ponder a split on this issue in the Appellate Division, which has never been settled in all these years by the Court of Appeals.³²

Along the same lines, the doing-business cases prior to 1963 seemingly required the maintenance of an office or physical plant in

30. When CPLR 302 first took effect in 1963, it contained three bases for the assertion of long-arm jurisdiction: claims arising from a transaction business in New York, a tortious act in New York, or the ownership, use or possession of real property in New York. Over the years, the Legislature has added new categories of New York contacts that may subject a party to long-arm jurisdiction. *See infra* text accompanying notes 40–41.

31. *See* Vincent C. Alexander, Practice Commentaries, C301:10, *in* CPLR 301.

32. *Compare* *ABKCO Indus., Inc. v. Lennon*, 384 N.Y.S.2d 781 (App. Div. 1976) (allowing doing business jurisdiction over individual), *with* *Nilsa B.B. v. Clyde Blackwell H.*, 445 N.Y.S.2d 579 (App. Div. 1981) (rejecting extension of doing-business jurisdiction over individual).

New York³³ or the continuous presence of employees engaging in sales activity on behalf of the out-of-state employer.³⁴ The ability to conduct long-range business via the internet and other electronic modes of communication was unheard of in 1963. Should it not be possible under CPLR 301, in appropriate circumstances, to reach a finding that an out-of-state defendant who has engaged in such sustained New York business via electronic means can be subject to general personal jurisdiction in New York? Chief Judge Kaye suggested this possibility in a footnote in *Deutsche Bank Securities, Inc. v. Montana Board of Investors*,³⁵ a case better known for its application of the long-arm statute to a New York-directed transaction conducted by means of an instant messaging service. Inasmuch as the courts created the doing business basis of jurisdiction in the first place, can it fairly be denied that CPLR 301 leaves courts free to expand the doctrine to encompass contemporary circumstances in accordance with common law tradition?

The evolution of CPLR 302, the long-arm statute, gives students a particularly vivid picture of the interplay between legislative action and that of the courts. One of the earliest major CPLR cases decided by the Court of Appeals was *Feathers v. McLucas*,³⁶ where the 302 category of jurisdiction over claims arising from the commission of a tortious act within the state was interpreted narrowly to apply only to the situation in which a tortfeasor's conduct, such as negligent manufacturing, transpired in New York. It was not enough that the tortfeasor's out-of-state negligent conduct resulted in injury within the state. Despite recognizing that such an assertion of jurisdiction would be constitutional in many circumstances, the court ruled that the Legislature simply did not intend such an application of long-arm jurisdiction. The court rejected an opposite interpretation reached by the Illinois Supreme Court under a similarly worded statute,³⁷ and also rejected the statement of the Advisory Committee, as well as the explicit writings of then-Professor and Committee Reporter, now Judge, Jack B. Weinstein,³⁸ that the statute was intended to give litigants the ability "to take full advantage of the state's constitutional power over

33. See, e.g., *Tauza v. Susquehanna Coal Co.*, 115 N.E. 915 (N.Y. 1917).

34. See, e.g., *Benware v. Acme Chem. Co.*, 135 N.Y.S.2d 207 (App. Div. 1954).

35. 850 N.E.2d 1140, 1143 n.2 (N.Y. 2006).

36. 209 N.E.2d 68 (N.Y. 1965) (*Feathers* was one of three cases consolidated for appeal; the first case name in the court's opinion is *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.*).

37. *Gray v. Amer. Radiator & Standard Sanitary Corp.*, 176 N.E.2d 761 (Ill. 1961).

38. See Weinstein, *supra* note 5, at 66.

persons and things.”³⁹ The Legislature responded shortly thereafter by amending the statute to allow jurisdiction over claims arising from the defendant’s commission of a tortious act outside the state causing injury within the state provided certain additional affiliating connections exist between the defendant and the state of New York.⁴⁰ One might assume that the Legislature was indicating—after the fact—that it agreed with the view that the individual categories of New York activity listed in the statute should be interpreted liberally and with a view toward facilitating the exercise of long-arm jurisdiction.

The same pattern—strict judicial construction followed by a broadening of the statute through legislative amendment—has been seen in judicial interpretations of the long-arm category of “transaction of business in New York.”⁴¹ Ironically, the Court of Appeals’ cautious approach to long-arm jurisdiction starkly contrasted with its wildly expansive application of quasi in rem attachment jurisdiction in *Seider v. Roth*,⁴² which ultimately met its constitutional demise in the

39. N.Y. ADV. COMM. ON PRACTICE & PROCEDURE, SECOND PRELIMINARY REPORT, LEGIS. DEC. NO. 13, at 37 (1958).

40. N.Y. C.P.L.R. 302(a)(3) (McKinney 2013).

41. In *McKee Elec. Co. v. Rauland-Borg Corp.*, 229 N.E.2d 604 (N.Y. 1967), and *Kramer v. Vogel*, 215 N.E.2d 159 (N.Y. 1966), the court held that the “mere shipment” of goods to New York was not a transaction of business in New York. These cases were overruled by a 1979 amendment to CPLR 302(a)(1) that provides for jurisdiction for a claim arising from a contract to supply goods or services in New York. More recently, the court declined to apply the transaction-of-business-in-New-York category to a foreign litigant who wrongfully procured a defamation judgment in England against a New York author, seeking to enjoin her New York publication activity. *Ehrenfeld v. Bin Mahfouz*, 882 N.E.2d 830 (N.Y. 2007). The Legislature overruled this decision with the adoption of CPLR 302(d).

In contrast to the foregoing cases, *Parke-Bernet Galleries, Inc. v. Franklyn*, 256 N.E.2d 506 (N.Y.1970), was an early decision giving a broad reading to the transaction-of-business-in-New-York category with respect to a California art collector who participated in a New York auction by telephone from California. *But see M. Katz & Son Billiard Products, Inc. v. G. Correale & Sons, Inc.*, 232 N.E.2d 864 (1967) (rejecting jurisdiction over out-of-state buyer who placed one telephone order for goods from New York seller).

