ESSAYS

A TRIBUTE TO DAVID D. SIEGEL

George Carpinello*

Every attorney who practices law in the courts of New York knows David Siegel: he has written the preeminent treatise on New York practice; he authors McKinney’s Commentaries on Civil Practice; he authors the Commentaries on the Federal Rules of Civil Procedure; he authors the New York State Law Digest; he dissects the latest procedure cases in his Siegel’s Practice Review; and he is one of the most entertaining and informative speakers on the CLE circuit. But some of us are privileged to know David in another capacity: as one of the longest-standing members of the Advisory Committee on Civil Practice for the Courts of the State of New York.

The Committee was established pursuant to Sections 212(1)(g)\(^1\) and 212(1)(q)\(^2\) of the Judiciary Law, at the same time the Civil Practice Laws and Rules was adopted,\(^3\) to advise the courts on proposed changes in civil practice. The Advisory Committee meets on a monthly basis and presents a report to the Legislature in January of each year making proposed changes in the CPLR and in the Uniform Rules.\(^4\) It receives proposals for legislative and regulatory change from the members of the New York Judiciary, from the practicing bar, and from the standing committees of various bar associations.\(^5\) It also routinely comments on bills introduced by others in the Legislature affecting civil practice in

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\(^1\) N.Y. JUD. LAW § 212(1)(g) (McKinney 2003).

\(^2\) N.Y. JUD. LAW § 212(1)(q) (McKinney 2003).

\(^3\) N.Y. C.P.L.R. 101 (McKinney 2003) (establishing the CPLR in 1962, the same year § 212 of the Judiciary Law was originally adopted).


\(^5\) Id.
The Committee has over thirty members from every geographic area of the state and from every area of civil practice. Thus, although the formal purpose of each meeting is to discuss the proposals that are on our agenda, in reality, the real reason to attend is to listen to the stimulating and informative give-and-take with some of the best attorneys in their fields.

The issues that come before the Committee relate to every aspect of civil litigation: When should a motion for summary judgment be made? How many days service should be allowed for service by overnight carrier? May attorneys serve interlocutory papers by e-mail? Should there be mandatory electronic filing in New York? Should affidavits be replaced by universal affirmations? What is the appealable paper when the Appellate Division orders a conditional remittitur? When should disclosure of expert information be made? Should experts be routinely deposed in commercial cases? Should a case be thrown out of court because the plaintiff's attorney served a complaint with the wrong index number on it?

In the center of all these issues is, of course, Professor Siegel. When any proposal relating to the CPLR is presented to the Committee, the first order of business is to hear Professor Siegel's overview of the genesis of the provision, how the provision has worked in practice, and how the courts have interpreted it. Professor Siegel sets the stage for the discussion and explains the problem that needs resolution. He acts as a human hyperlink: click on any aspect of the problem and he immediately gives you all the history you would want or need. Of course, Professor Siegel not only provides elucidation on the proposals that come before the Committee, but he is also the most prolific contributor to the agenda of the Advisory Committee. I can recall more than one meeting when the majority of the items of the agenda were generated by Professor Siegel.

All the major proposals that come out of the Advisory Committee bear the marks of David's influence. Practitioners no doubt remember Chapter 216 of the Laws of 1992,7 which introduced Commencement-by-Filing in New York State. That legislation, which was the result of cooperative efforts among the Advisory Committee, the CPLR Committee of the New York State Bar

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6 Id.
Associates, the Federal Commercial Litigation Section of the New York State Bar Associates, and others, made a fundamental change in the New York law by declaring that an action was commenced by filing, not by service. The genesis of the legislation was the New York Legislature’s desire to raise revenue through a simple bill requiring that the summons and complaint be filed in the Clerk’s office and that an index number be purchased in every case. But the drafters of Chapter 216 believed that the Legislature’s revenue-raising measure provided a golden opportunity to end the satellite litigation generated by motions relating to proper service. As Professor Siegel has long preached, the careful attorney should not wait until the last day of the statute of limitations period to commence an action. But last minute service sometimes cannot be avoided. Many such cases have floundered on the rocks of improper service; if service were not properly effected and the statute of limitations ran, the plaintiff was left with nothing. The drafters of Chapter 216 believed that, if actions were commenced by filing papers in the clerk’s office, not only would traverse hearings on service end, but the potential procedural pitfalls that once meant sudden death to a plaintiff’s case would virtually disappear.

