

NEW YORK CIVIL PRACTICE BEFORE TRIAL

Volume 1

Michael H. Barr
Hon. Myriam J. Altman
Burton N. Lipshie
Sharon Stern Gerstman

James Publishing



Contact us at (800) 440-4780 or www.jamespublishing.com

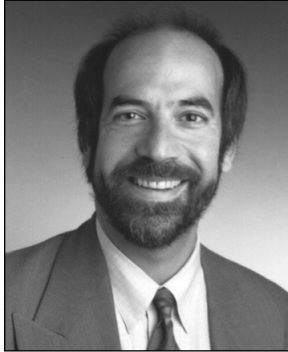
Copyright © 2001-2013
James Publishing, Inc.
ISBN: 1-58012-065-2

All rights reserved.

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional service. If legal advice or other expert assistance is required, seek the services of a competent professional.

Revision 1, 7/02
Revision 2, 10/03
Revision 3, 10/04
Revision 4, 11/05
Revision 5, 12/06
Revision 6, 12/07
Revision 7, 1/09
Revision 8, 12/09
Revision 9, 1/11
Revision 10, 2/12
Revision 11, 4/13

About the Authors



Michael H. Barr is a partner with Sonnenschein Nath & Rosenthal in New York City. His practice concentrates on complex commercial, class action, insurance coverage, and securities litigation across a broad spectrum of substantive areas, including consumer fraud, environmental, insurance, trade regulation, real estate, professional liability, and contractual disputes.

Mr. Barr is presently serving as national coordinating counsel for an international insurer in defending a series of class actions involving retrospective premium workers' compensation issues. Over the past five years, he has defended another major insurer against allegations of improper life insurance sales practices in a consolidated multi-district litigation in federal court and before a multi-state task force of state insurance departments.

He has successfully defended a broad array of other companies in bad faith and other insurance coverage actions, including numerous appeals. He has lectured and written on a variety of insurance coverage issues, and has delivered papers at seminars on advertising injury, securities coverage, and bad faith issues. He has also successfully represented investor groups, bank directors and public companies in contested securities and mergers and acquisition cases.

Mr. Barr is a *cum laude* graduate of Harvard Law School.

The Honorable Myriam J. Altman served as an Associate Justice in the Appellate Division, Second Department, New York City from 1994 to 2004. She died on January 29, 2005.

Prior to her appointment as Associate Justice, she served as Judge of the Civil Court of the City of New York from 1978 to 1987 and Acting Justice of the Supreme Court from 1979 to 1997. She was elected Justice of the Supreme Court of the State of New York in 1987. In 1993 she presided over one of the four new specialized commercial parts in New York County.

Justice Altman was chair of the Appellate Division's In-house Continuing Legal Education Committee, and a member of the State Bar's Standing Committee on Civil Practice Law and Rules. She was chair of the Litigation Committee of the Association of the Bar of the City of New York, and co-chair of the Office of Court Administration Committee on Case Management Education. She was a member of the Commercial Courts Task Force, and from 1988 to 1993 was a member of the State Commission on Judicial Conduct. In October 1996, July 1993, and October 1993, Justice Altman was found qualified for appointment to the Court of Appeals by the Commission on Judicial Nomination. She graduated from the NYU School of Law.



Burton N. Lipshie has since 1977 been the Managing Attorney of the 60-lawyer Litigation Department of Stroock & Stroock & Lavan in New York City, and the firm's national litigation coordinator.

He is responsible for providing procedural expertise in all litigation matters handled by the New York City office, and for creating and running programs on litigation skills and advanced legal writing. He has a general litigation practice, with an emphasis on motions and appellate work.

Before joining Stroock, Mr. Lipshie was an Assistant District Attorney in New York County from 1967 to 1971, and Law Secretary to Justice Abraham Gellinoff, Supreme Court, New York County and Appellate Term, First Department from 1971 to 1977.

(continued on back)

Since 1985, Mr. Lipshie has been an adjunct professor at Cardozo School of Law where he teaches New York Practice, Legal Writing, and Moot Court. For nine years in a row he was named “Outstanding Adjunct Professor” and now the award is named after him.

He serves on the Advisory Committee on Civil Practice to the Chief Administrative Judge, the CPLR Committee of the State Bar Association, and the Departmental Disciplinary Committee of the Appellate Division, First Department. He has provided the annual CPLR update at the Unified Court System annual judicial seminars since 1993, as well as the annual seminar for Law Clerks and Court Attorneys, and has delivered the annual Civil Law Update at the Bar Association of the City of New York.

Sharon Stern Gerstman is of counsel to Magavern Magavern Grimm LLP in Buffalo New York, after spending 29 years working for New York Supreme Court as the Principal Law Clerk for Hon. Joseph D. Mintz of the Eight Judicial District (Buffalo) of the New York Supreme Court (1981-2009), and as a Court Attorney/Referee in charge of ADR for the Niagara County Supreme Court (2010). She is also an adjunct professor at the University of Buffalo Law School, where she has taught New York Civil Practice since 1987.

Mrs. Gerstman is a former member of the ABA Board of Governors and currently serves in the ABA House of Delegates and on the Council of the Government and Public Section Lawyers Division. She is also a member of the New York State Bar Association Executive Committee and a member of its House of Delegates, and is a past chair of its Standing Committee on Civil Practice Law and Rules.

She is on the Professional Ethics Committee for the Bar Association of Erie County, and has served on its Board of Directors, on its Judicial Screening Committee and as past President of its Foundation. She was President of the Women Lawyers of Western New York.

She has written for various ABA and New York State Bar publications, and has spoken frequently at ABA, NYSBA and Erie County Bar CLE seminars. She has a JD from the University of Pittsburgh and an LLM from Yale Law School.



Forms Contributor

Alexander Levine, who provided many of the forms reproduced on the CD, is a trial attorney at the Law Offices of Joseph C. Messina. Mr. Levine litigates extensively in the areas of personal injury, family law and commercial law in both the federal and New York state courts. He will begin teaching at New York University in the Fall semester of 2001 and is organizing a legal web site at www.counsel247.com for legal advice and referrals. His personal gratitude is extended to Angie and Austin Levine, for without their love and devotion the practice of law would not be a pleasure.

Editorial Advisory Board

Harold Baer, Jr.
Judge, U.S. District Court
New York, NY

William H. Bave, Jr.
Wilson, Bave, Conboy, Cozza & Couzens, PC
White Plains, NY

Michael Bersani
Michaels & Smolak
Auburn, NY

Robert L. Conason
Gair, Gair, Conason, Steigman & Mackauf
New York, NY

Steven P. Curvin
Burgio, Kita & Curvin
Buffalo, NY

Louis P. DiLorenzo
Bond, Schoeneck & King, LLP
Syracuse, NY

Richard L. Engel
Nottingham, Engel, Gordon & Kerr, LLP
Syracuse, NY

Salvatore D. Ferlazzo
Ruberti, Girvin & Ferlazzo, PC
Albany, NY

James W. Gresens
Gresens & Gillen LLP
Buffalo, NY

(continued on back)

