

# Commercial and Federal Litigation Section Newsletter



A publication of the Commercial and Federal Litigation Section  
of the New York State Bar Association

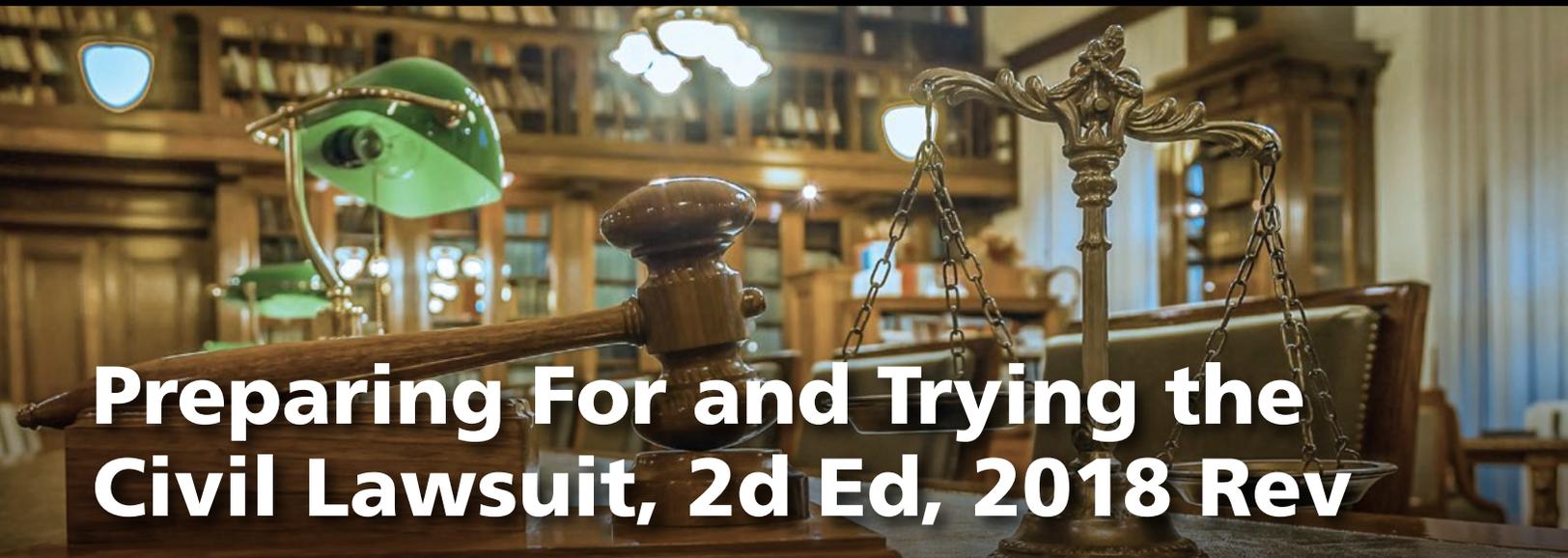


## Inside

- Annual Meeting 2020
- 2019 Scheindlin Award Winners
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*... and more*

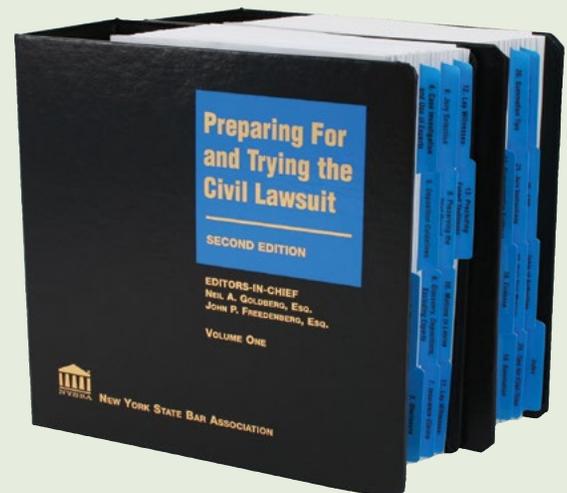
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# Message from the Chair

I was a commercial litigator in private practice for 29 years. I left my firm to take my current position as the Chief of the Litigation and Appeals Bureau in the Office of the Nassau County Attorney about two years ago, while I was vice chair of this Section. For those of you who do not know, the Nassau County Attorney, as distinguished from the District Attorney, represents the county on all civil matters. For me this was a return home as my first position as an attorney was in the Nassau County Attorney's Office. Although I am, once again, a government lawyer, I am still a commercial litigator; my personal caseload is replete with commercial disputes and regulatory challenges from commercial entities. Working for the government again, and being the supervisor of young attorneys, has caused me to reflect on how well my first stint as a Deputy County Attorney prepared me to be a litigation attorney and gave me the flexibility and knowledge base that enabled me to handle the vast variety of commercial cases that came my way over the years while I was in private practice.

Very early on in my tenure I was entrusted with the responsibility of handling cases on my own, with guidance from my bureau chiefs, who were my first mentors. However, their guidance was behind the scenes. When I was in court, I was generally there by myself. I was assigned property valuation cases, construction litigation, environmental litigation, and a wide variety of other disputes arising from the county's role as either a regulator of business or a party to a commercial agreement. In the course of my county career I took and defended countless depositions, tried cases, and drafted and argued motions in state and federal court, all at a relatively tender age. I developed the confidence and skills to be a litigator, and the type of cases I was assigned were so varied I was always learning new and interesting areas of the law.

In the course of representing the county, my adversaries were often from local firms that handled commercial litigation. I made many contacts in the legal community. Through my work for the county I met my future employer and joined the law firm where I was happily employed as a litigator representing both private and public entity clients for many years. During my time in private practice I frequently litigated against local municipalities, the state, and even the federal government,



**Laurel Kretzing**

using the skill set and knowledge that I had gained during my career as a government lawyer to the benefit of my commercial clients.

Now that I have returned to the county attorney's office, I find myself once again dealing with the amazing array of legal issues which march through my door on a daily basis. Like all local governments, the county interacts with the business community on a day-to-day basis. The county is both a regulator and a participant in commerce. In doing so, the county becomes involved in disputes which

range from breach of contract actions before the Commercial Division to disputes involving constitutional challenges to regulations before both the state and federal courts. These are important issues that keep me busy for every minute of my working day, but I find the knowledge and experience I gained during my years of commercial litigator enhance my ability to represent the government and provide real world perspective and guidance to the young attorneys I now supervise.

Which brings me to my point. Why not consider government employment? While the compensation might not be on par with the private sector, working for the public sector has other benefits. For those who have many years of experience, government needs your wisdom and expertise. On the other hand, if you are young and inexperienced and would like to try a case before you are old and still inexperienced, representing the government is the right place for you. As a young attorney working for the government, you receive invaluable trial experience and hands-on involvement in complex issues that really matter. You have an opportunity to truly grow as a lawyer, and your government work provides you with skills and contacts that enhance your career, if, or when you do enter, or re-enter, private practice. Just a thought.

Regards,

**Laurel Kretzing**

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# The Annual Meeting MCLE Review

By Moshe O. Boroosan

On January 29, 2020, as part of the NYSBA's Annual Meeting and Expo, the Commercial and Federal Litigation Section hosted a special, two-part CLE program.

## Emerging Technologies in Litigation

The first program, *Emerging Technologies in Litigation*, explored the impact of new technologies on the litigation and adjudication process. The panelists included New York State Supreme Court Justice Melissa A. Crane, Professor Maura R. Grossman of the University of Waterloo, Hon. Katherine B. Forrest (Ret.) of Cravath Swain & Moore LLP, and emerging technology attorney Gail L. Gottehrer. The panel was moderated by Kan M. Nawaday of Venable LLP.

The panel opened the event with a deep dive into the COMPAS (short for Correctional Offended Management Profiling for Alternative Sanctions) technology, an AI-driven algorithm used by courts and corrections departments nationwide to determine a criminal defendant's "risk," including the likelihood of recidivism or even whether the defendant will appear for the next court date. The marks generated by the COMPAS algorithm inform critical decisions about bail, sentencing, parole, and more. COMPAS has been adopted in New York State.

The panel was extremely critical of the use of COMPAS. Chief among the panel's concerns was the complete lack of transparency into the factors used by COMPAS to generate the marks. Ms. Gottehrer explained that COMPAS is developed and owned by a privately held company, the technology is proprietary or "black boxed," and government agencies have little to no visibility into the algorithmic standards for risk assessment. Although states have conducted validation studies that yielded encouraging results, those studies were inherently limited. The validation conducted by New York State, for instance, yielded a 70% accuracy rate—but did not account for race. By contrast, a 2016 *Pro Publica* study showed that that 70% figure was only accurate with respect to white defendants. For African American criminal defendants, the accuracy rate plummeted to a startling 40%.