42. 216 N.E.2d 312 (N.Y. 1966) (allowing quasi in rem jurisdiction over out-of-state defendant in case involving out-of-state automobile accident based on attachment of liability policy issued to defendant by insurer that did business in New York). The Court of Appeals is generally creditor-friendly when it comes to localizing the situs of property or garnishees in New York. *See, e.g., Hotel 71 Mezz Lender LLC v. Falor*, 926 N.E.2d 1202 (N.Y. 2010); *Koehler v. Bank of Bermuda Ltd.*, 911 N.E.2d 825 (N.Y. 2009); *ABKCO Indus., Inc. v. Apple Films, Inc.*, 350 N.E.2d 899 (N.Y. 1976). *But see Shaheen Sports, Inc. v. Asia Ins. Co.*, 2012 WL 919664 (S.D.N.Y. 2012) (New York courts treat each branch of a bank as a separate entity for purposes of property attachment).

U.S. Supreme Court.⁴³ Disagreement persists over the appropriate reach of the New York long-arm statute.⁴⁴

The analysis of these and so many other cases involving the tug and pull between the Legislature and the courts⁴⁵ sharpens the students' knowledge of legislation and statutory interpretation.

II.

LEGAL SCHOLARSHIP

Turning to scholarship—the duty and delight of a law school professor—the CPLR has provided a springboard for the writing of numerous books, articles and commentaries. One of the first and ever-timely such endeavors was the multi-volume treatise on New York Practice by then-Professor Weinstein and Professors Harold L. Korn and Arthur R. Miller.⁴⁶ It is still the premier authority to which I send students and practicing lawyers when they seek elucidation on the thorniest issues that arise under the CPLR. A two-volume *CPLR Manual*, originally authored by Professor Oscar G. Chase of N.Y.U. and now by David L. Ferstendig, Esq., builds upon the Weinstein, Korn and Miller tradition.⁴⁷ Professor David D. Siegel's hornbook on the CPLR, now in its fifth edition, is an eloquent, one-of-a-kind book written by a law professor who has devoted the lion's share of his academic career to analyzing, criticizing and tracking the development of the CPLR and its many amendments.⁴⁸

A unique form of academic scholarship is the authorship of casebooks for use in the classroom. Those of us who teach the CPLR have been blessed with two such books. In the early days, there was

43. *Rush v. Savchuk*, 444 U.S. 320 (1980).

44. Compare Jack B. Weinstein, *Mass Tort Jurisdiction and Choice of Law in a Multinational World Communicating by Extraterrestrial Satellites*, 37 WILLAMETTE L. REV. 145, 146–51 (2001) (urging broader interpretation of CPLR 302), with *New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 146–52 (2d Cir. 2011) (Wesley, J., concurring) (questioning Judge Weinstein's expansive application of CPLR 302(a)(3)(ii) in case against out-of-state gun retailers).

45. Studying the New York statute of limitations on medical malpractice, for example, gives the student a good look at judicial efforts to apply legislative policy. See CHASE & BARKER, *supra* note 14, at 296–307. See also *id.* at 279–96 (products liability).

46. JACK B. WEINSTEIN, HAROLD L. KORN & ARTHUR R. MILLER, *NEW YORK CIVIL PRACTICE* (David L. Ferstendig ed., 2d ed. 2013).

47. JACK B. WEINSTEIN, HAROLD L. KORN & ARTHUR R. MILLER, *CPLR MANUAL* (David L. Ferstendig ed., 3d ed. 2013).

48. DAVID D. SIEGEL, *NEW YORK PRACTICE* (5th ed. 2011). Since April 1993, Professor Siegel has also published a monthly report, now online, called “Siegel’s Practice Review,” which summarizes and analyzes current developments in New York civil practice.

the detailed and citation-rich New York Practice casebook by Professor Herbert Peterfreund of N.Y.U. and then-Dean, now Judge, Joseph M. McLaughlin of Fordham.⁴⁹ When these two distinguished members of the New York legal academy took their casebook off the market, Professor Chase, later joined by Professor Robert A. Barker of Albany, followed in their footsteps with *Civil Litigation in New York*.⁵⁰ Chase and Barker's streamlined casebook on the subject has become the gold standard for teaching the CPLR in law school.

Others of us have written Practice Commentaries on the CPLR for *McKinney's Consolidated Laws of New York Annotated*.⁵¹ In performing this undertaking, I, like the courts, examine the reports of the original Advisory Committee as well as the notes of the various committees, commissions, and bar associations that have successfully prevailed upon the Legislature to make changes to the CPLR over the years. In some instances, I have stumbled upon some gems of legislative intent that would have aided judicial analysis. For example, in *George Cohen Agency, Inc. & Donald S. Perlman Agency, Inc.*,⁵² the Court of Appeals wrote at length on the purpose and intended scope of CPLR 1007, a provision for impleader (third-party practice). The issue was whether a defendant, having satisfied the criteria for impleading a third-party defendant, *i.e.*, showing that the third-party defendant may be liable "for all or part" of the defendant's liability to the plaintiff, could seek additional damages above and beyond the claim-over liability. The court drew upon general principles of modern procedure that encourage the joinder of all relevant parties so as to achieve, when feasible and fair, an all-encompassing resolution of a dispute. The court then persuasively concluded that CPLR 1007 merely prescribes the threshold test for impleader and does not preclude the addition of other claims once the basic requirement is met. The court's opinion would have been bolstered by a citation to the Advisory Committee's Notes on CPLR 601—allowing for unlimited joinder of multiple claims—where the Committee wrote that the term "plaintiff" in that statute was intended to include "third-party plaintiff."⁵³

49. HERBERT PETERFREUND & JOSEPH M. McLAUGHLIN, *NEW YORK PRACTICE: CASES AND OTHER MATERIALS* (1978 ed.).

50. CHASE & BARKER, *supra* note 14.

51. The principal authors of the Practice Commentaries currently are Professors David D. Siegel, Patrick M. Connors, and Vincent C. Alexander. My predecessor as an author of the Practice Commentaries was then-Dean, now Judge, Joseph M. McLaughlin.

52. 414 N.E.2d 689 (N.Y. 1980).

