

# NEW YORK PRACTICE

**Sixth Edition**

**The Late David D. Siegel**

*Distinguished Professor of Law Emeritus  
Albany Law School*

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*For Cecelia, Fiona, George, and Donal,  
and the prior dedicatees: their moms and granny*

**DAVID D. SIEGEL**

*For my parents, Kitty and Bill, who always stressed  
the importance of education*

**PATRICK M. CONNORS**



# In Memoriam

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Professor David D. Siegel, the leading commentator on the CPLR since its adoption in 1963, passed away on October 9, 2014, just short of his 83rd birthday.

In rare instances, a scholar becomes such a presence in his or her field of discipline that serious consideration of a matter within that realm cannot be undertaken without reference to the author's body of work. Over five decades, Professor Siegel achieved this status in his field of concentration, New York Practice, a subject synonymous with his name. It is virtually impossible to author a meaningful piece on this fascinating subject without reference to Professor Siegel's voluminous scholarship. Thousands of judicial opinions grappling with the broad array of thorny and weighty issues that arise under the umbrella of civil procedure make the point. These decisions, and the briefs that preceded them, cite to and rely heavily upon Professor Siegel's writings. *See* Patrick M. Connors, *The King of New York Practice*, 72 Alb. L. Rev. 447 (2009).

Many readers had the distinct pleasure of being a student in Professor Siegel's classes and attending his CPLR Update programs, where another set of his talents was on display. His enthusiasm for the subject was contagious and, when accompanied by his unique wit and insight, made for an unforgettable learning experience. If you meet lawyers who do not find the CPLR interesting and fun, you can almost be certain that they never witnessed Professor Siegel at work.

Law schools exist today in a period of turmoil in legal education. Sadly, there is a substantial gap between what a student learns in law school, often at great monetary expense, and the essential knowledge required to effectively practice law. If law schools want to seriously address this problem, an examination of the career of Professor Siegel would be a good place to start. Unlike virtually any law professor of his time, Professor Siegel cultivated a broad audience of judges and lawyers who rely constantly on his writing, while also bridging the gap for generations of law students to enter the practice of law.



## Preface to Sixth Edition

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As the late Professor Siegel frequently observed, New York Practice is a scene in motion. The subject never rests. Events are frequent, both major and minor, and there have been many developments since the publication of the fifth edition in 2011. Although the Civil Practice Law and Rules (CPLR) has governed civil practice in New York for over five decades, the landscape is constantly changing as lawyers continue to press for every sort of procedural advantage for their clients. The Legislature and Judiciary add to the mosaic by amending statutes, promulgating court rules, and issuing decisions interpreting the procedural laws of The Empire State.

Sometimes these endeavors close gaps in the procedural landscape, but on occasion they create new problems and pitfalls that require analysis. We attempt to address it all here. This edition covers most statutory, caselaw, and rule developments through the beginning of 2017, and will be supplemented twice a year, in January and July. Numerous recent cases are discussed or cited, but cases from the mid-1960s to the mid-1970s, when the main caselaw on the CPLR was developed, remain a body of prime authority and, therefore, our continued focus.

This edition includes a federal chapter (Chapter 23) that Professor Siegel devised, and I assisted with, beginning with the second edition published in 1991. The chapter summarizes the civil jurisdiction and practice of the federal courts and compares and contrasts it with New York practice in a number of particulars. It has turned out to be one of the largest chapters in the book, and one of the most rewarding to construct and refine. Federal Civil Procedure and New York Practice, when placed side by side, often present an intertwined series of comparisons and contrasts that are helpful to developing a body of knowledge on procedure. Comparing and contrasting is a sure way to avoid procedural pitfalls, and avoiding such missteps is a principal goal of the federal chapter.

The sixth edition of New York Practice includes several new sections that address significant procedural developments arising during the 21st century. They include:

**§ 12A. Commercial Division of Supreme Court:** addressing the requirements for litigating an action in the Commercial Division and the various rules of practice in that court.