There is also no way to measure the role that current and historic bias plays in generating the COMPAS score. As Judge Forest observed, data sets could be impacted by



Moshe O. Boroosan

problematic policing policies, and its reliance on national data sets without accounting for the social and economic differences of various demographics across the country.

The panel emphasized that these concerns are not just academic. In *State v. Loomis*, 881 N.W.2d 749 (Wis. 2016), the Wisconsin Supreme Court invoked New York's flawed validation study to justify the continued use of COMPAS, so long as the AI risk scores were not determinative of sentencing. As a practical matter, however, COMPAS continues to play a major role in criminal justice risk assessment in the states that have adopted it. The panel concluded that processes and

procedures must be established that allow for a meaningful examination of AI tools like COMPAS in criminal justice risk assessment.

The discussion then turned to the use of AI in judicial decisions. Attorneys are increasingly relying on AI-driven judge analytics to guide their litigation strategy, including the popular *Lex Machina* software, which is marketed as a tool for litigators to predict how judges will rule. The panelists generally agreed that these tools could be useful in limited, rule-based scenarios. Professor Grossman also argued that AI analytics can offer insight into how a judge has ruled in the past, which can be helpful in identifying past biases. At the same time, the panel cautioned that there is a limit on how effective these predictions can be.

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MOSHE O. BOROOSAN practices consumer finance litigation at the Brooklyn-based Cohen & Mizrahi LLP. He is a 2015 graduate of St. John's University School of Law and an alumnus of the *St. John's Law Review*. Moshe has been recognized as a "Rising Star" among class action attorneys in the metro New York area.

Today's AI technology extends far beyond analytics. As Judge Forrest explained, China recently rolled out a full-fledged internet court system with holographic judges that have litigated thousands of cases to verdict. Judge Forrest argued, and the panel agreed, that AI judges may be effective in "rule-heavy" situations (Judge Crane suggested using AI judges to handle default motions), but that concerns about justice and fairness should be front and center.

The panel then shifted gears to emerging litigation issues created by new technologies. As deepfakes (AI-generated fake videos) become more prevalent—Judge Forest called them an "evidentiary nightmare—it is becoming more difficult to authenticate social media evidence in court. The use of blockchain technology to track the source of digital files provides the ideal solution. In fact, Vermont already passed a law that makes blockchain data presumptively admissible.

The imminence of fully autonomous vehicles will also spawn a new wave of litigation regarding liability, the panel said. The technology used in the most advanced self-driving vehicles in production today (including Teslas) are classified as Level II/Partial Driving Automation—the third lowest form of automation conceptualized by the Society of Automotive Engineers. That means that the vehicle can control both steering and accelerating, but a human operator can take control of the car at any time. The next level of autonomous vehicles (Level III/Conditional Driving Automation) incorporates AI-driven environmental detection capabilities that enable the vehicles to make informed decisions without human input.

The panel urged attendees to consider who should be liable if a Level II vehicle is operated by a drunk driver. What if a drunk driver climbs into a Level III vehicle? What if a Level III vehicle makes a decision that harms an innocent pedestrian? Who should be liable? Though this technology is right around the corner, the answers remain elusive.

All said, the *Emerging Technologies* panel served as important reminder that the practice of law is anything but stagnant. The changes brought about by the Fourth Industrial Revolution have and undoubtedly will continue to impact the litigation and adjudication processes. New technologies will create new challenges, and will create exciting new opportunities for the federal and commercial bar to define new solutions. Attendees left the CLE with both an awareness and an appreciation of the possibilities brought about by emerging technologies.

### **Budding Cannabis & CBD Litigation—Are You Ready for the Green Wave Heading Toward New York?**

The second panel discussion was entitled *Budding Cannabis and CBD Litigation—Are You Ready for the Green Wave Heading Towards New York?* The panelists were James M. Landau of McCarthy Fingar LLP, Elinor C. Sutton of Quinn Emmanuel Urquhart & Sullivan LLP, and Sara E. Payne, General Counsel of Jushi Holdings Inc.





## Overview of the Cannabis Industry

Ms. Payne kicked off the event with an overview of the cannabis industry from the vantage point of a cannabis law specialist. Today's cannabis industry is framed by the unusual conflict between state and federal law. Federal law still classifies marijuana as a Schedule I narcotic, and prohibits the possession, distribution, sale, or use of marijuana. At the same time, 34 states (including New York State) have comprehensive medical marijuana programs. Eleven states have legalized recreational marijuana for adults. And the cannabis industry is projected to reach \$17 billion in 2020.

In 2013, the Obama Administration issued guidance (the "Cole Memo") restricting federal enforcement of the federal marijuana prohibition when individuals and entities act in accordance with state regulation of medical marijuana. Congress subsequently enacted a spending measure (the "Rohrbacher Amendment") that prohibits the DOJ from using any of the funds appropriated by Congress to prevent states from implementing medical marijuana programs. Although the Cole Memo was officially rescinded by then-Attorney General Jeff Sessions in January 2018, the federal government has continued its hands-off approach to marijuana enforcement in jurisdictions that have enacted laws legalizing marijuana in some form.

This conflict has far reaching legal implications for the cannabis industry. For most industry participants, the panel explained, the question is how to legally engage in the actual production of marijuana. "Plant touching" clients—those involved in the production of medical marijuana, medical hemp, and legal recreational marijuana—seek the counsel of cannabis practitioners to navigate the complex and layered web of regulations governing their work. "Non-plant touching" clients, such as financial institutions and real estate professionals, provide the ancillary services to support cannabis operations. These clients, too, require legal advice to structure their operations and compliance.

The balance of cannabis law practice is devoted to counseling clients impacted by the legalization of marijuana. Clients include municipalities that are trying to

implement appropriate zoning rules, universities wrestling with allowing medical marijuana on campus, and federal contractors seeking to comply with drug-free worksites.

## Ethical Considerations of Cannabis Practice

Unsurprisingly, the complex dynamic creates myriad ethical issues for attorneys representing cannabis clients. Although lawyers may ethically assist cannabis clients in conduct designed to comply with New York State law, they must also warn clients of the limitations imposed by federal law. Moreover, given the federal prohibition on marijuana, attorneys may not provide business advice to cannabis clients.

## Marijuana in the Courtroom

Naturally, marijuana's societal ubiquity has required commercial litigators to confront marijuana-related issues in numerous practice areas. The panel observed, for instance, that legal rights and protections provided by federal law are not available to cannabis industry participants. Thus, federal bankruptcy is generally not available to cannabis businesses, and intellectual property protection for cannabis-related marks is largely elusive.

The panel also addressed the uptick in cannabis related employment litigation. These cases involve, among other things, whether an employee could be terminated for lawfully using cannabis, and whether cannabis industry employers must comply with federal wage and hour litigation. The discoverability of cannabis dispensary records has also emerged as an important issue: defendants in personal injury actions have started to demand the production of medical marijuana dispensary records. Finally, courts have shown an increasing willingness to enforce a wide range of cannabis related agreements.

## Conclusion

*Budding Cannabis* was a remarkably informative and entertaining CLE, and the panelists' expertise and passion for the subject were evident. As states move toward the legalization of marijuana, commercial litigators must be prepared to confront these issues. Those fortunate to attend the *Budding Cannabis* program certainly will be.

# The 2019 Scheindlin Event

By Laurel R. Kretzing

On November 13, 2019, ComFed once again gathered in the Ceremonial Courtroom at 500 Pearl Street, home to the United States District Court for the Southern District of New York, to honor the female litigators who are at the top of the profession and the young women litigators following in their footsteps. In what has been dubbed the “Night of the Sharons,” the Section presented the fourth annual Shira A. Scheindlin Award for Excellence in the Courtroom to Sharon L. Nelles, managing partner of Sullivan & Cromwell LLP’s Litigation Group, and Sharon Porcellio, member of Bond Schoeneck & King, PLLC, and a former Chair of this Section. The Section also presented the Judith S. Kaye Scholarship to five up-and-coming young female litigators: Erica Barrow of Baker & Hostetler LLP; Joanna Chen and Gabriela Wolfe, both from Phillips Lytle LLP; Melissa Meyler of Bond Schoeneck & King, PLLC; and Sarah Washington of Goldberg Segalla.

As always this was a very moving and inspirational evening. The Hon. Laura Taylor Swain, pinch hitting for Chief Judge Colleen McMahon, opened the evening with gracious and thoughtful welcoming remarks. It was an honor to have Judge Swain, a trailblazer in her own right, as our host for the evening.

The Hon. Shira Scheindlin, for whom this award is named, was on hand to congratulate both winners. Judge Scheindlin noted that she had known Sharon Porcellio for years, having worked with her on many Section events as well as the Section’s Report *If Not Now When?*, the study of women lawyers in the courtroom. Judge Scheindlin noted that Ms. Porcellio worked tirelessly on the report itself and after its release in speaking on the subject to promote the message of the report and solutions to increase female participation in the courtroom.