53. N.Y. SEN. FIN. COMMITTEE ET AL., *FIFTH PRELIMINARY REPORT, LEGIS. DOC. No. 15*, at 299 (1961).

On another occasion, the Court of Appeals apparently overlooked the Advisory Committee's explanation of the meaning of "*prima facie* evidence" as set forth in CPLR Article 45's evidence provisions. The court took the position that the term "*prima facie* evidence," when set forth in a CPLR statute, creates only a permissive inference, not a presumption, that some other fact exists, imposing no burden of rebuttal on the other side.⁵⁴ The Advisory Committee, however, was clear in stating that *prima facie* evidence, as used in CPLR Article 45, creates a presumption that casts upon the opponent the burden of coming forward with contrary evidence, in the absence of which the party who introduces *prima facie* evidence is entitled to a ruling in its favor on the relevant point.⁵⁵ In a later case involving a non-CPLR statute, the court held that *prima facie* evidence does indeed have a genuinely presumptive effect.⁵⁶

Empirical research offers another opportunity for scholarship. When the CPLR was being debated, some members of the Columbia Law School faculty encouraged the conducting of field research to test the validity of some of the foundations upon which various CPLR provisions were premised.⁵⁷ A potential model for such empirical work was Columbia Professor Maurice Rosenberg's study of the effect of mandatory pretrial conferences on the quality, efficiency and outcome of personal injury litigation in New Jersey, one of the first leading empirical studies of civil procedure.⁵⁸ Regrettably, few empirical studies have focused specifically on New York procedure. Field research is expensive and time-consuming and not always effective in persuading rule-makers or decision-makers of the value of reform. Nevertheless, inspired by the proponents of such scholarship, I under-

54. *Commissioner of Social Services v. Philip De G.*, 460 N.E.2d 681, 682 (N.Y. 1983) (examining N.Y. C.P.L.R. 4518(c) (McKinney 2013) hospital records hearsay exception). *See also* *People v. Mertz*, 497 N.E.2d 657, 658 (N.Y. 1986) (examining CPLR 4518(c), government records hearsay exception). *Mertz*, it should be noted, was a criminal case in which the treatment of *prima facie* evidence as a permissive inference was consistent with constitutional considerations.

55. N.Y. ADV. COMM. ON PRACTICE & PROCEDURE, SECOND PRELIMINARY REPORT, LEGIS. DOC. NO. 13, at 267 (1958). In addition to CPLR 4518(c), other provisions of CPLR Article 45 confer the status of "*prima facie* evidence" on certain facts contained in specified documents. *See, e.g.*, CPLR 4520 (certificate of public officer); CPLR 4538 (authenticity of acknowledged document). *See also* N.Y. BANKING LAW § 675(b) (McKinney 2013) (opening of bank account in joint names is "*prima facie* evidence" of intent to create joint tenancy).

56. *Powers v. Powers*, 653 N.E.2d 1154, 1157–58 (N.Y. 1995) (examining N.Y. FAM. CT. ACT § 454(3)(a)).

57. *See* Weinstein, *supra* note 5, at 64–66, 80–86.

58. Maurice Rosenberg, THE PRETRIAL CONFERENCE AND EFFECTIVE JUSTICE: A CONTROLLED TEST IN PERSONAL INJURY LITIGATION (1964).

took an empirical study for my doctoral thesis at Columbia Law School. My topic was the attorney-client privilege, a subject encompassed by CPLR 4503, and my particular inquiry was the effect, in practice, of the attorney-client privilege on communications between corporate executives and the attorneys for their corporate employers.⁵⁹ It was my great good fortune to have Judge Weinstein, at that point a member the adjunct faculty at Columbia, serve as my dissertation adviser.

Based on the findings of the study, I made a proposal for restricting the scope of the attorney-client privilege in the corporate context,⁶⁰ and an intermediate appellate court in Arizona actually adopted the proposal, only to be promptly reversed by the Arizona Supreme Court.⁶¹ Other data reported in the study had a more favorable reception in the U.S. Supreme Court, where the Court cited some of the study's findings as tending to support application of the privilege in the very different context of counseling individual clients.⁶²

I am not aware of any empirical studies on specific provisions of the CPLR, although Professor Chase analyzed statistics in a 1988 article—his inspiration was the twenty-fifth anniversary of the CPLR—showing that delays in the administration of civil justice in New York were probably about the same both before and after adoption of the CPLR.⁶³ Indeed, most of the field research on civil procedure has focused on the issues of litigation delay and cost.⁶⁴

59. Vincent C. Alexander, *The Corporate Attorney-Client Privilege: A Study of the Participants*, 63 ST. JOHN'S L. REV. 191 (1989) (interview survey of 102 corporate attorneys and 52 corporate executives). The study was designed to evaluate the effect of the corporate attorney-client privilege in general, not specifically under CPLR 4503.

60. *Id.* at 368–413. A more recent empirical study on the conduct of corporate attorneys, focusing on their involvement in public relations aspects of legal controversies, is reported in Michele DeStafano Beardslee, *Advocacy in the Court of Public Opinion, Installment One: Broadening the Role of Corporate Attorneys*, 22 GEO. J. LEGAL ETHICS 1259 (2009).

61. *Samaritan Foundation v. Goldfarb*, 862 P.2d 870 (Ariz. 1993), *vacating in part* 844 P.2d 593 (Ariz. Ct. App. 1992).

62. *Swidler & Berlin v. United States*, 524 U.S. 399, 409 n.4 (1998).

63. Oscar G. Chase, *The Paradox of Procedural Reform*, 62 ST. JOHN'S L. REV. 453, 471–73 (1988). Professor Jay C. Carlisle analyzes the potential delay-reducing impact of CPLR 3031–17 in *Simplified Procedure for Court Determination of Disputes Under New York's Civil Practice Law and Rules*, 54 BROOK. L. REV. 95 (1988).

64. *See generally* CARRIE J. MENKEL-MEADOW & BRYANT G. GARTH, *THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH* 679, 680 (ed. Peter Cane & Herbert M. Kritzer 2010); Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 992–95 (2003) (review of empirical research showing that claims about the magnitude of civil litigation are over-

III.