While the passage of Chapter 216 was a major procedural reform, it certainly did not end the satellite litigation and it created pitfalls of its own. Problems such as failing to timely purchase an index number, filing with the wrong clerk’s office, filing an unsigned order to show cause, or filing a show cause order without a return date have bedeviled the courts for the last decade and a half and have provided Professor Siegel with ample fodder for his commentaries and practice review.

In the Committee, Professor Siegel has been particularly supportive of the Advisory Committee’s efforts to legislatively overrule decisions which, in the Committee’s view, have been unduly harsh in dismissing actions when the filing missteps caused no prejudice to any party. Ultimately, the Advisory Committee recommended, and the Legislature adopted, an amendment to

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8 Id.
9 The drafters did not foresee that an issue would arise about filing the complaint in the wrong clerk’s office. See Mendon Ponds Neighborhood Ass’n v. Dehm, 781 N.E.2d 883, 883–84 (N.Y. 2002).
CPLR 2001 allowing the courts to overlook mistakes in the filing of a complaint or petition on such terms as may be just where no substantial right of a party has been prejudiced by the mistake.\textsuperscript{12} This law is consistent with the long-standing position of the Advisory Committee that harmless errors in procedure and so-called “law office failures” should be overlooked by the courts in favor of deciding cases on their merits.

Because the Advisory Committee has both outstanding defense and plaintiffs’ counsel in its membership, its meetings can become quite contentious and consensus is sometimes hard to achieve. Standing in the middle of the divide is Professor Siegel, who sees issues from the detached perspective of an academic, but an academic who is intimately familiar with what is happening in the courts. Because he is so secure in his knowledge of the law, he is not at all embarrassed or reluctant to ask practicing attorneys about their personal experiences and how those experiences relate to particular issues. He asks, with child-like innocence: “I know what the statute says, but tell me how it really works in the courts.” Anyone who has attended one of his CLE seminars knows that this is a classic Siegel modus operandi: teach not just what you know, but what the students can teach each other. I can recall many an Advisory Committee meeting when I was anxious to move on to the next item on the agenda but was stymied by Professor Siegel’s persistent and probing questioning of other attorneys on the Committee about their experiences with some esoteric procedural device.

We all know that Professor Siegel has a gift for language, both in the written and the oral form, and he never hesitates to add levity to the discussion. He enjoys skewering other members of the Committee with gentle verbal barbs, often criticizing them for their malapropisms or inexact use of language. The Chair is a frequent recipient of Professor Siegel’s chastisements. The Chair takes this all with good humor for the greater good of the Committee’s entertainment and education.\textsuperscript{13}


\textsuperscript{13} On very rare occasions, Professor Siegel is wrong. At least two or three times a year, Professor Siegel purports to remind me that when speaking of a beneficial or useful proposal I should use the term \textit{salutory} rather than \textit{salutary} because \textit{salutary} refers to something that promotes, or is conducive to, good health. But, sadly, Professor Siegel is incorrect. \textit{Webster’s} says that the secondary meaning of \textit{salutary} is “promoting or conducive to some good purpose; beneficial.” \textit{Webster’s New World Dictionary} 1186 (3d college ed. 1994). My dictionary does not contain the word \textit{salutory}. \textit{See Balleinette’s Law Dictionary} 454–55 (2005) (“\textit{Salus populi est suprema lex}. The welfare of the people is the highest law.”) (emphasis
Each year the Chair of the Advisory Committee makes a pilgrimage to Capitol Hill in Albany to urge legislators to adopt provisions recommended by the Advisory Committee. This is always a difficult task because the legislators and their staff are preoccupied with the budget and other important issues of public policy. The arcana of the CPLR, although critically important to practitioners, does not command the rapt attention of the Legislature. Thus, we often bring out our secret weapon, Professor Siegel, whose stature and encyclopedic knowledge of the CPLR command the attention of even the most jaded and overworked legislative staffer. Of course, it does not hurt that at least half of the staffers in the room are former students of Professor Siegel, and, as they did in law school, they listen when David Siegel speaks.