**§ 63A. Commencement of Actions by Electronic Filing (“E-Filing”):** addressing the developments in commencing actions via e-filing in various counties

throughout New York State's court system and the numerous statutes and rules containing e-filing procedures. Several existing sections were also revised to address issues arising in e-filed actions, including: § 202 (filing and service of papers in e-filed actions); § 246 (providing motion papers to the court in e-filed actions); § 250 (entry of orders in e-filed actions); § 533 (calculating appeal time in e-filed actions); §§ 11, 524, 536 (e-filing of records and briefs in appeals to the appellate division and the Court of Appeals).

**§ 76B. Curing Technical Defects in Service:** addressing the Court of Appeals decision in *Ruffin v. Lion Corp.* allowing CPLR 2001 to cure certain service defects.

Chapter 13, entitled "Disclosure," was substantially expanded to include additional discussion of the various issues that have arisen concerning the disclosure of electronically stored information ("ESI"), including who pays the cost of such disclosure (§§ 353, 362), the proper methods for seeking ESI from parties and nonparties (§ 362), and penalties for failure to preserve relevant ESI (§ 367).

I have always taught professional responsibility alongside New York Practice, and there are many important areas of intersection. The book now integrates a discussion of many relevant ethical issues that arise in conjunction with various procedural issues. They include: multijurisdictional practice (§ 10), expanded treatment of statute of limitations issues, including the doctrine of "continuous representation" in legal malpractice actions (§§ 35, 42), withdrawal from representation (§ 115), communications with represented parties (§ 202), Judiciary Law section 470's physical office requirement (§ 202), the lawyer's ethical duties in the disclosure process (§ 352A), compensation to fact witnesses (§ 382), and mandatory arbitration of fee disputes (§§ 456, 603).

This edition also includes hundreds of updated citations so lawyers and judges can easily find the most recent caselaw in a particular area.

Frequent references are made to our McKinney's Practice Commentaries, New York Law Journal columns, and law review articles, which provide more expanded treatments of matters necessarily set forth in a relatively abbreviated form here. These citations also allow for reference to many items that cannot be comprehensively addressed in a one-volume work. Similarly, there are frequent references to Professor Siegel's pieces in the New York State Law Digest and Siegel's Practice Review, which provide similar coverage. The form of citation to the New York State Law Digest is by issue number: "NYSLD No. 462," for example, refers to issue number 462 of the Digest. Most references are to lead notes, appearing on page 1 of an issue. Unfortunately, most of these issues are not available online, but hard copies are usually resting on the shelves of a good law library. The form of citation to Siegel's Practice Review is by issue number and page: "SPR 223:4," for example, refers to page 4 of Issue 223. Most issues of the Practice Review are available in hard copy, and all are available on WESTLAW.

We study and practice law in The Information Age. This treatise is designed to provide far more than a recitation of procedural law, although it does a fair bit of that. Very few procedural issues arise in a vacuum, and this book coordinates various topics that frequently intersect in the practice of law with cross-references to other relevant portions of the text. Judges, lawyers, and law students often benefit from the integra-



tion the book offers, which provides context and allows the reader to view the complete dimensions of a procedural problem. This was Professor Siegel's design in authoring the initial editions of the treatise, and I have done my best to continue to achieve that goal.

Another critical aspect of writing effectively on civil procedure is access to the front lines, where the rubber meets the road and statutes and rules are interpreted and applied to resolve actual controversies. Following in Professor Siegel's footsteps, I frequently provide continuing legal education programs to lawyers at law firms and bar association functions, and to judges and court attorneys at programs offered by the Office of Court Administration. Recently, I have spoken to groups of lawyers and judges in Albany, Bronx, Broome, Essex, Jefferson, Kings, Nassau, New York, Onondaga, Otsego, Oswego, Rockland, Saratoga, Suffolk, and Westchester Counties, and in Montreal, Canada for the Federation of Bar Associations of the Fourth Judicial District. The interactions at such programs with judges, lawyers, and those who work in the court system help to provide invaluable ideas and perspective, which are reflected on these pages.

