Civil Practice for Paralegals in New York State

Practical Interpretation of the Crucial Elements

Charles E. Coleman, J.D.
Gail Elizabeth Williams, J.D.

Department of Law and Paralegal Studies
New York City College of Technology
City University of New York

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INTRODUCTION

Thank you for purchasing this text. Yes, it is a textbook. *Civil Practice for Paralegals in New York State* may not look like any other text that you use. It lacks the serious looking leatherette cover and the structural binding that you may have become used to. However, this text is not meant to be a law school text, a bar review course or a practice manual for attorneys, although some neophyte attorneys may find it useful as a starting point. It is specifically designed to serve as a basic text for use in a course for paralegals in civil procedure. We do not want to ever forget the basics. Therefore, it should be on the paralegal's desk, throughout their education and into the workplace.

Civil procedure is often the first substantive law course that paralegal students take. This book was written for use in a college level 3 credit course on civil law and procedure. However, it is certainly adaptable for a shorter course or for a combined course simply by being selective about the materials to be covered and the time spent in each topic area.

Besides being a primer on civil procedure, we foresee the student also using this text as an introduction to the learning of statutory law. We are describing what the law is and referencing the Civil Practice Law and Rules of New York State. The purpose of the references is to encourage students to read one type of primary authority, the statute, and to see for themselves what the law is telling them to do. This text will be based primarily on New York State law.

In this text we break down civil procedure into its basic components as it relates to paralegals. And, we deliberately keep the chapters short and to the point, avoiding redundancy. It also makes it easier to review

specific topics. We include vocabulary as a part of the text; vocabulary, by itself, will be found in your legal dictionary. We do not intend to devote a lot of space to analysis and case law–this is covered in other courses and would tend to delve into those areas which fall within the attorney's realm of responsibility.

The publications of Looseleaf Law have been used by your authors for many years and we have come to appreciate the loose leaf format, mainly because of ease in updating the content. We believe that currency is a prime ingredient in learning law. In fact, this is the primary reason why we have undertaken this task. Using the looseleaf format, only those pages which need periodic updating need be printed. The owner will then simply replace the old pages with the new. This way the text will always be fresh and accurate. An out of date law book can easily be problematic.

This text is linked to the Looseleaf Law Publication, Civil *Practice Law & Rules of The State of New York Plus Comprehensive Appendix of Related Statute.* Since we will be giving citations to this statute and others, a student may use other statutory compilations, but what we will be referencing is just about entirely contained in this publication. Also, we will be using the forms found in the rear of the Looseleaf Law CPLR book.

Every person involved in the practice of law, in any capacity, should also have, alongside this text, their own legal dictionary, thesaurus, English dictionary and one of the many excellent reference works on writing and grammar. There should also be an appropriate reference available for legal research, legal writing and legal citations. For a deeper understanding of civil practice in New York, there are many different texts and treatises on the subject.

The authors hope that this text will fill a need in the paralegal education community. Although we strive for perfection, that can only be a goal. We ask for the assistance of the faculty and students who use this book. We are providing our publisher's email address to enable you to point out any specific shortcomings you may come across or any suggestions you may have as to expanding the content. We will carefully consider and respond to your questions and comments. In fact, your suggestions may appear in the next update. We look forward to working together to reach your educational goals.

Charles E. Coleman and Gail Elizabeth Williams
info@LooseleafLaw.com

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CHAPTER 1
Civil Procedure

If one were to go back far enough, we would find that if one suffered a loss due to someone else's fault, there was not much that could be done about it. The person who suffered the loss, if they considered themselves big enough and bad enough, could try to seek remuneration for their loss from the transgressor. Unfortunately, they could suffer more loss, if they turned out not to be as big and bad as they thought.

In time, in Merry Olde England, a court system was developed. This court system would serve as a place where wrongs could be righted. However, it was not always clear who was wrong and who was right. It pretty much depended on the judge. It was often a difficult decision. In addition, how could a person know what to do when a situation arose which had to be dealt with.

What eventually developed was the concept of case law. That is, when a court made a decision on a set of facts, that was recorded. Other courts would then tend to follow those decisions, unless it had been overturned by a higher court. Of course, if a higher court had decided on the matter, the lower court was required to follow the higher court's decision. Then, when a person had a particular problem, he could read the prior case law dealing with the same or similar facts, and decide what should be done. These concepts eventually led to the legal precepts referred to as *res judicata* and *stare decisis*. The former means that once a claim has been decided, the same Plaintiff(s) cannot bring the same claim with the same set of circumstances against the same defendant(s). The latter refers to issues that are litigated and decided within a claim. Once an issue has been decided, that issue should not be allowed to be re-litigated by a party who participated in the original case. This is the common law. A further discussion of these two legal principles will appear later in this text.

Common Law was brought with the settlers from England and became the basis of the laws of the United States and most of the states. In fact, it remains the law, unless it has been superceded by a statute. Statutes, such as the Civil Practice Law and Rules of New York State, are essentially modifications of the Common Law.

We still have common law. The statutes are subject to review by the courts. The courts determine if the statutes are violative of the federal or state constitution. If a court finds that the statute violates the constitution, that law may be struck down, until and unless a higher court determines otherwise.

