

# Civil Litigation in New York



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*To My Wonderful Grandchildren*

*Kara Chase-Kohn*

*Amaya Chase-Luthra*

*Lucia Chase-Kohn*

*Ilan Chase-Luthra*

*Rafael Chase-Kohn*

*O.G.C.*

*To Ellen*

*My Wife*

*R.A.B.*



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# Preface to the Seventh Edition

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We are very pleased to present the seventh edition of *Civil Litigation in New York*. We give many thanks to Carolina Academic Press which has published this edition—the first it has done so. The people at Carolina Academic have been very helpful and made the change over to them as effortless possible.

Our goal continues to be the provision of a book that is readable, as reasonably thorough as space permits, and as thought-provoking as the many interesting issues raised by modern litigation allow. The seventh edition retains the transactional approach used in the prior editions. The organization of the chapters follows the usual development of an action as experienced by counsel to the extent feasible. While this approach gives the student a way of fitting each piece into a cognizable whole, it should not suggest invariability.

We have again interspersed litigation problems throughout the book designed to encourage the student to read the surrounding material carefully. Often, discussion of a problem will highlight ambiguity in doctrine which purports to be straightforward. Evaluation of competing approaches should call for reference to underlying policy and value assumptions. The student (and teacher) will then be encouraged to think about the values that a procedural system can and should serve.

Reflecting the many legal developments in the past eight years since the 6th edition, as well as our own ambition to improve the book, the new edition includes much new material. The chapter on personal jurisdiction has been particularly affected by the close attention the Supreme Court of the United States has recently paid to the area. We found that these cases worked best when folded into the subdivisions of personal jurisdiction doctrine, rather than as a separate treatment of constitutional issues.

As with the preparation of any casebook, we faced many difficult decisions of inclusion and exclusion. We hope we have struck the right balance between preservation and dynamism. You will find that important new cases have been added and statutory changes noted, but we have avoided change for change's sake and have thus retained the cases that make up the “canon” of our subject.

We are especially grateful to the Research Assistants of NYU School of Law for their dedicated and helpful research assistance:

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We again thank our fellow teachers of New York Practice throughout New York and beyond for their ongoing support and friendly suggestions.

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O.G.C.

R.A.B.

December 15, 2019

# Original Preface

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This book grew out of my experience as a teacher of New York Practice at New York University School of Law and at Brooklyn Law School. Its authorship is in some sense shared by the many students who, through our classroom discussions, helped me develop my thinking about the subject and how to teach it. Similarly, my fellow proceduralists on the faculties of both of those institutions were a frequent source of stimulation and encouragement. I must single out Professors Margaret A. Berger, Sheila L. Birnbaum, Samuel Estrieher, Richard T. Farrell, Stephen Gillers, Andreas F. Lowenfeld, Burt Neuborne, Linda J. Silberman and David H. Schwartz. I am especially grateful to Professor Michael A. Schwind, who read and commented on portions of the manuscript.

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Finally, I gratefully acknowledge the generous financial support provided by the New York University Law Center Foundation; it was extraordinarily important in making this project possible.

Oscar G. Chase

July, 1983



# Introduction

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## A. About This Book: A Memo to the Student

Civil litigation in New York is complex and demanding. It calls on such advocacy skills as oral argument, brief writing and cross-examination, but even more does it demand familiarity with the “law” of litigation. The purpose of this book is to help you learn that law in the context in which an advocate must apply it. We hope that you will not only become familiar with the rules of New York practice but that you will develop a sense of how they can be creatively applied. To that end we have included in each chapter litigation problems which are designed to help you put the law into a practical perspective. The problems are based on realistic situations (sometimes on actual cases) and therefore raise the sorts of difficult issues which can arise in the course of any action. Usually you will find that we have presented the problem prior to the material which bears on it. This will hopefully make the material less abstract and more involving. Many of the problems do not have a single answer which is correct in an absolute sense. As with most legal issues there are various possible solutions, each with its own supporting arguments. Please approach them in that spirit.

In keeping with its purposes, the book is organized roughly along the path litigation normally takes, starting with the rules governing the choice of forum. Since there is no route which all lawsuits must follow, and since there are some rules of litigation (*e.g.*, those governing motion practice) which are relevant to several stages of a lawsuit, you should not take the linear organization we have adopted as exemplifying all lawsuits or as an approach you would always follow in practice. Use it, rather, to gain and keep a general sense of litigation as a process with a beginning, middle and clearly defined goal.