SERVICE TO THE LEGAL COMMUNITY

The third area of endeavor for a law professor is service to the legal community. For many years, members of the legal academy have been active participants in law reform efforts. The CPLR itself resulted from the diligent and painstaking work of then-Professor Weinstein and other members of the Columbia faculty, joined by professors from other law schools and members of the practicing bar. The tradition of academic involvement with the CPLR continues. The current CPLR Advisory Committee, which reports to the Chief Administrative Judge of the Courts, is composed not only of practicing attorneys, retired judges, court clerks, and court attorneys, but also two full-time law professors,⁶⁵ two former professors,⁶⁶ and at least two who serve as adjunct professors.⁶⁷ This committee

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.⁶⁸

Each year, the Committee typically generates several well-considered proposals for amendments to the CPLR and other procedure-related statutes. For the year 2013, for example, the Committee has

stated); Danya Schocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085, 1102–16 (2012) (review of empirical research undermining the popular belief that civil litigation, particularly discovery, takes too long and is too expensive).

65. The author of these remarks (St. John's) and Professor Patrick M. Connors (Albany).

66. Professor David D. Siegel (first at St. John's and later at Albany) and George F. Carpinello (formerly at Albany).

67. Thomas F. Gleason (Albany) and Burton N. Lipshie (Cardozo).

68. N.Y. ADVISORY COMM. ON CIVIL PRACTICE, REPORT OF THE ADVISORY COMMITTEE ON CIVIL PRACTICE TO THE CHIEF ADMINISTRATIVE JUDGE OF THE COURTS OF THE STATE OF NEW YORK 6 (2013) [hereinafter 2013 Adv. Comm. Rep.], available at <http://courts.state.ny.us/ip/judiciary/legislative/pdfs/2013/2013-CivilPractice-ADV-Report.pdf>.

recommended a total of twenty-nine legislative changes to the CPLR.⁶⁹

Unfortunately, few, if any, of the Advisory Committee's twenty-nine proposed changes to the CPLR are likely to be enacted in 2013 or thereafter. The Legislature has sole control over changes to the CPLR and, in recent years, has shown little interest in procedural reform.⁷⁰ It is unknown whether the Legislature has been unimpressed with the recent proposals or simply preoccupied with more urgent business. Bar associations and others may, of course, make their own legislative recommendations, and some worthy ones have recently been adopted.⁷¹

Legislative control over practice and procedure in the courts is a longstanding tradition in New York, enshrined in the constitution.⁷² For a few years after the CPLR took effect, however, both the constitution and implementing legislation authorized the Judicial Conference, a statutorily defined group of judges headed by the Chief

69. Fifteen inactive proposals were also continued from years past, including a recommendation to repeal the so-called "Dead Man's Statute" (N.Y. C.P.L.R. 4519 (McKinney 2013)). See 2013 Adv. Comm. Rep., *supra* note 68, at 154–85. In addition, the Committee's recommendations for 2013 include the adoption of seven amendments to certain procedure-related administrative regulations of the Chief Administrative Judge. See *infra* text accompanying notes 79–80.

70. In 2012, none of the Committee's twenty-four proposals to amend the CPLR were enacted into law. In 2011, only six out of twenty-five proposals were enacted, in 2010 the number of enactments was three out of twenty, and in 2009 only two out of nineteen made it into the CPLR. See 2013 Adv. Comm. Rep.; N.Y. ADVISORY COMM. ON CIVIL PRACTICE, REPORT OF THE ADVISORY COMMITTEE ON CIVIL PRACTICE TO THE CHIEF ADMINISTRATIVE JUDGE OF THE COURTS OF THE STATE OF NEW YORK (2012); N.Y. ADVISORY COMM. ON CIVIL PRACTICE, REPORT OF THE ADVISORY COMMITTEE ON CIVIL PRACTICE TO THE CHIEF ADMINISTRATIVE JUDGE OF THE COURTS OF THE STATE OF NEW YORK (2011); N.Y. ADVISORY COMM. ON CIVIL PRACTICE, REPORT OF THE ADVISORY COMMITTEE ON CIVIL PRACTICE TO THE CHIEF ADMINISTRATIVE JUDGE OF THE COURTS OF THE STATE OF NEW YORK (2010); N.Y. ADVISORY COMM. ON CIVIL PRACTICE, REPORT OF THE ADVISORY COMMITTEE ON CIVIL PRACTICE TO THE CHIEF ADMINISTRATIVE JUDGE OF THE COURTS OF THE STATE OF NEW YORK (2009). Proposals not adopted in a given year are typically carried over to subsequent years.

71. See, e.g., Exempt Income Protection Act, 2008 N.Y. LAWS ch. 575, which amended several provisions of CPLR Article 52 in order to enhance the ability of low-income judgment debtors to protect their exempt assets from improper enforcement restraints, executions and levies. See *generally* Cruz v. TD Bank, N.A., 855 F.Supp.2d 157, 166–68 (S.D.N.Y. 2012).

72. See N.Y. CONST. art. VI, § 30; Cohn v. Borchard Affiliations, 250 N.E.2d 690, 697 (N.Y. 1969) (noting that the New York Constitution gives the Legislature control over the CPLR even though "[w]e may, as students of the judicial process, strongly favor having the court invested with the power to regulate procedure and to promulgate rules bearing thereon").

Judge,⁷³ to adopt and amend, subject to legislative veto, those provisions of the CPLR referred to as “Rules” (indicated by the prefix “R”) as compared to “sections” (indicated by the prefix “§”).⁷⁴ The designations of some CPLR provisions as Rules (subject to change by the Judicial Conference) as compared to sections (legislative action only) sometimes seemed arbitrary, despite the explanation that sections represented fundamental policy while Rules were of lesser import.⁷⁵ The Judicial Conference was aided in its rule-making activity by an advisory group of legal scholars and practitioners.⁷⁶ Although the courts did not have *carte blanche* to amend any and all provisions of the CPLR, they at least had some ability to make changes. This all came to an end in 1978, when, as a result of a constitutional amendment, the Judicial Conference’s rule-making authority was rescinded.⁷⁷ Since then, the Legislature has been the sole gatekeeper of the CPLR. The Chief Administrative Judge, on behalf of the courts and with the assistance of an advisory committee, can recommend, but cannot implement, change.⁷⁸