Jack Kaufmann
Dewey Ballantine LLP
New York, NY

Lee S. Michaels
Michaels & Smolak
Auburn, NY

Thomas A. Moore
Kramer, Dillof, Tessel, Duffy & Moore
New York, NY

Jeffrey C. Slade
Slade & Associates
New York, NY

James M. Wicks
Farrell Fritz
Uniondale, NY

Editorial Staff

Managing Editor
Donna M. Cole

Contributing Editors
Matthew Grad
Ward Miller
Craig H. Scott
Neil Stadtmore

Production
Amanda Winkler
Patricia Knight

Table of Contents

Chapter 1	Taking the Case
Chapter 2	Presuit Activities
Chapter 3	Statutes of Limitations
Chapters 4-5	Reserved
Chapter 6	Subject Matter Jurisdiction
Chapter 7	Personal Jurisdiction
Chapter 8	Forum Selection: Venue and Removal
Chapter 9	Summons, Service of Process, and Appearance
Chapters 10-13	Reserved
Chapter 14	Parties
Chapter 15	Pleadings
Chapter 16	Motion Practice
Chapter 17	Temporary Restraining Orders and Preliminary Injunctions
Chapter 18	Interlocutory Appeals
Chapters 19-23	Reserved
Chapter 24	All Discovery
Chapter 25	Privileges
Chapter 26	Production of Documents and Other Things
Chapter 27	Depositions
Chapter 28	Physical and Mental Examinations
Chapter 29	Bills of Particulars and Interrogatories
Chapter 30	Notices to Admit
Chapter 31	Discovery Disputes
Chapters 32-35	Reserved
Chapter 36	Motions to Dismiss
Chapter 37	Summary Judgment
Chapter 38	Expedited Judgment: CPLR 3213; 3222
Chapter 39	Default Judgment; Dismissal for Failure to Act; Discontinuance
Chapter 40	Settlement and Alternative Dispute Resolution (ADR)
Chapter 41	Simplified Procedure
Chapter 42	Special Proceedings

Tables

Index

(This page intentionally left blank.)

Expanded Table of Contents

CHAPTER 1 TAKING THE CASE

I. Initial Client Contact

II. Case Assessment and Valuation

A. Weigh Costs and Benefits

B. Evaluate Client

C. Consider Ethical Factors

1. Professional Rules Govern
2. Is There a Conflict of Interest?

D. Evaluate Fee Sources

III. After Assessment and Valuation

A. Initial Steps

B. Prepare for Case Conference

C. Consider Fee and Cost Arrangements

1. Preliminary Considerations
2. Factors in Selecting a Fee Arrangement
3. Time-Based (Hourly-Rate) Billing
4. Contingency Fees
5. Retainers
6. Other Fee Arrangements
7. Costs and Expenses

D. Prepare to Formalize Attorney-Client Relationship

1. Preliminary Considerations
2. Ethical (CPR) Guidelines and Requirements
3. Draft Proposed Retainer Letter
 - a. *In All Cases*
 - b. *In Hourly-Rate Billing Arrangements*
 - c. *In Contingency-Fee Arrangements*
 - d. *In Other Arrangements*

IV. Case Conference

A. Overview

B. Information to Obtain

C. Information to Convey

V. Taking Over from Prior Counsel

CHAPTER 2 PRESUIT ACTIVITIES

I. Investigation

A. Preliminary Considerations

B. Reasons to Conduct a Presuit Investigation

1. Legal Requirements
 - a. *In General*
 - b. *CPLR 8303-a*
 - c. *22 NYCRR §130-1.1*

2. Practical Purposes

C. Sources for Investigation

1. Client
2. Opposing Parties
3. Third-Party Witnesses
4. Experts
5. Other Sources

II. Presuit Communications, Demands, and Notices

A. Communications with Parties

B. Demand Letters

C. Threatening Action

D. Notice Requirements

E. Communicating with Insurers

III. Litigation Planning

A. Pre-Filing Resolution

1. Negotiation
2. Alternative Dispute Resolution

B. Plaintiff's Considerations

1. Legal Research
2. Parties
3. Causes of Action
4. When to File
5. Where to File
 - a. *Personal Jurisdiction*
 - b. *State or Federal Court?*
 - c. *Choosing the Appropriate Level of State Court*

C. Defendant's Considerations

IV. Presuit Disclosure

A. Role in Litigation

B. Permissible Bases for Obtaining Presuit Discovery

1. To Assist in Bringing an Action
2. To Preserve Information
3. To Aid in Arbitration

C. Procedures

CHAPTER 3 STATUTES OF LIMITATIONS

I. Overview

A. General Points

B. Sources of Law

C. Conditions Precedent Distinguished

D. Laches Distinguished

II. Calculating Limitations Period

A. General Points

B. When Period Expires

III. Interposing Claim

A. Claims in Complaint

1. By Filing
2. By Service

B. Relation Back Doctrine

1. Counterclaims, Cross-Claims, and Third-Party Claims
2. Amended Pleadings
3. Parties United in Interest

IV. Determining Applicable Period

A. Torts

1. Personal Injury and Injury to Property
2. Professional Malpractice (Non-Medical)
 - a. General Points*
 - b. Architects, Engineers, and Surveyors*
3. Medical Malpractice
4. Fraud
5. Intentional Torts
6. Wrongful Death Suits
7. Tortious Interference with Contract

- B. Contract Actions***
- C. Breach of Fiduciary Duty and Similar Claims***
- D. Real Property Actions***
- E. Enforcement of Judgments and Awards***
- F. Statutory Causes of Action***
- G. Residual Limitations Period***

V. Modifying Limitations Period

- A. By Agreement***
- B. By Acknowledgment of Debt***
- C. By Estoppel***
 - 1. General Points
 - 2. Estoppel in Medical Malpractice Actions
- D. By Governor's Executive Order in Time of Emergency***

VI. Accrual

- A. Torts***
 - 1. General Points
 - 2. Particular Causes of Action
- B. Professional (Non-Medical) Malpractice***
- C. Medical Malpractice***
 - 1. General Rule
 - 2. Continuous Treatment Rule
 - a. General Points*
 - b. What Is Treatment*
 - c. What Is Same Condition*
 - d. What Is Continuous*
 - e. When Treatment Ends*
 - f. Imputing One Provider's Treatment to Another*
 - 3. Foreign Object Rule
- D. Products Liability***
 - 1. Toxic Torts
 - a. Suspension of Statute of Limitations*
 - b. Injuries Covered*
 - c. Discovery*
 - d. Retroactivity and Revivor Statutes*
 - 2. Breach of Warranty
- E. Contract Actions***

VII. Tolls

- A. Absence Toll***
- B. "Do-Over" Toll***
- C. Infancy and Insanity Toll***

- D. Death Toll*
- E. Tolls for Crime Victims*
- F. Legal Impediment Tolls*
- G. Marriage Toll*

VIII. Borrowing Statute

[CHAPTERS 4-5 RESERVED]

CHAPTER 6 SUBJECT MATTER JURISDICTION

I. Overview

- A. Nature of Subject Matter Jurisdiction*
- B. Related Concepts*
- C. New York State Court System*
- D. Federal Constraints on Subject Matter Jurisdiction*
- E. Strategic Considerations in Choosing Court*
- F. Raising Lack of Subject Matter Jurisdiction*

II. Supreme Court

- A. Subject Matter Jurisdiction*
- B. Supreme Court Justices*
- C. Rules of Practice in Supreme Court*
- D. Trials*

III. Trial Courts of Limited Jurisdiction

- A. Surrogate's Court*
- B. Family Court*
- C. Court of Claims*
- D. Civil Court of the City of New York*
 - 1. Subject Matter Jurisdiction
 - 2. Civil Court Judges
 - 3. Rules of Practice
 - 4. Small Claims Part
 - 5. Trials
- E. County Courts*
 - 1. Subject Matter Jurisdiction
 - 2. Judges of the County Courts
 - 3. Rules of Practice and Trials
- F. Other Trial Courts*
 - 1. District Courts