*Below: Sharon Porcellio, one of the Scheindlin Award winners, and Judge Erin Peradotto. Next page: Shira Scheindlin with Kaye and Scheindlin scholarship winners (l-r): Gabriela Wolfe, Sarah Washington, Melissa Meyler, Sharon Porcellio, Shira Scheindlin, Sharon Nelles, Erica Barrow, and Joanna Chen. For more photos, see page 20.*





Judge Scheindlin went on to note that Sharon Nelles, as litigation managing partner at Sullivan & Cromwell, is a role model to young women in the profession, demonstrating that a woman can rise to the top of the profession based on her legal and personal skills. Judge Scheindlin also noted Ms. Nelles' public engagement in helping to ensure that women lawyers have equal opportunities and status on the litigation side of the practice of law.

In addition to congratulating the Scheindlin Award winners, Judge Scheindlin spoke out against the lack of civility in the public discourse:

I was stunned recently when a United States Senator said, referring to majority leader Nancy Pelosi—"it must suck to be so dumb!" ... but we have become so accustomed to this kind of conduct that we are no longer shocked or shaken. Our President has accused a congressman of committing treason—a crime punishable by death—for doing his job as a Committee Chair. He has also routinely made personal attacks on judges when he dislikes their rulings. You all recall remarks like "the so-called judge" or the "Mexican judge" or the "Obama judge." And perhaps one of the worst offenses is the belittling of adversaries based on their appearance—Little Mike; Sleepy Joe; or how can she look in the mirror when she is so ugly!

This is not the way we behave in a civil society and certainly not in the practice of law. We are trained as lawyers to begin an argument by saying "I respectfully disagree." That is the right way to con-

duct ourselves and it is the way we want to present ourselves to our children and grandchildren.

Following Judge Scheindlin's timely remarks, the Keynote Speaker, NYSBA President Henry (Hank) Greenberg, provided us with some historical perspective on the evening's events and forward-looking thoughts for the legal profession.

Among his many other achievements, our NYSBA President was a law clerk to Judith Kaye and is a co-editor of *Judith S. Kaye in Her Own Words*, Judith Kaye's memoir. It was important to be brought back to what was important to Judge Kaye and to understand what this award really means; President Greenberg's remarks were illuminating. Judge Kaye was a woman of achievement who never forgot the importance of advancing the rights of woman in the profession.

President Greenberg reminded us that women won the right to vote in New York in November of 1917 and that almost three years later, August 18, 2020, the 19th Amendment to the United States Constitution was ratified by the states. He also emphasized the fact that we, as lawyers, are instrumental in fighting for human rights and civil liberties but remain one of the least diverse professions.

We have come a long way, but our journey continues. As President Greenberg said, "the awards and scholarships we present tonight . . . nurture others, reward and encourage those who nurture others . . . [and] it is incumbent on us to make a proactive commitment to diversity." This event plays an important part in demonstrating ComFed's commitment to diversifying the commercial litigation bar.

# CLE Roadshow: Technology in the Courtroom

By Hamutal G. Lieberman

On October 22, 2019, the Commercial and Federal Litigation Section presented two back-to-back CLE programs showcasing the technology that has recently been integrated in various courtrooms throughout New York State. The presenters included ComFed members Mark A. Berman, Partner at Ganfer Shore Leeds & Zauderer LLP, former Chair of the Section and Chair of NYSBA's Committee on Technology and the Legal Profession; Matthew D. Donovan, Partner at Farrell Fritz, P.C.; Hamutal G. Lieberman, Senior Associate of Zumpano Patricios & Popok PLLC; and Joam Alisme, Associate of Ganfer Shore Leeds & Zauderer LLP.

The first CLE program took place in the courtroom of Deputy Administrative Judge, Civil Term, 11th Judicial District, and Queens County Commercial Division Presiding Justice Marguerite A. Grays. The second CLE program was at the courtroom of New York County Commercial Division Justice Saliann Scarpulla and was sponsored by the Second Circuit Judicial Council and the New York State-Federal Judicial Council. This second program shows the strength of the Section as it had previously presented before this august group. ComFed previously presented this program two other times.

Each courtroom is designed slightly differently, so that the technology can be customized to fit the configuration of each room to be the most efficient and convenient for the attorneys, the jury, and the judge. Following the presentation portion of the CLE program, attendees were given the chance to ask the presenters questions and to engage in a "hands on" workshop and try out the technology for themselves.

These "smart courtrooms" are outfitted with an 86-inch smart board, a document camera/projector, a podium with a USB/HDMI port, monitors on the counsel tables, the witness stand, and the bench, and what is referred to as a "kiosk" used to speed up the check-in process during court appearances. Depending on the courtroom, jurors might have a fixed monitor in front of them or they may be given a tablet to review evidence. A deep dive into the technology and how to use it is set forth below.

## Smart Board

The 86-inch smart board acts as the control panel of the entire system. The smart board can be utilized in a variety of ways depending on the goal of the attorney's presentation. It can act as a large projector connected to a laptop or tablet, or it can operate entirely independently

using information stored on a USB drive connected to it and brought by the attorney. If utilized as a projector, showing a video, photograph, chart, or other piece of paper or electronic evidence to the judge or jury, an enlarged screen is much more effective than proffering up a paper version of the exhibit. You can also hyperlink to materials referred to in the document being presented, such as a deposition transcript, video, 3D picture, or other evidence. If utilized independently, the smart board can be navigated as a touch screen or by using a stylus. Documents, photos, video, and charts can be manipulated through features such as highlighting, cut and paste, drawing, and zooming in and out. After manipulating the document, you have the option to save it to be submitted to the judge and/or jury, or for your own records. The smart board can also be used as an electronic marker board and has a variety of different colored electronic pens/markers that can be used to draw or highlight legal points. Finally, the smart board has the capability to connect to a Wi-Fi network allowing the attorneys to link documents to the online docket or other websites.

## USB/HDMI Equipped Podium

A USB/HDMI equipped podium allows the attorney to bring different types of devices to connect to the smart board. As discussed above, the attorney wishing to utilize the smart board as a projector may opt to display a document from his or her laptop or tablet. Tablets with drawing capabilities may offer another option for those attorneys who feel more comfortable manipulating documents or audio/video files while holding the tablet. A tablet also gives an attorney more mobility while presenting to the judge or jury compared to using a laptop from a stationary position.

## Monitors for Attorneys, Jury Box, Witness Stand, the Public and Judge

Smaller monitors are positioned throughout the courtroom on the counsel tables, on the witness stand, in the jury box, and on the judge's bench. Depending on the courtroom, the monitor on the witness stand will allow for the witness to be able to annotate documents. Also,

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monitors may be located throughout the courtroom to assist the public. This allows other parties, witnesses, the jury, the public, and the judge to be able to easily follow the displayed documents.

### Document Camera

The document camera, or “ELMO,” looks like an old-school overhead projector, but it is hooked up to the smart board. Some attorneys may elect to use this technology to display documents that are too old or delicate to be scanned. Another functional use for the “document” camera is to present unique pieces of evidence, such as an actual cell phone, a piece of machinery, a gun, or a pharmaceutical pill. Once the item is projected onto the smart board, the attorney can take an image of the exhibit and manipulate it using the same highlighting and drawing tools discussed above.

### Kiosk

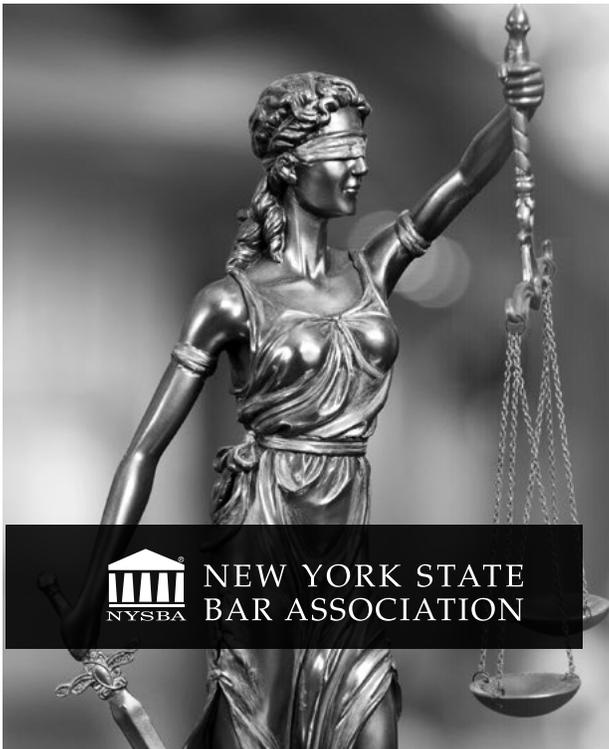
The kiosk, placed at the entrance of the courtroom, is used to check in to the courtroom, eliminating the wait to speak with the part clerk upon arrival. The attorney simply enters the index number of the case he or she is appearing on, and the appropriate conference form is printed with the caption information prepopulated so that it can be easily completed. It contains a barcode scanner to facilitate uploading to the Electronic Case Files (ECF) system.

