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Advocate's VIEW

Civil procedure from a New Yorker's perspective

After practicing civil litigation in the Miami, Florida, area for 12 years, this past year I exchanged my flip flops for a warm pair of boots when I relocated back to my home town of Rochester and joined Leclair Korona Giordano Cole as an associate.

In addition to buying new footwear, I have had to learn the ins and outs of practicing under the New York CPLR, the Uniform Rules, and the various Judges' individual rules. Having substantial experience litigating commercial matters, employment disputes, and personal injury actions out of state, I bring a fresh perspective to the procedural aspects of civil practice in New York. I have found that some of the procedural rules are extremely helpful, while others seem to impede the litigation process.

By STACEY E. TRIEN
Daily Record Columnist

There are some procedures unique to New York which are actually quite helpful to the practitioner and the parties. CPLR 5701, for example, allows interlocutory appeals, as of right, to the Appellate Division, from nearly every type of non-final order in an action originating in the Supreme Court, see CPLR 5701(a).

I worked on numerous cases in Florida where there was a strong possibility that the trial judge's decision on a motion to dismiss or summary judgment would be reversed on appeal but, because Florida does not allow for interlocutory appeals of such decisions, we were faced with litigating the action, at our client's expense, until final judgment in order to appeal.

I also appreciate the general practice in Supreme Court of issuing scheduling orders. In Florida state court, the parties are free to conduct discovery for months or years, until one side decides to send a notice to the Judge stating that the case is ready for trial, at which time the Judge will issue a pretrial order, finally providing discovery deadlines, motion deadlines, and a trial date. The scheduling orders in New York seem to move the cases along at a reasonable rate.

Similarly, CPLR 3106(a) is helpful in setting forth a clear priority as to depositions. Under this rule, in the absence of special circumstances, the defendant has priority with respect to taking the plaintiff's deposition if it serves a notice of examination with its response to the complaint, *Hakim Consultants, Ltd. v. Formosa, Ltd.*, 175 AD2d 759 (1st Dept. 1991). This provides the parties with a clear roadmap when scheduling the parties' depositions.

Again, this was an issue of some contention in Florida. In that state, if the parties cannot agree as to scheduling the parties' depositions, and seek a judge's determination, the judge (generally after admonishing both parties for their failure to resolve this issue on their own) will rule based on his or her own discretion, with no clear guidance.

Another positive aspect of Supreme Court practice is that the Judges will rule by submission upon request. In Florida, this luxury is relegated to Federal Court. This raises another benefit for commercial litigators in New York, which is the ability to seek referral to the Commercial Division under 22 NYCRR § 202.70.

It is extremely beneficial to be able to divert a complex commercial action to a judge who focuses on such matters in state court. The request for transfer to the Commercial Division must be filed with a request for judicial intervention (RJI) within 90 days after service of the complaint or, if one party files an RJI within the 90-day period and does not designate the action as commercial on the RJI, another party may apply for transfer to the division by letter application (with a copy to all parties), 22 NYCRR §§ 202.70(d) and 202.70(e).

Having extolled some of the virtues of New York's practices and procedures, I now turn to some of the potential pitfalls for a new attorney in the state. One of the first things that I discovered in delving into Supreme Court practice is that there are multiple sets of procedural rules: the CPLR, the Uniform Rules for New York State Trial Courts, and possibly the judges' individual rules, which in Monroe County may or may not be on the Inter-

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net. In my recent experience practicing in New York, this system gives rise to some confusion.

That brings me to the fact that New York does not have statewide e-filing. Believe it or not, Florida, the state that brought you "hanging chads" and many strange man vs. alligator stories, has had mandatory statewide e-filing and e-service since 2013.

Another characteristic of New York practice is that there is no mechanism allowing for the depositions of corporate representatives comparable to Federal Rule of Civil Procedure 30(b)(6) (and similar rules in other states). Under FRCP 30(b)(6), if a party notices the deposition of a corporation or other entity and designates particular matters for examination, the named entity must designate one or more persons to testify as to the matters designated. A corporation has the responsibility to produce a Rule 30(b)(6) witness who has educated himself with respect to the designated matters. There is no such mechanism under the New York Rules, making it considerably more difficult to elicit testimony and information from corporations and similar entities.

The rule with respect to interrogatories in negligence actions also seems to restrict the discovery process. Under CPLR 3130, in an action seeking to recover damages for personal injury, injury to property, or wrongful death predicated on negligence, a party may not serve interrogatories on and conduct a deposition of the same party without leave of court.

In practice, this precludes parties from serving interrogatories in negligence actions, in that doing so would bar a party's deposition. The rules do permit the parties to serve a request for a verified bill of particulars under CPLR 3043, another unique discovery mechanism in New York which permits a request for limited information in negligence actions. Under this system, the parties to a negligence action are somewhat constrained as to the information they are able to obtain prior to taking the parties' depositions.

There are some rules that New Yorkers should be proud of and others which may benefit from a second look. In the area of e-filing and e-service, I remain optimistic and have a strong feeling that New York will ultimately e-volve.

Stacey Trien is an associate in the Rochester law firm of Leclair Korona Giordano Cole LLP, where she concentrates her practice in civil litigation with an emphasis on business/commercial, construction and personal injury matters.