2. City Courts
3. Village and Town Courts

IV. Removal and Transfer

A. General Points

B. Action Commenced in Wrong Court

C. Removal to Higher Court to Permit Additional Relief

D. Transfer to Lower Court

1. On Parties' Consent
2. Without Parties' Consent

E. Transfer by Supreme Court to Court of Concurrent Jurisdiction

CHAPTER 7 PERSONAL JURISDICTION

I. General Points

II. General (Unlimited) Jurisdiction [CPLR 301]

A. General Points

B. Individuals

1. New York Domicile
2. Nonresident "Tagged" with Service in New York
 - a. *General Points*
 - b. *When Tagging Is Unavailable*
3. Doing Business in New York

C. Corporations—Domestic or "Authorized" in New York

D. "Unauthorized" Foreign Corporations

1. General Points
2. Doing Business in New York
 - a. *General Points*
 - b. *Federal Due Process*
 - c. *New York Office and Staff*
 - d. *Soliciting in New York*
 - e. *Maintaining Web Sites*
 - f. *Banking in New York*
 - g. *Third-Party Doing New York Business for Defendant*
3. Parent or Subsidiary Present in New York

E. Partnerships and Individual Partners

1. Partnerships
2. Individual Partners

III. Long-Arm Jurisdiction [CPLR 302]

A. General Points

B. Issues Regarding Specific Types of Defendants

C. Transacting Business in New York

1. General Points
2. Did Defendant Transact Business in New York?
 - a. *General Points*
 - b. *Dealing by Phone, Mail, Fax, etc.*
 - c. *Stock Sales and Purchases*
3. Does Plaintiff's Claim Arise from the Transaction?
4. Agent v. Principal

D. Contracting to Supply Goods or Services in New York

1. General Points
2. Goods and Services
3. Promissory Notes and Guarantees

E. Torts

1. General Points
2. Tort Committed Inside New York
3. Tort Committed Outside New York Causing New York Injury
 - a. *General Points*
 - b. *Additional Conditions*
 - c. *Option #1: Subparagraph (i)*
 - d. *Option #2: Subparagraph (ii)*
 - i. Defendant's Far-Flung Commerce
 - ii. Forseeability and Minimum Contacts

F. Real Property Ownership or Use

G. Marriage and Family Law Cases

1. Types of Jurisdiction Required
2. Matrimonial Long-Arm Jurisdiction

IV. Consent and Waiver

A. Consent

1. Designating New York Agent for Service
2. Consent by Agreement
 - a. *General Points*
 - b. *Consent to Arbitrate*

B. Appearance and Waiver

1. General Points
2. Waiver
3. Special and Limited Appearances

V. In Rem and Quasi In Rem Jurisdiction

A. General Points

B. Federal Due Process Limits

CHAPTER 8 FORUM SELECTION: VENUE AND REMOVAL

I. Overview

- A. General Points*
- B. Jurisdiction Issues*
- C. Significance of Venue*
- D. Change of Venue*

II. Determining Venue

- A. General Points*
- B. Venue Statutes*
 - 1. General Statute—Venue Based on Residence
 - 2. Special Statutes
 - 3. Non-Jury Trials
- C. Determining Residence*
 - 1. Individuals
 - 2. Representatives and Assignees
 - 3. Entities
 - a. Corporations*
 - b. Unincorporated Entities*
- D. Consumer Credit Transactions*
- E. Government Entities*
- F. Property*
 - 1. Real Property Actions
 - 2. Attacking Agreement
- G. Venue Agreements*
 - 1. General Points
 - 2. Attacking Agreement
- H. Venue in Multi-Party Actions*

III. Selecting and Pleading Venue

- A. Selecting*
- B. Designating*
- C. Pleading Techniques*

IV. Change of Venue

- A. Challenging Improper Venue*
 - 1. General Points
 - 2. Who Can Challenge
 - 3. Whether to Challenge

4. Procedure
 - a. *Pre-Motion Demand*
 - b. *Motion to Transfer*
5. Failure to Make Timely Demand and Motion

B. Change from Proper Venue

1. General Points
2. Grounds
 - a. *Convenience and Justice*
 - b. *Impartial Trial*
 - c. *Joinder of Claims or Parties*

C. Effecting Transfer

V. Choosing Between Federal and State Court

A. Plaintiff's Initial Choice

1. Subject Matter Jurisdiction
2. Strategic Considerations
 - a. *General Points*
 - b. *Territorial Jurisdiction, Venue, and Applicable Law*
 - c. *Procedure and Evidence*
 - d. *Discovery*
 - e. *Judges and Juries*

B. Removal to Federal Court

1. Strategic Considerations
2. Grounds for Removal
3. Procedures for Removal
 - a. *Notice of Removal*
 - b. *Who May Remove*
 - c. *Consent of Other Defendants*
4. Time for Removal
 - a. *Removal Based on Initial Pleading*
 - b. *Removal Based on Subsequent Developments*
5. Remand to State Court
 - a. *Motion to Remand*
 - b. *Hearing and Disposition*
 - c. *Sua Sponte Remand*
 - d. *Review*
 - e. *Costs and Attorney Fees*

CHAPTER 9 SUMMONS, SERVICE OF PROCESS, AND APPEARANCE

I. Overview

- A. General Points*
- B. Time Limits*
- C. Who May Serve Process*
- D. Service Abroad*

II. The Summons

- A. Content*
 - 1. Original Summons
 - a. Basic Requirements*
 - b. Jurisdictional Defects*
 - c. Specific Requirements and Defects*
 - 2. Summons with Notice
 - 3. Supplemental and Third-Party Summonses
 - 4. Civil Court Summons
- B. Amending the Summons*

III. Service by Mail

IV. Service on Individuals

- A. General Points*
- B. Personal Delivery*
- C. Leave and Mail Service*
 - 1. General Points
 - 2. Timing Issues
 - 3. Completion of Service
 - 4. At Actual Place of Business
 - 5. At Dwelling Place or Usual Place of Abode
 - 6. To Person of Suitable Age and Discretion
- D. Nail and Mail Service*
 - 1. General Points
 - 2. Timing Issues
 - 3. Completion of Service
 - 4. Due Diligence
 - 5. Actual Dwelling or Place of Business
- E. Serving Defendant's Agent*
- F. Expedient Service*
 - 1. General Points
 - 2. Other Methods Must Be Impracticable
- G. Service on Infants and Those in Need of Guardians*
 - 1. Infants
 - 2. Persons in Need of a Guardian

H. Motor Vehicle Accidents: Nonresident Driver or Owner

1. General Points
2. Returned Mail
3. Timing Issues
4. Completion of Service

V. Service on Corporations

A. General Points

B. Under the CPLR

1. General Points
2. Whom to Serve
3. Completion of Service

C. Under Business Corporation Law

1. Domestic and Authorized Foreign Corporations
2. Unauthorized Foreign Corporations
 - a. General Points*
 - b. Timing Issues*
 - c. Completion of Service*

VI. Service on Unincorporated Entities

A. Partnerships

1. General Points
2. Leave and Mail Service
3. Nail and Mail Service
4. Delivery to Agent
5. Expedient Service
6. Service Outside State
7. Limited Partnerships and LLPs: Service on Secretary of State
 - a. Domestic and Authorized Foreign Limited Partnerships and Registered LLPs*
 - b. Unauthorized Foreign Limited Partnerships*

B. Other Unincorporated Entities

VII. Service on Governmental Entities

VIII. Service by Publication

A. When Permitted

B. Procedure

IX. Proof of Service

A. General Points

B. Content

C. Filing

X. Defendant's Appearance

A. General Points

B. What Constitutes Appearance

1. Formal Appearance
2. Informal Appearance

C. What Does Not Constitute Appearance

D. Who May Appear

E. Limited Appearance

XI. Challenging Service

[CHAPTERS 10-13 RESERVED]