### Skype Videoconferencing

In an effort to reduce inconvenience and expense, some courts may use this technology to hold court conferences and/or to conduct witness examinations remotely. This is done by utilizing the Skype videoconferencing application on the smart board. If opposing counsel is located out-of-state or a witness is particularly frail or ill and traveling to the courthouse may be a burden, the court might consider permitting use of Skype.

### Hearing, Visually and Physically Impaired Accommodations

The courtroom is outfitted with assistive listening technology for hearing-impaired witnesses and jurors. This entails a special headset that is synced with the audio system installed in the courtroom. In addition, the smart board has a program that reads any selected text through a computerized voice that can be utilized to assist a visually impaired person. Depending on the courtroom, the jury box has been modified for wheelchair accessibility.



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## COMMITTEE ON PROFESSIONAL ETHICS ETHICS OPINIONS

The Committee on Professional Ethics has issued over 1100 opinions since 1964. It provides opinions to attorneys concerning questions of an attorney's own proposed ethical conduct under the New York Rules of Professional Conduct. It cannot provide opinions concerning conduct that has already taken place or the conduct of another attorney. When an inquiry is submitted, it will be researched to determine whether an existing opinion is responsive to the question. If no opinions exist, the inquiry will be forwarded to the committee for preparation of an opinion.

Inquiries submitted to the committee are confidential, and no identifying information is included in the opinion.

If you have a question about your own proposed conduct, send your inquiry to the committee by **email to [ethics@nysba.org](mailto:ethics@nysba.org)**; by **fax to (518) 487-5564**; or by **mail to One Elk Street, Albany, NY 12207**. Please include in all inquiries your name, mailing address, telephone and email address.

**To view Ethics Opinions, visit: [www.nysba.org/Ethics/](http://www.nysba.org/Ethics/)**

# An Interview with Justice Andrea Masley

By Ashley Alenick

Justice Andrea Masley started her legal career as a litigation associate at Dechert Price & Rhoads following her graduation from Fordham Law School. After working for several years at the City Bar Association as its Diversity Counsel, Justice Masley joined the New York State Supreme Court, New York County, in 1998. She first served as the Principal Court Attorney for Judge Louise Gans, where she had the opportunity to work on all types of issues arising in the caseload of between 500-800 proceedings. Beginning in 2001, Justice Masley was Justice Charles Edward Ramos' Principal Law Clerk in the Commercial Division.

In 2007, Justice Masley was elected to a 10-year term in the New York City Civil Court, which included an assignment to the Family Court from 2008-2010. She was elected to the New York State Supreme Court in 2016 and assigned to the Commercial Division in 2017, a position she has held since. I had the pleasure of interviewing Justice Masley recently.

**Q: I understand that you have spent quite a bit of your professional career in the New York Court System. How have your prior experiences influenced you as a Judge?**

Being a law clerk for ten years, and for two different judges, was incredibly valuable experience. Working so closely with judges gave Justice Masley firsthand insight, through which she learned the different ways and approaches judges take to decide disputes. She said she uses this knowledge every day in her work.



*Justice Andrea Masley*

**Q: As a judge, you have presided over quite a range of cases. Are there any that are particularly memorable to you?**

Justice Masley indicated that she did not even think about becoming a judge until she clerked for Judge Gans. While working in that job, she realized “what a difference you could make in a person’s life.” That realization came through two cases that really moved her—both of which involved parties being evicted from their homes. Participating in the resolution of those cases encouraged Justice Masley to become a judge so she could “intervene and do what the law allows” to assist people in need.

To this day, Justice Masley finds all of her cases fascinating. She explained that, as of the date of this interview, she had a caseload of approximately 350 cases, 247 of which had motions pending. As of a week before this interview, 89 of those motions had been

argued and submitted, and the Court was working on decisions (which are, in almost all instances, made on a first come, first served basis); the rest of the motions were in various stages of briefing. Justice Masley indicated that she strives to do as much work as possible off the bench in order to minimize the delays in each case and to keep the cases mov-

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**ASHLEY ALENICK is a member of the Publications Committee of the Commercial and Federal Litigation Section. She is a former law clerk to the Honorable David B. Katz, P.J.E.P. in the Essex County, New Jersey Family Court, and is assistant legal counsel at Vodafone Americas.**

ing forward towards resolution. Through this process, she said she is able to “learn a little bit from every case.”

**Q: I understand that there was a time when you taught a course in Remedies at Fordham Law School (2005). If you could create a course for lawyers appearing in your courtroom, what would the syllabus look like?**

Justice Masley explained that she started teaching Remedies because she believes the subject is “essential” for law students, and even more so for practicing attorneys, and she was “heartbroken” that Fordham was eliminating the course as a requirement. That being said, in answer to the question, Justice Masley indicated that she would create three different meaningful CLE courses for New York practitioners:

First, New York Practice. The reason for this, Justice Masley stated, is because lawyers are often so wrapped up in what is currently happening in their cases that they do not always think through to the end (i.e. how will I prove the damages I am seeking?). Justice Masley finds this linear and forward thinking to be so important that she and two of her law clerks are currently writing a chapter for Robert L. Haig’s *Commercial Litigation in New York* on specific performance. Second, unsurprisingly, is Remedies. Finally, Justice Masley strongly believes that lawyers should take a course on trial skills before trying a case. She indicated that she often sees lawyers get frustrated at trial because they are not as “nimble as they need to be on evidentiary issues.” She believes that trial skills must constantly be honed and improved.

**Q: What advice would you offer to those aspiring to a career in the judiciary?**

Justice Masley enthusiastically said that, for those who know they wish to aspire to a career in the judiciary, there is no better training than to work for a Judge. That said, she greatly appreciates her staff, specifically noting how “very lucky” she is to have the assistance of a Commercial Division Law Clerk, a third law clerk assigned to her through a program<sup>1</sup> offered under the auspices of the New York State Supreme Court, New York County. Justice Masley believes that the clerks in this one-year program (which can be extended to two years) have a tremendous opportunity to learn about the Commercial Division, knowledge that is invaluable whether they want to go into private commercial practice or into the judiciary thereafter. Beyond working for a judge, Justice Masley advised that anyone interested in being a part of the judiciary should spend some time reading materials and attending trainings on how to become a Judge, as the process is extremely lengthy and complicated, with many different ways to be elected, appointed, etc.



**Ashley Alenick**

#### Endnote

1. Every Commercial Division justice (as of the date of the interview eight such justices are on the bench) hires individually; anyone interested can write to the justices about becoming a clerk.

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# Mandatory Mediation Pilot Program in New York County

By Kevin Egan

On May 8, 2017, the New York County Supreme Court, Civil Branch, kicked off a pilot project for the automatic referral of “certain commercial cases” to mandatory mediation in the Commercial Division’s Alternative Dispute Resolution Program. While the Division’s ADR Program has been in existence since the mid-1990s, this pilot project marked a radical departure, not only from the traditional case-by-case direct referrals from Division Justices, but also from the Division’s 1-in-5 pilot project that ran from August 2014 until January 2016. The lessons derived from the 1-in-5 pilot contributed to the design of this pilot.<sup>1</sup>

Originally, the “certain commercial cases” designated in the enabling administrative order, signed by then Administrative Judge Peter H. Moulton, were defined as non-Division commercial cases in which the filer of the Request for Judicial Intervention (RJI) *identified* the case as a “contract” matter and *requested* a preliminary conference. This case profile was selected after studying two years of intake statistics. Non-Division cases were targeted because the smaller amounts in controversy often would be subsumed by litigation discovery costs. The preliminary conference request in the RJI would assure that no motions, especially dispositive motions, would be pending during the mediation process. And finally, the designation of “contract” matters on the RJI would result in a pool of approximately 400 cases per year.

The administrative order established a centralized Preliminary Conference Part for all cases referred to the project. Upon the filing of the RJI, the cases are assigned to an IAS Justice, but scheduled for an appearance in the Preliminary Conference Part.<sup>2</sup> Although the conference may address issues such as adjournments and requests for exemption, the main focus of the conference is the crafting of a consent order providing for discovery tailored to aid in the mediation process. At this early stage in the action, discovery largely involves document exchange. Aside from enhancing the efficacy of the mediation, this early discovery conference may produce long-range benefits. As panel mediator Alida Camp, points out, the parties’ “willingness to engage in discovery to maximize the mediation’s productivity is a good start to the mediation process itself.”

The discovery time limits tend to be strict, perhaps six weeks for simultaneous document exchange. The mediator is assigned during this discovery phase and will schedule the mediation to occur in the 30-day period between the end of mediation-related discovery and the

compliance conference scheduled before the assigned Justice.

