

## THE KING OF NEW YORK PRACTICE\*

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In rare instances, a person 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 that person's body of work. For example, it is impossible to exclude the works of Darwin in any comprehensive discussion of evolution. No rendering of the history of baseball would be complete without mention of Babe Ruth, Hank Aaron, and Willie Mays. A colloquium on American literature would seem incomplete and shallow without some portion of the meeting devoted to Mark Twain.

Over almost five decades, Professor David D. Siegel has achieved a similar 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.

Professor Siegel has certainly occupied the field of New York Practice. The field has also occupied him. Through his tireless, thorough, and precise work ethic, he has constructed an amazing number of monuments in the skyline of New York civil procedure. He is the author of the leading treatise in the field, *New York Practice*,<sup>1</sup> now in its fourth edition and with over 100,000 copies in

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\* This tribute to Professor Siegel was first published in Volume 72 of the *Albany Law Review*. See Patrick M. Connors, Essay, *The King of New York Practice*, 72 ALB. L. REV. 447 (2009). That particular volume was dedicated to Professor Siegel, in honor of his retirement, and included several essays about Professor Siegel and remarks given during a November 2008 Albany Law School event in his honor. See Brian C. Borie, Foreword, *Our Teacher and Friend: David D. Siegel*, 72 ALB. L. REV. 387 (2009).

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<sup>1</sup> DAVID D. SIEGEL, *NEW YORK PRACTICE* (4th ed. 2005). The first edition was published in

circulation. Often referred to as “The Bible” by the New York bench and bar, this text is truly a landmark work in the field of civil procedure, being equally accessible and informative to judges, lawyers, and law students.

Since 1977, he has been the sole author of the New York State Law Digest, one of the most widely read publications in New York legal circles. During the last thirty-two years, he has produced 375 consecutive monthly issues of the Digest.<sup>2</sup> This popular publication, which now contains four single-spaced pages analyzing Court of Appeals opinions, could not sufficiently house the reflections and commentary of such an active mind. Therefore, in 1993, Professor Siegel began constructing what would become another skyscraper in the panorama of New York law, *Siegel’s Practice Review*, a monthly analysis of procedural developments in the New York courts.<sup>3</sup> Over fifteen years and 200 installments later, the *Practice Review* is must reading for judges and litigators in New York State courts, as well as CPLR junkies of all kinds, and is relied upon regularly by the bench and bar in making procedural law within the state.<sup>4</sup>

The foundation for much of the above work began as far back as 1962, when Professor Siegel joined a small group of authors to publish the original set of *McKinney’s Consolidated Laws Practice Commentaries*. Professor Siegel authored the original *Practice Commentaries* for CPLR Article 50 (“Judgments Generally”), CPLR Article 51 (“Enforcement of Judgments and Orders Generally”), and CPLR Article 52 (“Enforcement of Money Judgments”).<sup>5</sup> After the CPLR was enacted in 1963, the courts quickly began to rely upon these writings in resolving procedural issues during the statute’s infancy.<sup>6</sup>

Over the last forty-six years, Professor Siegel has assumed the authorship of the *Practice Commentaries* for several additional articles including CPLR Article 31 (“Disclosure”),<sup>7</sup> Article 32

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1978, the second in 1991, and the third in 1999.

<sup>2</sup> See David D. Siegel, *Obtaining a Lien on a Judgment Debtor’s Personal Property*, N.Y. ST. L. DIG., Dec. 1977; David D. Siegel, *Settlement Between Injured Plaintiff and Tortfeasor Defendant Can’t Wipe Out Subrogation Claim of Health Insurer*, N.Y. ST. L. DIG., Mar. 2009.

<sup>3</sup> David D. Siegel, SIEGEL’S PRAC. REV., Apr. 1993.

<sup>4</sup> See *infra* Chart A.

<sup>5</sup> David D. Siegel, *Practice Commentaries*, in N.Y. C.P.L.R. 5001–5021 (McKinney 1962); David D. Siegel, *Practice Commentaries*, in N.Y. C.P.L.R. 5101–5107 (McKinney 1962); David D. Siegel, *Practice Commentaries*, in N.Y. C.P.L.R. 5201–5252 (McKinney 1962).

<sup>6</sup> See, e.g., *City of N.Y. v. Panziner*, 259 N.Y.S.2d 284, 287, 289 (App. Div. 1965) (citing Professor Siegel’s *Practice Commentaries* three times in resolving a priority dispute in judgment enforcement).