CHAPTER 14 PARTIES

I. General Points

II. Capacity to Sue, Be Sued, or Defend

A. Corporations

1. Domestic and Authorized Foreign Corporations
2. Unauthorized Foreign Corporations

B. Partners and Partnerships

C. Other Types of Persons or Entities

D. Challenging Capacity

III. Standing to Sue

IV. Suing or Defending Special Parties

A. Infants and Incompetents

1. General Points
2. Representation
 - a. *Proper Representatives*
 - b. *Failure to Appear by Proper Representative*
3. Appointment of Guardian ad Litem
4. Default Judgment and Arbitration
5. How to Settle Ward's Claim
 - a. *Obtaining Court Approval*
 - b. *Notice and Supporting Papers*

B. Business and Other Entities

1. Corporations

2. Partnerships
 - a. *Basic Points*
 - b. *Limited Partnerships*
3. Unincorporated Associations
4. Other Entities

C. *Unknown or Fictitious Defendants*

D. *Misnamed Parties*

V. Joinder

A. *How to Join Parties*

B. *Necessary Joinder*

1. General Points
2. Examples
3. Dismissal for Non-Joinder
 - a. *General Points*
 - b. *Procedure*
4. Excusing Necessary Joinder

C. *Permissive Joinder*

1. Requirements
2. Joinder of Plaintiffs
3. Joinder of Defendants

D. *Challenging Misjoinder*

VI. Substitution

A. *General Points*

B. *Mandatory Substitutions*

1. Death
2. Incompetence, Receivership, or Dissolution

C. *Permissible Substitutions*

D. *Procedure*

1. Motion to Substitute
2. Failure to Move for Substitution

VII. Interpleader

A. *General Points*

B. *Requirements*

C. *What Is Not Required*

D. *Personal Jurisdiction*

1. Basic Points
2. Notice of Nonresident Claimant in Pending Action
3. Federal Interpleader
 - a. *Statutory Interpleader*
 - b. *Federal Rule Interpleader*

E. Procedure

1. Stakeholder Files Interpleader Complaint
2. Motion for Discharge
3. Motion to Deposit Stake

VIII. Intervention

A. Basic Points

B. Motion to Intervene

C. Intervention as of Right

D. Permissive Intervention

IX. Third-Party Practice (“Impleader”)

A. Basic Points

B. Requirements

C. Insurance Cases

D. Whether to File a Third-Party Claim

E. Early Strategies

F. Procedure

1. Third-Party Summons and Complaint
2. Third-Party Defendant’s Response
3. Plaintiff’s Claims Against Third-Party Defendant
4. Dismissal or Severance

G. Vouching-in as Alternative to Impleader

X. Class Actions

A. Basic Points

B. Factors for Class Certification

1. Prerequisites
2. Discretionary Factors

C. Procedural Issues

D. Pre-Certification Discovery

E. Order Allowing Class Action

F. Notice to Class Members

G. Management of Class Actions

H. Class Action Settlements

CHAPTER 15 PLEADINGS

I. All Pleadings

A. Basic Points

B. Purposes

C. Format (for ALL Court Papers)

D. Drafting Rules and Techniques

E. Verification

1. Basic Points
2. When Required
 - a. *Basic Points*
 - b. *Exceptions*
3. By Whom
 - a. *Requirements and Exceptions*
 - b. *Agent or Attorney*
4. Form and Content
5. Defective or Missing Verification
 - a. *Basic Points*
 - b. *How to Respond*
 - i. Defendants
 - ii. Plaintiffs
 - iii. Treat Pleading as Nullity

F. Sanctions for Frivolous Pleading

II. Complaints

A. Definitions

B. Goals and Pitfalls

C. Particularity Requirements

1. The Key Rule: CPLR 3013
 - a. *Basic Points*
 - b. *Exceeding Minimum Requirements*
2. Particularity for Specific Matters [CPLR 3015]
 - a. *Condition Precedent*
 - b. *Corporate Status*
 - c. *License to Do Business (In Actions vs. Consumers)*
 - d. *Other Matters*
3. Special Particularity for Specific Claims [CPLR 3016]
 - a. *Basic Points*
 - b. *Libel or Slander*
 - c. *Fraud or Mistake*
 - d. *Separation or Divorce*
 - e. *Action on Judgment*
 - f. *Action Based on Law of Foreign Country*
 - g. *Itemized Claims for Goods or Services*
 - h. *Motor-Vehicular Personal Injury*
 - i. *Misconduct by Non-Profit's Director, Officer, or Trustee*
4. Shareholder Derivative Actions [Bus Corp L §626(c)]

D. Before Drafting

E. Drafting the Complaint

1. Basic Points
2. Caption and Introductory Matters
3. Background Facts
4. Causes of Action
 - a. *Basic Pleading Points & Strategies*
 - b. *Splitting Claims Not Permitted*
 - c. *Joinder of Claims*
5. Demand for Relief
 - a. *Basic Points*
 - b. *Pleading Dollar Amount of Damages*
6. Attorney's Indorsement and Signature

F. Attaching Documents

1. When Optional
2. Medical Malpractice Action (Certificate of Merit)

III. Before Answering

IV. Answers

A. Basic Points

B. Format

C. Parts and Divisions

D. Allegation Responses

1. Admissions
2. Denials
 - a. *Basic Points*
 - b. *Types of Denials*
3. Types of Allegations

E. Disputing Special Matters

1. Itemized Claims for Goods or Services
2. Other Matters

F. Affirmative Defenses

1. Basic Points
2. Specific Defenses
 - a. *In All Types of Actions*
 - b. *Contract Actions*
 - c. *Tort Actions*
3. Pleading Requirements
4. Failure to Plead
 - a. *Basic Points*
 - b. *Raising Defense in Amended Answer*

G. Service and Filing

1. Basic Points
2. Extending Service Deadline
 - a. *By Stipulation*
 - b. *By Court Order*
 - i. Basic Points
 - ii. Moving Late
 - iii. Court's Discretion

H. Plaintiff's Reply

V. Counterclaims and Cross-Claims

A. Counterclaims

1. Basic Points
2. Substance of Counterclaims
 - a. *Basic Points*
 - b. *Claims Related to Events in Complaint*
3. Who May Counterclaim Against Whom
4. Effect of Party's Capacity in Suit
5. Special Counterclaim Defendants
6. Statute of Limitations Issues

B. Cross-Claims

C. Procedure

1. Pleading
2. Service and Filing
3. Response
 - a. *To Counterclaim*
 - b. *To Cross-Claim*
 - c. *Motions*

VI. Amended and Supplemental Pleadings

A. Basic Points

B. Supplements

1. Basic Points
2. Method, Content, and Timing

C. Amendments

1. Basic Points
2. Limitations
3. Without Leave or Stipulation

D. Amending or Supplementing with Leave of Court

1. Basic Points

- 2. Court's Discretion
 - a. *Granting Leave*
 - b. *Denying Leave*
 - i. Prejudice
 - ii. Other Grounds
 - 3. Request for Leave
- E. Response to New Pleading***

CHAPTER 16 MOTION PRACTICE

I. Overview

II. Where to File the Motion

III. Preparing, Serving, and Filing the Motion

A. Formal Requirements

B. Essential Elements of Motion: Notice, Factual Basis, Law

- 1. Notice Requirements
- 2. Affidavits and Exhibits
- 3. Brief in Support of Motion
 - a. *General Considerations*
 - b. *Drafting Considerations*