Nevertheless, the Chief Administrative Judge, on behalf of the courts, has been given some authority by the constitution and statute, to adopt, without prior legislative approval, administrative regulations on practice and procedure provided they are not inconsistent with existing law.⁷⁹ It is through this mechanism that the Uniform Civil Rules for the Supreme Court and the County Court were adopted, providing procedural detail to fill gaps in the CPLR on such matters as motion practice and pretrial conferences.⁸⁰ Similarly, it was the Chief Administrative Judge’s rule-making authority that produced regulatory provi-

73. See N.Y. JUD. LAW § 214(1) (McKinney 2013).

74. See WEINSTEIN, KORN & MILLER, *supra* note 46, at ¶ 102.01.

75. See Samuel M. Hesson, *The New York Civil Practice Law and Rules*, 27 ALB. L. REV. 175, 175 (1963); Weinstein, *supra* note 5, at 52. Why is it, for example, that summary judgment, which can foreclose a litigant’s day in court, should be designated a Rule (see CPLR 3212), whereas the requirement for verification of pleadings is designated a section (see CPLR 3020)?

76. PETERFREUND & McLAUGHLIN, *supra* note 49, at 8.

77. See 1986 REP. N.Y. LAW REVISION COMM’N, *reprinted in* 2 N.Y. SESS. LAWS 2425, 2746–50 (McKinney).

78. N.Y. JUD. LAW § 212(1)(g); N.Y. JUD. LAW § (1)(q).

79. N.Y. CONST. art. VI, § 30; N.Y. JUD. LAW § 211(1)(b); § 212(2)(d). See *A.G. Ship Maintenance Corp. v. Lezak*, 503 N.E.2d 681, 684 (N.Y. 1986) (“Generally, . . . the Legislature has the power to prescribe rules of practice governing court proceedings, and any rules the courts adopt must be consistent with existing legislation and may be subsequently abrogated by statute.”).

80. N.Y. COMP. CODES R. & REGS. tit. 22, §§ 202.1–202.70 (West 2013). Section 202.1(d) states that the Uniform Rules “shall be construed consistent with the Civil Practice Law and Rules (CPLR), and matters not covered by these provisions shall be governed by the CPLR.”

sions on sanctions for frivolous litigation conduct,⁸¹ attorney certification of litigation papers,⁸² attorney conduct during depositions,⁸³ and an entirely separate subset of rules for the litigation of commercial cases in the Commercial Division of the Supreme Court.⁸⁴ These additional rules have been beneficial. Indeed, the rules' provisions for sanctions and attorney certifications of papers fill holes that were left open when the Legislature first rejected some of the original Advisory Committee's proposals for inclusion in the CPLR.⁸⁵

The current rulemaking authority of the Chief Administrative Judge, however, may be a mixed blessing. While it allows for the making of some interstitial improvements in practice and procedure, the creation of additional rules external to the CPLR forces attorneys and judges to search yet another source when seeking the answer to a procedural problem. It has always been necessary to consult caselaw construing the CPLR, but now the practitioner must also look into whether a matter of procedure not mentioned in the CPLR might be covered in the Uniform Civil Rules, some particular Part of the Chief Administrative Judge's rules, local district rules, or individual judges' rules.⁸⁶

The inability of the courts directly to amend New York's rules of practice and procedure has long been lamented by commentators and the courts.⁸⁷ The Legislature, of course, should play a significant oversight role in making improvements in procedure because the legislative ranks contain many lawyers and friends of lawyers who will have constructive ideas about practice and procedure.⁸⁸ But surely legislative involvement, as in many other states and under federal law,⁸⁹ can be effective by way of veto and independent legislation. The courts

81. N.Y. COMP. CODES R. & REGS. tit. 22, §§ 130-1.1, 130-1.2–130.1.5. The regulatory sanctions, adopted in 1989, are much broader in scope than the statutory provision for sanctions in tort actions, N.Y. C.P.L.R. 8303-a (McKinney 2013), which was added by the Legislature in 1985 and amended in 1986.

82. N.Y. COMP. CODES R. & REGS. tit. 22, § 130-1.1a.

83. N.Y. COMP. CODES R. & REGS. tit. 22, §§ 221.1–221.3. See Patrick M. Connors, Practice Commentaries, C3115:1 (Supp. 2006 & 2013 Cum. Pocket Part), in CPLR 3115 (analyzing the deposition conduct rules and their consistency with the CPLR).

84. N.Y. COMP. CODES R. & REGS. tit. 22, § 202.70.

85. See N.Y. SEN. FIN. COMM., SIXTH REPORT, LEGIS. DOC. NO. 8, at 30 (1962).

86. See, e.g., III & III-A McKinney's New York Rules of Court-Local Civil (2013).

87. See, e.g., Cohn v. Borchard Affiliations, 250 N.E.2d 690, 697 (N.Y. 1969); Thomas Shaw, *Procedural Reform and the Rule-Making Power in New York*, 24 *FORDHAM L. REV.* 338 (1955).

88. See Weinstein, *supra* note 5, at 52.

89. See Judith Resnik, *PROCESSES OF THE LAW: UNDERSTANDING COURTS AND THEIR ALTERNATIVES* 132-140 (2004).

themselves, with the counsel of an active advisory committee and the additional input of bar associations and other interested parties, are the bodies most acutely aware of contemporary procedural problems and the means of solving them. If compromise is needed, a careful reworking of the CPLR's sections (legislative change only) and rules (court-initiated change with legislative veto) could be adopted.

In conclusion, it is the opinion of this professor, who teaches the CPLR, writes about it, and participates in efforts for its improvement, that the CPLR has served the bench and bar of New York quite effectively for the past fifty years. It carries forward New York traditions that apparently are near and dear to the hearts of New York judges and attorneys, and there is value in that.⁹⁰ It is a testament to the CPLR's durability that, unlike the pre-1963 era of New York history, there have been no periodic and widespread calls for the overhaul of the New York procedure code.⁹¹ The CPLR may have some quirks, but on the whole, it is a coherent code of procedure that is not mere "piffle-paffle." The CPLR gives New York litigants a fair and reasonable means of having their disputes resolved on the merits. Such is the purpose of procedure.