The variety of paths litigation can take brings us to another point about the study of it. The flexibility of modern civil procedure, including that of New York, allows and therefore requires the lawyer to make frequent tactical choices. Should one make a particular motion? Obtain a provisional remedy? Seek discovery? If so, what kind? How should the pleading be drafted? It is our view that an effective advocate knows what the ethical choices are in every situation and does their best to pick the alternative which will maximize the client’s chances of success. Thus, as you read the cases and problems which follow, we urge you to think about and evaluate the choices that the litigants made.

The management of the litigation system in pursuit of success is not the only challenge to the student or attorney. Equally fulfilling, if not more so, is participation in the ongoing effort to reform and improve the system. Thus, these materials frequently encourage you to step back from the process and ask “How can we make this better?”

## B. Sources of New York’s Law of Civil Procedure

The Civil Practice Law and Rules, the “CPLR,” is the primary focus of this book, as it is the primary source of the law of civil litigation in New York. Adopted in 1962, effective September 1, 1963 (*see* CPLR 10005), it was the product of over five years of study by distinguished academicians and lawyers.<sup>1</sup>

CPLR 101 states that the CPLR governs the procedure in “civil judicial proceedings in all courts of the state and before all judges, except where the procedure is regulated by inconsistent statute.” As we shall see momentarily, there are several statutes which are either inconsistent with the CPLR or at least supplementary to it. Note first that the CPLR, like every rule of procedure, must of course accord with the federal and state constitutions. The United States Constitution is relevant primarily because of the “Due Process” clause of the Fourteenth Amendment, prohibiting the taking of “life, liberty, or property, without the due process of law. . . .” The basic requisite of due process, “a meaningful opportunity to be heard,”<sup>2</sup> remains a lively ingredient in the discussion of concepts as varied as provisional remedies<sup>3</sup> and jurisdiction.<sup>4</sup>

The Constitution of the State of New York has its own due process clause, in Article 1, §6, which in language and substance generally tracks that of the federal constitution but which stands as an independent guardian of procedural fairness.<sup>5</sup> In other provisions the state constitution regulates civil practice in some detail. It has on most points been amplified by statute or rule, but remains supreme in case of conflict with them. The right to jury trial, as well as its waiver, and jury composition are covered in Article I, §2. The Judiciary Article (Article VI) establishes a “unified

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1. The principal drafts were the work of the Advisory Committee on Practice and Procedure, which was appointed for this purpose in 1956 and which submitted its final report in January, 1961. The legislative history is reviewed in the Sixth Report Of The Senate Finance Committee On The Proposed Revision Of The Civil Practice Act And Rules (1962), reprinted in part at 1962 N.Y. Session Laws, p. 3333. *See also* Weinstein, *Proposed Revision of New York Civil Practice*, 60 Colum. L. Rev. 50 (1960).

2. *Boddie v. Connecticut*, 401 U.S. 371, 377, 91 S. Ct. 780, 785 (1971).

3. *Carey v. Sugar*, 425 U.S. 73, 96 S. Ct. 1208 (1976).

4. *Shaffer v. Heitner*, 433 U.S. 186, 97 S. Ct. 2569 (1977).

5. *See Sharrock v. Del Buick-Cadillac, Inc.*, 45 N.Y.2d 152, 408 N.Y.S.2d 39, 379 N.E.2d 1169 (1978), *infra* (holds “state action” present for the purposes of the state due process clause even if lacking for the purposes of federal due process).



court system,”<sup>6</sup> defines the subject matter jurisdiction of the various courts which it creates or authorizes to be created,<sup>7</sup> and provides for judicial appointments and discipline, and for administrative supervision of the court system.<sup>8</sup>

The statute of most general applicability which supplements the CPLR is the Judiciary Law. It details the jurisdiction of some of the courts created by, or authorized to be created by, the Constitution.<sup>9</sup> Here, too, are set forth some of the powers and duties, administrative and otherwise, of the judges of the various courts<sup>10</sup> as well as other court officers,<sup>11</sup> including attorneys.<sup>12</sup> Also important from the point of view of the student of civil practice is Article 2, General Provisions Relating to Courts and Judges, which includes matters of procedural detail not found in the CPLR.<sup>13</sup>

The CPLR is the general code of procedure for two of the major trial courts of the state: the Supreme Court (which is the court of general jurisdiction) and the County Courts. Individualized codes of procedure have been developed for all other courts and are set forth in the Court of Claims Act, Family Court Act, Surrogate’s Court Procedure Act, Uniform District Court Act, Uniform City Court Act, Uniform Justice Court Act, and New York City Civil Court Act. These court acts are, however, coordinated with the CPLR to some extent. Thus, the Family Court Act provides that the CPLR is applicable “to the extent . . . appropriate” whenever the former does not cover the point in question.<sup>14</sup> Given this “complex maze of 11 separate trial courts,” a number of efforts over the years have sought to consolidate the New York State court system to increase operational efficiency and reduce the costs of litigation. Press Release, New York State Unified Court System, Chief Judge Proposes Constitutional Reforms to Simplify Outdated Court Structure, Aiming to Enhance Access, Optimize Resources (Sept. 25, 2019) (on file with author). For a discussion of these efforts, see § 3.04[3].