Most of the existing Commercial Division ADR rules apply to the pilot program. The main difference, of course, is the early automatic referral versus the direct referral at any stage of the case by the assigned Justice in the Commercial Division program. The two other differences are: (1) the method of selecting the mediator; and (2) the compensation rules. In the pilot program, the parties do not have the option of selecting their own mediator or choosing from a list of three mediators provided by the ADR coordinator, two options that are available to parties in Commercial Division cases. Instead, the coordinator assigns a mediator from the panel, and to the extent possible selects a mediator with the same practice background as the issues presented in the case. As for compensation, mediators in the pilot cases may not deviate from the basic structure of providing prep time and three hours of mediation without compensation and a \$400 per hour cap thereafter.

Although many of the cases in this program involve amounts in controversy that are smaller—often significantly smaller—than in Commercial Division cases, the mediator’s task is unchanged.

“From a mediator’s point of view,” notes Mark Alcott, a long-time member of the Commercial Division ADR Panel, “the new breadth of the caseload does not significantly change the task at hand. The challenge is the same, and one is called upon to use the same skills. Most importantly, the satisfaction of helping the parties to resolve their differences remains the same.”

Other long-time panel members, accustomed to the types of cases referred from the Commercial Division, expressly welcome the opportunity to mediate pilot cases.

Marc Isserles, who is also a member of JAMS, remarks that the pilot program “gives parties an early opportunity to fully explore the potential benefits of settlement with the aid of an experienced mediator.”

Lynne Uniman observes that referring these smaller cases to mediation “before they have spent a great deal and before their positions harden, provides a challenge yet gives the mediator the flexibility that is often needed to assist in a consensual resolution.”

The statistics from the program have been promising. In the first year (May 8, 2017, through May 7, 2018), a

total of 154 cases completed mediation. Of these cases, 85 settled, a settlement rate of 55%. For calendar year 2018, a total of 188 cases were referred to mediation. Preliminary statistics show that 106 of these cases have completed mediation, with 61 settling in mediation for a settlement rate of 58%. Of the remaining 82 cases, many are still actively in mediation while several others were removed from the program for various reasons (e.g., bankruptcy filings, withdrawal of defense counsel, or failure of party to schedule a mediation session). Significantly, 21 of these 82 cases settled prior to the assignment of a mediator.

Finally, in early 2019, two events highlighted the early success of the program. First, on January 22, 2019, Hon. Deborah A. Kaplan, Administrative Judge for Civil Matters in the First Judicial District, signed an administrative order expanding the pilot program to include a wider variety of non-Division commercial actions. In light of this expansion, program administrators have added a second weekly preliminary conference calendar. Second, on February 26, 2019, Chief Judge Janet DiFiore, in her State of the Judiciary address, stated, "our past experience with court-sponsored ADR programs has been positive, featuring high settlement rates and strong user satisfaction levels among participating litigants and lawyers." Prominently mentioned in this section of the address was the New York County pilot program.

**Kevin Egan, former law clerk to Commercial Division Justice Beatrice Shainswit, is now Senior Settlement Coordinator in Supreme Court, New York County. He works with the Commercial Division ADR Panel and handles the preliminary conference calendar for the Mandatory Mediation Pilot Project.**

## Endnotes

1. Every fifth case, in the order in which the Request for Judicial Intervention (RJI) was filed, was referred to the Division's pilot program. Strict adherence to this procedure resulted in referrals of inappropriate cases, such as the RJI accompanying a motion to enter a default judgment against the sole defendant in the case, or the RJI accompanying a request to obtain the deposition of a New York witness in a case pending in a foreign jurisdiction. The pilot rules also allowed counsel 120 days from the filing of the RJI either to engage the services of a mediator or request the ADR coordinator to assign a mediator. In a significant number of cases, counsel did neither.
2. Initially, a Supreme Court Justice was assigned to preside in the Part. A subsequent administrative order provided that a staff attorney could be assigned to handle the conferences.

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# ComFed Welcomes Justice Odorisi

By Mark A. Berman

ComFed came to Rochester to welcome New York State's newest Commercial Division Justice, J. Scott Odorisi. Continuing ComFed's mission of organizing events throughout the state, on February 3, 2020, through the work of Mark A. Berman and jointly sponsored with and organized by the Monroe County Bar Association (MCBA), a "meet and greet" took place with the CD's newest justice for drinks and appetizers at a local restaurant, Trata. It was so successful that attendance had to be closed out and approximately 50 practitioners attended. This is a prime example of NYSBA and a local bar association working together to promote collegiality among the bench and bar and seeking to strengthen both bars through developing events that meet the needs of our membership. It was the great relationship that Kevin Ryan, MCBA's Executive Director, has with NYSBA that made possible this unusual joint event. A similar event is planned for April 2, 2020, in Kings County to meet with Brooklyn's newest Commercial Division Justice, Larry D. Martin.

Carolyn Nussbaum, the MCBA President, welcomed all attendees, and NYSBA was proudly represented by T. Andrew Brown, the President-Elect Designee of the Association, who spoke on the importance of having events of this type. Then Justice Craig A. Doron, the Chief Administrative Judge of the Seventh Judicial District, spoke to the practitioners about the strength of Rochester's commercial bar. Mark A. Berman then introduced Justice Odorisi to the attendees, who spoke about his judicial approach to cases and expressed his great pleasure with being appointed to the Commercial Division bench. Justice Odorisi made it clear that the night was not about learning his individual practice rules, which would be addressed at a later date, but about getting to know each other and providing an opportunity for Rochester's commercial practitioners to mingle.



*Mark A. Berman*

**ComFed Welcomes Justice Odorisi:  
Rochester, NY, February 2020**



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***Above: I-r Chair-Elect Jonathan Fellows, Awardee Sharon Porcellio, Hon. Shira A. Scheindlin (Ret.), Awardee Sharon Nelles, and Chair Laurel R. Kretzing***

***Right: Shira Scheindlin with past awardee and presenter Rita Glavin, Awardee Sharon Nelles, and the first Scheindlin Awardee, Carrie Cohen***

***Below: Henry (Hank) Greenberg, NYSBA President; the Hon. Erin Peradotto, Appellate Division, Third Department, and Chair-Elect Jonathan Fellows.***



# The Life of a Trial: Strategies for Putting on a Successful Trial

By Mahnoor Misbah

On November 14 and 15, 2019, the Commercial and Federal Litigation Section hosted the 2019 Commercial Litigation Academy. The event consisted of several panel discussions aimed at providing helpful knowledge and insight into commercial and federal litigation matters. One of the panels, entitled *Trials (Including Evidence Rules in Discussion)*, was a discussion on how to effectively prepare for and put on a trial. Panelists included Hon. Shirley Kornreich, mediator and arbitrator, JAMS; Rahul Mukhi, partner at Cleary Gottlieb Steen & Hamilton LLP and former Assistant U.S. Attorney for the Southern District of New York; and David R. Marriot, partner at Cravath, Swaine & Moore LLP. The panel was moderated by Lauren E. Aguiar from Skadden, Arps, Slate, Meagher & Flom LLP.



**Mahnoor Misbah**

The panelists started the discussion by addressing how to decide whether to go to trial. Judge Kornreich suggested that parties should not go to trial unless there is an emotional piece to the case. The panelists then agreed that once you have determined that you will go to trial, the first step is to determine the legal aspects of your case, which means looking at the elements of the claim. At this stage, your charge book becomes very important.

The panel discussion then shifted to opening statements. All of the panelists agreed that the opening is your chance to tell your version of the story. Mr. Marriot pointed out that even though you cannot argue in opening, you can tell a story about what happened from your perspective. He also stressed that parties should use the opening to share what their witnesses will say when they get on the stand. Mr. Mukhi emphasized that the opening is your way to build credibility and gain the jury's trust. That is why attorneys should not misstate or overstate anything during the opening. Judge Kornreich seconded that assertion and cautioned attorneys to not oversell their story and to not promise the jury something they cannot ultimately give, because that will create mistrust. The panelists concluded this part of the discussion by offering some practical tips on

how to approach writing the opening, such as: start with the charge, write out your story word for word, reverse engineer it, then write it out on note cards until you have it perfected. They also suggested practicing the opening on people who are not members of your litigation team.

The discussion then transitioned into the second stage of trial: direct examinations. The panelists urged that attorneys should frame questions on direct as "who, what, when, where, how" questions. These open-ended questions allow you to storytell. In order to stay organized and on track while sharing your side of the story, the panelists recommended using sign-posts so that the jury

knows where the line of questioning is headed. Each line of questioning should have a theme, so attorneys should think both in terms of big picture and specific details. The panel also suggested that the direct should start off strong and highlight what is most important to your case. This can be done by starting with your good evidence. The speakers ended this portion of the discussion by offering tips on how to prepare witnesses, such as preparing him or her to answer questions in a way that does not seem rehearsed, so that the witness is more believable.

