

1-1-2013

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Vincent C. Alexander

St. John's University - New York

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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.

* Charles M. Sparacio Professor of Law, St. John's University School of Law. I wish to thank the following colleagues for their comments and suggestions in the preparation of my remarks: At St. John's Law School, Professor Edward D. Cavanaugh and Vice Dean Emeritus Andrew J. Simons; and on the Advisory Committee on Civil Practice, Chair George F. Carpinello, Esq., and members Thomas F. Gleason, Esq., and Professor Patrick M. Connors.

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).