
BYER'S CIVIL MOTIONS

(formerly “A Guide to Civil Motions In
New York State Courts” by Edward I. Byer)

Second Revised Edition

Revised by

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To Dad, who taught me a love for the law; to Jackie, David and Jennifer, for their patience and understanding; and to Eddie Byer, the “dean” of the courthouse, who blazed the trail.

PREFACE

My mentor and friend, Edward I. Byer, published the First Edition of his seminal treatise, *Civil Motions*. I am honored that he saw fit to designate me as his successor to carry on his life's work.

In revising this work, it has been my goal not only to integrate the cumulative annual supplement into the body of the text, but to reorganize the entire structure of the work, both in format and substance, in order to make it more "user friendly", i.e., to make the law more readily accessible. In the Revised Edition, the subjects are arranged alphabetically. This was done to facilitate the pragmatic purpose of the work, which is to enable the user to find the answer to real legal questions in the shortest possible time. Chapters range from "Abandoned Cases" to "Waiver and Estoppel." "Arbitration" is under the "As"; "Venue" is under the "Vs". This simple alphabetizing will save the user time fumbling through the table of contents and/or index just to find the appropriate chapter. The chapters, too, have been reorganized and broken down into discrete subdivisions to enable the user to zero-in on fine points of law and practice.

The Second Revised Edition contains new chapters and sections, which the author believes, will be practical, useful and helpful to bench and bar alike. These include bankruptcy, recusal of judges, sealing of court records, new court rules promulgated by the Chief Administrative Judge of the Courts governing the conduct of depositions, new procedures required by those seeking temporary restraining orders (TRO's), the use of pseudonyms (e.g. "John Doe" or "Anonymous") in the caption, and the Soldiers' and Sailors' Civil Relief Act, which may become of greater importance as the wars overseas continue, involving tens of thousands of members of the military. This treatise, unlike others on the market, is not limited to procedure under the CPLR, but contains substantive law as well, to assist and guide busy litigators writing briefs and arguing before the court, and judicial and non-judicial staff in drafting opinions. This is the one book to have on your desk and in your briefcase!

HOWARD G. LEVENTHAL, ESQ.

CHAPTER 1

INTRODUCTION

§ 1:01. Sections and Rules.

§ 1:02. Improper Form of Action.

§ 1:01. Sections and Rules.

Civil Practice Law and Rules may be cited as CPLR, which is divided into sections and rules. It governs the procedure in civil judicial proceedings in all the courts, except where the procedure is regulated by inconsistent statute. Reference to any section or rule may be noted as CPLR with the section or rule number, without indicating whether it is such (CPLR 101).

“Sections” are subject to alteration by the legislature. Changes or adoption of “rules” are controlled by CPLR 102. In the event of a conflict between a section and a rule, the statute takes precedence (*Foley v. Roche*, 68 AD2d 558, 418 NYS2d 588, 1st Dept. 1979).

CPLR “shall be liberally construed to secure the just, speedy and inexpensive determination of every civil judicial proceeding” (§ 104).

Rules of evidence applicable to civil cases are also applicable to criminal proceedings unless otherwise provided by statute or by judicially established rules of evidence applicable to criminal cases (Criminal Procedure Law Sec. 60.10; *Peo. ex rel Lemon v. Supreme Court*, 245 NY 24).

CPLR has abolished the distinction between law and equity (§ 103, subd. (a)). A civil judicial proceeding is either an action or special proceeding. All civil judicial proceedings shall be prosecuted in the form of an action, except where prosecution in the form of a special proceeding is authorized. The procedure under CPLR is the same in an action or proceeding (subd. [b]).

§ 1:02. Improper Form of Action.

A civil judicial proceeding is not to be dismissed for error in form (*Dittmar Explosives, Inc. v. A.E. Ottaviano, Inc.*, 20 NY2d 498, 285 NYS2d 55 1967) when the court has jurisdiction over the parties (*Port Chester Electrical Construction Corp. v. Atlas*, 40 NY2d 652, 389 NYS2d 327).

CPLR 103 (c) provides that if a court has obtained jurisdiction over the parties, a civil proceeding shall not be dismissed solely because it is not brought in the proper form, but the court shall make whatever order is required for its proper prosecution. In the interests of justice, the court may convert a motion into a special proceeding, or vice-versa, upon such terms as may be just, including the payment of fees and costs.

When the court has jurisdiction, it can fashion an order to remedy any procedural infirmity by converting it into the proper form for determination on the merits (subd. [c]); *Press v. County of Monroe*, 50 NY2d 695, 431 NYS2d 394).

The following are typical examples in Article 78 proceedings attacking the constitutionality of laws, where the statute of limitations was not in issue, which were converted to declaratory judgment actions: *Matter of Amer. Volkswagen v. State Tax Comn.* 47 NY2d 345, 418 NYS2d 324 (Tax Law § 1137-A); *New York Public Interest Group v. Steingut*, 40 NY2d 250, 386 NYS2d 646 (statute); *Matter of Friedman v. Cuomo*, 39 NY2d 81, 382 NYS2d 961; *Press v. County of Monroe*, 50 NY2d 695, 431 NY2d 394 (converted to special proceeding under the Election Law); *Matter of Merced v. Fisher*, 38 NY2d 557, 381 NYS2d 817 (Vehicle and Traffic Law); *Boryszewski v. Brydes*, 37

NY2d 361, 372 NYS2d 623 (Retirement and Social Security Law); *Matter of Dubois v. Town Bd. of Town of New Paltz*, 35 NY2d 617, 364 NYS2d 506 (Highway Law); *Matter of Kovarsky v. Housing & Dev. Admin. of City of New York*, 31 NY2d 184, 335 NYS2d 383 (New York City Administrative Code); *Matter of Gold v. Lomenzo*, 29 NY2d 468, 329 NYS2d 805 (Real Property Law); cf., *Matter of Lakeland Water Dist. v. Onondaga County Water Auth.*, 24 NY2d 400, 301 NYS2d 1 (Article 78 proceeding challenging general rates fixing order of administrative agency as “excessive, arbitrary and capricious”).

In one Article 78 proceeding, the Court of Appeals considered the merits of a constitutional challenge to Chapter 1012 of the laws of 1971, without converting it to a declaratory judgment action (*Matter of 241 East 22 St. Corp. v. City Rent Agency*, 33 NY2d 134, 350 NYS2d 631 1973).

An improper declaratory proceeding can be converted into an Article 78 proceeding (*Verbanic v. Nyquist*, 41 AD2d 466, 344 NYS2d 406; *Liederman v. Mills*, 238 AD2d 593, 656 NYS2d 388 [2nd Dept. 1997]).

A complaint seeking equitable relief should not be dismissed if it shows a cause of action for legal relief (*Lane v. Mercury Record Corp.*, 21 AD2d 602, 252 NYS2d 1011, aff’d 18 NY2d 889, 276 NYS2d 626).