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**MAHNOOR MISBAH is the Commercial Division Law Clerk to Justice Saliann Scarpulla of New York State Supreme Court, New York County, Commercial Division. She formerly clerked for Justice Arlene P. Bluth of New York State Supreme Court, New York County, Center for Complex Litigation. Ms. Misbah is a graduate of the Fordham University School of Law, where she was a member of the Moot Court Board, Brendan Moore Trial Advocacy Team, and *Urban Law Journal*.**

Next, the panel discussed cross-examinations. Mr. Marriot shared that there are three goals for cross: (1) to impeach the other side's witness; (2) to use their witness to make your own affirmative points and even try to make them your witness; and (3) to not come across as heavy handed during questioning. Mr. Mukhi agreed with this last point, stating that the best cross is a friendly cross. Judge Kornreich also agreed and shared that from a judge's perspective, it is very important for her that attorneys get along with their adversaries. The panelists all agreed that the cross should be concise. You should pick out beforehand exactly the points you want to target.

The discussion then shifted to closing arguments. The panel shared that the closing is your chance to argue your case, which cannot be done during opening. Mr. Marriot emphasized that you should not simply rehash things during closing. Instead, you should make the inferences for the jury. This means that you should explain the facts

and the law and the conclusion the jury should make from applying the facts to the law. The closing is the last and final stage of the life of a trial.

This informative panel gave attendees a look into all stages of a trial and offered guidance on approaching each stage. Each of the panelists brought a unique perspective because of their different career paths. The advice and practical tips that the panelists shared will be valuable to any attorney practicing litigation.



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# Becoming an Ally: Four Trailblazing Jurists Discuss Diversity and Inclusion

By Michael Lieberman

On February 25, 2020, the Commercial and Federal Litigation and Young Lawyers Sections hosted a panel discussion on how attorneys can work together to foster diversity and inclusion in the legal profession and create opportunities for advancement for attorneys of historically underrepresented backgrounds. The panel featured the Honorable Laura Taylor Swain, United States District Court Judge for the Southern District of New York; the Honorable Dora Irizarry, Chief Judge of the United States District Court for the Eastern District of New York; the Honorable Saliann Scarpulla, Justice of the New York State Supreme Court, Commercial Division, New York County; and the Honorable Joel Cohen, Justice of the New York State Supreme Court, Commercial Division, New York County. Rachel Silverman, business development advisor at Hub6, LLC and a frequent lecturer and leading expert on issues of diversity and inclusion in the legal profession, served as the panel's moderator.

Judge Swain opened with a few words on the life and legacy of the Honorable Deborah Batts, who died on February 3, 2020. Judge Batts served as a United States District Court Judge for the Southern District of New York for more than a quarter of a century. As the first openly gay federal judge in United States history and the first African American faculty member at Fordham Law School, Judge Batts was truly a trailblazing jurist in more ways than one. Judge Swain reflected on how Judge Batts served as a mentor to countless law students and lawyers and promoted diversity in the judiciary. Judge Swain's thoughtful tribute was a fitting start to the panel's discussion on some of the causes that Judge Batts championed and the work that remains unfinished.

Ms. Silverman began the discussion by defining the terms "mentor," "sponsor," and "ally." A mentor is an experienced and trusted advisor who offers career advice and shares their wisdom and experiences with you. A sponsor is someone who will be an advocate for you, share their network with you, and will put their name and reputation on the line for you. An ally is someone



*Michael Lieberman*

who will leverage their credibility to create a more inclusive culture where everyone can succeed, who sets other people up for success, and who will advocate for diversity, equity, and inclusion.

Each of the judges shared some of their most influential mentors, sponsors, and allies from various stages of their lives and legal careers. Judge Swain spoke of the many mentors that she has had and the different ways that she gives back by being a mentor to her law clerks, interns, and other young lawyers. Judge Swain emphasized the importance of "paying it forward" when you have enjoyed the guidance of a mentor by in turn becoming a mentor to others.

The panel then discussed strategies for finding and benefitting from a mentor or sponsor. Law students, for example, can find mentors in their professors and faculty advisors. Junior associates at law firms can find mentors in partners and senior associates. Judicial clerks and interns can find mentors in the judges for whom they work. Young lawyers can also find mentorship opportunities by becoming active in bar associations.

Next, the panelists shared their thoughts on the importance of building a network of support and discussed how their networks have helped them overcome challenges and advance their careers. The judges discussed how they support their law clerks and interns by helping

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**MICHAEL LIEBERMAN is the Commercial Division Law Clerk to the Honorable Andrew Borrok, New York State Supreme Court, Commercial Division, New York County. He previously served as Vice President of Government Affairs at the New York Credit Union Association. Mr. Lieberman is a graduate of Albany Law School, where he served as Executive Editor for Symposium of the Albany Law Review and played fullback for the Albany Law School Rugby Football Club.**

them build networks as they progress through their legal careers. Judge Irizarry shared a story about how she was selected to serve as a second chair in a major jury trial as a young prosecutor by building a reputation as a hard worker who was eager to learn and who could be counted on, and by leveraging that reputation to establish the trust and confidence of senior attorneys in her office.

Next, the panel discussed what judges can do to help drive diversity, equity, and inclusion from the bench. Judge Cohen and Judge Scarpulla spoke about promoting diversity in the courtroom through changes in their individual part rules. Judge Scarpulla said that she has been known to note on the record at oral argument when there are several men present to argue a motion and no women, especially in large, complex commercial cases. The judges discussed how they often see young, female associates who have prepared the papers and are familiar with the case, but a male partner is arguing the motion. When they see the partner repeatedly pausing to confer with the associate, they will often address questions directly to the associate to create opportunities for the associate to gain meaningful courtroom experience.

Judge Swain and Judge Irizarry discussed how they encourage diversity and inclusion through their hiring of clerks and interns. Judge Irizarry encouraged judges to open up their selection criteria for judicial clerks and interns to provide opportunities for law students and attorneys of diverse backgrounds who may not meet the traditional criteria and who may be unfairly excluded from consideration. She also encouraged attorneys of all backgrounds to apply for competitive positions, including clerkships if they are interested, and not to exclude themselves from consideration by “self-selection” out of a fear of rejection. “Let them tell you no,” she said, but do not take yourself out of the running before you have even applied. Judge Irizarry also shared her story about how she changed the language that she uses in her court rules and in her writing to use gender-neutral terms to promote inclusivity and make lawyers from all backgrounds feel welcomed.

Judge Cohen spoke about the 2017 NYSBA Report “If Not Now, When?” and observed that the report highlights a significant imbalance between male and female attorneys in the courtroom and in Alternative Dispute Resolution, even though women now comprise half of all law school graduates. Judge Scarpulla observed that this dynamic is magnified in the Commercial Division, as the commercial bar remains predominantly male, and female attorneys and attorneys of color have a more difficult time breaking into commercial litigation compared to other practice areas.

Finally, the panel was asked what clients can do to help drive diversity and inclusion in law firms. Judge Cohen shared his observations regarding measures that clients can take, including insisting on diverse litigation teams and demanding that minority associates not only be included, but more importantly, that they be given meaningful work. He explained that doing so is not only the right thing to do, but it also builds teams with diverse experiences and perspectives, which leads to more successful outcomes.

The legal profession has a long history of excluding women, people of color, members of the LGBTQIA.+ community, and attorneys with disabilities. Correcting course will not be easy and no one person or group of people can do it alone. This panel called attention to how each of us—every judge, associate, partner, in-house lawyer, and law clerk—has a role to play in promoting diversity and inclusion, and we can find a platform to effect the change that we want to see through mentorship and sponsorship.

Judges can encourage diversity and inclusion by appointing more women as special masters, referees, mediators, and lead counsel in class actions, and by amending their individual rules to encourage the participation of more junior, underrepresented attorneys. Law firm partners can ensure that they are prioritizing diversity in recruiting associates and can create more opportunities for associates of diverse backgrounds to gain courtroom experience. General counsels can demand that the law firms that they retain put diverse trial teams on their projects, and they can go a step further by demanding that more junior, underrepresented associates be given meaningful work and not merely be placed on a team to meet the client’s quota. All lawyers can be mindful of the words they use and can favor inclusive, gender-neutral language over antiquated, gender-biased terms.