The courts also serve to determine how the law is to be interpreted in relation to a given set of facts. This court made law then serves as the guide as to how similar facts will be dealt with. Thus, a statute does not stand alone. It carries with it all of the case law relative to that statute. In this text, we will be dealing mainly with the statute. Your instructor may determine that a case reading (and briefing) will serve to assist in understanding why we do what we do in civil procedure.

Please, at this point, remove any ideas you may have about the law. Modern media has not served that well in providing accurate information about the law. As you move through this course, some of those ideas may be validated. But, some may be entirely wrong. You need to approach this initial study of the law with a willingness to change the wrong concepts.

What it is and is not

Civil procedure is using the government–its courts–to settle a dispute about a private matter. A dispute may have arisen between two or more persons, persons and companies, persons and governments or companies and governments or any mixtures of these. The courts exist as an impartial forum to peaceably resolve these disputes.

Even though all parties to the dispute may not be happy with the results, justice has been satisfied. The person bringing the matter to court is generally referred to as the plaintiff. The person(s) against whom the case is brought is generally referred to as the defendant. It is up to the plaintiff to decide if she or he even wants to bring a court action. No matter how egregious the wrong, in civil actions, the plaintiff makes the decision whether to proceed or not. Defendants may be found liable. In that case they are required to follow the judgment of the court. This will not cause them to be imprisoned or pay a fine. However, they may become subject to losing their freedom or being otherwise sanctioned for certain improper conduct related to civil actions, particularly if they resist the judgment.

One of the first things the student has to do is recognize the difference between civil and criminal actions. Contrary to the description in the above paragraph, criminal law does not have as a party the person who has been wronged. The victim of a crime is not the plaintiff. The plaintiff in a criminal case is the People of the State of New York. The victim is merely another witness to the crime. That is why a district attorney may proceed with a criminal prosecution without the victim's consent. Defendants in criminal actions are being charged with a crime. Upon conviction they may serve time in prison, pay a fine or both.

Civil and criminal proceedings are separate and distinct from each other. A civil proceeding may be instituted even if there is or has been a criminal proceeding. The reverse is also true. The exact same conduct that makes an act a crime may also be a civil wrong. For instance, the criminal charge of assault is also the civil wrong of battery. The district attorney decides whether to

lay a charge of assault. The assault victim may choose whether or not to become a plaintiff in a civil action.

The standards of proof in civil and criminal actions are also different. It is "a preponderance of the evidence" in the former; and, "beyond a reasonable doubt" in the latter. This can result in interesting and misunderstood results. We will take two fictional cases as an example. For our fictional case we will assign percentages to our standards of proof. Please, keep in mind that the percentages are arbitrary. We assign preponderance of the evidence as 51%; and beyond a reasonable doubt as 98%. We assume that the exact same evidence is used in both the civil and criminal trials and that both juries view the evidence exactly alike.

If the government is unable to present enough evidence to find the defendant guilty, that means it has not reached its burden of proof—our fictitious 98%. The government may have failed to reach its burden by anywhere between 0% and 97.9%. Thus the victim in the criminal action may still choose to become the plaintiff in a civil action against the defendant. However, if the defendant is found guilty in the criminal proceeding, a court of competent jurisdiction has already determined that the 98% burden was reached. Since that finding of guilt (our fictitious 98%) encompasses the required civil finding (51%) there is no need to determine if liability exists (*res judicata*). Of course, the civil action in this circumstance, would still be required to determine the damages suffered by the plaintiff.

This is certainly not to say that the more evidence a party has, the better. The trier of the fact must review the evidence and determine the quality, including the truthfulness, of the evidence submitted. This means that, after due consideration of all of the evidence, the jury weighs not how much evidence is submitted, but how much of it

they believe and if it has a bearing on the facts to be proven and supports the claims being made as against the evidence presented by the opposing party. This is why appellate courts are loathe to undermine the determination of the facts as found at the trial level. The appellate courts have no opportunity to observe the witnesses and seldom have access to the physical evidence presented. [See also the 7th Amendment of the U.S. Constitution.]

There are many circumstances where the nature of a cause of action may be civil as well as criminal. In spite of this fact the cases may not be merged. Considering the distinction in the standard of proof this is not feasible.

The CPLR

In looking at the statute we will be working with, note that it is called the Civil Practice Law AND Rules. This indicates that two matters are being dealt with—law and rules. There is some historical significance to which provisions are called "law" and which are called "rules." Laws may be referred to as "Section" or have the symbol [§]. Rules are referred to as "Rule" or "R." as the symbol. It does not make a lot of difference as to which are which, except when writing a citation. The numbers follow consecutively whether it is a law or rule. However, many numbers are skipped.

The CPLR is divided into 100 Articles. The provisions in each Article start with the number of the article with the number of the subdivision attached. If the subdivision is only one numeral, a "0" is added. For example: Article **1** starts with section (§) 1, the subdivision is thus numbered CPLR **§10**1; Article **94** has a Rule (R) 4, becoming CPLR **R.94**04; and, Article **55** has a Rule (R) 21, becoming CPLR **R.55**21.

The CPLR is the main statute used in civil litigation. Some of its laws and rules also may apply to criminal matters. However, no statute stands alone. It is often supplemented or modified by other statutes, both state and federal. All statutes are subject to the provisions of state and, ultimately, the federal constitutions. The states may give more freedoms or rights with their own laws and constitutions, but may not take away those freedoms and rights granted by the federal constitution, as interpreted from time to time by the U.S. Supreme Court.