C. Serving the Motion

D. Filing the Motion

IV. Opposing the Motion

A. Opposition Papers

B. Making Cross-Motions

C. Moving Party's Reply

V. Hearing on the Motion

A. Appearance on Return Date; Oral Argument

B. Disqualifying the Judge

- 1. Statutory Standard
- 2. Court Rules
- 3. Discretionary Recusal

C. Effective Oral Argument

D. Trial of an Issue Raised by a Motion

VI. Court's Decision on the Motion

A. Court's Order

B. Stay of Proceedings

VII. Emergency Motions

VIII. Ex Parte Motions

IX. Reopening the Court's Decision

- A. Tactical Considerations*
- B. Motion for Reargument*
- C. Motion to Renew*

CHAPTER 17 TEMPORARY RESTRAINING ORDERS AND PRELIMINARY INJUNCTIONS

I. Overview

- A. Types of Injunctions*
- B. Distinguished from Other Pre-Judgment Orders*
- C. Advantages and Disadvantages*
 - 1. Advantages
 - 2. Disadvantages

II. Jurisdiction, Venue, and Parties

- A. Subject Matter Jurisdiction*
- B. Venue*
- C. Parties*
 - 1. Movant
 - 2. Persons Bound

III. Grounds and Defenses

- A. Statutory Requirements*
 - 1. General Points
 - 2. Likelihood of Success
 - 3. Irreparable Injury
 - a. Adequate Legal Remedy*
 - b. Real Injury*
 - 4. Balancing Equities
 - 5. Defenses
- B. Judicial Requirements*
 - 1. General Points
 - 2. Likelihood of Success
 - 3. Irreparable Injury
 - a. Adequate Legal Remedy*
 - b. Real Injury*
 - 4. Balancing Equities
 - 5. Defenses

IV. Typical Subject Matter

- A. Asset Protection and Enforcement of Judgments*
- B. Property*
- C. Business*
- D. Other*

V. Preliminary Injunction Procedure

- A. Effective Preparation and Advocacy*
- B. Motion Papers*
- C. Notice*
- D. Opposing Motion*
- E. Hearing*
- F. Undertaking*
- G. Order*

VI. TRO Procedure

- A. General Points*
- B. Motion Papers*
- C. Hearing*
- D. Service*
- E. Duration*
- F. Undertaking*

VII. Court Oversight

- A. Reconsideration of Ruling on Motion*
- B. Vacatur or Modification*
- C. Enforcement by Contempt*
 - 1. General Points
 - 2. What Constitutes a Violation
 - 3. Penalties
 - 4. Contempt Procedure
- D. Recovery on Undertaking*

CHAPTER 18 INTERLOCUTORY APPEALS

I. General Points

II. Specific Orders

- A. Orders Involving Merits or Affecting Substantial Rights*
- B. Other Orders Appealable as of Right*
- C. Orders Not Appealable as of Right*

III. Tactics and Procedures

- A. When to Appeal an Order*
- B. Where to Appeal*
 - 1. To the Appellate Division
 - 2. To the Appellate Term or Other Courts
- C. Assuring an Appealable Format*
- D. Failure to Perfect Appeal*

[CHAPTERS 19-23 RESERVED]

CHAPTER 24 ALL DISCOVERY

I. Purpose, Goals, and Governing Law

II. Scope of Disclosure

- A. Basic Points*
- B. Matters Discoverable*
- C. Matters Usually Outside Scope*
 - 1. Privileged Matter
 - 2. Attorney Work Product
 - 3. Other Matters
- D. Special Scope Rules*
 - 1. Trial Preparation
 - a. Expert Witnesses*
 - b. Materials*
 - 2. Type of Proceeding
 - 3. Non-Party Witnesses

III. Planning

A. Planning Strategies

1. Basic Points
2. Establish Goals
3. What Discovery Devices to Use

B. Sequence of Discovery

IV. Commencement and Timing

A. Commencement of Disclosure

B. Timing Factors

1. For Discovering Party
2. For Responding Party

V. Supervising and Compelling Disclosure

A. Supervising Disclosure

B. Compelling Disclosure

VI. Stipulations

VII. Amendment or Supplementation of Responses

A. General Points

B. Procedure

CHAPTER 25 PRIVILEGES

I. General Concepts

A. Overview

1. Definitions; Purposes
2. Creation and Duration
3. Effect of Privileges on Discovery

B. Enforcing a Privilege

1. Asserting the Privilege
2. Establishing Privilege

C. Waiver of Privilege

1. Basic Points
2. How a Privilege Is Waived

II. Attorney-Client Matters

A. Attorney-Client Privilege

1. Summary and Tactics

2. Elements of a Privileged Communication
 - a. *Must Be a "Communication"*
 - b. *Must Be in the Course of Professional Employment*
 - c. *Must Be a Confidential Communication*
3. Exceptions

B. *Work Product*

C. *Material Created for Litigation*

III. Self-Incrimination

IV. Trade Secrets

V. Physicians

A. *Summary & Elements of Rule*

B. *When Privilege Does Not Apply*

VI. Hospital Records

VII. Therapists & Counselors

A. *Psychologists*

B. *Social Workers*

C. *Rape Crisis Counselors*

VIII. Families

A. *The Spousal Privilege*

B. *Children*

IX. The Clergy

X. Journalists

A. *Shield Law Privilege*

B. *Constitutional Privilege*

XI. Settlement Negotiations and Mediation

XII. Financial Institutions

XIII. Public Interest Privileges

CHAPTER 26 PRODUCTION OF DOCUMENTS AND OTHER THINGS

I. Party Document Requests

A. General Points

B. Using Document Requests with Other Discovery Tools

C. Steps to Obtain Documents

1. Prepare Notices
 - a. Form
 - b. Format
 - c. Substance
 - i. General Points
 - ii. By-Category Requests
2. Particular Types of Documents
3. Serve and File
4. Track Response

D. How to Respond and Produce

1. Initial Steps
2. Time to Respond
3. Failure to Timely Respond
4. “Possession, Custody or Control”
5. Locate, Collect, and Examine Items
 - a. General Points
 - b. Locate Items
 - c. Collect Items
 - d. Examine Items
6. The Response
 - a. General Points
 - b. Format
 - c. Objections
 - i. General Points
 - ii. Specific Objections
 - d. Dealing with Problem Requests
 - i. Overbroad, Vague, or Ambiguous
 - ii. Unduly Burdensome
 - e. Protect Confidential Information
 - f. Service and Filing
7. Prepare for Production

E. Inspection and Copying

F. Discovery Disputes

1. General Points
2. Motions

II. Nonparty-Document Inspection

A. Overview

B. Subpoena Procedure

1. General Points
2. How to Subpoena
3. Responding to Subpoena
 - a. *Objections*
 - b. *Motion to Quash, Fix Conditions or Modify Subpoena*
 - c. *Producing Business Records*
4. Motion to Compel Compliance
5. Remedies for Disobeying Subpoena

III. Medical Records

A. Hospital Records and Government Medical Records

B. Exchange of Records in Connection with Exam

1. General Points
2. In Personal Injury Cases

IV. Public Records

A. Subpoenas for Government Records

B. Access to Public Records

1. Overview and Strategies
2. New York Public Records
 - a. *Authority, Scope, Exceptions*
 - b. *Procedure*
 - c. *Appeal from Agency Denial of Access*
3. Federal Public Records
 - a. *Authority & Exceptions*
 - b. *Procedure*