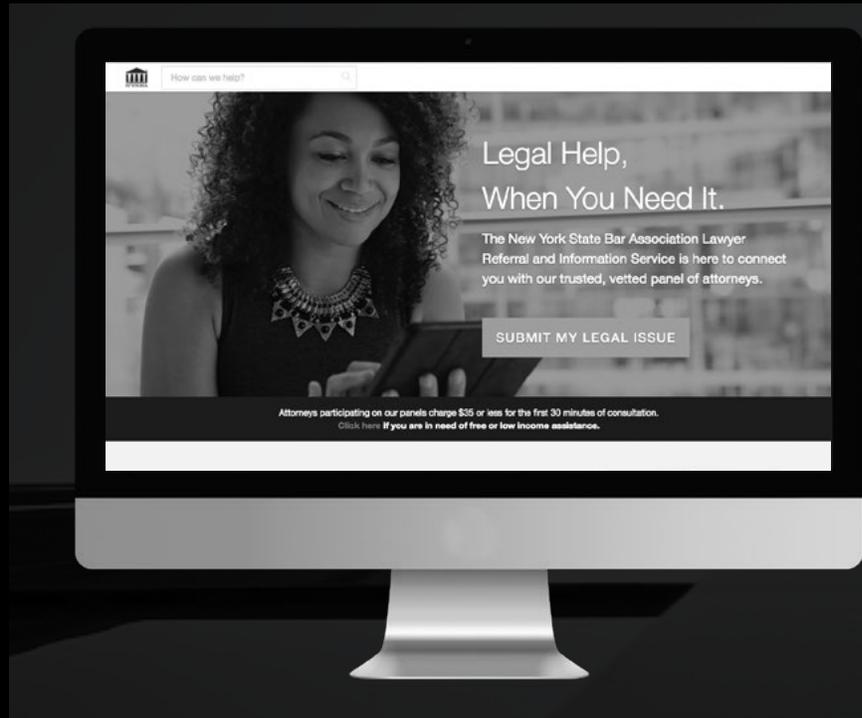
Today’s young lawyers are tomorrow’s mentors, sponsors, and allies, and the future of the legal profession is ours to shape. We must work together to promote diversity and inclusion and eliminate bias, in the courtroom and beyond.

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# CPLR AMENDMENTS: 2019 LEGISLATIVE SESSION

(2019 N.Y. Laws ch. 1-758)

CPLR	Chapter (Part) (Sub-part, §)	Change	Eff. Date
208(b)	11(2)	Extends statute of limitation for sexual abuse claims and causes of action	2/14/19
213(9)	184	Adds actions by attorney general pursuant to Gen. Bus. Law Art. 23-A or Exec. Law § 63(12)	8/26/19
213-a	36(F)(6)	Provides that overcharge claim may be filed at any time but penalties and damages may go back only six years	6/14/19
213-c	315(3)	Extends statute of limitations to 20 years, expands list of sexual offenses included, and expands list of potential defendants	9/18/19
214-g	11(3)	Adds revival provision for sexual abuse claims and causes of action	2/14/19
214-h	442	Adds a statute of limitations for certain actions by public water suppliers to recover damages for injury to property	11/4/19
215(9)	245	Adds a proviso that actions to recover damages for injuries arising from domestic violence shall be commenced within two years	9/4/19
1211(b)(2), (3)	427	Changes recipient of notice to all parents and guardians of the infant	10/29/19
1311(1)	55(PP)(1)	Deletes an action to recover a money judgment; deletes certain actions relating to post-conviction forfeiture crimes	10/9/19
1311(11)(d)	55(PP)(9)	Adds a requirement for contents of certain documents given to State Division of Criminal Justice Services	10/9/19
1311-b	55(PP)(2)	Adds a section on obtaining money judgments	10/9/19
1312(1), (3), (4)	55(PP)(3)	Deletes money judgment (subd. 1); adds requirement relating to applications for provisional remedies (subd. 3); adds restriction on court in modification or vacatur of provisional remedies (subd. 4)	10/9/19
1349(2)	55(PP)(4)	Adds exception to supercession by another law	10/9/19
1349(5)	55(PP)(5)	Adds a provision on deposit of certain monies and proceeds from sale of property realized as a consequence of forfeiture	10/9/19
1352	55(PP)(8)	Adds a requirement for a prompt opportunity to be heard	10/9/19
1602(14)	180	Adds an exception for failure to obey or enforce certain orders of protection	10/20/19
3015(e)	693	Changes "Westchester county department of consumer affairs/weights measures" to "the county of Westchester"	12/20/19
3215(b)	627	Permits party entitled to judgment to submit certain additional proof	12/12/19
3218(a)(1)	214	Deletes non-residents	8/30/19
3218(b)	214	Amends provision on places for filing affidavit	8/30/19
3403(a)	11(4)	Adds a special trial preference for cases revived under 214-g	2/14/19
4503(a)(2)	529	Provides that fiduciary's testimony of reliance on attorney's advice does not constitute a waiver; adds lifetime trustee	11/20/19

CPLR	Chapter (Part) (Subpart, §)	Change	Eff. Date
4511	223(1)	Deletes subdivision (c) and reletters (d) and (e)	12/28/18
4532-b	223(2)	Adds a new provision on information taken from web-mapping service, global satellite imaging site, or internet mapping tool	12/28/18
5003-b	160(9)	Replaces “sexual harassment” with “discrimination, in violation of laws prohibiting discrimination”; adds cross reference to Exec. Law art. 15	10/11/19
5205(5)	580(3)	Changes “fraudulent conveyances” to “voidable transactions”	4/4/20
5519(g)	580(4)	Changes “fraudulent conveyances without fair consideration” to “voidable transactions”; changes cross reference to D&C Law art. 10	4/4/20
5521(b)	707(2)	Adds Pub. Off. Law § 89(5)(d)(ii)	6/17/20
6312(b)	167(6)	Adds exception for actions brought under Real Prop. Law § 265-a	8/14/19
Art. 63-a	19(1)	Adds provisions on extreme risk protection orders	8/24/19
7515(a)(2), (3)	160(8)	Replaces “unlawful discriminatory practice of sexual harassment” with “discrimination, in violation of laws prohibiting discrimination”; adds cross reference to Exec. Law art. 15	10/11/19
8019(a)	55(SS)(1)	Adds Suffolk County exception	4/12/19
8021(f)(1)(b)	55(SS)(2)	Adds Suffolk County exceptions	4/12/19

- Notes: (1) 2019 N.Y. Laws ch. 55, Part O, § 16, extends the expiration of CPLR 1101(f) (fees for inmates) until March 31, 2020.  
(2) 2019 N.Y. Laws ch. 55, Part VV, § 1, deletes the expiration of CPLR 3408(a).  
(3) 2019 N.Y. Laws ch. 47, § 1, extends the expiration of CPLR 105(s-1) (“the sheriff”) until June 30, 2020.  
(4) 2019 N.Y. Laws ch. 212, § 1, extends the expiration of CPLR 2111(2-a) until Sept. 1, 2020.

## CPLR AMENDMENTS: 2020 LEGISLATIVE SESSION (2020 N.Y. Laws ch. 1-56 and 58-88))

CPLR	Chapter (Part) (Subpart, §)	Change	Eff. Date
211(a)	56(JJ, 49)	Amends “newspaper of general circulation” to “electronic or physical form”	4/1/20
213-d	56(YY, 4)	Adds three-year limitations period for actions for medical debts	4/3/20

- Notes: (1) 2020 N.Y. Laws ch. 58, Part XXX, Subpart B, Item R, § 1, extends the expiration of CPLR 105(s-1) (definition of “sheriff”) until June 30, 2021, effective April 3, 2020.  
(2) 2020 N.Y. Laws ch. 58, Part XXX, Subpart B, Item Q, § 1, extends the expiration of CPLR 214-b (statute of limitations for phenoxy herbicides) until June 16, 2022, effective April 3, 2020.  
(3) 2020 N.Y. Laws ch. 55, Part A, § 16, extends the expiration of CPLR 1101(d) and (f) (waiver of fee; fees for inmates) until Sept. 1, 2021, effective April 3, 2020.  
(4) 2020 N.Y. Laws ch. 58, Part XXX, Subpart B, Item SS, § 1, extends the expiration of CPLR 2111(b)(2-a) (exception to residential mortgage exclusion) until Sept. 1, 2021, effective April 3, 2020.