Professor Siegel is usually on the winning side of any argument that takes place in the Committee, but occasionally he is in the minority. The starkest example of this was the Committee’s recent consideration of the so-called “Libel Terrorism Protection Act,” which would give New York courts jurisdiction over foreign nationals who commence actions in foreign court seeking to recover libel judgments against American citizens.\(^\text{14}\) Such libel actions, brought in jurisdictions that lack the First Amendment protection present in American law, place a “Sword of Damocles” over the heads of American authors in the form of a potential action to enforce the judgment in New York courts. The proposal allowed the author to bring a declaratory judgment action against the libel plaintiff in New York’s courts to have the judgment declared invalid.\(^\text{15}\) The Committee was sympathetic with the goals of the legislation but believed that there were numerous problems with the bill, including possible constitutional infirmities.\(^\text{16}\) The Committee opposed the bill and wrote a letter to the Legislature and the Governor criticizing it. Professor Siegel dissented because he believed that the bill was a reasonable attempt to avoid what he considered to be a gross injustice perpetrated against American authors.\(^\text{17}\) Of course, Professor Siegel’s view won out: the Legislature passed it, virtually unanimously, and it was signed by

\(^{17}\) See id.
the Governor.\textsuperscript{18}

Professor Siegel’s long-term perspective on issues is vitally important, especially to younger attorneys. I remember the first year that I was Chair of the Committee. We had labored long and hard over a particular change in the CPLR. Our proposal went nowhere in the Legislature. I later learned, days after the session ended, that, in the closing hours of the session, a legislator had proposed an alternative bill affecting the same provision that the Committee had labored over. The legislator’s bill, which I felt was vastly inferior to the Committee’s proposal, passed without dissent, discussion or input from any corner. I called Professor Siegel to vent my rage and to ask for advice as to what the Committee should do in response. “Nothing,” said Professor Siegel, “these things will work themselves out.” Elaborating, he said “the courts will take care of it and if they don’t, we will revisit the issue in a few years and recommend a corrective measure.” He was right: the courts took care of it. The issue became insignificant and I learned a valuable lesson about setting priorities and keeping one’s perspective.

Finally, as I put the finishing touches on this piece, the Court of Appeals decision in \textit{Fasso v. Doerr},\textsuperscript{19} has come across my desk. The case relates to the issue of whether a health insurer, who has reimbursed the injured plaintiff for medical expenses, has a right to be represented in settlement discussions, or may intervene at trial, in order to protect its claim against the defendant for equitable subrogation.\textsuperscript{20} The issue is complicated by CPLR 4545, which provides that plaintiffs are not entitled to recover for reimbursed medical expenses under the collateral source rule.\textsuperscript{21} In light of this rule and the well-established principle that the subrogee stands in the shoes of the subrogor, is it appropriate to allow health insurers to intervene in these cases and demand a portion of the settlement or verdict? Of course, this is an issue on which Professor Siegel has written,\textsuperscript{22} and, of course, the Court of Appeals cited his commentary.\textsuperscript{23} It is also an issue on which the Advisory Committee has been active.\textsuperscript{24} The Committee has recommended, for the last


\textsuperscript{19} No. 21, 2009 WL 435322 (N.Y. Feb. 24, 2009).

\textsuperscript{20} \textit{Id.} at *1–2.

\textsuperscript{21} N.Y. C.P.L.R. 4545 (McKinney 2007).

\textsuperscript{22} See DAVID D. SIEGEL, NEW YORK PRACTICE § 180, at 309–10 (4th ed. 2005).

\textsuperscript{23} See \textit{Fasso}, 2009 WL 435322, at *6.

\textsuperscript{24} See, e.g., REPORT OF THE ADVISORY COMMITTEE ON CIVIL PRACTICE, \textit{supra} note 4, at 26–33.
three years, an amendment to CPLR 4545 to provide that health insurers have no right of subrogation when the plaintiff is not entitled to recover for those medical expenses under the collateral source rule.\textsuperscript{25} The Committee acknowledged that, under traditional common law principles, the tortfeasor should make all the innocent victims whole, including those who have reimbursed the plaintiff for a portion of his or her injuries.\textsuperscript{26} And it is not the goal of the Advisory Committee to shift the loss from the tortfeasor’s insurance carrier to the health insurer.\textsuperscript{27} But the Committee’s concern is to insure that the injured plaintiff is made whole and does not suffer the worst of both worlds: not being able to recover for medical expenses under the collateral source rule but still being required to pay over a portion of any verdict or settlement to the health insurer.\textsuperscript{28} How the Legislature resolves the issue remains to be seen. But as usual, it was Professor Siegel who placed the problem in perspective for the Court of Appeals and whose commentary prompted the Court to ask for legislative correction.

\textsuperscript{25} Id. at 26.
\textsuperscript{26} See id.
\textsuperscript{27} See id. at 26–28.
\textsuperscript{28} See id.