V. Land and Other Things

CHAPTER 27 DEPOSITIONS

I. Overview

A. General Principles

B. Types of Depositions

II. Functions

A. Generally

B. Using Deposition Testimony At and After Trial

1. When Available
2. Use and Effect of Testimony

C. Use in Conjunction with Other Discovery Devices

III. Taking a Deposition

A. Preparation

1. Procedure
 - a. *Select Deponents*
 - b. *Choose Location*
 - c. *Schedule the Deposition*
 - d. *Notice Party's Deposition*
 - e. *Subpoena Non-Party Deponent*
 - f. *Select Recording Method*
 - g. *Deposition Officer*
 - h. *Translators*
2. Substantive Preparation
 - a. *General Considerations*
 - b. *Prepare Outline*
 - c. *Organize Exhibits in Advance*

B. Conducting the Deposition

1. Getting Started
2. Review Document Requests
3. General Considerations for Conducting Examination
4. Suspending or Adjourning a Deposition
 - a. *Suspending*
 - b. *Adjourning*
5. Court's Involvement
 - a. *Generally*
 - b. *Orders Compelling Disclosure and Penalties*

IV. Defending a Deposition

A. Respond to Notice or Subpoena

1. Objections to Notice
2. Document Production
3. Designated Witness

B. Preparation

1. Introduction
2. Guidelines for Witness
3. Guidelines for Experts

C. Conduct During the Deposition

1. General Points
2. Objections

V. Discovery Disputes

A. General Points

B. Specific Disputes

VI. Preparing Transcript for Use at Trial

CHAPTER 28 PHYSICAL AND MENTAL EXAMINATIONS

I. General Points

A. Overview

B. Who Is Subject to Exam

1. Parties
2. Non-Parties

C. Preliminary Considerations

II. Setting the Logistics

A. Examiner

1. Selection by Discoverer
2. Challenging Designated Examiner

B. Location

C. Time

D. Conditions and Scope

E. Costs

III. Initiating Exam

IV. Preparing for Exam

A. General Points

B. Hospital Record Authorizations

1. Overview
2. Privilege and in Controversy Requirement
 - a. Plaintiffs*
 - b. Defendants*
 - c. Representatives and Non-Parties*

V. Conducting Exam

VI. Subsequent Motions and Use of Report

VII. Exchange of Examining Physician Reports

A. *General Points*

B. *Option to Exchange*

C. *What Reports Must Be Exchanged*

CHAPTER 29 BILLS OF PARTICULARS AND INTERROGATORIES

I. Bill of Particulars

A. *General Points*

B. *Making a Demand*

1. Format
2. Appropriate Demands
3. Filing and Service

C. *Response and Objections*

1. Deadline
2. Contents of Bill of Particulars

D. *Amending or Supplementing Bill of Particulars*

II. Interrogatories

A. *General Points*

1. Overview
2. Availability
3. Use in Negligence Cases
4. Use in Matrimonial Action or Proceeding

B. *How to Use Interrogatories*

1. General Points
2. Using Interrogatories with Other Discovery Tools
3. Types of Interrogatories

C. *Propounding Interrogatories*

1. Format
2. Preliminary Parts
3. Drafting Techniques
4. Areas of Inquiry
 - a. *General Points*
 - b. *Facts*
 - c. *Documents*
5. Service
6. Track Response

D. Responding to Interrogatories

1. General Points
2. Time to Respond
3. Service and Filing
4. Drafting Responses
 - a. *General Points*
 - b. *Format*
 - c. *Dealing with Documents*
 - d. *Objections*
 - i. General Points
 - ii. Specific Objections
 - iii. Dealing with Problem Requests
 - iv. Protecting Privileged Information

E. Amended and Supplemental Answers

1. General Points
2. Procedure

F. Discovery Disputes

1. General Points
2. Extend Time to Answer
3. Protective Order
4. Compel Production
5. Sanctions

G. Evidence Issues

1. General Points
 - a. *Who May Introduce Answers*
 - b. *How Answers Are Used*
2. Motion Practice
3. Trial

CHAPTER 30 NOTICES TO ADMIT

I. General Points

- A. Overview*
- B. Narrow Scope of Notices to Admit*

II. How to Use Notices to Admit

- A. General Strategies*
- B. Documents and Photographs*
- C. Use with Other Discovery Tools*

III. Propounding a Notice to Admit

- A. Drafting Format and Techniques*
- B. Service and Filing*

IV. Responding to Requests

- A. General Points*
- B. Response Deadline*
- C. Drafting Points*
 - 1. Format
 - 2. Responses
 - 3. Sworn-Statement Responses
 - a. General Points*
 - b. When to Use Sworn Statement*

V. Motions

- A. General Points*
- B. Motions by Propounder of Notice*
 - 1. Motion Challenging Answer
 - 2. Sanctions for Failure to Admit (Post-Trial Motion)
- C. Motions by Responder*
 - 1. Motion to Extend Time to Respond
 - 2. Motion for Protective Order
 - 3. Motion for Relief from Response

VI. Use of Responses at Trial

- A. Admitting Answers Into Evidence*
- B. Effect of Admissions*

CHAPTER 31 DISCOVERY DISPUTES

I. General Requirements and Procedure

A. Before a Motion

1. Negotiation Strategy
2. Discovery Conferences

B. Making a Motion

II. Motions Affecting Disclosure Time Limits

III. Motion for Supervision of Disclosure

IV. Motions to Compel Disclosure

A. Pre-Action Disclosure

B. Pre-Trial Disclosure

C. Disclosure During and After Trial

V. Motions for Sanctions

A. For Noncompliance with Disclosure Demands

B. For Noncompliance with a Notice to Admit

VI. Motions Restricting Disclosure

A. Motion for Protective Order

B. Motion to Suppress Improperly Obtained Information

VII. Discovery from or for a Foreign Jurisdiction

A. Action from Another Jurisdiction

B. Out of State Deposition

[CHAPTERS 32-35 RESERVED]

CHAPTER 36 MOTIONS TO DISMISS

I. Overview

A. Nature and Purpose

B. Distinguished from Other Motions

C. Advantages

D. Disadvantages

E. Governing Law

II. When to File the Motion; Waiver

A. Motion to Dismiss Complaint or Claim

1. Waiver Considerations
2. Before or After Responsive Pleading
3. Motion Based on Improper Service

B. Other Dismissal Motions

III. Grounds

A. Jurisdictional Objections

1. Subject Matter Jurisdiction
 - a. *General Considerations*
 - b. *Preemption by Federal Law*
 - c. *Claims Against the State*
 - d. *Nonjusticiability*
2. Personal Jurisdiction [CPLR 3211(a)(8)]
 - a. *Preliminary Considerations*
 - b. *Defective Summons*
 - c. *Improper Service of Process*
 - d. *Court Lacks Jurisdiction Over Defendant*
3. In Rem and quasi in Rem Jurisdiction

B. Lack of Capacity to Sue [CPLR 3211(a)(3)]

1. Preliminary Considerations
2. Claimant Under Legal Disability
 - a. *Types*
 - b. *Unlicensed Foreign Corporation*
 - c. *Capacity of Public Officers to Maintain Actions*
 - d. *Post-Bankruptcy Claims*
3. Lack of Representative Capacity

C. Another Action Pending [CPLR 3211(a)(4)]

1. Application of CPLR 3211(a)(4)
 - a. *In General*
 - b. *Action Pending Outside New York*
2. When Is Dismissal Appropriate?
3. When Are Consolidation or Stay Appropriate?