<sup>7</sup> See David D. Siegel, *Practice Commentaries*, in N.Y. C.P.L.R. 3101–3200 (McKinney

(“Accelerated Judgment”),<sup>8</sup> and Articles 55 through 57 (“Appeals Generally,” “Appeals to the Court of Appeals,” and “Appeals to the Appellate Division”).<sup>9</sup> The *Practice Commentaries* are enormously insightful and provide some of the most detailed analyses of procedure available, positing and accurately forecasting numerous issues for the courts and litigants to consider. This wealth of inspection and observation demonstrate that, in the world of procedure, Professor Siegel’s thinking starts where most of ours stops. It is no surprise that the *Practice Commentaries* are still relied upon by the bench and bar with great frequency even well into the twenty-first century.<sup>10</sup> As Professor Siegel has frequently observed, New York Practice is a subject that never rests.

Respecting the full landscape of procedure, Professor Siegel has always recognized that justice in New York’s vast Unified Court System is often administered in tribunals other than the Supreme Court, the Appellate Division and the Court of Appeals, and has devoted a substantial portion of his attention to procedure in these alternative venues. As he accurately notes in Chapter 21 of *New York Practice*, “[t]he ‘Small Claims Court’ may be the only contact many people will ever have with the court system.”<sup>11</sup> Professor Siegel not only authors the *Practice Commentaries* for the four lower court acts—the New York City Civil Court Act,<sup>12</sup> the Uniform Justice Court Act,<sup>13</sup> the Uniform City Court Act,<sup>14</sup> and the Uniform

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1970). The author revised and recompiled the Article 31 *Practice Commentaries* in 2004. Rather than abandoning so much fine writing and analysis, the author carried forward most of the organization and a substantial portion of Professor Siegel’s observations. One truly gains a new-found respect for the enormity of Professor Siegel’s work when undertaking such a task, especially considering that the Article 31 Commentaries are a relatively small aspect of it.

<sup>8</sup> See David D. Siegel, *Practice Commentaries*, in N.Y. C.P.L.R. 3201–3222 (McKinney 2005).

<sup>9</sup> See David D. Siegel, *Practice Commentaries*, in N.Y. C.P.L.R. 5501–5532, 5601–5615, 5701–5713 (McKinney 1995). Professor Siegel has also authored *Practice Commentaries* for CPLR Articles 22, 23, 30, 40, 41, 42, 43, 50, 51, 52, 53, and 54.

<sup>10</sup> See *infra* Chart A. The New York Court of Appeals continues to rely heavily upon Professor Siegel’s *Commentaries*, and has cited them as recently as May 2008. *Pludeman v. N. Leasing Sys. Inc.*, 890 N.E.2d 184, 187 (N.Y. 2008). For other recent examples, see *Iacovangelo v. Shepherd*, 833 N.E.2d 259, 260 (N.Y. 2005); *Banco Popular N. Am. v. Victory Taxi Mgmt., Inc.*, 806 N.E.2d 488, 490 (N.Y. 2004); *Reynolds v. Dustman*, 804 N.E.2d 411, 412 (N.Y. 2003).

<sup>11</sup> DAVID D. SIEGEL, *NEW YORK PRACTICE*, § 581 (3d ed. 1999).

<sup>12</sup> See, e.g., David D. Siegel, *Practice Commentaries*, in N.Y. CITY CIV. CT. ACT §§ 101–110 (McKinney 1989).

<sup>13</sup> See, e.g., David D. Siegel, *Practice Commentaries*, in N.Y. UNIFORM JUST. CT. ACT §§ 101–111, (McKinney 1989).

<sup>14</sup> See, e.g., David D. Siegel, *Practice Commentaries*, in N.Y. UNIFORM CITY CT. ACT §§ 101–107 (McKinney 1989).

District Court Act<sup>15</sup>—but also authored the acts themselves while on the staff of the Joint Legislative Committee on Court Reorganization in the 1960s.<sup>16</sup> Professor Siegel also authored the original *McKinney's Practice Commentaries* for the Domestic Relations Law<sup>17</sup> and for several articles in the Surrogate's Court Procedure Act.<sup>18</sup>

Remarkably, there is still more, including substantial writing on the federal scene. Professor Siegel is one of the few authors of practice commentaries in the United States Code Annotated.<sup>19</sup> His comprehensive treatment of Rule 4 of the Federal Rules of Civil Procedure has been cited extensively by the federal courts, including the United States Supreme Court.<sup>20</sup> In 1999, Professor Siegel also added a new chapter to the third edition of *New York Practice*, entitled "Federal Practice Reviewed and Compared: Parallels and Pitfalls."<sup>21</sup> The chapter serves a unique role in legal literature, as

[i]t is primarily an enumeration of distinctions designed for lawyers versed in New York Practice who are considering whether to bring a federal action, who are defending a federal action, or who, defending a case brought in a state court, are considering whether (and how) to remove the case

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<sup>15</sup> See, e.g., David D. Siegel, *Practice Commentaries*, in N.Y. UNIFORM DIST. CT. ACT §§ 101–106 (McKinney 1989).