Law schools exist today in a period of turmoil in legal education. Sadly, there is a substantial gap between what a student learns in law school, often at great monetary expense, and the essential knowledge required to effectively practice law. This gap will likely expand after the implementation of the Uniform Bar Exam in New York in July of 2016. See § 10. This book and the supplements that will follow remain dedicated to bridging that gap for law students to enter the practice of law, and to assist new lawyers in providing value to their clients and law firms.

This Sixth Edition is done in two forms. The Practitioner's Edition is in hard cover, with a pocket in the back for the supplements that will update it biannually. The abridged Student Edition, in soft cover, omits the chapters on federal practice and on arbitration, which have their own courses in law school, and the materials on landlord-tenant proceedings and small claims, which are often incidents of other courses, like real estate transactions and consumer rights.

The book is also available on ProView, Thomson Reuters' eReader app. This enables customers to access the publication when they are at court, travelling to court, or at their office or home, from a tablet, smartphone, laptop, or desktop. Information on obtaining the book in the ProView eBook format is provided immediately following this preface.

A treatise of this sort is in some respects only as good as its index, so we've sought over the years to make our index a thorough one. But in point of convenience and speed, the recent technology explosion displaces the traditional index altogether when the item indexed is available in electronic form, as this book is. In addition to being available in electronic form on ProView, it is also on WESTLAW, with a search engine that goes through the whole book in no time, highlighting the searched term and then, through "links," permitting the viewer, with just a "click," to call up on screen for instant access almost any item cited in the book—cases and statutes, of course, but also authorities like ours: the SPR, the McKinney's Commentaries, and other sections of this text. These electronic formats move the conventional "index" closer to the museum, but it's not there yet; so, with the anti-electronic holdouts in mind, the index is included.

For aid in reviewing the manuscript and checking citations, I am indebted to my research assistants at Albany Law School: Mara Afzali, Katie Birchenough, and Steven Cummings (ALS 2017); Anneliese Aliasso, Allison Bartlett, and Sarah Baum (ALS

2018). I have also received several valuable suggestions over the years from my first research assistant at Albany Law School, John Higgitt (ALS 2001), whose publications are frequently referenced in the text. My writing has always benefitted from the insights of Albany Law School's former research librarian, Bob Emery, who provided assistance to me in countless ways for sixteen years. My reliable and cheerful administrative assistant at Albany Law School, Theresa Colbert, has also assisted me in so many tasks necessary for the publication. Elena Renner, the publisher's Principal Attorney Editor, also helped guide me through my first edition of the book.

In 2000, after 3 years of clerking for Judge Richard D. Simons at the New York Court of Appeals and nine years of full time practice at Hancock & Estabrook in Syracuse, I decided to pursue a full time teaching position at Albany Law School. That decision was primarily inspired by the many great teachers I have had in my life. The education I received from the Marianists at Chaminade High School helped me to excel under the guidance of the Jesuits at Georgetown University. Professor Walter I. Giles, who taught so many budding lawyers at Georgetown, had a profound impact on my career and showed me how a teacher could shape the life of a student in so many ways. I then received a great legal education at St. John's University School of Law, where I had the pleasure of taking Professor David Siegel's Federal Jurisdiction class in 1986 and New York Practice class in 1987. Just as the Beatles and Rolling Stones have borrowed and stolen so much from Chuck Berry, the King of Rock and Roll, I have borrowed and stolen from Professor Siegel, the King of New York Practice. He has laid down the law on how to teach and write on procedure, and I have been very fortunate to be able to follow his path in the classroom, at lectures to the bench and bar, and in this remarkable treatise.

Finally, special thanks to my wife Margyt, our children Aron and Jessye, and our standard poodle Theo, who have all been patient and supportive through this endeavor.

PATRICK M. CONNORS

Saratoga Springs, New York

October 30, 2017



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