90. Jack B. Weinstein & Jonathan B. Wiener, *Of Sailing Ships and Seeking Facts: Brief Reflections on Magistrates and the Federal Rules of Civil Procedure*, 62 ST. JOHN'S L. REV. 429, 441 (1988) ("any procedural system, if it is to work effectively, must be adapted to local institutions and attitudes"). See also Weinstein, *supra* note 5, at 53.

91. See Chase, *supra* note 63, at 454 (observing that New York's Field Code, adopted in 1848, was replaced in 1880 by the Code of Civil Procedure (the "Throop Code"), which was revised in 1920 as the Civil Practice Act, which the CPLR replaced in 1963, thus constituting a roughly 40-year cycle of major recodifications of New York civil procedure law).

THE CPLR: A PRACTITIONER'S PERSPECTIVE

David L. Ferstendig

INTRODUCTION

I would like to thank this illustrious panel of scholars and giants in the law profession. I feel like one of those imposters who sneak into special events just to get photographed with celebrities. I thank Professor Chase for inviting me.

My mission today is to give the practitioner's perspective, and Chief Judge Kaye, we will be speaking about a couple of the cases that you mentioned. It is impossible for me to divorce the CPLR from the available procedural law and the actual practice in the courts. And it is the actual practice that sometimes gets in the way. When I was thinking about my mission, it brought to mind a story that was told by the cerebral 1970s comic, David Brenner. He relates that when he was five years old he had trouble falling asleep at night because when he heard the sound of the male bee buzzing he was afraid he was going to be stung.¹ When he went to the doctor for a well care visit when he was about five years old, his mother told the doctor about the problem and the doctor turned to David and said, "David, I have some good news for you and I have some bad news. The good news is the male bee that buzzes at night does not sting. The bad news is that it is the female bee that stings and she makes no noise at night. So the next time you go to sleep and you hear nothing—that is when you should be afraid." And that is the problem that I feel, at times, as a practitioner in the New York State courts. It is not necessarily the statutory framework or the rules; it is the uncertainty that haunts you.

My presentation today will focus on the challenges facing a practitioner in New York state courts. More specifically, I believe there are at least two major obstacles that unnecessarily complicate the practice of law. One is the current system which makes procedural legislative amendments virtually impossible to get passed. The second is the relative uncertainty that prevails in critical areas of practice, particularly in discovery in general and expert disclosure in particular and in calendar practice. Within this category of uncertainty I see two major culprits: the vast repository of sources of procedure outside of the

1. I was told by a colleague afterwards that it was actually a mosquito, not a bee. Apologies to the bees!

CPLR, particularly the unwritten practices in certain courts, some of which are at odds with existing written procedural laws, and the conflict among the Appellate Division departments in areas that should be certain and not controversial.

I.

SIGNIFICANT PROCEDURAL DEVELOPMENTS OVER THE PAST FIFTY YEARS

Much has happened in these fifty years that has impacted procedure and practice. There is, for example, commencement by filing in 1991–1992 that dramatically altered commencement-related issues. There has been the adoption of the IAS system, DCM, and Standards and Goals. The rapid advancement of technology has impacted how people do business, communicate and socialize. There has been the slow transition to e-filing and the complicated implications of ESI, electronic discovery, just to name a few.

Some of these issues impact the CPLR. In many circumstances, jurisdiction for example, both the CPLR and the courts have filled in the gaps. For example, in 1979, when it was apparent that CPLR 302(a)(2),² which deals with tort-related jurisdiction, could not cover a situation where the tort occurred outside of New York, your classic product liability litigation where there might be a design defect outside of New York but the injury occurred here, the legislature responded, prodded by the *Feathers v. McLucas* case,³ enacting CPLR 302(a)(3).⁴ More recently, in *Deutsche Bank Securities, Inc. v. Mon-*

2. “Personal jurisdiction by acts of nondomiciliaries. (a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nondomiciliary, or his executor or administrator, who in person or through an agent . . . commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act.” N.Y. C.P.L.R. 302(a)(2).

3. 209 N.E.2d 68 (N.Y. 1965).

4. “Personal jurisdiction by acts of nondomiciliaries. (a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent . . . commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce.” N.Y. C.P.L.R. 302(a)(3).

tana Board of Investments,⁵ the Court harkened back to the *Parke-Bernet Galleries v. Franklyn* case.⁶ *Park-Bernet* was the open telephone auction line case, in which jurisdiction was found even though the person who was bidding was located outside of New York. The *Deutsche Bank* court found there to be electronic injection into New York through emails and instant messaging.

On ESI, New York State is a little behind the curve in setting up workable guidelines but again the courts, here the First Department, have given us guidance through the *Voom HD Holdings, LLC v. EchoStar*⁷ and *U.S. Bank N.A. v. GreenPoint Mortgage Funding*⁸ cases by adopting the Federal *Zubulake*⁹ principles on cost allocation and the preservation of ESI.

A. Current State of the CPLR

There are certainly significant portions of the CPLR which are still applicable, maintaining their vibrancy to this date. However, there are sections that have lost their relevancy, some because they have been supplemented by the Uniform Rules, local rules and the practice in particular courts. For example, one does not have to be a CPLR devotee to know that many of the provisions in the CPLR dealing with appeals have been replaced in practice by the Court of Appeals and Appellate Division rules; or that the calendar practice provisions in the CPLR have limited applicability in light of provisions in the Uniform Rules and court practices.

B. Applicable Procedural Law

In addition, a practitioner faces a vast repository of sources of procedural law in the New York State Courts. In addition to the CPLR, there are, among others, the: Uniform Rules for Trial Courts, Appellate Court Rules, Commercial Part Rules, particular court rules, particular judges' rules, implications of deadlines inserted in preliminary conference orders, and "unwritten" rules of practice in courts,

5. 850 N.E.2d 1140, 1143 (N.Y. 2006) ("We have in the past recognized CPLR 302(a)(1) long-arm jurisdiction over commercial actors and investors using electronic and telephonic means to project themselves into New York to conduct business transactions, and we do so again here.") (internal citations omitted).

6. 256 N.E.2d 506 (N.Y. 1970).

7. 939 N.Y.S.2d 321 (App. Div. 2012).

8. 939 N.Y.S.2d 395 (App. Div. 2012).