<sup>16</sup> David D. Siegel, *My Friend Harold McNiece*, DENOVO, Fall 2005, at 26–27.

<sup>17</sup> See David D. Siegel, *Practice Commentaries*, in N.Y. DOM. REL. LAW §§ 1–199 (McKinney 1964). The *Practice Commentaries* for the Domestic Relations Law were subsequently turned over to then Professor Alan D. Scheinkman, who is now a judge in Supreme Court, Westchester County. See, e.g., Alan D. Scheinkman, *Practice Commentaries*, in N.Y. DOM. REL. LAW §§ 1–108 (McKinney 1999).

<sup>18</sup> See David D. Siegel, *Practice Commentaries*, in N.Y. Surr. Ct. Proc. Act §§ 101–105 (McKinney 1967); David D. Siegel, *Practice Commentaries*, in N.Y. Surr. Ct. Proc. Act §§ 201–212 (McKinney 1967); David D. Siegel, *Practice Commentaries*, in N.Y. Surr. Ct. Proc. Act §§ 301–315 (McKinney 1967); David D. Siegel, *Practice Commentaries*, in N.Y. Surr. Ct. Proc. Act §§ 501–509 (McKinney 1967); David D. Siegel, *Practice Commentaries*, in N.Y. Surr. Ct. Proc. Act §§ 2701–2702 (McKinney 1967). Professor Siegel also participated in the drafting of the Surrogate's Court Procedure Act while on the staff of the Commission on Estates in the 1960s.

<sup>19</sup> Professor Siegel has authored commentaries for the following federal rules and statutes: 9 U.S.C.A. §§ 15–16; 28 U.S.C.A. §§ 331–332, 372, 651–655, 657–658, 1254, 1257–1258, 1292, 1332, 1367, 1392, 1441, 1447, 1658, 1963, 2071–2074, 2077, 2101, 2103; FED. R. CIV. P. 3, 4, 45.

<sup>20</sup> See, e.g., *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 422 (1996); *Bollore S.A. v. Import Warehouse, Inc.*, 448 F.3d 317, 321 n.5 (5th Cir. 2006); *Robinson Eng'g Co. Pension Plan & Trust v. George*, 223 F.3d 445, 449 (7th Cir. 2000); *Hendry v. Schneider*, 116 F.3d 446, 449 n.3 (10th Cir. 1997); *Levy v. Pyramid Co. of Ithaca*, 871 F.2d 9, 9 (2d Cir. 1989).

<sup>21</sup> SIEGEL, *supra* note 11, at 1082.

to a federal court.<sup>22</sup>

This chapter comparing federal and state procedure showcases one of Professor Siegel's greatest talents: his unique ability to highlight the interplay of various provisions in civil procedure that might not be apparent to the lawyer zeroed in on only one of them. For example, Professor Siegel has emphasized that the federal removal statute,<sup>23</sup> which allows a defendant in state court to remove a case to federal court if subject matter jurisdiction is present, poses "some special pitfalls for New York state court defendants."<sup>24</sup> The removal statute requires that the case be removed within thirty days of the "initial pleading."<sup>25</sup> Defendants in New York State courts may be served with a summons and notice in the first instance, rather than a summons and complaint.<sup>26</sup> Does the service of the summons and notice start the thirty-day period for removal, or can the defendant await the service of the complaint? Furthermore, in a personal injury or wrongful death action in New York State court, CPLR 3017(c) prohibits the plaintiff from stating the amount of monetary damages.<sup>27</sup> How can a defendant in such a case be sure that plaintiff's claim meets the \$75,000 threshold for federal subject matter jurisdiction, thereby opening the door to removal? Thankfully, these matters are all explored by Professor Siegel in *New York Practice*, with detailed insights that can only be made by a scholar immersed in the procedure of both venues.<sup>28</sup>

In 1982, Professor Siegel published *Conflicts in a Nutshell*.<sup>29</sup> Now in its third edition,<sup>30</sup> this work has often served as a life raft for law students wading through one of the most complicated subjects in the law school curriculum. It is in these knotty areas of the law that Professor Siegel is at his best, explaining complex subjects with clarity and precision, while still maintaining his entertaining style.<sup>31</sup> For example, he discusses the concept of "renvoi," whereby the home forum's choice of law rules, those of State F, require application of still another jurisdiction's choice of law rules, those of

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<sup>22</sup> *Id.*

<sup>23</sup> 28 U.S.C.A. § 1441 (West 2008).