The Surrogate’s Court Procedure Act makes “[t]he CPLR and other laws applicable to practice” relevant in the Surrogate’s Courts except where “other procedure is provided by this act.”<sup>15</sup> The New York City Civil Court Act, the Uniform District Court Act, the Uniform Justice Court Act, and the Uniform City Court Act contain identical provisions, which read as follows:

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6. N.Y. Const. Article VI, § 1.

7. See Chapter 3, *infra*.

8. N.Y. Const., Art. VI, § 28.

9. *E.g.*, Jud. L. § 190 (County Court Jurisdiction).

10. See Jud. L. § 2-B, enumerating the general powers of all courts of record. See also *id.*, § 147-a, describing the general power of supreme court justices.

11. See Jud. L. Article 8, dealing with court clerks.

12. See generally Jud. L. Article 15.

13. *E.g.*, Jud. L. § 4 (court sessions to be public, subject to enumerated exceptions); Jud. L. § 28 (court not to amend transcripts in relation to objections without consent of party making the objection); see also Jud. L. art. 19. (contempt powers and procedures).

14. Family Ct. Act § 165.

15. Surr. Ct. Pr. Act § 102.

The CPLR and other provisions of law relating to practice and procedure in the supreme court, notwithstanding reference by name or classification therein to any other court, shall apply in this court as far as the same can be made applicable and are not in conflict with this act.<sup>16</sup>

The major factor that determines whether any CPLR provision applies in an action pending in a court that has its own practice act is whether and in what manner the court act covers the particular aspect of procedure in question. If the act specifically covers the subject, its provisions govern.<sup>17</sup> When there is doubt whether the CPLR or another act governs a point, the broad scope of CPLR 101 has been relied upon in resolving ambiguity in favor of the CPLR.<sup>18</sup>

The CPLR incorporates both law and rules of civil practice in a single integrated document. Each provision of the law is designated a “section” or “rule.” Sections have always been alterable only by the legislature. The rules were formerly amendable by the Judicial Conference subject to legislative veto<sup>19</sup> but may, as of this writing, be amended only by the legislature itself.<sup>20</sup> Sections and rules are interspersed, with the provisions numbered in the order in which they appear regardless of their status as section or rule.<sup>21</sup>

Students and practitioners must also be aware of another set of rules relevant to practice in New York: the Uniform Rules for the New York State Trial Courts. These rules, which were promulgated by the Chief Administrator of the Courts in 1986, supplement the CPLR and provide additional detail regulating the conduct of litigation. They should not be confused with the “rules” in the CPLR itself. They are codified in Title 22 of the Official Compilation of Codes, Rules and Regulations of the State of New York (“NYCRR”), and are posted at [www.courts.state.ny.us/ucsrules.html](http://www.courts.state.ny.us/ucsrules.html). These rules are uniform in the sense that they provide a common set of rules for each court (e.g., the Supreme Court), which apply in every county or city in which that court sits. There are, however, different uniform rules for each of the courts of inferior jurisdiction, and each appellate court has its own rules. Therefore, you must be careful to consult the appropriate rules in 22 NYCRR whenever you practice in a court which is new to you. Moreover, Parts 125-136 of 22 NYCRR set

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16. Section 2102 of each act.

17. *Id.*

18. *Santiago v. Johnson*, 61 Misc. 2d 746, 305 N.Y.S.2d 717 (Civ. Ct. 1969) (disbursements taxed in accordance with CPLR provision).

19. The Judicial Conference enjoyed this power pursuant to N.Y. Const., Art. 6, § 30 and Judiciary Law § 229, but this power was removed by constitutional and statutory amendments, *see* N.Y. Const., Art. 6, § 30, as amended, Nov. 8, 1977; L. 1978 Ch. 156, § 6.

20. N.Y. Const. Art. 6 § 30. This power may be delegated by the legislature to a court or to the Chief Administrator of the Courts, *id.*, but no such delegation is currently in force.

21. In citing a provision, an attorney need not indicate whether it is a rule or a section. CPLR 101. It has been held, however, that a rule must yield to a section in case of conflict, CPLR 102; *Foley v. Roche*, 68 A.D.2d 558, 418 N.Y.S.2d 588 (1st Dep’t 1979).

forth some general rules and apply throughout the state. In the readings that follow we direct your attention to them as they become relevant.