D. Absence of Indispensable Party [CPLR 3211(a)(10)]

E. Failure to State a Cause of Action [CPLR 3211(a)(7)]

1. Tests Legal Sufficiency of Complaint
2. Tests Cause of Action
3. Pleading Deficiencies
4. Procedural Issues Applicable Only to CPLR 3211(a)(7) Motion

F. Various Affirmative Defenses [CPLR 3211(a)(5)]

1. Motion May Raise Specified Defenses
2. Arbitration

3. Res Judicata
 - a. Causes of Action Arising from Same Transaction
 - b. Adjudication on the Merits
 - c. Full and Fair Opportunity to Litigate
 - d. Other Application
4. Collateral Estoppel
 - a. Identity of Issue
 - b. Identity of Party
 - c. Full and Fair Opportunity to Litigate
5. Bankruptcy
6. Disability of the Moving Party
7. Payment (Accord and Satisfactions), or Release
8. Statute of Limitations
9. Statute of Frauds

G. Improper Counterclaim [CPLR 3211(a)(6)]

H. Defense Founded on Documentary Evidence [CPLR 3211(a)(1)]

I. Immunity Under the Not-for-Profit Corporation Law [CPLR 3211(a)(11)]

J. Forum Non Conveniens [CPLR 327]

1. Elements of the Motion
2. Factors to Be Considered
3. Conditions of Dismissal

K. Motion to Dismiss Defense [CPLR 3211(b)]

1. Nature and Purpose
2. Deciding the Motion

IV. Procedure

A. How and When to Make the Motion

B. Preparing Motion Papers

1. Notice of Motion
2. Affidavits
3. Exhibits
4. Brief in Support of Motion

C. Service

D. Response

1. Preliminary Concerns
2. Prepare Papers
3. Leave to Replead (CPLR 3211(a)(7) or CPLR 3211(b) Motion)
4. Cross-Motions
5. Gaining Additional Time
6. Serving Opposition Papers

E. Conversion to Summary Judgment Motion

1. Motion Under CPLR 3211(a) After Issue Is Joined
2. Conversion of Pre-Answer Motion to Dismiss
3. Conversion of Other Motions

F. Determination by Court

1. Facts Unavailable to Opposing Party
2. Immediate Hearing
3. Leave to Replead

CHAPTER 37 SUMMARY JUDGMENT

I. Overview

- A. Basic Points***
- B. Advantages***
- C. Disadvantages***
- D. Strategies***

II. Partial Summary Judgment

- A. Basic Points***
- B. Severance, Stay, and Conditions***

III. Requirements for Summary Judgment

- A. Claim or Defense Established “As a Matter of Law”***
- B. No Triable Issue of Fact***
 1. Basic Points
 2. Written Instruments
 3. Negligence

IV. Burdens on MSJ and How to Meet Them

- A. Basic Points***
- B. If Movant Has Trial Burden (MSJ by Plaintiff)***
 1. Movant’s MSJ Burden
 2. Non-Movant’s MSJ Burden
- C. If Non-Movant Has Trial Burden (MSJ by Defendant)***
 1. Movant’s MSJ Burden
 - a. Basic Points*
 - b. Negate a Prima Facie Element*
 - c. Assert Complete Defense*
 2. Opponent’s MSJ Burden

V. Evidence

- A. Basic Points***
 1. MSJ Evidence
 2. Admissibility Requirement
 - a. Basic Points*
 - b. Non-Movant’s Inadmissible Evidence*

B. Affidavits

1. Basic Points
2. Preparing Affidavits
 - a. *Form & Content Requirements*
 - b. *Working with Affiants*
 - c. *Effective Drafting*
3. Exhibits

C. Discovery Products

1. Deposition Transcripts
2. Other Discovery Products

D. Pleadings & Bills of Particulars

E. Other Methods of Establishing Facts

VI. Summary Judgment in Specific Actions

VII. Whether to Move for Summary Judgment

A. Basic Points

B. How to Decide

VIII. Initiating MSJ

A. When to Move

1. Earliest Date to Move
2. Latest Date to Move
 - a. *Deadline Set by Court or Rule*
 - b. *Court Leave for Late Motion*
 - i. Procedure
 - ii. Bases for Granting

B. Preparing MSJ Papers

1. Notice of Motion or OSC
2. Movant's Affidavit
3. Other Supporting Papers

C. Service

IX. Response to MSJ

A. Basic Points and Initial Steps

B. Opposition Papers

C. If Opposition Facts Are Unavailable

1. Basic Points
2. Required Showing
 - a. *Basic Points*
 - b. *Facts in Movant's Exclusive Control*

D. Lifting Automatic Stay on Discovery

E. Cross-Motions

1. To Amend Pleading
2. For Summary Judgment

F. Serve Opposition Papers

X. Response to MSJ Opposition

A. When No Attack Is Necessary

B. Reply

C. Response to Cross-MSJ

XI. Oral Argument

A. Basic Points

B. Effective Argument

XII. Decision and Disposition

A. Basic Points

B. Judgment Against MSJ Movant

C. Immediate Trial of Certain Issues

D. Designating Undisputed Facts

E. Costs, Attorney Fees, and Interest

F. Sanctions

G. Procedure

XIII. Post-Decision Motions

XIV. Appeal

CHAPTER 38 EXPEDITED JUDGMENT: CPLR 3213; 3222

I. Summary Judgment in Lieu of Complaint; CPLR 3213

A. Nature and Purpose

B. Requirements for a CPLR 3213 Action

1. Action on an Instrument for Payment of Money
 - a. Nature of Required Financial Instrument*
 - b. Qualifying Instruments*
 - c. Instruments that Do Not qualify*
2. Action on a Judgment

C. Procedure

1. Prosecuting a CPLR 3213 Action
2. Defending a CPLR 3213 Action

II. Action on Submitted Facts; CPLR 3222

A. *Nature and Purpose*

B. *Procedure*

CHAPTER 39 DEFAULT JUDGMENT; DISMISSAL FOR FAILURE TO ACT; DISCONTINUANCE

I. Default Judgment [CPLR 3215]

A. *Basic Points*

B. *Entry by Court Clerk*

1. Basic Points
2. Plaintiff's Motion—If “Sum Certain”

C. *Entry by Court*

D. *If Default More Than One Year Old*

1. Basic Points
2. Plaintiff's Requirements
 - i. Valid Excuse for Delay
 - ii. Meritorious Claim

E. *Types of Default Conduct*

1. No Initial Appearance
2. Failure to Timely Respond to Pleading
3. Violating Settlement with Provision for Judgment
4. Other Default Conduct

F. *Avoiding Plaintiff's Application for Default*

G. *Applying for Judgment*

1. Whether to Apply
2. Where & When to Apply
3. Moving Papers
 - a. *Basic Points*
 - b. *Proof of Service of Summons*
 - c. *Affidavit of Default*
 - d. *Affidavit in Support of Claim*
4. Notice
 - a. *Depends on Defendant's Status*
 - b. *Additional Notice of Summons*
5. In Matrimonial Actions
 - a. *Basic Points*
 - b. *Facts Plaintiff Must Prove to Support Judgment*
6. In Consumer Credit and Mortgage Foreclosure Actions

H. *Responding to Application*

1. Basic Points
2. Whether to Oppose

3. Opposing the Application
 - a. *Direct Opposition*
 - b. *Cross-Motion to Cure Default*

I. Damages Inquest

1. Basic Points
2. Defendant's Participation

J. Amount & Type of Judgment

K. Relief from Judgment

1. Basic Points
 - a. *Direct Appeal*
 - b. *Authority to Vacate*
2. Summons Not Received in Time to Defend [CPLR 317]
3. Excusable Default & Other Grounds [CPLR 5015(a)]
 - a. *Basic Points*
 - b. *Excusable Default*
 - i. Basic Points
 - ii. Excuses
 - c. *Plaintiff's Fraud or Other Misconduct*
 - d. *Lack of Jurisdiction*
 - e. *Lack of Notice Under CPLR 3215(g)*
4. By Stipulation [CPLR 5015(b)]
5. Motion Papers & Procedure