<sup>24</sup> SIEGEL, *supra* note 1, at 1109.

<sup>25</sup> § 1446(b).

<sup>26</sup> *See* N.Y. C.P.L.R. 305(b) (McKinney 2009).

<sup>27</sup> C.P.L.R. 3017(c).

<sup>28</sup> SIEGEL, *supra* note 1, at § 619.

<sup>29</sup> DAVID D. SIEGEL, *CONFLICTS IN A NUTSHELL* (1982).

<sup>30</sup> DAVID D. SIEGEL & PATRICK J. BORCHERS, *CONFLICTS IN A NUTSHELL* (3d ed. 2005).

<sup>31</sup> *See* Albert M. Rosenblatt, *Remarks and Song*, 72 ALB. L. REV. 417 (2009).

State X, which in turn point back to State F's choice of law rules.<sup>32</sup> He candidly instructs, in a way that all can clearly grasp, that

[a] déjà vu is all we experience when we get back there: since the State F choice of law rule is the one that originally sent us to the State X choice of law rule, a return to the State F choice of law rule will only send us back to the X rule, which will send us back to the F rule, etc., in a kind of circular perpetual motion that will never give us an internal substantive rule to apply to the case.<sup>33</sup>

There may be a select few professors at law schools throughout the country who have produced a similarly expansive body of work, but it is doubtful that there is one who has been more influential than Professor Siegel in the actual development of the law in his or her field of concentration. Sadly, the works produced by most professors in law schools today are entirely irrelevant to the bench and bar. Practitioners in a particular field, who are constantly confronted with problems in interpreting the law, rarely turn to the writings of those in legal academia to assist them in drafting briefs and memos. Similarly, judges deciding cases in important areas of the law now frequently complain that the publications of many law professors are simply irrelevant. The Chief Judge of the United States Court of Appeals for the Second Circuit, Dennis G. Jacobs, attending a conference with six of his colleagues from the Second Circuit, recently informed a group of law professors that he had not "opened up a law review in years"<sup>34</sup> and Judge Robert D. Sack observed that articles authored by law professors are "largely ignored and seldom cited by judges."<sup>35</sup>

This is a problem the law school academy must seriously and promptly address. It has augmented the substantial gap between what a student learns in law school, often at great monetary expense, and the essential knowledge required to practice law effectively.<sup>36</sup> An examination of the career of Professor Siegel would

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<sup>32</sup> SIEGEL & BORCHERS, *supra* note 30, at § 18.

<sup>33</sup> *Id.*

<sup>34</sup> Adam Liptak, *When Rendering Decisions, Judges Are Finding Law Reviews Irrelevant*, N.Y. TIMES Mar. 19, 2007, at A8.

<sup>35</sup> Thomas Adcock, *Federal Judges Discuss Usefulness of Law Reviews*, N.Y.L.J., Mar. 16, 2007, at 20.

<sup>36</sup> See WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 6 (2007) (noting that the new approach to legal teaching "broke apart the older forms of induction into the profession"); THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION, ABA, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM 4 (1992) ("The lament of the practicing bar is a steady refrain: 'they can't draft a contract, they can't write'. . . . Law schools offer the traditional responses: 'We teach them

be a good place to start.

Unlike virtually any law professor of his time, Professor Siegel has cultivated a unique audience of judges and lawyers who rely constantly on his writing. Professor Siegel certainly had the good fortune to arrive on the scene at the right juncture. His career as a law professor began in the fall of 1962, just after the CPLR was passed, and one year before the chapter took effect in September, 1963.<sup>37</sup> Professor Siegel was there, at the right time and place, to usher in a new era of civil procedure in New York State.<sup>38</sup> While he was certainly blessed with good fortune to be on the scene at this historic moment, that chance happening provides only minimal explanation for the large footprint he has left on New York law.

Revolutionary baseball executive Branch Rickey, who was primarily responsible for Jackie Robinson's entry into the big leagues, famously declared that "[l]uck is the residue of design."<sup>39</sup> In a similar vein, Benjamin Franklin observed that "[d]iligence is the mother of good luck."<sup>40</sup> Rather than simply "luck," it is Professor Siegel's design and diligence that have brought him to the forefront of his field.