Additionally, a new set of rules, the Practice Rules of the Appellate Division, was adopted in 2017 and revised in June 2018. The rules apply to all four of the Appellate Departments. The Rules are a “must” for any lawyers who practice in any of the Departments. Notably, Rule 1250.1(h) provides sanctions for violations of any of the rules.

The Judicial Conference, acting pursuant to CPLR 107, adopted an Appendix of Official Forms which became effective September 1, 1968.<sup>22</sup> The forms were intended to “exemplify the simplicity and brevity of statement which the CPLR contemplates.”<sup>23</sup> Although the courts revoked the Appendix of Official Forms in 2016, the pleadings, summonses, and motion papers previously included as official forms within the Appendix remain useful as templates for practitioners.

## C. Bibliography

We who practice in New York are fortunate to have available several helpful works. The preeminent multi-volume treatise is Jack B. Weinstein, Harold L. Korn & Arthur R. Miller, *New York Civil Practice: CPLR* (David L. Ferstendig ed., 2d ed., Matthew Bender & Co. 2013) (available digitally through Lexis Advance). Also a multi-volume work is Francis X. Carmody & William Wait, *Carmody-Wait 2d Cyclopedia of New York Practice* (Robert D. Hursch et. al. eds., 2d ed., West Group 1999) (updated with annual supplements). Useful single volume texts are David D. Siegel and Patrick M. Connors, *New York Practice* (6th ed. West Academic Publishing, 2018) (updated with supplements through 2018); Oscar G. Chase, David L. Ferstendig, *CPLR Manual* (3d ed., Matthew Bender & Co. 2013) (available digitally through Lexis Advance); and David L. Ferstendig, *New York Civil Litigation* (Matthew Bender & Co. 2013) (available digitally through Lexis Advance).

Annotated editions of the CPLR are published in 7B McKinney’s Consolidated Laws (which also has practice commentaries that are updated regularly) and in 4 New York Consolidated Laws Service.

The best sources of the legislative history of the CPLR are the Final Report of the Advisory Committee on Practice and Procedure (1961), the four preliminary reports of the Advisory Committee on Practice and Procedure (1957- 1961) and the Sixth Report of the Senate Finance Committee on the Proposed Revision of the Civil Practice Act and Rules (1962). Legislative history of some of the amendments to the CPLR is found in the various annual reports of the Advisory Committee on

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22. CPLR 107 initially empowered the Judicial Conference of the State of New York to “adopt, amend and rescind an appendix of forms.” Effective May 30, 1974, such power was transferred to the state administrator. *See* L. 1974, Ch. 615, § 12.

23. Introductory Statement, Appendix of Official Forms.

Civil Practice to the Chief Administrator of the Courts of the State of New York and in annual reports to the legislature of the Law Revision Commission. *See generally*, William H. Manz, *If It's Out There: Researching Legislative Intent in New York*, 77-APR N.Y. St. B.J. 43 (2005). Also of interest is a symposium, *The CPLR at Fifty: Its Past, Present, and Future in N.Y.*, 16 Journal of Legislation and Public Policy 643 (2013), which includes comments by Oscar G. Chase, Hon. Jack B. Weinstein, Hon. Judith Judge Kaye, William Nelson, Vincent C. Alexander, and David L. Ferstendig.

Statistics, calendar conditions, and other information about the court system are published each year in the annual reports of the Chief Administrator of the Courts. A website on which this material and other information about the courts, including official forms, court rules, and guidance for attorneys, may be found is [www.courts.state.ny.us](http://www.courts.state.ny.us).

Developments in New York's law of civil procedure are discussed in the annual survey of New York law of the *Syracuse Law Review*. Additionally, the *New York State Law Digest*, edited by David L. Ferstendig, publishes monthly judicial and statutory updates on New York civil procedure.

As to more specialized works, the jurisdiction of the Court of Appeals is surveyed in Arthur Karger, *The Powers of the New York Court of Appeals* (Rev. 3d ed. Thompson/West 2005) (updated with supplements through July 2019) (available digitally through Westlaw). Two other useful monographs on appeals are Alan D. Scheinkman & David D. Siegel, *Practitioner's Handbook For Appeals to the Court of Appeals of the State of New York* (3d ed. 2008), available digitally at <http://www.nysba.org/4017AppealsCourtofAppeals>, and Alan D. Scheinkman & David D. Siegel, *Practitioner's Handbook for Appeals to the Appellate Divisions of the State of New York* (2d ed. 2005), both of which were published by the New York State Bar Association.