# 2019 Amendments to the Uniform Rules for Supreme and County Courts, Rules Governing Appeals, and Certain Other Rules of Interest to Civil Litigators

(West's 2019 N.Y. Orders 1-32; West's 2020 N.Y. Orders 1-10; Adopted Rules on OCA website, at <http://nycourts.gov/rules/comments/index.shtml>; amended rules on appellate court websites)

22 NYCRR §	Court	Subject (Change) Link to Order	Eff. Date
202.6(b)	Sup.	Adds applications for extreme risk protection orders Link: <a href="https://www.nycourts.gov/LegacyPDFS/RULES/trialcourts/AO-171-19.pdf">https://www.nycourts.gov/LegacyPDFS/RULES/trialcourts/AO-171-19.pdf</a>	8/12/19
202.70(g)	Sup.	Replaces Preamble for the Rules for the Commercial Division Link: <a href="https://www.nycourts.gov/LegacyPDFS/RULES/trialcourts/AO-332-18.pdf">https://www.nycourts.gov/LegacyPDFS/RULES/trialcourts/AO-332-18.pdf</a>	1/1/19
202.70(g), Rule 3(a)	Sup.	Adds provision encouraging counsel to work together to select mediator Link: <a href="https://www.nycourts.gov/LegacyPDFS/RULES/trialcourts/AO-399-18.pdf">https://www.nycourts.gov/LegacyPDFS/RULES/trialcourts/AO-399-18.pdf</a>	1/1/19
202.70(g), Rule 10	Sup.	Adds (1) requirement that statement submitted by counsel must include certain information prescribed by OCA and (2) ADR attorney certification form Link: <a href="http://ww2.nycourts.gov/sites/default/files/document/files/2019-03/AO90-internet.pdf">http://ww2.nycourts.gov/sites/default/files/document/files/2019-03/AO90-internet.pdf</a>	7/1/19
202.72	Sup.	Adds new provision on actions revived under CPLR 214-g Link: <a href="http://ww2.nycourts.gov/rules/trialcourts/202.shtml#72">http://ww2.nycourts.gov/rules/trialcourts/202.shtml#72</a>	7/31/19
670.1(c)	2d Dep't	Adds provision on appearance of counsel Link: <a href="http://nycourts.gov/courts/ad2/pdf/Local%20Rules%20-%2020190327.pdf#page=4">http://nycourts.gov/courts/ad2/pdf/Local%20Rules%20-%2020190327.pdf#page=4</a>	3/27/19
670.2	2d Dep't	Adds restrictions and requirements relating to withdrawal of appeal and defines "settlement" for purposes of 22 NYCRR § 1250.2(c) Link: <a href="http://nycourts.gov/courts/ad2/pdf/Local%20Rules%20-%2020190327.pdf#page=5">http://nycourts.gov/courts/ad2/pdf/Local%20Rules%20-%2020190327.pdf#page=5</a>	3/4/19
670.3(a)(5), (b)	2d Dep't	Adds requirement in appeal of order or judgment in CPLR 214-g case that informational statement so note; lower court clerk must notify the AD; appeal shall be actively managed Link: <a href="http://nycourts.gov/courts/ad2/pdf/Local_Rules-20191125.pdf">http://nycourts.gov/courts/ad2/pdf/Local_Rules-20191125.pdf</a>	10/16/19
670.3(d)(2)	2d Dep't	Requires that counsel attending the mediation have knowledge of the matter on appeal and be prepared to engage in meaningful settlement discussions Link: <a href="http://nycourts.gov/courts/ad2/pdf/Local_Rules-20191125.pdf#page=7">http://nycourts.gov/courts/ad2/pdf/Local_Rules-20191125.pdf#page=7</a>	11/25/19
670.7	2d Dep't	Adds provisions on supplemental records Link: <a href="http://nycourts.gov/courts/ad2/pdf/Local%20Rules%20-%2020190327.pdf">http://nycourts.gov/courts/ad2/pdf/Local%20Rules%20-%2020190327.pdf</a>	6/12/19

22 NYCRR §	Court	Subject (Change) Link to Order	Eff. Date
670.9(a)	2d Dep't	Adds requirement that digital copies of records, appendices, and briefs comply with guidelines for e-filed documents  Link: <a href="http://nycourts.gov/courts/ad2/pdf/Local%20Rules%20-%2020190327.pdf#page=9">http://nycourts.gov/courts/ad2/pdf/Local%20Rules%20-%2020190327.pdf#page=9</a>	11/28/18
Parts 730 & 731	AT, 2d Dep't	Replaces the current parts with new parts combining parts 731 and 732, requiring parties to file a printed record in some appeals, and expanding the time to perfect to six months  Link: <a href="http://nycourts.gov/courts/AD2/pdf/Term/Appellate_Term_Rules_2020.pdf#page=4">http://nycourts.gov/courts/AD2/pdf/Term/Appellate_Term_Rules_2020.pdf#page=4</a>	1/1/20
Part 850	3d Dep't	Amends provisions relating to exceptions to initial filings under 22 NYCRR § 1250.3(a) (§ 850.3); certification of records on appeal (§ 850.7(b)); time, number, and manner of filing of records, appendices, and briefs (§ 850.9); dismissals (§ 850.10); criminal appeals (§ 850.11); original special proceedings (§ 850.13); certain miscellaneous appeals and proceedings (§ 850.14)  Link: <a href="http://www.nycourts.gov/ad3/RulesOfPracticePart850.pdf">http://www.nycourts.gov/ad3/RulesOfPracticePart850.pdf</a>	1/7/19
Part 1200	All Courts	Divides the Standards of Civility into two sections (General Standards and Standards for Transactional/Non-Litigation Settings) and adds new provisions  Link: <a href="https://www.nycourts.gov/LegacyPDFS/RULES/jointappellate/Joint%20Order%20re%20Standards%20of%20Civility%20(und).pdf">https://www.nycourts.gov/LegacyPDFS/RULES/jointappellate/Joint%20Order%20re%20Standards%20of%20Civility%20(und).pdf</a>	1/24/20

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from the Association and the  
Commercial and Federal Litigation Section

# Proposed Rules of Interest to Civil Litigators (2018-2020)

(<http://nycourts.gov/rules/comments/index.shtml>)

Note: The comment periods for all of the following proposed rules, except the first one (as of press time), have expired.

## **April 17, 2020: Request for Public Comment on a Proposed Revision of Rule 7.5 of the Rules of Professional Conduct**

Description of proposal: <https://www.nycourts.gov/LegacyPDFS/rules/comments/pdf/RequestForPublicComment-TradeNames.pdf>

Email comments to [rulecomments@nycourts.gov](mailto:rulecomments@nycourts.gov) by June 1, 2020.

## **March 5, 2020: Request for Public Comment on a Proposed Revision of Rule 31 of the Rules of the Commercial Division**

Description of proposal: <https://www.nycourts.gov/LegacyPDFS/RULES/comments/PDF/Rule31March5.pdf>

## **December 23, 2019: Request for Public Comment on a Proposed Amendment to Commercial Division Rule 6 to Permit the Court to Require Hyperlinking in Electronically Filed Documents**

Description of Proposal: <https://www.nycourts.gov/LegacyPDFS/RULES/comments/PDF/hyperlinking.pdf>

## **September 10, 2019: Request for Public Comment on the Proposed Amendment of the Commercial Division Standard Form Confidentiality Order and Rule 11-g to Allow “Highly Confidential – Attorney’s Eyes Only” Designations**

Description of Proposal: <http://ww2.nycourts.gov/sites/default/files/document/files/2019-09/RPC-HighlyConfidential.pdf>

## **September 3, 2019: Request for Public Comment on the Proposal to Repeal Commercial Division Rule 23 (“60-day Rule”)**

Description of Proposal: <https://www.nycourts.gov/LegacyPDFS/RULES/comments/PDF/RPC%20Rule%2023%20repeal.pdf>

## **August 22, 2019: Request for Public Comment on the Proposed Amendment to Commercial Division Rule 6 to Require Proportionally Spaced 12-Point Serif Type in Papers Filed with the Court**

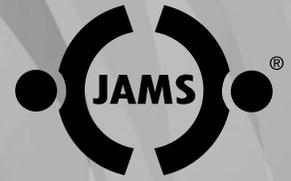
Description of Proposal: <https://www.nycourts.gov/LegacyPDFS/RULES/comments/PDF/Request%20for%20public%20comment%20-%20Font.pdf>

## **August 1, 2019: Request for Public Comment on the Proposed Amendment to Commercial Division Rule 1 to Facilitate Remote Video Appearances by Counsel**

Description of Proposal: <http://ww2.nycourts.gov/sites/default/files/document/files/2019-08/RequestForPublicComment-Rule1.pdf>

## **October 15, 2018: Request for Public Comment on the Proposed Adoption of Certain Rules of the Commercial Division in Other Courts of Civil Jurisdiction**

Description of proposal: <http://ww2.nycourts.gov/sites/default/files/document/files/2018-10/UsingCommercialDivRulesOct15.pdf>



# JAMS is proud to support the NYSBA Commercial and Federal Litigation Section

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[www.nysba.org/commercial-federal-litigation-section](http://www.nysba.org/commercial-federal-litigation-section)

# The Commercial and Federal Litigation Section Welcomes New Members

(New members Oct. 1, 2019 – May 8, 2020)

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## COMMERCIAL AND FEDERAL LITIGATION SECTION NEWSLETTER

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# Evidentiary Privileges

(Grand Jury, Criminal and Civil Trials)

Sixth Edition

## Author

**Lawrence N. Gray, Esq.**

Former Special Assistant Attorney General  
NYS Office of the Attorney General

A valuable text of first reference for any attorney whose clients are called to testify before grand juries, or in criminal or civil trials, *Evidentiary Privileges*, 6th edition, covers the evidentiary, constitutional and purported privileges that may be asserted at the grand jury and at trial.

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Lawrence N. Gray is the author of numerous publications on criminal law and trial. This latest edition of *Evidentiary Privileges* draws from the author's experience as a former special assistant attorney general and his many years of practice in the field of criminal justice.

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