9. See *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2005); *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003); *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003); *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280 (S.D.N.Y. 2003).

particularly in the area of calendar practice that impact discovery and summary judgment motion practice.

This array of provisions and practices present a trap for the unwary and a nuisance and stumbling block, at times, even for the sophisticated practitioner.

C. *Out of Date or Irrelevant CPLR Provisions*

In the CPLR itself, there are provisions that have become irrelevant. As I said earlier, a practitioner relying only on the CPLR provisions relating to appellate and calendar practice would be in for a rude awakening. But how relevant are the CPLR 3020 verification requirements—especially in view of Uniform Rule Part 130 signing requirements?¹⁰ In addition, some provisions in the CPLR appear to harken back to the days of commencement by service.¹¹

Perhaps we need to revisit the service statutes in New York. In an era when we are communicating by the internet, by email and by text, should we limit service on natural persons to personal delivery, leave and mail, and nail and mail?¹² But, again, if we were to find a consensus, how are we to bring about change in this environment?

II.

PROBLEM #1: THE PROCESS OF PASSING LAWS

Much of the problem begins with what has already been alluded to—the process by which laws are created and amended. Simply stated, the process that existed when the Judicial Conference had power to amend a rule without input from the Legislature was more efficient and productive. Those of us who have familiarity with how the Legislature works know how difficult it is to get legislation passed. The New York State Legislature is very busy with budgets and other issues. Combine that with special interests on all sides of an issue and it becomes almost impossible to pass most procedural legislation. Finally, let us be honest: procedural law is not something about which the average legislator is excited or concerned.

I like to tell my students about the passage of CPLR 302(d) a few years back, the Libel Terrorism Protection Act.¹³ This provision was enacted in reaction to the decision in *Ehrenfeld v. Mahfouz*,¹⁴ in which the Court of Appeals held that CPLR 302(a)(1) did not provide a juris-

10. N.Y. COMP. CODES R. & REGS. tit. 20 § 130 (McKinney 2013).

11. See, e.g., N.Y. C.P.L.R. 308(2), (4) (McKinney 2013) (filing requirements).

12. See N.Y. C.P.L.R. 308(1), (2), (4).

13. Libel Terrorism Protection Act, 2008 N.Y. Sess. Laws ch. 66 § 3, (McKinney).

14. 881 N.E.2d 830 (N.Y. 2007).

dictional predicate for the Court to declare a British libel judgment invalid. This issue was a hot one, reported in the press and on television, producing the type of publicity that pushed the issue to the forefront. In a mere matter of months, CPLR 302(d) wound its way through the legislature and was signed into law. How many people in this room or, for that matter, in the bar at large, have been impacted by CPLR 302(d)? I would venture a guess that it is very few. But try to push forward any type of legislation that deals with the vagaries of expert disclosure, and that legislation may not even make it out of committee!

So we are left with a core problem: even where there might be some type of consensus that changes need to be made, how do we effect them? Into this abyss step the Uniform Rules. Perhaps out of frustration with the legislative process I have discussed, the Uniform Rules, which do not require legislative approval, have become more and more a source of procedure—with some provisions arguably in conflict with the CPLR. Some might say, in fact, that those rules, at times, impinge on the CPLR.

III.

PROBLEM #2: NEW YORK PRACTICE “ON THE GROUND”

The second major obstacle is the uncertainty that a practitioner faces that unnecessarily complicates the practice of law. Within this category, I see two culprits: the unwritten practices in the courts and the apparent conflict in the Appellate Division with respect to some basic procedural issues.

A. *Unwritten Practices In Various Courts*

The unwritten practices—that bee (or mosquito) that makes no noise—directly implicates discovery, calendar practice and summary judgment motions. Back in 1996, the “120-day rule” as it became known to practitioners, was passed. CPLR 3212(a) provides that after issue has been joined, the court can set a deadline for service of summary judgment motions, which is to be no earlier than thirty days after the filing of the note of issue. If the court does not set a date, the deadline is to be no later than 120 days after filing of the note of issue except “with leave of court on good cause shown.” Significantly, the filing of the note of issue (together with the certificate of readiness) is *supposed* to signify that discovery is complete. In *Brill v. City of New*

York,¹⁵ the New York State Court of Appeals restored an apparently meritless claim because the summary judgment motion was made after the 120-day period, and there was no showing of good cause for the delay in making the motion. But how does a practitioner reconcile the *Brill* decision with Queens County's practice of *requiring* the filing of the note of issue *before* discovery is complete, or Kings County's general unwillingness to strike notes of issue even where huge chunks of discovery remain? While some decisions have found "good cause" where there is outstanding discovery, inevitably that discovery must be related (or "essential") to the grounds for the summary judgment motion,¹⁶ a fact not always readily ascertainable in advance. A practitioner is then forced to make his or her motion prematurely if the court will not extend the summary judgment motion deadline. The point is that many practitioners caught up in this scenario are not the ones targeted by the *Brill* decision. They are attorneys who wish to comply with deadlines.

Another more recent example is the New York Court of Appeals decision in *Cadichon v. Facelle*.¹⁷ There, the Court found that a "ministerial dismissal" without judicial involvement, a practice not uncommon in some courts, did not meet the requirements of CPLR 3216. The Court focused on the statutory requirement that the demand (to file the note of issue) contain language providing that the "default by the party upon whom such notice is served in complying with such demand within said ninety day *period will serve as a basis for a motion* by the party serving said demand for dismissal as against him for unreasonably neglecting to proceed (CPLR 3216(b)(3). [emphasis supplied])."¹⁸ Since there was no "motion," just a ministerial act by the court, the Court of Appeals held that the CPLR 3216 dismissal provisions did not apply.

15. *Brill v. City of New York*, 814 N.E.2d 431 (N.Y. 2004). See David L. Ferstendig, *The Continuing Shrill Over Brill*, 2008 EMERGING ISSUES 823.

16. See e.g., *Avezbakiyev v. City of New York*, 960 N.Y.S.2d 910, 911 (App. Div. 2013) ("The Supreme Court properly denied, as untimely, the motion of the defendants Horizon at Forest Hills, LLC, and Britt Realty Development Corp. (hereinafter together the appellants) for summary judgment dismissing the complaint and all cross claims insofar as asserted against them, since they failed to demonstrate good cause for the delay in making their motion for summary judgment. Significant outstanding discovery may, in certain circumstances, constitute good cause for a delay in making a motion for summary judgment. Here, however, the discovery outstanding at the time the note of issue was filed was not essential to the appellants' motion.") (citations omitted).