II. Dismissal for Failure to Act

A. Failure to Serve Complaint [CPLR 3012(b)]

1. Initial Points
2. Motion to Dismiss
 - a. *Timing*
 - b. *Avoiding Dismissal: Requirements & Factors*
 - c. *Court's Ruling & Consequences*

B. Want of Prosecution [CPLR 3216]

1. Basic Points
2. Ninety-Day Demand for Note of Issue
 - a. *Serving the Demand*
 - b. *Complying with the Demand*
3. Timing of Motion
4. If Plaintiff Fails to Comply: Showing Required to Avoid Dismissal
 - a. *Justifiable Excuse*
 - b. *Meritorious Claim*

C. Default at Calendar Call or Conference

1. Discretionary Dismissal
2. Automatic Dismissal of Abandoned Cases [CPLR 3404]
 - a. *Basic Points*
 - b. *Restoring Case to Calendar*

D. Not Timely Moving for Default Judgment [CPLR 3215(c)]

E. Other Grounds for Dismissal

III. Voluntary Discontinuance [CPLR 3217]

A. Basic Points

B. Methods of Discontinuance

1. Unilateral Discontinuance
2. Stipulation
3. Court Order
 - a. *Basic Points*
 - b. *Ruling on Motion*

CHAPTER 40 SETTLEMENT AND ALTERNATIVE DISPUTE RESOLUTION

I. Settlement

A. Case Evaluation

1. Why Try to Settle?
2. When Should You Settle?
3. Tax Consequences
4. Impact on Government Benefits
5. Impact on Underinsurance Coverage
6. Liens
7. Ethical Responsibilities

B. Negotiation

1. General Points
2. Plaintiff's Perspective
 - a. *Settlement Letters*
 - b. *Negotiations with Insurers*
 - c. *Negotiations with Third Parties*
3. Insurer's Perspective

C. Special Offers

1. Tender
2. Offer to Liquidate Damages
3. Offer to Compromise

D. Court's Role in Settlements

1. Settlements Requiring Court Approval
 - a. *Minors or Incompetents*
 - b. *Death Actions*
 - c. *Other Occasions for Seeking Court Approval*
2. Preliminary and Pre-Trial Conferences
3. Reporting Settlement

E. Mechanics of Settlements

1. Types of Settlements
2. Structured Settlements
3. Settlement Documents

4. Settlement for Disabled Plaintiff
5. Multiparty Settlements
 - a. *Joint Tortfeasors*
 - i. General Points
 - ii. Practical Considerations
 - iii. Proof and Computation of Reduction of Verdict
 - b. *Successive Tortfeasors*
 - c. *Parties with Indemnification Agreements*

F. Enforceability of Settlements

1. Settlements as Contracts
 - a. *General Points*
 - b. *Setting Aside a Settlement Agreement*
2. Settlements as Judgments

II. Alternate Dispute Resolution

A. Mediation

1. General Points
2. Matrimonial Mediation
3. The Mediation Process
 - a. *Overview and Roles*
 - b. *Appearance*
 - c. *Confidentiality*
 - d. *Agreement*

B. Arbitration

1. Definition & Overview
2. Court Ordered Arbitration
 - a. *Procedure*
 - b. *Award*
 - c. *Trial de Novo*
3. Contractual Arbitration
 - a. *Drafting Agreements*
 - b. *Court Enforcement of Agreement*
 - c. *Initiating Arbitration*
 - d. *Arbitration Procedure*
 - e. *Arbitrators' Award*
 - f. *Court Confirmation*

CHAPTER 41 SIMPLIFIED PROCEDURE

I. Basic Points

II. Invoking the Procedure

- A. *Basic Points*
- B. *Joint Statement*
- C. *Motions to Settle Terms & Adjudicate*

III. The Adjudication

A. Basic Points

B. Evidence

CHAPTER 42 SPECIAL PROCEEDINGS

I. Overview

A. Nature of Special Proceedings

B. Types of Special Proceedings

C. Parties and Pleadings

II. Procedure

A. Initiating Special Proceeding

1. Statute of Limitations
2. Jurisdiction and Venue
3. Petitioner's Papers
4. Filing
5. Service and Notice

B. Temporary Relief

C. Responding to Petition

D. Replying to Answer

E. Motions

1. General Points
2. Motion to Dismiss
3. Motion to Correct Defects
4. Motion to Sever

F. Discovery

G. Hearing

H. Order and Judgment

III. Special Proceedings Under Article 78

A. General Points

B. Scope

1. Mandamus
2. Prohibition
3. Mandamus to Review
4. Certiorari to Review

C. Limitations on Review

1. General Points
2. Final Determination
3. Exhaustion of Administrative Remedies

4. Availability of Appeal or Other Remedy
5. Declaratory Judgment Action
6. Tax Certiorari Proceeding

D. Parties

1. Respondents
2. Petitioner

E. Initiating Article 78 Proceeding

1. Statute of Limitations
2. Jurisdiction and Venue
3. Petitioner's Papers
4. Notice and Service

F. Responding to petition

G. Replying to Answer

H. Stays and TROs

I. Transfer to Appellate Division

J. Hearing and Trial

K. Judgment

TABLES

INDEX

NEW YORK CIVIL PRACTICE BEFORE TRIAL

Volume 2

Michael H. Barr
Hon. Myriam J. Altman
Burton N. Lipshie
Sharon Stern Gerstman

James Publishing



Contact us at (800) 440-4780 or www.jamespublishing.com

Copyright © 2001-2013
James Publishing, Inc.
ISBN: 1-58012-065-2

All rights reserved.

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional service. If legal advice or other expert assistance is required, seek the services of a competent professional.

Revision 1, 7/02
Revision 2, 10/03
Revision 3, 10/04
Revision 4, 11/05
Revision 5, 12/06
Revision 6, 12/07
Revision 7, 1/09
Revision 8, 12/09
Revision 9, 1/11
Revision 10, 2/12
Revision 11, 4/13

Table of Contents

Chapter 1	Taking the Case
Chapter 2	Presuit Activities
Chapter 3	Statutes of Limitations
Chapters 4-5	Reserved
Chapter 6	Subject Matter Jurisdiction
Chapter 7	Personal Jurisdiction
Chapter 8	Forum Selection: Venue and Removal
Chapter 9	Summons, Service of Process, and Appearance
Chapters 10-13	Reserved
Chapter 14	Parties
Chapter 15	Pleadings
Chapter 16	Motion Practice
Chapter 17	Temporary Restraining Orders and Preliminary Injunctions
Chapter 18	Interlocutory Appeals
Chapters 19-23	Reserved
Chapter 24	All Discovery
Chapter 25	Privileges
Chapter 26	Production of Documents and Other Things
Chapter 27	Depositions
Chapter 28	Physical and Mental Examinations
Chapter 29	Bills of Particulars and Interrogatories
Chapter 30	Notices to Admit
Chapter 31	Discovery Disputes
Chapters 32-35	Reserved
Chapter 36	Motions to Dismiss
Chapter 37	Summary Judgment
Chapter 38	Expedited Judgment: CPLR 3213; 3222
Chapter 39	Default Judgment; Dismissal for Failure to Act; Discontinuance
Chapter 40	Settlement and Alternative Dispute Resolution (ADR)
Chapter 41	Simplified Procedure
Chapter 42	Special Proceedings

Tables

Index

(This page intentionally left blank.)