Professor Siegel clerked for Chief Judge Albert Conway of the New York Court of Appeals from 1958 through the end of 1959. Although he was offered a full-time teaching position immediately after his clerkship, he declined. As he candidly admitted, "I'd had too little experience in practice to presume to teach it."<sup>41</sup> He then "hung up a shingle" and implored his friends: "send me your garbage!"<sup>42</sup> This two-year detail in the trenches provided the "practical slant" that Professor Siegel has since "tried to make the keystone of [all his] writings."<sup>43</sup> It also provided a unique dimension to his perspective on the law and his teaching. Students in his classes were not simply learning the law, but how it actually worked in the real world.

The plan has worked. While Professor Siegel taught in law

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how to think, we're not trade schools . . .").

<sup>37</sup> N.Y. C.P.L.R. 10005 (McKinney 2009).

<sup>38</sup> He presented numerous programs throughout the state, which were attended by dozens of judges and hundreds of lawyers in an era in which continuing legal education was not mandatory.

<sup>39</sup> Jerome Stenger, *Living in the Future: Branch Rickey and the Evolution of Baseball*, OHIO WESLEYAN MAG., Winter 2006, at 16.

<sup>40</sup> Charles W. Meister, *Franklin as a Proverb Stylist*, 24 AMER. LIT. 157, 160 (1952).

<sup>41</sup> David D. Siegel, *supra* note 16, at 27.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

schools for almost five decades, he was always present on the other side of the fence through his scholarship and continuing legal education programs. The first recorded citation to the writings of Professor Siegel is likely in *Paskus, Gordon & Hyman v. Peck*,<sup>44</sup> by Judge Eugene M. McCarthy. (Judge McCarthy was certainly getting in on a good thing at the ground floor!) Since *Paskus* was handed down, Professor Siegel has been cited in more than 3,600 opinions issued by New York State courts.<sup>45</sup> *New York Practice*, standing alone, has been cited by the Court of Appeals in 141 cases, a staggering figure.<sup>46</sup>

Why do judges and lawyers continue to rely so heavily on the writings of a law school professor in developing an area of jurisprudence that is so practice oriented? Professor Siegel has never labored in an ivory tower. Instead, since the early 1960s, he has chosen to conduct a whistle-stop tour through most of the sixty-two counties in New York State to reach his audience. In his update programs, Professor Siegel is simultaneously informative, insightful, and entertaining, taking what would otherwise be mundane material and bringing it all to life. When attendees leave a Siegel Update and subsequently turn to his writings for clarification on a point, they are not simply consulting a book. Rather, they are turning to a familiar person who has spent time in their midst, struggling through the dilemmas faced by the bench and bar.

While the audience is certainly enriched after these events, so too is the Professor. The lively interchange at these programs inures to his benefit, providing him with an unsurpassed perspective on the myriad number of distinct procedural practices in the state, from Erie County to Suffolk County, and many places in between. Lawyers and judges will also frequently send Professor Siegel decisions from their own cases. The questions posed and issues raised by this dialogue are, in turn, explored in a future issue of the *New York Law Digest* or *Practice Review*, or in the next annual installment of *Practice Commentaries*. These observations and

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<sup>44</sup> *Paskus, Gordon & Hyman v. Peck*, 246 N.Y.S.2d 874, 875 (Civ. Ct. 1964) (noting, with citation to Professor Siegel's Practice Commentary, that the practice of serving a summons without a complaint, permitted in Supreme Court, is not applicable in Civil Court).

<sup>45</sup> A search using the following terms and connectors in Westlaw's "New York State Cases" database produced 3,714 results: (seigel siegel) /s ((practice /1 commentar!) "new york practice" "n.y. practice" "practice review" nylj "n.y. prac." "new york prac.").

<sup>46</sup> A search using the following terms and connectors in Westlaw's "New York State Cases" database produced 141 results: co(high) & (siegel seigel) /s ("new york practice" "n.y. practice" "new york prac." "n.y. prac.").

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recommendations are then cited and discussed by lawyers arguing before other courts, which then rely upon Professor Siegel's writings to support the conclusions in their opinions. Some of these opinions may ultimately make the big time and appear in *New York Practice!*

The cycle never ends because, as anyone close to this fascinating subject knows, New York Practice is a scene in motion. It will not rest. Neither will its closest observer, Professor Siegel, The King of New York Practice.

### CHART A

	Generally	Court of Appeals	Appellate Division	Trial Courts
<b>Siegel, <i>New York Practice</i></b>	1,863	141	1,056	666
<b>Siegel, <i>Practice Commentaries</i></b>	1,946	108	1,201	637
<b><i>Siegel's Practice Review</i></b>	51	6	22	23
<b>Siegel, <i>New York State Law Digest</i></b>	41	4	23	14