17. 961 N.E.2d 623 (N.Y. 2011).

18. *Id.* at 625 (2011).

However, nowhere is a “ministerial dismissal” sanctioned in the CPLR or Uniform Rules. In fact, CPLR 3216 provides the proper procedure to follow where there is a neglect to prosecute. The majority opinion in *Cadichon* does not address this core issue—that is, the apparent lack of authority for such “ministerial dismissals” or why such practices are permitted.

B. Appellate Division Conflict on Matters That Should Be Red Letter Law

Another challenge a practitioner faces is the conflict among the respective Appellate Division departments with respect to some basic procedural issues.

I wrote an article for the Albany Law Review a few years back discussing disclosure from non-parties.¹⁹ Prior to a 1984 amendment, CPLR 3101(a)(4) provided that a party seeking disclosure from a non-party had to show “special circumstances.” While the case law interpreting “special circumstances” came to varying conclusions, it was clear that this standard required something more than a mere showing of materiality and necessity, the general scope of disclosure under CPLR Article 31 and applicable to disclosure from parties. In 1984, the “special circumstances” requirement was removed. Nevertheless, the Second and Third Departments continued to apply the “special circumstances” standard. The article was prompted by the Second Department decision in *Kooper v. Kooper*,²⁰ which highlighted the confusion in that area, when it finally rejected its prior continuing application of the “special circumstances” standard which, as discussed above, had been legislatively eviscerated twenty-six years before the *Kooper* decision.²¹ However, it appears that the *Kooper* court applied some of the same criteria used by the courts applying the “special circumstances” standard, most significantly whether a party is unable to obtain the disclosure from other sources. Moreover, as we stand here today, there is still no agreement among the four departments about this critical issue of disclosure from non-parties. The Second and Third Departments continue to hold that a significant factor to be considered is a party’s inability to obtain the requested disclosure

19. David L. Ferstendig, *A Practitioner’s Continued Uncertainty: Disclosure for Nonparties*, 74 ALB. L. REV. 731 (2011).

20. *Kooper v. Kooper*, 901 N.Y.S.2d 312 (App. Div. 2010).

21. *Id.* See generally 6 JACK B. WEINSTEIN, HAROLD L. KORN & ARTHUR R. MILLER, NEW YORK CIVIL PRACTICE § 3101.33a (David L. Ferstendig ed., 2d ed. 2013); 1 JACK B. WEINSTEIN, HAROLD L. KORN & ARTHUR R. MILLER, CPLR MANUAL §20.03 (David L. Ferstendig ed., 3d ed. 2013).

elsewhere, while the First and Fourth Departments generally permit non-party discovery where the disclosure sought is material and necessary.

Another example is the diametrically opposed positions taken by the Second and Fourth Departments with respect to the disclosure of background information of experts in medical malpractice actions. Under CPLR 3101(d)(1), in medical, dental or podiatric malpractice actions, a response to a demand for expert information is to omit the names of the experts but is required “to disclose all other information concerning such experts otherwise required by this paragraph.” The issue was the impact of the expansion of computer technology on the availability of information. Specifically, some plaintiffs were arguing that by divulging an expert’s background information, defendants could learn of that expert’s identity. In *Thompson v. Swiantek*,²² the Fourth Department carved out its own rule, permitting a responding party to withhold information concerning the expert’s medical school education and the location of his or her internships, residencies, and fellowships. The Second Department ruled instead that a party must provide all expert information, including the expert’s qualification, with the exception of the expert’s identity, unless it could be shown that there was “a concrete risk” that the prospective expert “would be subject to intimidation or threats if his or her name were revealed before trial.”²³ And just to confuse the bar, the Second Department case is named *Thomas*!

What about the timing of expert disclosure? Does it have to be completed before the filing of the note of issue? Many courts have concluded that there is nothing in CPLR 3101 providing for such a deadline. However, some panels of the Second Department had held that a trial court is to bar an expert affidavit submitted in opposition to a summary judgment motion, where the expert was not exchanged prior to the filing of the note of issue.²⁴ Then along came the *Rivers v. Birnbaum* case at the end of last year to clear all of this up.²⁵ Before they did so, however, the First Department jumped in and adopted the

22. *Thompson v. Swiantek*, 736 N.Y.S.2d 819 (App. Div. 2002).

23. *Thomas v. Alleyne*, 752 N.Y.S. 2d 362, 368, 370 (App. Div. 2002).

24. *See Construction by Singletree, Inc. v. J.C. Construction Mgmt. Corp.*, 866 N.Y.S.2d 702 (App. Div. 2008); *Safrin v. DST Russian & Turkish Bath*, 791 N.Y.S.2d 443 (App. Div. 2005).

25. *Rivers v. Birnbaum*, 953 N.Y.S.2d 232 (App. Div. 2012). *See generally* 6 WEINSTEIN, KORN & ARTHUR R. MILLER, NEW YORK CIVIL PRACTICE, § 3101.52d (David L. Ferstendig ed., 2d ed. 2013); 1 WEINSTEIN, KORN & MILLER, CPLR MANUAL *supra* note 21, §20.02; David L. Ferstendig, *LexisNexis AnswerGuide New York Civil Litigation* §6.25 (2013).

old Second Department line of cases on this issue.²⁶ *Rivers* held that there was no hard and fast rule and that a court does not have to automatically preclude the expert submission. The Court has discretion to permit the expert affidavit.

CONCLUSION

In sum, much of the CPLR remains relevant. There are provisions that have become irrelevant or outdated. However, it is very difficult to pass any legislative amendments to the CPLR. Perhaps the bigger problem lies in the vast array of sources of procedural law, the unwritten local practices that unnecessarily complicate and confuse the practice of law and the Appellate Division conflicts on important issues. Taken together, these circumstances present traps to the wary and unwary practitioner.

26. *Garcia v. City of New York*, 951 N.Y.S.2d 2 (App. Div. 2012).